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ARTICLES

Games Lawyers Play: Pre-Preferral Delay, Due Process, and the Myth of Speedy Trial in the Military Justice System

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Don't talk to me about "speedy trial...." That's a game you lawyers play. As far as I'm concerned, there is no "right to speedy trial," the way you all play it.

- Colonel William E. Collins[1]

I. INTRODUCTION: THE CASE OF STAFF SERGEANT JACK CROKER

Life was good for Staff Sergeant Jack Croker[2] in July 1989. He and his wife, Mary (also a staff sergeant in the United States Air Force), were well into successful careers as Air Force photographic intelligence specialists. Jack in particular was a "fast burner"—he had made his rank quickly and expected to make technical sergeant in the next promotion cycle. The Sergeants Croker were stationed together at an American air base on an island in East Asia, and lived in base housing there. They had three little children. The youngest was a six-month-old daughter, Lisa. All was going well for the young family. But everything changed on July 6, 1989.

Early that afternoon, Jack rushed Lisa into the base hospital emergency room. The baby wasn't breathing. Jack told the medics that he had left Lisa with a bottle of formula propped up so she could drink it, and then left her for several minutes while he looked after his other children and put in some laundry. (Mary had left the house for work about four hours earlier. It was Jack's day off). When he returned, Lisa was covered in vomit and had turned blue. After some frantic and clumsy attempts at resuscitation, Jack bundled her up and drove to the emergency room. The doctors quickly revived the

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[1] Commander, Goodfellow Technical Training Center, Goodfellow Air Force Base, Texas, responding to advice from his staff judge advocate (the author), April 1988.

[2] All names in the case of "Sergeant Jack Croker" are fictitious, although the case is real. The author is an Air Force judge advocate, and was "Sergeant Croker's" lead defense counsel.

baby, and all was thought to be well. A few hours later, however, Lisa suffered her first seizure, one of many to follow. A CAT scan and x-rays revealed a skull fracture, subdural hematoma, and severe edema. Lisa soon needed a respirator to breath, and successive EEGs showed less and less brain stem activity. A week later, she was declared "brain dead." The next day, July 14th, her physicians, with her parents' consent, disconnected the respirator and Lisa stopped breathing forever.

Lisa clearly had been the victim of violence, and the obvious suspects were her parents. Notwithstanding initial medical estimates that Lisa's injuries could have been inflicted up to eight hours[3] before Jack brought her to the hospital, which made either or both Crokers possible culprits, the Air Force investigation focused on Jack almost exclusively. However, he was not formally charged until March 1991, and not brought to trial until July 1991. By that time, Sergeant Croker's life and career were in ruins due to the "administrative" actions taken by the Air Force while he was under investigation—actions which, in effect, presumed his guilt, and against which he had no effective recourse. In the military's speedy trial "game," Sergeant Croker came out the loser before he was even charged.

On July 8th 1989, Sergeant Croker was put on "administrative hold," a status which involuntarily extended his overseas tour.[4] The same day, he was barred from access to classified information.[5] Because Jack's career field required contact with classified information,[6] he was barred from his duty section and not allowed to work in his field. Over the next two and one-half years,[7] Sergeant Jack Croker, career Air Force noncommissioned officer and

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[3] Over the next two years, prosecution medical experts steadily narrowed their opinion as to the likely time gap between the injuries and when Lisa first showed signs of respiratory distress. At Sergeant Jack Croker's general court-martial, two prosecution medical experts testified, respectively, that the blows were very probably struck within a half-hour and one hour of Lisa's arrival at the emergency room. The defense's expert vigorously disagreed, opining that the only reasonable medical conclusion from the evidence was that some of Lisa's injuries could have been inflicted anytime up to six hours before her breathing difficulties began, and that others could have been sustained up to 48 hours before. This latter opinion brought in Lisa's babysitter and the babysitter's family members as possible perpetrators.

[4] *See* Air Force Instruction [hereinafter "AFI"] 36-2110, Assignments ¶ 5.2.2, tbl. 27 (20 July 1994). Since the Croker trial, the Air Force has completed a total overhaul of its regulatory architecture, converting its "Air Force Regulations" [hereinafter "AFR"] into "Air Force Instructions." At the time of Sergeant Croker's case, the authority for involuntarily extending his overseas tour was AFR 39-11. For the convenience of readers who may want to research current Air Force procedures, only the AFI will be cited in subsequent notes.

[5] AFI 31-501, Personnel Security Program Management ch. 8 (2 May 1994).

[6] Including Sensitive Compartmented Information, the military's highest classification. *See id.* at ¶ 3.4 (1994).

[7] While Sergeant Croker was arraigned on July 15, 1991, the trial did not begin "for real" until January 13, 1992. After arraignment, a defense motion to dismiss for speedy trial and due process violations was litigated and denied by the military judge. The judge then granted the defense an indefinite delay to petition the United States Court of Military Appeals (since

intelligence specialist, bounced from one menial set of duties to another. Because promotion tests in his career field contained classified information, Sergeant Croker was not allowed to test for promotion.[8] His enlistment expired in Spring 1990. His commander denied him the opportunity to reenlist because of the pending investigation.[9] Because of their special skills, the Air Force offers Special Reenlistment Bonuses ("SRB") to members of Sergeant Croker's career field as incentives to reenlist.[10] In Sergeant Croker's case, the SRB was nearly $16,000. However, his commander's action in denying him reenlistment disqualified him for the bonus.

Even though Sergeant Croker could not reenlist in the Air Force, he was not allowed to separate at the end of his enlistment.[11] At the request of the base staff judge advocate,[12] Sergeant Croker's enlistment was extended indefinitely pending the outcome of the investigation and any court-martial.[13]

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renamed the United States Court of Appeals for the Armed Forces) for a writ of mandamus requiring the dismissal of the charge. The petition was eventually denied. Although Sergeant Croker continued to suffer personally and professionally between July 1991 and January 1992, primary responsibility for this portion of the delay belongs to him and his attorneys.

[88] Air Force enlisted members compete for promotion to the grades of staff sergeant and above within their respective career fields. The competition is governed by "WAPS"— the Weighted Airman Promotion System. Probably the most important elements of WAPS are the two promotion examinations, the Promotion Fitness Examination ("PFE") and Specialty Knowledge Test ("SKT"). All airmen competing for promotion to a particular grade take the PFE, which encompasses general matters all Air Force noncommissioned officers are supposed to know. No classified information appears on the PFE. The SKT is different for each career field, and covers knowledge peculiar to that field. *See* AFI 36-2502, Airman Promotion Program (20 July 1994).

[9] The opportunity for an airman to reenlist for another term of service is not an automatic right, and may be denied for proper cause by an airman's commander. *See* AFI 36-2606, Reenlistment in the United States Air Force ch. 1 (1 March 1996).

[10] *See* 10 U.S.C. § 308 (1994); and AFI 36-2606 ch. 2, *supra* note 9.

[11] As a general rule, when military status ends, court-martial jurisdiction ends with it, even for crimes committed during military service. *See* 10 U.S.C. §§ 802, 803 (1994); Solorio v. United States, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 365 (1987); United States *ex. rel.* Toth v. Quarles, 350 U.S. 1, 76 S.Ct. 1, 100 L.Ed. 8 (1955); United States *ex. rel.* Hirshberg v. Cooke, 336 U.S. 210, 69 S.Ct. 530, 93 L.Ed. 621 (1949). Therefore, if Sergeant Croker's commanders wanted to deny him reenlistment, they had to extend his current enlistment in order to retain court-martial jurisdiction.

[12] The "staff judge advocate," or "SJA," is the chief legal counsel for a military command. He or she heads up an office which is responsible for a multitude of criminal and civil law issues on behalf of the command, as well as providing legal assistance on some civil law matters to military members and their families. In the criminal law context, the SJA is analogous to a district attorney, although with no inherent authority to dispose of charges or convene courts-martial. In the military justice system, that power is retained by commanders. In practice, however, the SJA is probably the single most influential player in the process. *See* 10 U.S.C. §§ 822-824, 830-834 (1994); and MANUAL FOR COURTS-MARTIAL, United States (1995 ed.) [hereinafter "Manual"], Rules for Courts-Martial [hereinafter "R.C.M."] 401-407, 504, 601-604. *See also infra* note 80.

[13] *See* R.C.M. 202(c), *supra* note 12; and AFI 36-3208, Administrative Separation of Airmen ¶ 2.4

On July 22, 1989, the Crokers and their two surviving children traveled back to the United States on emergency leave to bury Lisa. Two days earlier, as a condition to being allowed to accompany Jessica's body home, the Crokers' commander had ordered them to leave their children in the States when they returned to the base.[14] The Crokers obeyed and returned without the children on August 31st. Their commander eventually rescinded the order, and the Crokers' children were reunited with their parents at the air base in November. However, the commander then ordered Sergeant Jack Croker to move out of his family quarters and into his unit's enlisted dormitory, and further ordered both Crokers that Jack was not to see his children except in public places.[15]

Some time earlier, both Crokers had requested reassignment to a States-side base on humanitarian grounds.[16] Mary Croker's request was granted. Jack's, however, was denied because he was under investigation. In late November, Mary and the children departed for reassignment in the United States. Jack remained in Asia.

For the next two years-plus, the Crokers were forced to maintain separate households. During this time, Sergeant Jack Croker was granted leave to travel to the United States to visit his family on three occasions, each time flying commercial air at his own expense. One time, Sergeant Mary

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(14 October 1994).

[14] To be legally enforceable, an order must be "lawful." Manual, *supra* note 12, Part IV ¶ 14b(2). That is, "[t]he order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs." *Id.* ¶ 14c(2)(a)(iii). There is no published precedent in military law addressing an order such as that issued to the Crokers. Its lawfulness is certainly doubtful, and was indeed questioned by the Crokers. However, military subordinates who disobey orders they believe may be unlawful do so at their peril. It is no defense to a charge of disobedience that a military member believed an order to have been illegal, if that order is eventually ruled to have been lawful. See *Id.* ¶ 14c(2)(a)(i), R.C.M. 916(l)(1). In any case, the Crokers obeyed the order and the issue never came to a head.

[15] This type of order has been held to be lawful under certain circumstances. *See* United States v. McCarthy, 38 M.J. 398 (C.M.A. 1993) (dictum); United States v. Button, 31 M.J. 897 (A.F.C.M.R. 1990), *aff'd on other grounds*, 34 M.J. 139 (C.M.A. 1992). For obvious reasons, commanders are reluctant to involve themselves this deeply in the personal and family lives of their subordinates. Within United States territory, a state's child welfare agencies and courts generally assume jurisdiction in cases of suspected child abuse, and any protective orders usually issue under civil authority. In foreign countries, however, the responsibility for protecting American military family members pending the outcome of investigations falls on commanders almost exclusively.

[16] The death of a child permits, at the request of the member, reassignment to a base nearby other family, if consistent with the needs of the service. *See* AFI 36-2110, *supra* note 4, fig. A7.1 .

Croker was sent on a temporary duty assignment base to the Asian air base, and they were able to spend a few days together (but without their children). The cost of Jack's air fares, long distance telephone calls from East Asia to the Midwest United States, and other miscellaneous expenses caused by the separation exceeded $10,000. Jack was unable to be with Mary and the children during his wife's hospitalization and convalescence after an automobile accident. The Croker children suffered emotional problems tied to their father's absence. Both children and Mary were in therapy. In July 1990, an Air Force prosecutor visited Mary's base and informed her commanders and co-workers that both Jack and Mary had been charged with the murder of Lisa. These statements were false, for no charges had been preferred[17] against either Croker as of July 1990. At that time, the Air Force Office of Special Investigations (AFOSI) still had an open investigation into Lisa's death.[18]

Notwithstanding the lack of charges, Air Force legal authorities treated the case as an ongoing prosecution. From September 1990 to March 1991, prosecutors and defense counsel exchanged myriad correspondence concerning discovery, appointment of expert consultants, and scheduling of and appearance of witnesses at an Article 32 investigation.[19] Prosecution correspondence was often signed as "Trial Counsel" or "Government Representative," titles which exist in military law only after charges have at least been formally preferred and, in the case of a "trial counsel," charges have been referred for trial and a court-martial convened.[20] Many of the personnel actions taken against Sergeant Croker during this period (for example, extensions of the administrative hold action and his enlistment) were officially justified because of a "pending court-martial." However, no charges existed against Sergeant Jack Croker until March 21, 1991, when he was formally charged with involuntary manslaughter.[21]

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[17] "Preferral" of charges is the first formal step in the military justice system. It is analogous to the criminal complaint in many civilian jurisdictions. *See* 10 U.S.C. § 830 (1994); R.C.M. 307, *supra* note 12.

[18] The AFOSI (the Air Force's criminal investigative agency) had first opened its investigation on July 5, 1989, and closed it in late October 1989. However, AFOSI reopened the investigation in February 1990, closed it again in March, reopened it again in April, and closed it for the last time on August 24, 1990.

[19] Article 32, Uniform Code of Military Justice (hereinafter "U.C.M.J." or "Code"), 10 U.S.C. § 832 (1994). The Article 32 investigation is a formal hearing into charges conducted by an investigating officer, who examines evidence and makes recommendations whether the charges should be referred to trial by court-martial. *See also* R.C.M. 405, *supra* note 12. The Article 32 investigation is analogous to the Grand Jury. However, the investigating officer's recommendations are not binding. The actual decision whether the accused will face trial by court-martial—the "referral"— is made by the "convening authority," a commander or other official empowered by law to convene courts-martial. *See* 10 U.S.C. §§ 822-824, 834 (1994); R.C.M. 504, 601, *supra* note 12.

[20] 10 U.S.C. § 827 (1994); R.C.M. 501(b), 405(d)(3)(A), *supra* note 12.

[21] The preferral of this charge, and its immediate transmittal to the summary court-martial

After an Article 32 investigation, the charge was referred for trial by a general court-martial in late April. Trial began on July 15, 1991, at which time Sergeant Croker moved to dismiss the charge for violations of his rights to speedy trial and due process. The military judge denied the motion, but granted a continuance to allow Sergeant Croker to petition the United States Court of Military Appeals[22] for a writ of mandamus requiring dismissal of the charge.[23] In October, the Court of Military Appeals denied the petition, without prejudice for renewing the issues on appeal of any conviction.[24] Trial on the merits began on January 13, 1992. Four days later, Sergeant Jack Croker was found not guilty by a jury[25] of Air Force officers and enlisted men and women.

A week after his acquittal, Sergeant Croker's commander again denied him reenlistment in the Air Force, and also denied him a further extension on his current enlistment. Sergeant Croker made a formal complaint of his commander's actions under Article 138, U.C.M.J.,[26] which was denied. He

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convening authority, tolled the statute of limitations well within the five-year limitation period. *See* 10 U.S.C. §843(b)(1) (1994).

[22] The United States Court of Military Appeals has been the highest appellate court within the military justice system. It has since been renamed the United States Court of Appeals for the Armed Forces, but without any change in its jurisdiction. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a), 108 Stat. 2663 (1994). The court is composed of five civilian judges (three at the time of Sergeant Croker's petition). As an "Article I" court, its members are not appointed for life as are members of the "Article III" judiciary. Rather, its judges are appointed for fifteen-year terms. Decisions of the Court of Appeals for the Armed Forces may be appealed to the United States Supreme Court by petition for writ of certiorari. *See* 10 U.S.C. §§ 867-867a, 941-946 (1994); R.C.M. 1204-1205, *supra* note 12.

The military justice system also maintains intermediate appellate courts for each of the services. Until 1994, these were called, respectively, the Air Force, Army, Navy-Marine Corps, and Coast Guard Courts of Military Review. However, they have been renamed the Air Force, Army, etc. Courts of Criminal Appeals, also without a change in their jurisdiction. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(b), 108 Stat. 2663 (1994). Although judges of the service Courts of Criminal Appeals may be either civilians or military lawyers, they are presently all uniformed judge advocates, with the exception of the civilian Chief Judge of the Coast Guard court. They are appointed by the Judge Advocates General of their respective services (or, in the case of the Coast Guard court, the General Counsel of the Department of Transportation). *See* 10 U.S.C. § 866 (1994).

[23] *See* 28 U.S.C. § 1651 (1994), commonly known as the "All Writs Act." In extraordinary cases where the normal review process does not afford an adequate remedy, the military appellate courts will intervene under authority of the All Writs Act. *See, e.g.*, ABC, Inc. v. Powell, 47 M.J. 363 (1997); Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982); Andrews v. Heupel, 29 M.J. 743 (A.F.C.M.R. 1990).

[24] Sergeant Croker's eventual acquittal, of course, made this remedy superfluous.

[25] The correct term is actually "members." 10 U.S.C. § 825 (1994); R.C.M. 501(a), 502(a), 503(a), *supra* note 12.

[26] Article 138 (10 U.S.C. § 938 (1994)) provides military members a formal procedure for complaining of wrongs allegedly committed by their commanders.

was honorably discharged from the Air Force and was on an airplane back to his family by mid-February 1992.[27]

After more than two and one-half years, Jack Croker was finally exonerated of the accusation that he shook and pummeled his infant daughter to death. However, his Air Force career was over, and his personal and family life would never be the same.

II. THE PROBLEM: ACCOUNTABILITY FOR PRE-PREFERRAL DELAY

The cruelest irony of Sergeant Jack Croker's experience was that the Air Force inflicted the vast majority of the damage without preferring any charges, or even formally apprehending him.[28] The Air Force— an agency of the United States Government — was able to ruin his career and, to a large extent, the rest of his life by delaying preferral of charges while imposing a variety of administrative sanctions during the delay. Under the current state of the law, the military was able to do this without speedy trial accountability under the Sixth Amendment[29] or Article 10, U.C.M.J.,[30] and without violating Sergeant Croker's rights to military due process[31] or his due process rights under the Fifth Amendment.[32]

This problem exists only in the military justice system. In the civilian world, the government lacks the power to affect a defendant's life and livelihood, short of an indictment or imposition of pretrial restraint, which, in turn, would trigger the citizen's Sixth Amendment speedy trial rights. In the military, the government—as represented by the commander—may impose

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[27] The reason officially cited by Sergeant Croker's commander for denying his reenlistment was an act of adultery committed by Sergeant Croker in December 1991. Adultery is a violation of Article 134, U.C.M.J. *See* 10 U.S.C. 934 (1994); Manual, *supra* note 12, Part IV ¶ 62. That charge had originally been preferred and referred for trial by the same general court-martial as the manslaughter charge. However, upon motion by the defense, the military judge ruled that the Article 32 investigation into the adultery charge had been defective, and had to be reaccomplished. This resulted in the convening authority ordering the adultery charge severed from the manslaughter charge, so the latter could be tried as scheduled. After the manslaughter acquittal, Sergeant Croker accepted nonjudicial punishment from his commander under Article 15, U.C.M.J. (10 U.S.C. § 815 (1994)) for the adultery, and the convening authority dismissed the adultery charge.

[28] The military uses the word "apprehension" to describe the act known as "arrest" in civilian jurisdictions. *See* 10 U.S.C. § 807 (1994); R.C.M. 302, *supra* note 12. In military law, "arrest" is a form of pretrial restraint akin to confinement, but is "moral restraint" imposed by an order to remain within specified limits rather physical restraint. *See* 10 U.S.C. § 809(a) (1994); R.C.M. 304(a)(3), *supra* note 12.

[29] U.S. CONST. AMEND. VI.

[30] 10 U.S.C. § 810 (1994).

[31] The concept of "military due process" is discussed at section V.A. *infra*.

[32] U.S. CONST. AMEND. V.

numerous adverse administrative actions on the member based, at best, only on suspicion, and without preferring charges. Under military court precedent, these actions usually do not amount to a form of "pretrial restraint" which would trigger speedy trial accountability. At present, there is no effective remedy in military law to address oppressive pre-preferral delay. It is the goal of this article to propose one.

This article will begin with an overview of the law of speedy trial under the Sixth Amendment, Article 10 of the U.C.M.J., and Rule for Court-Martial (R.C.M.) 707. It will then discuss the complementary concepts of "military due process" and due process under the Fifth Amendment. In each area, the article will address theories of accountability for oppressive pre-preferral delay in the military justice system, and how each is inadequate under the current state of military law. The article will close with two proposed solutions, one focusing on "military due process" and the other grounded in the Fifth Amendment.

III. THE LAW OF SPEEDY TRIAL

In the military justice system, an accused's speedy trial rights are primarily affected by three sources of law: the Speedy Trial Clause of the Sixth Amendment to the United States Constitution, Article 10 of the U.C.M.J., and R.C.M. 707.[33]

A. Speedy Trial Under the Sixth Amendment

The seminal authorities for Sixth Amendment speedy trial analysis are the cases of *United States v. Marion*[34] and *Barker v. Wingo*,[35] decided in 1971 and 1972, respectively. In *Marion*, the Supreme Court staked out the parameters of a defendant's rights under the Speedy Trial Clause. In *Barker*, the Court set out the factors to be considered in deciding whether those rights

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[33] Article 33, U.C.M.J. (10 U.S.C. § 833 (1994)) is also a source of "speedy trial" law in the military justice system. United States v. Vogan, 35 M.J. 32, 33 (C.M.A. 1992). Article 33 requires a commander to forward charges to the general court-martial convening authority within eight days of an accused's arrest or confinement, if practicable. Historically, the purpose of this requirement has been to ensure early assignment of defense counsel to military members undergoing severe pretrial restraint. United States v. Jackson, 5 MJ 223, 226 (C.M.A. 1978). If Article 33 is violated, the accused must show specific prejudice to obtain relief, which is rare. *See, e.g.*, United States v. Rogers, 7 M.J. 274, 275 (C.M.A. 1979); United States v. Nelson, 5 M.J. 223, 226 (C.M.A. 1978).

The Speedy Trial Act of 1974 (18 U.S.C. §§ 3161-3174 (1994)) and Fed. R. Crim. P. 48(b) do not apply to courts-martial. United States v. Bench, 23 U.S.C.M.A. 480, 482, 50 C.M.R. 560, 1 M.J. 118 (C.M.A. 1975)(Cook, J., dissenting); United States v. Vogan, 32 M.J. 959, 961 (A.C.M.R. 1991), *aff'd*, 35 M.J. 32 (C.M.A. 1992).

[34] United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

[35] Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

had been violated.

In *Marion*, three years had passed between the defendant's alleged crime and his indictment. He claimed this violated his right to speedy trial. In a unanimous opinion, the Court rejected the argument that the Sixth Amendment applied to pre-indictment delay, tying the Speedy Trial Clause to when a citizen becomes an "accused," that is, when he or she has been indicted or subjected to another form of public accusation, such as an arrest and holding. In language destined to become frequently quoted in later decisions, the Court explained the tie between arrest and the Speedy Trial Clause, and the values the clause sought to protect:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.[36]

With *Marion* laying out the building blocks of Sixth Amendment speedy trial analysis, the Court in *Barker v. Wingo* then turned to the "nuts and bolts" of deciding whether the right has been violated. *Barker* reached the Court as an appeal of the denial of a convict's habeas corpus petition. The petitioner had been arrested in July 1958. Thereafter, there had been a total of sixteen continuances in his trial while the state attempted to convict first the petitioner's alleged co-actor in a brutal multiple murder.[37] With few exceptions, the petitioner had not objected to these delays, and had been free on bail between June 1959 and his October 1963 trial, which resulted in his conviction.

In a unanimous opinion, the *Barker* Court rejected the inflexible standards argued by both sides,[38] and adopted a balancing test which weighed the conduct of both the prosecution and defense. The Court named four factors as governing whether an accused's right to speedy trial had been violated:

1. The length of pretrial delay;
2. The reasons for delay, identifying three general categories of delay

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[36] *Marion*, 404 U.S. at 320.

[37] The state's prosecutors perceived their case against the co-actor was better than against the petitioner, and that they needed the co-actor's testimony to convict the petitioner. There were a total of six trials of the co-actor, including retrials after mistrials and appellate reversals, before he was finally convicted.

[38] The petitioner argued for a set period of time, after which the right to speedy trial is violated unless the defendant has been brought to trial. The state's attorneys urged a "demand rule," whereby the Speedy Trial Clause would only have relevance if an accused expressly demanded a speedy trial. The Court rejected the former rule as too inflexible, noting that delay often works in a criminal defendant's favor. The justices rejected the "demand rule" as inconsistent with the Court's holdings that constitutional protections may ordinarily only be lost when they are expressly waived.

by the government: deliberate delay intended to hamper the defense, neutral delay (such as that caused by overcrowded dockets), and delay for clearly valid reasons (such as witness unavailability);

3. Whether the defendant has asserted the right to speedy trial (a factor to which the Court expressly accorded particularly strong weight); and

4. Prejudice to the defendant from the delay.

Regarding the last factor, the Court focused the search for prejudice on the values protected by the Speedy Trial Clause, as identified in *Marion*: prevention of oppressive pretrial incarceration, minimization of a defendant's anxiety, and limitation of impairment of an accused's defense at trial.

The four *Barker* factors have since provided the blueprint for all speedy trial analysis under the Sixth Amendment. However, the parameters of the right—that is, under what circumstances the right could be evoked and just what societal values it protected—continued to be refined by the Supreme Court over the next two decades.

Three years after *Marion*, the Supreme Court reinforced the connection between arrest and the Speedy Trial Clause in the 1975 case of *Dillingham v. United States*.[39] *Dillingham* reversed a Court of Appeals decision that had refused to consider the delay between the defendant's arrest and his indictment in its speedy trial analysis. In a per curiam opinion, the Court expressly rejected the notion that the right to speedy trial depended upon indictment, information, or other formal charge.

However, in the 1982 case of *United States v. MacDonald*,[40] the Court considered the impact of a government decision to formally drop charges, and held that the Speedy Trial Clause had no application during a period when the government formally abandons its prosecution, even when the charges are reinstated some years later. Speaking for a divided court,[41] the Chief Justice stated that the Speedy Trial Clause was not intended to protect defendants from prejudice due to simple passage of time, a matter which is covered by statutes of limitations and the Due Process Clause of the Fifth Amendment. Rather, the Sixth Amendment right to speedy trial is intended to protect citizens from prejudice stemming from incarceration, other impacts on liberty, and disruption of life. Once charges have been formally dismissed, these factors are no longer present. Drawing on the values stressed in *Marion*, the *MacDonald* Court stated: "Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone

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[39] Dillingham v. United States, 423 U.S. 64 , 96 S.Ct. 303, 46 L.Ed.2d 205 (1975).

[40] United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982), the famous "Fatal Vision" murder case. *See* JOE MCGINNESS, FATAL VISION (1983).

[41] The Court was divided six to three. Justice Stevens filed a separate concurring opinion. Justice Marshall dissented in an opinion joined by Justices Brennan and Blackmun.

openly subject to a criminal investigation."[42] In the case of Jeffrey MacDonald, the physician and former Green Beret captain discharged from the Army after his military prosecution had been abandoned, during the period between the dismissal of court-martial charges and his indictment in United States District Court, "[h]e was free to go about his affairs, to practice his profession, and to continue his life."[43]

In 1986, a sharply divided Supreme Court in *United States v. Loud Hawk*[44] extended its *MacDonald* reasoning to the situation where an indictment had been dismissed by defense motion, and the government had pursued an eventually successful interlocutory appeal. In holding that the time when no indictment was outstanding and the government was seeking a reversal of the dismissal did not weigh towards a Speedy Trial Clause violation, the Court reinforced the ties between the right to speedy trial and the existence of a formal prosecution, and also the values protected by the Sixth Amendment, that is, pretrial deprivations of liberty and disruption of a defendant's life. In so holding, the *Loud Hawk* majority was not impressed with arguments that the government's public desire to prosecute, and the defendants' continued need for the services of counsel, were sufficient to constitute "public accusation" and preserve the relevance of the Speedy Trial Clause during the interlocutory appeal: "[T]he Speedy Trial Clause's core concern is impairment of liberty; it does not shield a suspect for every expense or inconvenience associated with criminal defense."[45]

The most recent Supreme Court case addressing the Speedy Trial Clause reaffirmed the basic *Marion* building blocks, but with a twist. In *Doggett v. United States*,[46] the Court reversed the Court of Appeals and held the defendant's speedy trial rights had been violated. While restating the basic *Marion* tenet that the Speedy Trial Clause has no applicability beyond the confines of a formal criminal prosecution, *Doggett* did *Marion* one better by clarifying that the Sixth Amendment protected more than a defendant's pretrial liberty, and that the effect of pretrial delay on an accused's ability to defend at trial was also a factor to be weighed in deciding whether the right to speedy trial had been violated.[47]

Notwithstanding *Doggett*, the Supreme Court cases starting with

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[42] *MacDonald*, 456 U.S. at 9.

[43] *Id.* at 10.

[44] United States v. Loud Hawk, 474 U.S. 302, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986). Justice Powell wrote for a 5 to 4 majority. Justice Marshall wrote the dissent, in which Justices Brennan, Blackmun, and Stevens concurred.

[45] *Loud Hawk*, 474 U.S. at 312.

[46] Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992).

[47] *Compare* Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973), where the Court, in a per curiam opinion, sharply reversed an Arizona Supreme Court decision which had held that prejudice to a defendant's ability to defend at trial is the only type of prejudice to be considered in applying the Barker v. Wingo balancing test.

Marion and *Barker* have made it clear that the core concerns of the Sixth Amendment's Speedy Trial Clause are a defendant's personal condition—liberty and freedom to pursue a vocation, disruption of life and drain on financial resources, and personal anxiety and that of family and friends. These concerns are present whenever a citizen is under investigation or is considered a possible target of prosecution. Notwithstanding, the Supreme Court has made it clear that the Speedy Trial Clause is only relevant during an official prosecution, triggered by formal arrest, information, or indictment.

B. Speedy Trial Under Article 10, U.C.M.J.

Prior to the adoption of the 1984 edition of the Manual for Courts-Martial and, with it, Rule for Courts-Martial 707, speedy trial accountability was governed by Article 10 in conjunction with the Sixth Amendment. The government's responsibility began with the accused's confinement or "formal presentment of charges."[48] Although it has been stated that Article 10 "reiterates" the Speedy Trial Clause of the Sixth Amendment,[49] the precise relationship between the Sixth Amendment and Article 10 has never been delineated by the military courts. However, because of the absence of bail in the military, it is generally assumed that the protections of Article 10 are more rigorous than those of the Speedy Trial Clause.[50]

Article 10 of the U.C.M.J. (10 U.S.C. § 810 (1994)) states, in pertinent part:

> Any person subject to this chapter [i.e., the U.C.M.J.] shall be ordered into arrest[51] or confinement, as circumstances may require; . . . .[52] When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

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[48] United States v. Williams, 12 U.S.C.M.A. 81, 82, 30 C.M.R. 81 (1961). Once charges are preferred, "the person accused shall be informed of the charges against him as soon as practicable." 10 U.S.C. § 830(b); *see also* R.C.M. 308, *supra* note 12.

[49] United States v. Hounshell, 7 U.S.C.M.A. 3, 21 C.M.R. 129, 132 (1956).

[50] United States v. Kossman, 38 M.J. 258 (C.M.A. 1993); United States v. Burton, 21 U.S.C.M.A. 112, 44 C.M.R. 166, 171 (1971).

[51] Recall that "arrest," in military law, is a form of close pretrial restraint imposed by order rather than physical constraints. The physical detention of suspects by law enforcement officers, typically called "arrest" in civilian jurisdictions, is known in the military as "apprehension."

[52] Military members charged with U.C.M.J. offenses are not routinely confined or placed under arrest prior to trial. There is no bail in the military justice system. Accordingly, the prerequisites for lawful pretrial confinement are stricter than mere probable cause. *See* R.C.M. 305, *supra* note 12; United States v. Heard, 3 M.J. 14 (C.M.A. 1977); United States v. Otero, 5 M.J. 781 (A.C.M.R.), *pet. denied*, 6 M.J. 121 (C.M.A. 1978); Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976); United States v. Lynch, 13 M.J. 394 (C.M.A. 1982).

How the United States Court of Military Appeals has applied this statutory mandate—which, by its terms, applies only to military members confined or in arrest prior to trial—has been an cyclical exercise, starting with a blurry, *ad hoc* test, followed by a near "bright line" standard, and then a return to the original *ad hoc* analysis. The Court of Military Appeals' construction of Article 10 has also been heavily influenced by the presence—or absence—of more specific standards set out in the Manual for Courts-Martial.

Prior to 1971, the Court of Military Appeals held that Article 10's requirement for "immediate steps...to try [an accused in pretrial confinement or arrest] or to dismiss the charges and release him" was satisfied if the government could show "reasonable diligence" in prosecuting the accused.[53] This standard left room for leisurely case processing: "[T]he touch stone for measurement of compliance with the provisions of [Article 10] is not constant motion, but reasonable diligence in bringing the charges to trial."[54]

In 1971, the Court of Military Appeals decided *United States v. Burton*,[55] a landmark case in military speedy trial analysis under Article 10, U.C.M.J., and abandoned "reasonable diligence" in favor of a more discrete requirement. After applying the "reasonable diligence" standard to the case at bar (and finding no Article 10 violation), the *Burton* court accepted the appellate defense counsel's invitation to adopt a new standard, one which was more amenable to objective measurement. The court still rejected rigid time limits, and instead adopted a rebuttable presumption as the test for Article 10 violations: in the absence of defense requests for continuance, if an accused is in pretrial confinement in excess of three months an Article 10 violation is presumed. The prosecution could rebut this presumption by showing diligence, but not easily: "In such cases [of pretrial confinement exceeding three months], this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed."[56] Moreover, regardless of the time an accused had been confined, the *Burton* court held that, when an accused demands a speedy trial, the government must proceed immediately or show adequate cause for further delay.

From *Burton* until the adoption of the 1984 edition of Manual for Courts-Martial—which brought with it Rule for Court-Martial 707—military speedy trial battles revolved almost exclusively[57] around the so-called "*Burton*

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[53] United States v. Callahan, 10 U.S.C.M.A. 156, 27 C.M.R. 230, 232 (1959); United States v. Davis, 11 U.S.C.M.A. 410, 29 C.M.R. 226, 230 (1960).

[54] United States v. Tibbs, 15 U.S.C.M.A. 350, 35 C.M.R. 322, 325 (1965).

[55] United States v. Burton, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971).

[56] 44 C.M.R. at 171.

[57] *Compare* United States v. Rowsey, 14 M.J. 151 (C.M.A. 1982), holding that an accused's right to speedy trial under Article 10 could be violated without invoking the *Burton* presumption. In *Rowsey*, the accused had been confined for "only" 85 days, but had made two

presumption," soon modified from "three months" of pretrial confinement to a more precise "90 days."[58] Because Article 10 only applied to cases of pretrial "arrest" or "confinement," litigation soon focused on whether "stone walls a prison make," that is, whether various of forms of pretrial restriction, although not nominally "confinement," were tantamount to the stockade or brig. If so, and the total of such "confinement" exceeded 90 days, then the accused could claim a presumptive Article 10 violation.[59]

Because the *Burton* presumption applied "in the absence of defense requests for continuance,"[60] litigation also frequently involved controversies as to which party was accountable for particular periods of delay, sometimes generating titanic courtroom frays over which side was responsible for a handful of days—anything to get the government's accountability over (or under) 90 days.[61] Accounting could get somewhat complicated when cases involved multiple charges, preferred at different times.[62]

The preeminence of *Burton* as the military speedy trial icon was diminished by the adoption of Rule for Court-Martial 707 in 1984. R.C.M. 707 will be addressed in detail below. For now, suffice to say the presence of this rule on the military speedy trial scene shifted the litigation hub away from the *Burton* presumption, and eventually prompted the Court of Military Appeals to reconsider the usefulness of *Burton* in implementing Article 10.

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demands for speedy trial which had been ignored by the prosecution. *Rowsey*, however, was an exception within a phalanx of cases for which application (or non-application) of the *Burton* presumption was the prize.

[58] United States v. Driver, 23 U.S.C.M.A. 243, 49 C.M.R. 376 (1974).

[59] *See, e.g.*, United States v. Powell, 2 M.J. 6 (C.M.A. 1976) (restriction to post was not tantamount to confinement); United States v. Schilf, 1 MJ 251, 252 n. 2 (C.M.A. 1976) (restriction to squadron area with periodic sign-in requirement was tantamount to confinement); United States v. Burrell, 13 M.J. 437 (C.M.A. 1982) (hospitalization and escort requirements not sufficiently onerous to be equivalent to confinement); United States v. Cherok, 19 M.J. 559 (N.M.C.M.R. 1984), *aff'd other grounds*, 22 M.J. 438 (C.M.A. 1986) ("arrest" is tantamount to confinement); United States v. Buchecker, 13 M.J. 709 (N.M.C.M.R. 1982) (assignment to "training brigade" was not tantamount to confinement); United States v. Sims, 13 M.J. 813 (A.F.C.M.R. 1982) (restriction to base, coupled with orders not to go to Noncommissioned Officers Club and to report in periodically, was sufficiently onerous to be equivalent to confinement).

[60] *Burton*, 44 C.M.R. at 172.

[61] *See, e.g.*, United States v. Leonard, 3 M.J. 214 (C.M.A. 1977), holding defense accountable for delay caused by psychiatric evaluation of accused. *Accord*, United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983). *See also*, United States v. Henderson, 1 M.J. 421 (C.M.A. 1976) (normal delays for leave, crowded dockets, and personnel shortages are accountable to prosecution); United States v. Herron, 4 M.J. 30 (C.M.A. 1977) (accused is responsible for delay due to his withdrawal of previous waiver of Article 32 investigation).

[62] *See* United States v. Ward, 1 M.J. 21 (C.M.A. 1975), holding that independent sets of charges, preferred at different times, demanded separate accounting for purposes of the *Burton* presumption. Consequently, a confined accused's Article 10 right to speedy trial could be violated for one set of charges, but not for another.

In *United States v. Kossman*,[63] the military trial judge had granted a defense motion to dismiss the charges for violation of the accused's right to speedy trial. The government's accountability for the accused's pretrial confinement was less than 120 days (the R.C.M. 707 standard), but more than 90 days. Notwithstanding compliance with R.C.M. 707, the judge applied the *Burton* presumption, found a violation of Article 10, and dismissed the charges. The prosecution pursued an interlocutory appeal,[64] and the Navy and Marine Corps Court of Military Review affirmed the dismissal. The Judge Advocate General of the Navy then certified the decision for review by the Court of Military Appeals.[65]

The Court of Military Appeals took the opportunity presented by *Kossman* to reexamine Article 10 and *Burton* in light of R.C.M. 707 and, by a three to two majority, overruled *Burton*. The majority opinion explained that *Burton* had been decided in a procedural vacuum. In 1971, there was no "mechanistic speedy trial template."[66] Therefore, a court-made rule was necessary to give a military accused's right to speedy trial a practical standard for enforceability. However, the majority characterized the *Burton* presumption as no more than a "rough-and-ready rule of thumb"[67] and "something of a crude stop gap" which "occasionally created difficult results."[68] The 1984 adoption of R.C.M. 707 had set out a detailed matrix of speedy trial rules which made the *Burton* presumption obsolete, or so the majority opinion reasoned. Hence, the court returned Article 10 speedy trial analysis to its pre-*Burton* state—the "reasonable diligence" standard.

While *Kossman* firmly established R.C.M. 707 at the center of military speedy trial analysis, the court emphasized the obvious point that Article 10 still held a position of supremacy over R.C.M. 707 in legal hierarchy,[69] and that R.C.M. 707 is not the "'know-all, be-all' of speedy trial rules."[70] Where it is established that the government could go to trial much sooner than the arbitrarily selected times set out in R.C.M. 707, the court made clear that a speedy trial motion based solely on Article 10 would still lie.[71]

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[63] United States v. Kossman, 38 M.J. 258 (C.M.A. 1993).

[64] *See* 10 U.S.C. § 862 (1994); R.C.M. 908, *supra* note 12.

[65] With few exceptions, review of decisions of the service Courts of Criminal Appeals by the United States Court of Appeals for the Armed Forces is discretionary with that court. However, the Judge Advocates General of the services have the power to require review by the Court of Appeals for the Armed Forces of any Court of Criminal Appeals decision. 10 U.S.C. § 867(a) (1994).

[66] *Kossman*, 38 M.J. at 259.

[67] *Id.* at 261.

[68] *Id*. at 259.

[69] The President has the power to establish rules of procedure for courts-martial. 10 U.S.C. § 836(a) (1994). Of course, these rules may not conflict with acts of Congress, judicial interpretations of statutes, or the Constitution.

[70] *Kossman*, 38 M.J. at 261 n.3.

[71] The *Kossman* court's two dissenters, however, saw the majority ruling as a regression from

Throughout the debate on the proper Article 10 standard, one constant remained—no matter how the military courts have chosen to implement Article 10, by its terms that statute only applies when an accused is in arrest or confinement. Unless an accused is undergoing one of those close forms of pretrial restraint, he or she may not look to Article 10 for speedy trial relief. Short of delays rising to the level of a Sixth Amendment violation, military defendants not in such onerous restraint must look to R.C.M. 707 as controlling their speedy trial rights.

C. Speedy Trial Under Rule for Court-Martial 707

In Article 36(a), U.C.M.J.,[72] Congress conferred authority upon the President to establish procedural rules to implement the requirements of the Code. The vehicle for the Presidential rules is the Manual for Courts-Martial, an executive order containing rules of procedure and evidence, as well as maximum sentence limitations[73] and other materials. There have been three major revisions of the Manual since the adoption of the U.C.M.J., each corresponding to major legislation. The 1951 Manual[74] followed the Military

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a clear, well-recognized standard to chaos, and for no good reason. In the view of Chief Judge Sullivan, the return of Article 10 analysis to the "reasonable diligence" standard will produce "essentially unreviewable *ad hoc* decisions by military trial judges" and "condemn[s] the military legal community to reinvent our speedy-trial clock, second by second." 38 M.J. at 262 (Sullivan, C.J., dissenting). This dark prophesy seems born out by early decisions in the post-*Kossman* era. In United States v. Laminman, 41 M.J. 518 (C.G. Ct. Crim. App. 1994), a sharply divided Coast Guard Court of Criminal Appeals upheld the trial judge's dismissal of charges on Article 10 grounds, because the government had failed to carry its burden of proof that it had been reasonably diligent in bringing the accused to trial. *See* R.C.M. 905(c)(2)(B), *supra* note 12, assigning the burden of proof on speedy trial issues to the prosecution. In United States v. Hatfield, 44 M.J. 22 (1996), the Court of Appeals for the Armed Forces upheld the military judge's dismissal of charges after a 106 day delay. In doing so, the court reaffirmed the *Kossman* emphasis on the "degree of discretion" in a military judge. *Id.* at 24 (citing *Kossman*, 38 M.J. at 262). *See also* United States v. Calloway, 47 M.J. 782 (N.M. Ct. Crim. App. 1998) (no reasonable diligence where, among other delays, accused spent first 20 days in pretrial confinement without any action on his case and 66 days without assignment of defense counsel).

[72] 10 U.S.C. § 836 (1994).

[73] A few of the punitive articles of the Code expressly set out mandatory or maximum punishments. *See, e.g.*, 10 U.S.C. § 906 (1994) (Article 106—spying in war time), which has a mandatory death penalty; 10 U.S.C. § 118(1) and (4) (1994) (Article 118(1) and (4)—premeditated and "felony" murder), which have mandatory alternative punishments of either death or life imprisonment, as a court-martial may direct; and 10 U.S.C. § 920(a) (1994) (Article 120(a)—rape), which sets out a punishment of "death or such other punishment as a court-martial may direct." The vast majority of U.C.M.J. violations, however, are simply to be punished "as a court-martial may direct." 10 U.S.C. § 856 (1994) (Article 56) gives the President the authority to set maximums for punishment "which a court-martial may direct." These limits are found in Manual, *supra* note 12, Part IV.

[74] Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951).

Justice Act of 1950,[75] the original Code enactment. The 1969 Manual[76] was issued in response to the Military Justice Act of 1968,[77] the first major set of amendments to the Code which, among other changes, created the position of the "military judge" and the Courts of Military Review. The 1984 Manual[78] was promulgated after the Military Justice Act of 1983,[79] which was primarily directed at streamlining posttrial review of court-martial convictions. In between these major revisions, the Manual has been periodically amended by other Presidential executive orders, consecutively numbered as "changes," culminating in 1995 with the reissuance of the Manual as the "Manual for Courts-Martial, United States (1995 ed.)." [80]

Although not mandated by the Military Justice Act of 1983, R.C.M. 707 came into being as part of the 1984 Manual. It was designed as a military analog to the Federal Speedy Trial Act,[81] setting out specific rules intended to protect an accused's speedy trial rights, as well as command and societal interest in prompt administration of justice.[82]

In its original form, R.C.M. 707 required an accused to be brought to trial within 120 days after "notice of preferral [of charges] under R.C.M. 308 or imposition of pretrial restraint under R.C.M. 304, whichever is earlier." The rule listed a number of specific situations which would justify excluding time from the government's 120-day countdown. It also included a special provision for members in pretrial confinement or arrest, which, after a fashion, paralleled the *Burton* rule. This provided that no one could be held in pretrial arrest or confinement longer than 90 days, with a 10-day extension permitted upon application to a military judge and a showing of extraordinary circumstances. This part of the rule could be satisfied by releasing an accused after 90 days, even if he or she has not yet been brought to trial. However, the basic 120-day speedy trial "clock" would still be running, having been triggered by imposition of restraint or notice of preferral, whichever had come first.

R.C.M. 707 brought with it new controversies, along with some of the old ones. In the latter area, the prosecution and defense still quibbled over whether time should be excluded from government accountability, as they had

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[75] Pub. L. 81-506, 64 Stat. 108 (1950).
[76] Exec. Order No. 11430, 3 C.F.R. 137 (1968).
[77] Pub. L. 90-632, 82 Stat. 1335 (1968).
[78] Exec. Order No. 12473, 49 Fed. Reg. 17152 (1984).
[79] Pub. L. 98-209, 97 Stat. 1402 (1983).
[80] The 1984 Manual has been amended eight times. The last amendment was on May 12, 1995, and reissued the Manual as the "1995 Edition." Exec. Order No. 12960 (1995). Unless otherwise identified, all references to "Manual" are to the 1995 edition. For copies of all executive orders creating and then amending the 1984 Manual, *see* Manual, *supra* note 12, App. 25.
[81] 18 U.S.C. §§ 1361-3174 (1994).
[82] Manual, *supra* note 12, App. 21 A21-40, A21-38.

done and still did under the *Burton* presumption. Under R.C.M. 707, however, the parties had a specific series of "pigeon holes" to fight over, the prosecution claiming one or more applied while the defense argued the contrary.[83]

However, one major area of contention in *Burton*-style speedy trial litigation did not assume nearly the same importance under the original version of R.C.M. 707. It was no longer paramount for the defense to persuade the military judge to characterize pretrial restraint as tantamount to "confinement" or "arrest," as the R.C.M. 707 120-day "clock" was triggered by any form of pretrial restraint listed at R.C.M. 304(a). That rule describes four types of pretrial restraint. Arrest and confinement (R.C.M. 304(a)(3) and (4), respectively) have been discussed above. The other two forms of restraint under R.C.M. 304(a) are:

> (1) *Conditions on liberty*. Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.
> (2) *Restriction in lieu of arrest.* Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

Although "restriction" as a triggering mechanism for the speedy trial clock was new, this did not present many problems because it usually was a conspicuous form of restraint. As a rule, everyone responsible for administering the military justice system—senior commanders and, especially,

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[83] *See, e.g.*, United States v. Reap, 41 M.J. 340 (1995) (holding that in a case tried in June 1987 and February 1989, and interrupted by an Article 62 interlocutory appeal, the 63 days between military judge's suppression of evidence and notice of the Article 62 appeal was excluded); United States v. Montanino, 40 M.J. 364 (C.M.A. 1994) (stating that where defense requested trial delay to allow for presence of military defense counsel of choice, delay was excluded from government's speedy trial accountability even though delay request had been prompted by counsel's deployment); United States v. McKnight, 30 M.J. 205 (C.M.A.), *cert. denied*, 498 U.S. 942 (1990) (explaining where defense requested Article 32 hearing date between August 5th and 15th, and Investigating Officer not available until August 11th, defense is accountable for time up to August 11th); United States v. Ramsey, 28 M.J. 370 (C.M.A. 1989) (holding that absent bad faith, time taken by government to consider interlocutory appeal is excluded); United States v. Carlisle, 25 M.J. 426 (C.M.A. 1988) (stating government accountable for delay in Article 32 hearing, even though date selected to accommodate defense); United States v. Cook, 27 M.J. 212 (C.M.A. 1988) (holding delay in new Article 32 hearing due to defense request for witnesses was accountable to government); United States v. Raichle, 28 M.J. 876 (A.F.C.M.R. 1989) (explaining that absent express defense request for delay, government is responsible for delay to obtain defense-requested depositions); United States v. Miniclier, 23 M.J. 843 (A.F.C.M.R. 1987) (stating ime involved in considering officer's request to resign in lieu of court-martial not excluded from government accountability).

their staff judge advocates—knew when restriction had been imposed and, hence, that the speedy trial clock was ticking.[84] However, "conditions on liberty" were another matter. It is not uncommon for military supervisors, first sergeants, or unit commanders to order, or strongly "advise" (which, in the military, can be pretty much the same thing) a subordinate to do certain things, or to stay away from certain people or places pending disposition of charges. In such cases, it is far from certain that senior commanders or the staff judge advocate would be informed. Indeed, in some cases, a supervisor may impose the conditions and promptly forget he or she has done so. Hence, the speedy clock would be ticking away and the officials supervising the prosecution would not have the first clue about it.

As a result of "conditions on liberty" triggering the 120-day clock, cases could be lost on speedy trial grounds before key personnel even knew the clock was running.[85] The extreme consequences of a R.C.M. 707 violation—dismissal of charges—for what were seen by many as very limited restraints on pretrial freedom also produced some tortured analysis to avoid pinning the label "conditions on liberty" on actions which should have qualified.[86] Change 2 to the 1984 Manual[87] provided the "fix" to this problem, by amending R.C.M. 707 to carve away "conditions on liberty" as a type of restraint which would trigger the 120-day clock. This left confinement, arrest, and restriction as the forms of pretrial restraint which would implicate an accused's speedy trial rights under R.C.M. 707, a situation which has continued through R.C.M. 707 in its current form.

While the "conditions on liberty" controversy was going on, the other original R.C.M. 707 triggering device—notice of preferral of charges—also became the subject of controversy. The rationale behind having *notice* of preferral, as opposed to the act of *preferral* itself, as the event which begins speedy trial accountability may be traced to a fundamental principle of military

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[84] Although this is not always the case. *See* Andrews v. Heupel, 29 M.J. 743 (A.F.C.M.R. 1990) where the accused was apprehended for drug smuggling by Air Force investigators while he was on leave status in the Philippines, and then sent back to his home base in Hawaii while his prosecution in the Philippines was being prepared. Upon arrival in Hawaii, his commander restricted him to the base, thus starting the R.C.M. 707 120-day clock. However, no one informed military authorities in the Philippines. By the time the accused was brought to trial, his speedy trial rights under R.C.M. 707 had been violated several times over.

[85] *See, e.g.*, United States v. Webb, Misc. Docket No. 85-0016, slip op. (N.M.C.M.R. Oct. 11, 1985).

[86] *See, e.g.*, United States v. Facey, 26 M.J. 421 (C.M.A. 1988) (holding orders not to go beyond the "local area" surrounding the air base were not "conditions on liberty"); United States v. Fowler, 24 M.J. 530 (A.F.C.M.R. 1987) (stating requirement for telephone notification before leaving base was not "condition on liberty"); United States v. Johnson, 24 M.J. 796 (A.C.M.R. 1987), *pet. denied*, 26 M.J. 40 (C.M.A. 1988) (explaining cancellation of leave, direction not to leave area of Frankfurt, Germany, without permission, and order not to go near duty section were not "conditions on liberty").

[87] Exec. Order No. 12550, 51 Fed. Reg. 6497 (1986).

law—that any military member may prefer charges against another.[88] Because preferral may be an individual act, and not a governmental one, it was reasoned that the government should not begin its speedy trial accountability until the accused's commander formally notified him or her of the charges as required by Article 30(b) of the Code.[89] However, formal prosecutions rarely result from charges preferred by military members in their personal capacity.[90] The overwhelming majority of charges are preferred by commanders or other officers acting officially, based on formal investigation and after advice from their staff judge advocates.[91] In such cases, the start of the R.C.M. 707 120-day clock could be delayed, even after preferral of charges, simply by postponing formal notice to the accused of the charges. This opportunity to manipulate speedy trial accountability produced a flurry of litigation, primarily out of the Navy.[92]

The steady stream of judicial controversy over R.C.M. 707 resulted in a major amendment in 1991, and produced the version currently in effect. Change 5 to the 1984 Manual[93] overhauled the rule to remove the most frequent sources of litigation, and effected other major amendments as well. R.C.M. 707(a) was changed to make *preferral* a triggering event instead of *notice* of preferral. This eliminated any gap between these two acts as a source of dispute over accountability, and was intended to settle the starting points for

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[88] 10 U.S.C. § 830(a) (1994) states: "Charges and specification shall be signed by a *person subject to this chapter* under oath before a commissioned officer of the armed forces authorized to administer oaths . . . ." (emphasis added). *See also*, R.C.M. 307(a), *supra* note 12.

[89] 10 U.S.C. § 830(b) (1994). *See* United States v. Gray, 26 M.J. 16, 22-23 (C.M.A. 1988) (Cox, J., concurring).

[90] In the author's experience, charges preferred by military members in their individual capacity often stem from personal animosity toward a fellow member (e.g., adultery charges), or are reactions to perceived unfair treatment by superiors. This is not always the case, as the author is aware of cases where, after an accused's commander had refused to prefer charges, individual members have preferred charges at the recommendation of the installation staff judge advocate.

[91] *Gray*, 26 M.J. at 19 n.2.

[92] *See* United States v. Maresca, 28 M.J. 328 (C.M.A. 1989) (holding "constructive notice" to an accused, hence starting R.C.M. 707 clock, where government had opportunity to provide formal notice but did not do so); Thomas v. Edington, 26 M.J. 95 (C.M.A. 1988) (explaining actual notice had been given earlier than formal notice shown on charge sheet, and government accountability began with actual notice); United States v. Angel, 28 M.J. 600 (N.M.C.M.R. 1989) (stating under circumstances, notice to accused's defense counsel held to be notice to him, starting the 120-day clock); United States v. Berrey, 28 M.J. 714 (N.M.C.M.R. 1989) (holding intentional delay in Article 30(a) notice was a violation of military due process, requiring dismissal of charges); United States v. Leamer, 29 M.J. 616 (C.G.C.M.R. 1989) (stating delay between preferral and notice was not intentional manipulation, earlier oral notification that accused was under investigation was not the equivalent of Article 30(a) notice, and inadvertent observation of charge sheet by accused is not notice under Article 30(a)).

[93] Exec. Order No. 12767, 56 Fed. Reg. 302 (1991).

the 120-day clock with certainty.[94] R.C.M. 707(c)'s "laundry list" of circumstances which would exclude delay from government accountability was completely discarded in favor of a simple "bright line" test: any delays caused by appellate courts, or approved by the convening authority (prior to referral) or a military judge (after referral), would be excluded from the government's accountability, no matter which party requested or was responsible for the delay. The adoption of a simple rule of government accountability for all delays except those approved by judge or convening authority had been strongly recommended by the United States Court of Military Appeals,[95] and eliminated the courtroom quibbling over responsibility for delays which had dominated much of speedy trial litigation under R.C.M. 707. [96]

This new version of R.C.M. 707 also carried two more significant differences from its predecessors. The provision requiring trial or release within 90 days for members in pretrial arrest or confinement was deleted, leaving Article 10 (soon to be governed by the *Kossman* "reasonable diligence" standard instead of the *Burton* presumption) as the only source of special protection for those undergoing close forms of pretrial restraint. Further, the remedy for violations of R.C.M. 707 was altered to provide the government an "escape hatch" in certain cases. If a rule violation occurred, the military judge was required to dismiss the charges, just as in prior versions of the rule. Now, however, the judge had the discretion to dismiss either with or without prejudice, if the speedy trial violation was limited to the provisions of R.C.M. 707 and did not reach constitutional magnitude.[97]

Notwithstanding all the litigation and revision since R.C.M. 707's adoption a decade ago, two constants remain—for an active duty military member, it takes either a formal prosecution (i.e., preferral of charges) or a form of pretrial restraint recognized under the rule (either confinement, arrest, or restriction) to require the government to account for the time it takes to get

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[94] Manual, *supra* note 12, App. 21 A21-40.

[95] *Carlisle*, 25 M.J. at 428; *Maresca*, 28 M.J. at 333; United States v. Longhofer, 29 M.J. 22 (C.M.A. 1989).

[96] *See* United States v. Dies, 45 M.J. 376 (1996); United States v. Anderson, 46 M.J. 540, 544 (N.M. Ct. Crim. App. 1997); United States v. Nichols, 42 M.J. 715 (A.F.Ct.Crim.App. 1995). *Cf.* United States v. Thompson, 46 M.J. 472 (1995) (holding post-Change 5 R.C.M. 707 did not *per se* require advance approval of delay, although *post hoc* approval is risky; under the circumstances, convening authority's "ratification" of Article 32 Investigating Officer's approval of defense-requested delay is properly deducted from government's speedy trial accountability).

[97] R.C.M. 707(d) contains a list of factors for the judge to consider in deciding whether dismissal should be with prejudice. If, however, a violation raises to a constitutional level, the rule requires dismissal with prejudice. United States v. Strunk, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973). In this regard, R.C.M. 707 now parallels the Federal Speedy Trial Act. *See* 18 U.S.C. § 3162 (1994). For an example of the application of R.C.M. 707(d), s*ee* United States v. Edmond, 41 M.J. 419 (1995), *vacated on other grounds*, 516 U.S. 802 (1995).

an accused's case to trial.[98] Any and all action short of these two "triggers" has no R.C.M. 707 consequences for the government, no matter how serious their effects on the life and career of a military member.

In this regard, the law of speedy trial under R.C.M. 707 shares common elements with its superior siblings, Article 10 and the Sixth Amendment. Whichever source of law is applied, an accused must be formally charged, or apprehended and held in a recognized form of pretrial restraint, before his or her "right to speedy trial" assumes any relevance. In cases like that of Sergeant Croker, the issue now becomes whether it is possible to hold the government responsible, within the constraints imposed by the law of speedy trial, for the delays in his case and the actions taken against him during the process.

IV. SPEEDY TRIAL ACCOUNTABILITY FOR PRE-PREFERRAL DELAY

Sergeant Croker was not apprehended and held—at least nominally—in any form of pretrial restraint which triggered any speedy trial right under the Sixth Amendment, Article 10, or R.C.M. 707. A formal ceremony preferring charges did not occur until nearly two years after the death of his daughter and the beginning of the administrative actions which so profoundly affected his life and military career. To hold the government accountable, under any speedy trial theory, requires arguments grounded on creative constructions of the two triggering events under R.C.M. 707, which is the most liberal (from an accused's point of view) of the three legal authorities governing military speedy trial law. The first argument relies on a doctrine of "constructive preferral" of charges, which would start the government's speedy trial accountability under R.C.M. 707(a)(1). The second hinges on a finding that the administrative actions taken against military members like Sergeant Croker are, in combination, tantamount to "restriction in lieu of arrest" under R.C.M. 304(a)(2), hence triggering the 120-day clock under R.C.M. 707(a)(2).

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[98] At one time, one judge of the United States Court of Appeals for the Armed Forces opined that no form of pretrial restraint, even confinement, could *by itself* start the R.C.M. 707 clock; rather, such restraint must co-exist with formally preferred charges to trigger government accountability. *Gray*, 26 M.J. 16 (Sullivan, J.). However, the remaining judges did not join him in this novel reading of R.C.M. 707(a), which plainly states that *either* preferral (at the time of *Gray*, notice of preferral) *or* imposition of restraint starts the clock running, whichever event is earlier. As an additional point of information, it should be noted that the 120-day clock is also triggered for reservists, who are called to active duty for purposes of court-martial under R.C.M. 204, on the date of entry on such active duty. R.C.M. 707(a)(3), *supra* note 12.

A. Constructive Preferral

Constructive doctrine has been applied in military law in a number of contexts, both substantive[99] and procedural.[100] In particular, the doctrine has been utilized to negate a government manipulation of a former loophole in R.C.M. 707 speedy trial standards. As described earlier, prior to Change 5 of the 1984 Manual, the R.C.M. 707 speedy trial clock was triggered by notice of charges, and not the act of preferral itself. In passing on the practice of withholding formal notice after preferral of charges, the United States Court of Military Appeals in *United States v. Maresca*[101] applied the maxim of "[e]quity looks upon that as done which ought to have been done" and held, under the circumstances of the case, that the accused had been constructively informed of the charges within the meaning of Article 30(b).[102] This held the government accountable under R.C.M. 707 for a period beginning well before the notification date shown on the charge sheet.

Under the present version of R.C.M. 707, where the act of preferral triggers the clock, it would not be much of a stretch to extend *Maresca*'s "constructive notice" to a "constructive preferral" under the right circumstances. As was the case with Sergeant Croker's prosecution, when the government has clearly progressed beyond investigation, made a firm decision to prosecute, conducted itself in all respects in a manner consistent with a formal prosecution, and is merely delaying the preferral ceremony in order to avoid starting the R.C.M. 707 speedy trial clock until it is ready to immediately proceed to preliminary hearings and then to trial,[103] it may be

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[99] Constructive distribution of drugs: *see, e.g.,* United States v. Sorrell, 23 M.J. 122 (C.M.A. 1986); and United States v. Johnson, 26 M.J. 686 (A.C.M.R. 1988), *aff'd*, 28 M.J. 452 (C.M.A. 1989). Constructive possession of drugs: *see, e.g.,* United States v. Seger, 25 M.J. 420 (C.M.A. 1988); United States v. Traveler, 20 M.J. 35 (C.M.A. 1985); United States v. Wilson, 7 M.J. 290 (C.M.A. 1979); United States v. Englert, 42 M.J. 827 (N.M.Crim.App. 1995); and United States v. Copening, 38 M.J. 605 (Army Crim.App. 1993).

[100] Constructive enlistment before adoption of Article 2(c), U.C.M.J. (10 U.S.C. § 802(c) (1994)): *see*, United States v. Graham, 22 U.S.C.M.A. 75, 46 C.M.R. 75 (1972); and United States v. Overton, 9 U.S.C.M.A. 684, 26 C.M.R. 464 (1958). Constructive enlistment after Article 2(c): *see*, United States v. Hirsch, 26 M.J. 800 (A.C.M.R. 1988); and United States v. Quintal, 10 M.J. 532 (A.C.M.R. 1980), *aff'd*, 15 M.J. 278 (C.M.A. 1983). Constructive service of Courts of Military Review decisions: *see*, United States v. Myers, 28 M.J. 191 (C.M.A. 1989); United States v. Jackson, 38 M.J. 744 (Army Crim.App. 1993).

[101] United States v. Maresca, 28 M.J. 328 (C.M.A. 1989).

[102] *Id.* at 332 (quoting Black's Law Dictionary 485 (5th ed. 1979)). *See also*, United States v. Berrey, 28 M.J. 714, 720 (N.M.C.M.R. 1989) (Rubens, J., concurring).

[103] As noted above, charges were formally preferred against Sergeant Croker the day before his Article 32 hearing. This hearing date had been "set" and delayed several times over the previous months while the government tried to arrange times when all counsel and witnesses could be present at the same time. As has also been previously described, throughout this period counsel for both sides exchanged correspondence regarding discovery, witnesses, and other procedural matters as if a formal prosecution were underway, using titles existing under

credibly argued that charges should be held to have been constructively preferred as of the date of the decision to prosecute.

The mere absence of a preferral ceremony should not negate government speedy trial accountability. The formal acts of signing and swearing to charges do not, in themselves, signify a governmental decision to prosecute. As noted above, any military member can prefer charges. If a commander, acting in an official capacity, is reluctant to prefer charges, the installation staff judge advocate usually shops around until he or she finds someone who will.[104] A valid preferral ceremony is not a prerequisite to court-martial jurisdiction. Defects in the swearing procedure may be waived by an accused's failure to object at trial.[105] Moreover, a simple failure to

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military law only when charges have been preferred.

Another factor contributing to the "gamesmanship" surrounding the preferral of charges in the Air Force has nothing to do with the law of speedy trial, but rather management goals and competition among commands. Previously, the Air Force's *Military Justice Guide* (AFR 111-1) set out time processing "goals" for various types of courts-martial cases. AFR 111-1 has now been superseded by AFI 51-201, Administration of Military Justice (3 October 1997), which does not contain such goals. However, the Air Force has adopted a series of "metrics" or "quality performance indicators," which are variations on these goals. Installations are expected to meet or exceed the processing time goals, and some commands rank bases according to how fast they are able to process their cases. In the author's experience, this practice engenders considerable—and sometimes unhealthy—competition. Too often, this competition translates into artificial manipulation of the time of preferral of charges, which is the triggering event for processing time accountability. This can work to an accused's benefit, when his or her defense counsel knows how to "work the system." The government is sometimes willing to enter into a favorable pretrial agreement (the military term for "plea bargain") if an accused is willing to waive the mandatory period between service of charges after referral and date of trial (five days for general courts-martial, three days for special courts-martial; *see* 10 U.S.C. § 835 (1994) and R.C.M. 602, *supra* note 12). *See also, generally*, R.C.M. 705, *supra* note 12. The Air Force also measures the time between a "case ready date" and preferral, presumably as a means of detecting such manipulation of the preferral date. However, in the author's experience, this statistic is not emphasized as a performance indicator. Moreover, "case ready date" is itself subject to manipulation.

[104] *See, e.g.*, United States v. Miller, 33 M.J. 235 (C.M.A. 1991), holding that a commander may be lawfully ordered to prefer charges, as long as the commander may honestly swear that he or she has personal knowledge of or has investigated the charges and believes them to be true. *See also* United States v. Johnston, 39 M.J. 242 (C.M.A. 1994), where the base staff judge advocate asked a member of her staff to prefer the charges. In Sergeant Croker's case, everyone in his local chain of command refused to prefer charges, stating they were unable to take the required oath because they did not believe him guilty of harming his daughter. The installation staff judge advocate persuaded a commander outside Sergeant Croker's chain of command to prefer the manslaughter charge.

[105] United States v. Koepke, 15 U.S.C.M.A. 542, 36 C.M.R. 40 (1965); United States v. May, 2 C.M.R. 80 (C.M.A. 1952); United States v. Frage, 26 M.J. 924 (N.M.Crim.App. 1988). In fact, one judge of the United States Court of Appeals for the Armed Forces has opined that charges sworn before an officer not legally empowered to administer oaths (*see* 10 U.S.C. § 936 (1994)) is not prejudicial error, in the absence of objection from the accused. Frage v. Moriarty, 27 M.J. 341, 344 (C.M.A. 1988) (Sullivan, J., dissenting).

object will waive a defective preferral even when charges are completely unsigned and no attempt has been made to administer an oath.[106] In short, the formal preferral ceremony of signature and oath are matters of form, not substance,[107] and should not be the *sine qua non* for speedy trial accountability.

On the other hand, there is no precedent in military law for a "constructive preferral," and what precedent there is cuts against the concept. In his lead opinion in *Gray*,[108] Chief Judge Sullivan rejected the trial judge's ruling that "charges" had actually been pending at a point prior to the formal preferral ceremony, holding that "charges are pending in the military justice system when charges are preferred."[109] Moreover, application of a constructive preferral doctrine would be problematic, as a specific date to begin accountability would prove elusive in many cases.[110] In the final analysis, "constructive preferral" is not an adequate theory for holding the government accountable under R.C.M. 707 for pre-preferral delay.

B. Actions Tantamount to "Restriction in Lieu of Arrest"

"Restriction in lieu of arrest" is simply and broadly defined as "restraint of a person by oral or written orders directing the person to remain within specified limits...."[111] Like its more severe cousin of "arrest," "restriction" is moral and legal restraint only. A person under "restriction" is not locked up or under guard. The only things enforcing the restriction order are the member's conscience and the knowledge that breaking the restriction would be an offense punishable under the Code.[112] The line between "restriction" and "arrest" has never been precisely drawn by the military courts. However, the former has been described as having "normally more generous boundaries" than the latter.[113] To constitute "restriction," an order

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[106] United States v. Taylor, 15 U.S.C.M.A. 565, 36 C.M.R. 63 (1965); United States v. Westergren, 14 C.M.R. 560 (A.F.B.R. 1953).
[107] *May*, 2 C.M.R. at 81.
[108] United States v. Gray, 26 M.J. 16, 22-23 (C.M.A. 1988).
[109] *Id.* at 19.
[110] In Sergeant Croker's case, the staff judge advocate for the general court-martial convening authority exercising jurisdiction over Croker's base informed his defense counsel on August 27, 1990 that a decision had been made to prefer charges against Sergeant Croker. Therefore, application of "constructive preferral" to the Croker case would not have been difficult. In the normal case, however, staff judge advocates do not keep defense counsel so well informed as to their thought processes.
[111] R.C.M. 304(a)(2), *supra* note 12.
[112] United States v. Borges, 41 M.J. 739 (N.M. Crim. App. 1994) ; United States v. High, 39 M.J. 82 (A.F. Crim. App. 1994); United States v. Russell, 30 M.J. 977, 979 (A.C.M.R. 1990); United States v. Gregory, 21 M.J. 952, 955 (A.C.M.R.), *aff'd*, 23 M.J. 246 (C.M.A. 1986). *See also* 10 U.S.C. § 934 (1994); Manual, *supra* note 12, Part IV ¶ 102.
[113] United States v. Acireno, 15 M.J. 570, 572 (A.C.M.R. 1982).

need not precisely draw the lines beyond which an accused would be in violation, if he or she is "obviously restricted to some specified—albeit indeterminate—limit."[114]

Several of the measures taken against Sergeant Croker in the months before formal preferral of charges would seem to qualify, either alone or in combination, as "restriction." In particular, the involuntary extension of his enlistment, the involuntary extension of his overseas assignment, and the denial of his humanitarian reassignment while granting that of his wife, thus forcing a family separation, would appear to meet the simple definition of "restriction." In effect, Sergeant Croker was ordered to remain within specified limits—that is, the island on which his base was located—pending investigation and trial. It may be argued that, under the broad definition of "restriction," these actions were tantamount to that form of pretrial restraint, thus triggering the government's speedy trial accountability under R.C.M. 707(a)(2) at some point prior to the formal preferral of charges.[115]

Unfortunately for Sergeant Croker and other military members similarly situated, there is a solid phalanx of military case law running contrary to this argument. Limitations on leave and pass privileges, and other requirements not nominally "restriction," have usually been held not to constitute "restriction" for R.C.M. 707 purposes. [116] "Administrative hold" has been expressly held not to start the 120-day clock, even under the version of R.C.M. 707 in effect before Change 5 when imposition of "conditions on liberty" were enough to trigger speedy trial accountability.[117] Prior to R.C.M. 707, the military courts ruled that involuntary retention beyond a member's

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[114] United States v. Wilkinson, 27 M.J. 645, 649 (A.C.M.R. 1988), *pet. denied*, 28 M.J. 230 (C.M.A. 1989).

[115] In Sergeant Croker's case, the defense contended the government's accountability should have started either on November 29, 1989 (the day Sergeant Croker's family left the island while he was required to stay behind) or February 15, 1990 (the day "administrative hold" action had been formally initiated). Using either date, the government's R.C.M. 707 accountability would have far exceeded the 120 day maximum (586 days and 460 days, respectively).

[116] United States v. Reynolds, 36 M.J. 1128, 1130 (A.C.M.R. 1993) (stating limits on pass privileges and privilege to wear civilian clothes were not tantamount to "restriction"); United States v. Facey, 26 M.J. 421 (C.M.A. 1988) (holding in a pre-Change 5 case, that order not to go outside of "local area" without permission was not "condition on liberty"); United States v. Johnson, 24 M.J. 796 (A.C.M.R. 1987), *pet. denied*, 26 M.J. 40 (C.M.A. 1988) (stating in another pre-Change 5 case, that cancellation of leave, order not to leave area of Frankfurt, Germany, without permission, and order to stay away from duty section were not "conditions on liberty"); United States v. Fowler, 24 M.J. 530 (A.F.C.M.R. 1987) (holding in still another pre-Change 5 case, that first sergeant's order not to leave base without notification was not "condition on liberty"); and United States v. Bradford, 25 M.J. 181 (C.M.A. 1987) (stating under circumstances, Navy's shipboard "liberty risk" program was not "restriction"). *Compare* United States v. Wilkes, 27 M.J. 571 (N.M.C.M.R. 1988) (holding application "liberty risk" in that case to be subterfuge for pretrial restriction).

[117] United States v. Orback, 21 M.J. 610 (A.F.C.M.R. 1985).

separation date was not tantamount to "arrest" and, therefore, did not invoke the *Burton* presumption.[118] There has been no case since the adoption of R.C.M. 707 analyzing whether involuntary retention beyond a date of separation may be tantamount to "restriction."[119] However, there is no reason to believe the Court of Appeals for the Armed Forces would not extend its *Burton*-era precedents to reject such an argument.

Similarly, the actions taken to keep Sergeant Croker out of his duty section and restrict his access to the classified information necessary to currency in his career field may not be credibly argued to constitute "restriction." First of all, such measures on their face do not direct a member to "remain within specified limits," as "restriction" is defined at R.C.M. 304(a)(2). Moreover, the authority to control access to sensitive programs, equipment, and information is of special importance to military commanders. The military courts have been loathe to impose any *per se* legal consequence (such as triggering the R.C.M. 707 speedy trial clock) to any exercise of that authority. As has been stated by the Air Force Court of Military Review:

> Often considerations such special access programs, access to classified information, or the sensitive relationship of the duties and the alleged offense convince commanders that they should remove accused persons from their prior duties pending investigation or trial, *even where they see no need to order a R.C.M. 707 triggering event*.[120]

Therefore, it appears the theory that administrative actions are tantamount to "restriction in lieu of arrest" is a poor vehicle for holding the government accountable for pre-preferral delay in cases like that of Sergeant Croker. There is no published case where a military member has been subject to a combination of as many actions for so long a period of time before preferral as had Sergeant Croker. Therefore, the cases running against the argument are distinguishable. Nonetheless, no case has validated the argument and, short of another major revision of R.C.M. 707(a) or a change in the definition of "restriction in lieu of arrest" at R.C.M. 304(a)(2), it is not likely that any case will.

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[118] United States v. Rachels, 6 M.J. 232 (C.M.A. 1979); United States v. Amundson, 23 U.S.C.M.A. 308, 49 C.M.R. 598 (1975).

[119] *But see* United States v. Brunton, 24 M.J. 566, 570 (N.M.C.M.R. 1987), holding, without analysis or citation of authority, that "[i]nvoluntary extension of active duty does not constitute restraint within the definition of R.C.M. 707."

[120] United States v. Callinan, 32 M.J. 701, 703 (A.F.C.M.R. 1991) (emphasis added) (holding that "restriction" had been lifted, hence resetting the 120-day clock to "zero" under R.C.M. 707(b)(3)(B), even though the accused had remained barred from performing his prior duties). *Accord*, United States v. Bolado, 34 M.J. 732 (N.M.C.M.R. 1991), *aff'd*, 36 M.J. 2 (C.M.A. 1992), *cert. denied*, 113 S.Ct. 321 (1992).

C. The Government "Escape Hatch" in R.C.M. 707(d)

Aside from the above problems, any theory, even a successful one, of government accountability for pre-preferral delay tied exclusively to R.C.M. 707 may well end up as a short-lived victory for an accused. As described above, one of the major revisions to R.C.M. 707 brought about by Change 5 to the 1984 Manual for Courts-Martial was a completely rewritten subsection (d), which now allows a military judge to dismiss charges for violation of the 120-day rule either "with or without prejudice." Under the present version of R.C.M. 707(d), dismissal with prejudice is mandated only if the speedy trial violation is of constitutional magnitude. Therefore, even if the military courts adopted a doctrine of constructive preferral, or the rules were changed to hold that actions such as those imposed on Sergeant Croker triggered the 120-day clock, violations of R.C.M. 707 would still not necessarily deprive the government of its ability to prosecute. Rather, a dismissal without prejudice under R.C.M. 707(d) would end up only delaying the prosecution while the government ginned up new charges, with a new 120-day clock, all the while continuing to impose career and personal hardship on the accused.[121] The only situation where a R.C.M. 707(d) dismissal without prejudice would prevent further prosecution would be the narrow class of cases where trial of new charges would be barred by the statute of limitations.[122]

The existence of the R.C.M. 707(d) "escape hatch" undermines the deterrent effect of any speedy trial remedy tied solely to R.C.M. 707. To mandate dismissal with prejudice, any theory of government accountability for oppressive pre-preferral delay in the military justice system must be tied to a source of law beyond the procedural rules in the Manual for Courts-Martial. As we have seen, however, the superior sources of military speedy trial law—Article 10, U.C.M.J., and Speedy Trial Clause of the Sixth Amendment— both have ironclad ties to either the pendency of formal charges or close forms of pretrial restraint. Accordingly, the Sergeant Crokers of the American military may not look for relief to theories associated with the law of speedy trial. Rather, they must look to the compilation of constitutional and statutory rights known as "due process."

V. THE LAW OF DUE PROCESS AND PRE-INDICTMENT/PREFERRAL DELAY

In the military justice system, two complementary, yet distinct, bodies of law protect the rights of accused service members. These are the rights

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[121] *See, e.g.*, United States v. Edmond, 41 M.J. 419 (1995), *vacated on other grounds*, 516 U.S. 802 (1995).

[122] 10 U.S.C. § 843 (1994). *See* United States v. Vendivel, 37 M.J. 854 (A.F.C.M.R.), *rev'd sub nom.*, 38 M.J. 315 (C.M.A. 1993).

which have been recognized under the umbrella of the Due Process Clause of the Fifth Amendment to the United States Constitution, which all Americans possess, and the rights uniquely applicable to members of the United States military, collectively known as "military due process."

A. Military Due Process

For a time, both before and after the adoption of the Uniform Code of Military Justice, a prevailing opinion among the courts was that the Bill of Rights had little to no application in the military justice system.[123] In response, the military courts created by the U.C.M.J. developed the doctrine of "military due process" to embody the rights Congress had bestowed upon service members, and to illustrate that these rights paralleled those conferred upon civilians by the Constitution. At this time, Congress was considered as the sole source of "due process" for military members.[124] As the years went by, the military courts increasingly applied the Bill of Rights and other constitutional protections.[125] Notwithstanding, "military due process" has remained a vital and independent doctrine to this day.

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[123] United States *ex. rel.* Toth v. Quarles, 350 U.S. 1, 76 S.Ct. 1, 100 L.Ed. 8 (1955); Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed. 2d 630 (1958) (Black, J., concurring); Kennedy v. Commandant, 258 F.Supp. 967, 970 (D. Kan. 1966), *aff'd*, 377 F.2d 339 (10th Cir. 1967). "The swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws." Duncan v. Kahanamoku, 327 U.S. 304, 331, 66 S.Ct. 606, 90 L.Ed. 688 (1946).

[124] "Due process of law for military personnel is what Congress has provided for them . . . ." Burns v. Wilson, 346 U.S. 137, 147, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953). "This admirable result [i.e., fairness in the military justice system] has been achieved, not through direct extension of the Bill of Rights to servicemen, but by the exercise by Congress of its constitutional powers." Kennedy v. Commandant, 258 F.Supp. at 970.

[125] "Our armed forces are now stationed in 63 foreign countries . . . . They are not thereby deprived of their Constitutional rights and privileges. On the contrary, those Constitutional rights and privileges are a fundamental part of the military law." United States v. Burney, 6 U.S.C.M.A. 776, 21 C.M.R. 98, 123 (1956) (Quinn, C.J., concurring). The Bill of Rights applies "unless excluded directly or by necessary implication." United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411, 428-429 (1963) (Quinn, C.J., concurring). *Accord*, United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244, 246 (1960). "The time is long since past . . . when this Court will lend an attentive ear to the argument that members of the armed forces are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights." United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249, 253 (1967). *See also*, *e.g.*, United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988) (Fifth Amendment Due Process Clause includes Equal Protection guarantee and bars discriminatory use of peremptory challenges at courts-martial); United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) (military death penalty procedure violates Eighth Amendment); Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982) (Fifth Amendment due process clause held violated); United States v. Acosta, 11 M.J. 307 (C.M.A. 1981) (Fourth Amendment protection against unreasonable searches and seizures applies, but "unreasonable" construed in a military context); United States v. Thurman, 7 M.J. 26 (C.M.A. 1979) (military members entitled to equal protection of laws); United States v.

"Military due process" was first announced in 1951, by the then-brand new United States Court of Military Appeals, in the case of *United States v. Clay*.[126] The court's opinion described the source and effect of the new doctrine as follows:

> We do not bottom those rights and privileges [comprising military due process] on the Constitution. We base them on the laws enacted by Congress. But, this does not mean that we can not give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes.[127]

The *Clay* court then enumerated various rights bestowed by the Uniform Code of Military Justice which it considered sufficiently fundamental to be components of "military due process." These were service members' rights to

- Be informed of the charges.
- Be confronted by witnesses against them.
- Cross-examine witnesses for the government.
- Challenge court members for cause or peremptorily.
- A specified number of court members at general or special courts-martial.
- Be represented by counsel.
- Not be compelled to incriminate themselves.
- Exclusion of involuntary confessions.
- Have the court members instructed on the elements of offenses, the presumption of innocence, and the burden of proof.
- Be found guilty only when a designated number of court members concurred.
- If convicted, a sentence agreed to by a specified number of court members.
- Appellate review of convictions.[128]

In enumerating these aspects of "military due process," *Clay* made it clear this list would not necessarily be the last word on the subject: "By mentioning the foregoing rights and benefits, we have not intended to make the

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Annis, 5 M.J. 351 (C.M.A. 1978) (Sixth Amendment right to effective assistance of counsel applies); United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964) (all constitutional protections apply, except rights to indictment by grand jury and trial by petit jury). *But see*, United States v. Taylor, 41 M.J. 168 (C.M.A. 1994); United States v. Lopez, 35 M.J. 35 (C.M.A. 1992). In both cases, per Judge Crawford, the court noted that the Supreme Court has never expressly applied the Bill of Rights to the military justice system, but has assumed such application.

[126] United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

[127] *Clay*, 1 C.M.R. at 77.

[128] *Id.* at 77-78.

list all inclusive, nor to imply others might not be substantial."[129] The military courts have reinforced this doctrinal flexibility, by both words[130] and decisions expanding the list of rights encompassed by "military due process."[131] To be included within the doctrine, all that is required is an "act of Congress which grants a *fundamental right* to a military accused . . . ."[132]

In both very early and more recent decisions, the right of military members to have charges properly signed under oath has been recognized as sufficiently fundamental to be an element of "military due process."[133] Indeed, for accused soldiers in pretrial arrest or confinement, a *delay* in preferral may raise "military due process" implications.[134]

The status of a procedural violation as being so fundamental that it constitutes an infringement of military due process may be critical to the ultimate fate of a prosecution. Unlike garden-variety errors, which are tested for specific prejudice to an accused, "the concept of 'military due process' demands a finding that the denial was *per se* materially prejudicial to the substantial rights of an accused. *No search for prejudice is ever*

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[129] *Id.* at 78.

[130] *Clay*'s list of "military due process" rights is "a non-exclusive enumeration of its elements." United States v. Young, 2 U.S.C.M.A. 470, 9 C.M.R. 100, 107 (1953) (Brosnan, J., concurring).

[131] United States v. Mark, 47 M.J. 99 (1997) (holding SJA posttrial recommendation is important element of military due process); United States v. Doctor, 41 C.M.R. 785, 789 (N.C.M.R. 1969) (LaRouche, J., concurring and dissenting) (holding requirement that specification state an offense is an element of military due process); United States v. Oakley, 27 C.M.R. 560 (A.B.R. 1958) (stating military due process includes right to counsel during interrogation, when requested, citing United States v. Cates, 9 U.S.C.M.A. 480, 26 C.M.R. 260 (1958)); United States v. Dobr, 21 C.M.R. 451 (A.B.R. 1956) (adding right to introduce evidence in both findings and sentencing phases of courts-martial as elements of military due process, and held blanket prohibition of introduction of classified information was violation); United States v. Stein, 8 C.M.R. 467 (A.B.R. 1952) (explaining military due process includes right to effective defense counsel, and denial of ten minute recess to allow counsel to prepare for argument deprived accused of that right).

[132] United States v. Jerasi, 20 M.J. 719, 723 (N.M.C.M.R. 1985), *aff'd*, 23 M.J. 162 (C.M.A. 1986) (emphasis added).

[133] "Trial upon charges and specifications *signed under valid oath* appears to us to be a part of 'military due process,' the denial of which furnishes grounds for setting aside a conviction." United States v. Olivieri, 10 C.M.R. 644, 646 (A.F.B.R. 1953) (citation omitted) (emphasis added). *Accord*, United States v. Hill, 4 C.M.R. 597, 599 (A.F.B.R. 1953). "[I]t is important to note that the failure to properly swear to the charges involves concepts of military due process . . . ." United States v. Frage, 26 M.J. 924, 926 (N.M.C.M.R. 1988), *aff'd*, 27 M.J. 341 (C.M.A. 1988).

[134] United States v. McKenzie, 14 U.S.C.M.A. 361, 34 C.M.R. 141 (1964) (under circumstances, no violation of military due process); United States v. Schalck, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964) (remanded for hearing to determine possible military due process violation); United States v. Smith, 39 C.M.R. 315 (A.B.R. 1967) (delay between imposition of restriction amounting to "arrest" and preferral of charges was unreasonable, oppressive, and violated military due process).

undertaken."[135] Such "[d]epartures from fundamental requirements of law generally require reversal of the findings of guilty without 'nice calculations as to the amount of prejudice resulting from the error.'"[136] Otherwise, the importance of these fundamental rights would be diluted "by an assumption that doubtful cases call for its [i.e., the doctrine of military due process] protection but those appearing certain permit it to be discarded . . . . We must reject such contentions as their adoption would effectively eat away what Congress has declared to be military justice."[137]

Regrettably for military members in Sergeant Croker's position, there is no precedent for pre-preferral delay as a violation of military due process for persons not in pretrial arrest or confinement. In one case, *United States v. Berrey*,[138] the Navy and Marine Corps Court of Military Review came close. In that case, decided under R.C.M. 707 before Change 5 to the 1984 Manual changed one of the clock triggers from *notice* of preferral to the act of *preferral* itself, the court held the government's intentional delay in notifying the accused that charges had been preferred—notice withheld without good cause and for the express purpose of avoiding the start of the 120-day clock—violated military due process, requiring dismissal of the charges. There is a major distinction between a case of pre-preferral delay under R.C.M. 707 as it is presently written, and a delay in notice of preferral under the former version of the rule. However, as we will soon see, *Berrey*'s analysis supplies the foundation for holding that unreasonable pre-preferral delay deprives military members of a fundamental right conferred by Congress and, accordingly, constitutes a violation of military due process.

B. Due Process under the Fifth Amendment

This section begins with a discussion of the two key Supreme Court decisions in this area. It will then proceed to two questions which the Supreme Court has left unanswered, both of which have major significance to defendants seeking dismissal of charges due to pre-indictment delay. One of these assumes special importance to military members in Sergeant Croker's position.

1. The Cases of Marion *and* Lovasco

As with the Speedy Trial Clause of the Sixth Amendment, any analysis of the relationship between the Fifth Amendment's Due Process Clause and

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[135] *Jerasi*, 20 M.J. at 723 (emphasis added).
[136] United States v. Mickel, 9 U.S.C.M.A. 324, 26 C.M.R. 104, 107 (1958), citing Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).
[137] *Clay*, 1 C.M.R. at 81.
[138] United States v. Berrey, 28 M.J. 714 (N.M.C.M.R. 1989).

pre-indictment delay must begin with the Supreme Court's 1971 decision in *United States v. Marion*.[139] In rejecting the application of the Speedy Trial Clause to a three year delay between the alleged offenses and indictment, *Marion* held that the statute of limitations, and not the Constitution, was the primary guarantee against overly stale charges. However, the Court qualified this general pronouncement by stating that the statute of limitations did not fully define defendants' rights prior to formal indictment, and that the Due Process Clause would require dismissal of charges where pre-indictment delay "caused substantial prejudice to [defendants'] rights to a fair trial and that delay was an intentional device to gain tactical advantage of the accused."[140] The Court expressly declined to describe what circumstances would require dismissal on due process grounds, explaining that such a determination "will necessarily involve a delicate judgement based on the circumstances of each case."[141] The Court noted that the defendants in *Marion* had not proven, or even alleged, any specific prejudice or intentional delay by the government for tactical advantage. The Court returned the case to the District Court for a hearing where the defendants would have an opportunity to prove how they had been harmed by the pre-indictment delay. In doing so, however, the Court heavily hinted that it was prepared to tolerate considerable investigative delay by police:

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect . . . . Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.[142]

Marion set the stage for United States v. Lovasco,[143] a 1977 case which represents the Supreme Court's most significant treatment of the pre-indictment delay issue. In *Lovasco*, 18 months passed between the defendant's alleged offenses and his indictment. According to evidence presented to the District Court, the investigation had been essentially completed about one month after the offense, with very little more accomplished in the succeeding 17 months prior to indictment. The defendant moved to dismiss the indictment on due process grounds, claiming he had been harmed by the pre-indictment delay because of the deaths of two persons who would have testified on his behalf. The District Court granted the defendant's motion to dismiss, finding

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[139] United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).
[140] *Marion*, 404 U.S. at 324.
[141] *Id.* at 325.
[142] *Id.* at 325 n. 18.
[143] United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

the delay unexplained, unjustified, and prejudicial to the defendant. The Circuit Court of Appeals affirmed. The Supreme Court, however, reversed.

In overturning the lower courts' decisions in *Lovasco*, the Supreme Court reaffirmed principles, announced in *Marion*, that the Sixth Amendment Speedy Trial Clause did not apply to pre-indictment delay and the statute of limitations was the primary protection against overly stale charges. The Court also echoed *Marion* in recognizing that the Fifth Amendment Due Process Clause also affected the pre-indictment delay issue. However, Justice Marshall, writing on behalf of an 8 to 1 majority,[144] watered down this aspect of *Marion* by describing the Due Process Clause as having only "*a limited role* to play in protecting against oppressive delay."[145]

Although remarking that the defendant never revealed how the testimony of either deceased would have aided his defense, the Court acknowledged that he had demonstrated some harm because of the deaths of the two potential witnesses. The Court held, however, that prejudice to an accused was only half the pre-indictment delay story; in deciding whether such a delay violated due process, courts must also consider the *reasons* for delay, and do so with a hefty measure of deference to prosecutors:

> [The] Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgement as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions of fairness . . . . "[146]

The Court then announced a guiding principle for applying the Due Process Clause to pre-indictment delay. To warrant relief, such delay must violate "'fundamental conceptions of justice which lie at the base of our civil and political institutions,'...and which define 'the community's sense of fair play and decency,'. . . . "[147]

Applying this principle to the case before it, the Court found no violation of due process. Quoting with approval *Marion*'s declaration of "no constitutional right to be arrested," the Court in *Lovasco* extended this principle to a prosecutor's decision to indict. The Court reasoned that a due process requirement for prompt indictment after obtaining sufficient evidence to prove an accused's guilt beyond reasonable doubt would hamper continuing investigations into connected cases, as well as pressure prosecutors into early,

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[144] Justice Stevens dissented. However, the basis for his disagreement with the majority was that the record did not support its wide-ranging opinion. Justice Stevens expressed general agreement with the principles espoused by the majority and said he would have joined the opinion, had the record provided a sufficient foundation for the majority's holding.

[145] *Lovasco*, 431 U.S. at 789 (emphasis added).

[146] *Id.* at 790 (citation omitted).

[147] *Id.* (citations omitted).

and perhaps unwarranted, indictments. Describing investigative delay as fundamentally unlike that designed to gain a tactical advantage over a defendant, the Court held that the delay in obtaining the indictment against Lovasco did not violate "fundamental conceptions of justice," notwithstanding the death of two potential defense witnesses. Neatly summarizing its holding, the Court stated: "We therefore hold that to prosecute the defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time."[148]

In the wake of *Marion* and *Lovasco*, we can make a few generalizations about how pre-indictment delay (or, in the military context, pre-preferral delay) may constitute a violation of the Due Process Clause of the Fifth Amendment. First, prejudice must be demonstrated by the accused. It will not be presumed or made the subject of speculation. Second, prejudice to an accused by itself will not support a due process violation. The harm must be balanced against the government's reasons for delay. Third, in weighing the reasons for delay, the courts will tolerate considerable "investigative" delay, even when not much actual investigation is accomplished. These conclusions obviously lead to another one—cases dismissed because of pre-indictment delay will be few and far between. Nonetheless, the opportunity remains for an accused to make a case that such delay has been so oppressive as to deprive him or her of due process.

Marion and *Lovasco* remained ambiguous in two respects which are important to defendants' ability to prove violations of due process. The first area, equally significant in both civilian and military prosecutions, is whether a defendant must prove an improper motive on the part of the government in delaying the indictment or preferral. The second, which is of particular importance in the military justice system, is whether the prejudice recognized as raising a due process claim is limited to harm to an accused's ability to put on a defense at trial, or may it also include damage to an accused's personal and professional welfare.

2. Is "Improper Motive" Required to Violate Due Process?

Both *Marion* and *Lovasco* clearly stated that deliberate pre-indictment delay, intended by the government to gain a tactical advantage over an accused, would supply the foundation for finding that due process had been violated.[149] However, neither opinion made clear whether proof of improper motive was an absolute prerequisite for such a violation. As a result of this ambiguity, the federal circuits have disagreed over this issue, a split which the Supreme Court so far has declined to resolve.[150]

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[148] *Id.* at 795.

[149] *Marion*, 404 U.S. at 324; *Lovasco*, 431 U.S. at 795.

[150] *See* Hoo v. United States, 484 U.S. 1035, 108 S.Ct. 742, 98 L.Ed.2d 777 (1988) (order

A plurality of the circuits require a defendant to prove a deliberate delay to gain tactical advantage, an intent to harass, or some other improper motive, in addition to actual prejudice, in order to support a due process violation; however, the decisions within these circuits have not consistently taken this line. The First,[151] Third,[152] Fifth,[153] Tenth,[154], and Eleventh[155] Circuits fall in this category.

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denying cert.) (White, J., dissenting). In two other decisions, however, the Supreme Court included dicta which touched on the *Marion-Lovasco* test. These opinions have added little to clarifying the test. Indeed, in one case, the Court's dictum added a twist which confused the issue.

United States v. $8,850, 461 U.S. 461, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983), addressed whether an 18 month delay between seizure of currency and initiation of civil forfeiture action violated the owner's due process rights. In rejecting the government's argument that the *Marion-Lovasco* pre-indictment delay test should apply to the forfeiture delay, the Court restated *Marion-Lovasco* as holding that a due process claim would prevail "only upon a showing that the Government delayed seeking an indictment in a deliberate attempt to gain an unfair tactical advantage on the defendant *or in reckless disregard of its probable prejudicial impact* upon the defendant's ability to defend against the charges." 461 U.S. at 563 (emphasis added). The addition of "reckless disregard of probable prejudicial impact" as an alternative element to the test was a new feature. If this is indeed part of the test, on an equal footing with deliberate delay to obtain unfair tactical advantage, it would provide defendants with an attractive alternative to proving an improper motive. However, the Supreme Court has not repeated this dictum and, as we will soon see, it has been virtually ignored by the federal circuits.

In United States v. Gouveia, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984), the Court considered the applicability of the Sixth Amendment's right to counsel to penitentiary inmates in segregation pending investigation and indictment for new charges. In holding against such applicability, the Court stated that the Fifth Amendment Due Process Clause would provide relief to a prisoner "if the defendant can prove that the Government's delay in bringing the indictment *was a deliberate device to gain an advantage over him* and that it caused him actual prejudice in presenting his defense," citing *Marion* and *Lovasco*. 467 U.S. at 192 (emphasis added). However, this was a passing notation made without any express intent to resolve the divergent views as whether deliberate delay for tactical advantage was required for a due process violation.

Notwithstanding the dicta in *$8,850* and *Gouveia*, it is apparent from Justice White's *Hoo* dissent and the split of authority among (and, in some cases, within) the circuits, that neither opinion should not be considered as an attempt to clarify *Marion* and *Lovasco*. Until the Court expressly undertakes this task, the federal circuits and the military courts are free to fashion the elements of the *Marion-Lovasco* test as they see fit.

[151] United States v. Stokes, 124 F.3d 39, 47 (1st Cir. 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 1103 (1998); United States v. Henson, 945 F.2d 430, 439 (1st Cir. 1991); United States v. Acevedo, 842 F.2d 502, 504 (1st Cir. 1988); United States v. Lebron-Gonzales, 816 F.2d 823, 831 (1st Cir.), *cert. denied*, 484 U.S. 843 and 857 (1987).

[152] United States v. Ismaili, 828 F.2d 153, 167 (3d Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); United States v. Sebetich, 776 F.2d 412, 429 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988); United States v. Otto, 742 F.2d 104, 107 (3d Cir. 1984). *But see* United States v. United States Gypsum Co., 550 F.2d 115, 118 (3d Cir.), *cert. denied*, 438 U.S. 915 (1978).

[153] United States v. Crouch, 84 F.3d 1497 (5th Cir. 1996) (en banc), *cert. denied*, __ U.S. __, 117 S.Ct. 736 (1997) The *Crouch* en banc decision recognized divergence of opinion in circuit

Two circuits—the Fourth and the Ninth—have not required defendants to prove deliberate delay for an improper motive as a prerequisite to making their case for due process violations. Rather, these circuits apply a two-part balancing test: the accused must first prove actual prejudice from the pre-indictment delay; if there is prejudice, then the extent of the harm is balanced against the government's reasons for delay to determine if the delay violates the "'fundamental conceptions of justice which lie at the base of our civil and political institutions,'...and which define 'the community's sense of fair play and decency.'"[156] This test would analyze pre-indictment delay on a case-by-case basis, balancing the length of the delay and harm to the accused against the government's reasons. The longer the delay and the greater the prejudice, the heavier the government's burden to explain the delay. Deliberate delay to harass or gain tactical advantage is not *per se* required for a due process violation. However, if there is an improper government motive, a lesser amount of prejudice may tip the scales in favor of a due process violation than if the delay were the product of benign neglect. Regardless of the reasons for the pre-indictment delay, the defendant must first prove he or she suffered harm from the delay.[157]

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and resolved disparity in favor of requiring delay for tactical advantage; United States v. Neal, 27 F.3d 1035 (5th Cir. 1994); United States v. Beszborn, 21 F.3d 62, 65-66 (5th Cir. 1994); Dickerson v. Guste, 932 F.2d 1142 (5th Cir.), *cert. denied*, 502 U.S.875 (1991); United States v. Varca, 891 F.2d 900, 904 (5th Cir.), *cert. denied*, 498 U.S. 878 (1990); United States v. Ballard, 779 F.2d 287, 293 (5th Cir.), *cert. denied*, 475 U.S. 1109 (1986); United States v. Amuny, 767 F.2d 1113, 1119 (5th Cir. 1985). *But see* Dickerson v. Louisiana, 816 F.2d 220, 229 n.16 (5th Cir.), *cert. denied*, 484 U.S. 956 (1987); United States v. Townley, 665 F.2d 579, 582 (5th Cir.), *cert. denied*, 456 U.S. 1010 (1982). Although its holding was abandoned by later Fifth Circuit decisions, the *Townley* opinion contains an eloquent rejection of deliberate delay for tactical advantage as a required element of the *Marion-Lovasco* test.

[154] United States v. Trammell, 133 F.3d 1343, 1351 (10th Cir. 1998); United States v. Johnson, 120 F.3d 1107, 1109 (10th Cir. 1997); United States v. Muniz, 1 F.3d 1018, 1024 (10th Cir.), *cert. denied*, 510 U.S. 1002 (1993); United States v. Engstrom, 965 F.2d 836, 838 (10th Cir. 1992); United States v. Comosona, 848 F.2d 1110, 1113 (10th Cir. 1988); United States v. Padilla, 819 F.2d 952, 962-963 (10th Cir. 1987); United States v. Jones, 816 F.2d 1483, 1488 (10th Cir. 1987); United States v. Pino, 708 F.2d 523, 527 (10th Cir. 1983). *But see* United States v. Vigil, 743 F.2d 751, 757 (10th Cir.), *cert. denied*, 469 U.S. 1090 (1984) (requiring a showing of prejudice *or* intent to gain tactical advantage or harass).

[155] United States v. Foxman, 87 F.3d 1220, 1222 (11th Cir. 1996); United States v. Thomas, 62 F.3d 1332, 1339 (11th Cir. 1995), *cert. denied*, 516 U.S. 1166 (1996); United States v. Hayes, 40 F.3d 362, 365 (11th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995); United States v. Dyal, 868 F.2d 424, 429 n.2 (11th Cir. 1989); United States v. Benson, 846 F.2d 1338, 1341 (11th Cir. 1988); United States v. Russo, 796 F.2d 1443, 1451 (11th Cir. 1986); United States v. Caporale, 806 F.2d 1487, 1514 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 and 1021 (1987); Stoner v. Graddick, 751 F.2d 1535, 1543 (11th Cir. 1985).

[156] *Lovasco*, 431 U.S. at 790.

[157] In the Fourth Circuit, *see* Jones v. Angelone, 94 F.3d 900, 905 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 736 (1997); Howell v. Barker, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990); United States v. Automated Medical Laboratories, 770 F.2d 399, 403

The decisions in the remaining federal circuits are too contradictory or unclear to reach a confident conclusion on where these circuits stand on the issue of improper motive as an essential element of the test for due process denial. In several cases, circuit panels have simply refused to choose between requiring a showing of improper motive or adopting the flexible, balancing approach.

In the Second Circuit, the opinions are a mixture. Some are clear pronouncements requiring deliberate delay for an improper reason.[158] Others contain indecisive or ambiguous statements which leave the issue open for argument.[159]

Most of the Sixth Circuit opinions require the accused to show a delay was deliberately undertaken for tactical advantage.[160] However, a pair of contrary opinions frustrates any confident conclusion that the Sixth Circuit would absolutely require an improper motive before finding pre-indictment delay to have violated due process.[161]

The Seventh Circuit appears to be thoroughly indecisive on the issue. Several cases require deliberate delay for tactical advantage.[162] However,

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(4th Cir. 1985); United States v. Sample, 565 F.Supp. 1166, 1183 (E.D.Va. 1983). In the Ninth Circuit, *see* United States v. Ross, 123 F.3d 1181, 1186 (9th Cir. 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 733 (1998); United States v. Bracy, 67 F.3d 1421, 1427 (9th Cir. 1995); United States v. Contreras, 63 F.3d 852 (9th Cir. 1995); United States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992); United States v. Sherlock, 962 F.2d 1349, 1353 (9th Cir. 1992); United States v. Valentine, 783 F.2d 1413, 1416 (9th Cir. 1986); United States v. Mays, 549 F.2d 670 (9th Cir. 1977).

[158] United States v. Hoo, 825 F.2d 667, 670-671 (2d Cir. 1987), *cert. denied*, 484 U.S. 1035 (1988); United States v. Lawson, 683 F.2d 688, 694 (2d Cir. 1982); United States v. Snyder, 668 F.2d 686, 689 (2d Cir.), *cert. denied*, 458 U.S. 1111 (1982); United States v. DeFabritus, 605 F.Supp. 1538, 1546 (S.D.N.Y. 1985).

[159] United States v. Rubin, 609 F.2d 51, 66 (2d Cir. 1979), *aff'd*, 449 U.S. 424 (1981) (stating delay must violate concepts of fair play and decency "such as would occur if the prosecutor deliberately used the delay to achieve a substantial tactical advantage"). *Accord,* United States v. Scarpa, 913 F.2d 993, 1014 (2d Cir. 1990); and United States v. Ruggiero, 726 F.2d 913, 925 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984). *See also* United States v. Elsbery, 602 F.2d 1054, 1059 (2d Cir.), *cert. denied*, 444 U.S. 994 (1974) (holding defendant must show "unjustifiable" government conduct); United States v. Birney, 686 F.2d 102, 105 n.1 (2d Cir. 1982) ("We express no opinion at this time as to the propriety of dismissing an indictment for reason of prosecutorial negligence").

[160] United States v. Rogers, 118 F.3d 466 (6th Cir. 1997); United States v. Scott, 763 F.2d 220, 222 (6th Cir. 1985); United States v. Greene, 737 F.2d 572, 575 (6th Cir. 1984); United States v. Brown, 667 F.2d 566 (6th Cir. 1982).

[161] *See* United States v. DeClue, 899 F.2d 1465, 1468 (6th Cir. 1990); and Payne v. Roos, 738 F.2d 118, 122 (6th Cir. 1984). Both cases state that a defendant must prove *either* deliberate delay for tactical advantage, *or* that the government had no valid reason for the delay.

[162] United States v. Pardue, 134 F.3d 1316, 1319 (7th Cir. 1998); United States v. Sowa, 34 F.3d 447, 451 (7th Cir. 1994); United States v. Fuesting, 845 F.2d 644, 669 (7th Cir. 1988); United States v. Brown, 742 F.2d 359, 362 (7th Cir. 1984); United States v. Watkins, 709 F.2d 475, 479 (7th Cir. 1983).

others expressly reject improper motive as a mandatory element, and adopt the balancing test.[163] Another opinion implies a balancing test once an accused proves prejudice.[164] Often Seventh Circuit panels have steadfastly declined to select between a test with improper motive as a mandatory element, and the more flexible test where the government's reasons are balanced against the harm suffered by the accused. In these cases, the Seventh Circuit discussed both tests at length before concluding the defendants' failure to prove actual prejudice would cause them to lose under either approach, thereby avoiding the necessity of making a choice.[165]

The majority of Eighth Circuit cases favor the balancing test.[166] However, in three instances, and possibly a fourth, circuit panels stated the test as including a mandatory showing of intent to harass, gain tactical advantage, or achieve another improper purpose.[167]

Finally, the District of Columbia Circuit has gone a completely different way. In an unpublished opinion, which apparently is the only time this circuit has addressed the issue, the court held that no due process violation occurred from pre-indictment delay because there was no evidence of "deliberate attempt to gain an unfair tactical advantage" or "reckless disregard of probable prejudicial impact."[168] While not nearly as favorable to a defendant as the balancing test discussed above, the D.C. Circuit standard

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[163] Aleman v. Judges of Circuit Court of Cook County, 138 F.3d 302, U.S. App. LEXIS 4034 at *21 (7th Cir. 1998); United States v. Smith, 80 F.3d 1188, 1191-92 (7th Cir. 1996); United States v. Canoy, 38 F.3d 893, 902 (7th Cir. 1994); United States v. Solomon, 688 F.2d 1171, 1179 (7th Cir. 1982); United States v. King, 593 F.2d 269 (7th Cir. 1979).

[164] United States v. Eckhardt, 843 F.2d 989, 995 (7th Cir.), *cert. denied*, 488 U.S. 839 (1988) (stating that "we must defer to the government's prosecutorial decision in absence of such a showing [of prejudice by the defendant]" without mentioning improper motive).

[165] United States v. Windom, 19 F.3d 1190, 1195 (7th Cir.), *cert. denied*, 513 U.S. 862 (1994); Wilson v. McCaughtry, 994 F.2d 1228 (7th Cir. 1993); Pharm v. Hatcher, 984 F.2d 783, 786 (7th Cir.), *cert. denied*, 510 U.S.841 (1993); United States v. Koller, 956 F.2d 1408, 1415 (7th Cir. 1992); United States v. Hollins, 811 F.2d 384, 387-388 (7th Cir. 1987); United States v. Williams, 738 F.2d 172, 175 (7th Cir. 1984).

[166] United States v. Benshop, __ F.3d __, 1998 U.S. App. LEXIS 4469 at *9-10 (8th Cir. 1998) (calling the standard a "balancing test," the opinion seems to require proof of deliberate delay for tactical advantage); Bennet v. Lockhart, 39 F.3d 848, 851 (8th Cir. 1994), *cert. denied*, 514 U.S. 1018 (1995); United States v. Miller, 20 F.3d 926, 931 (8th Cir. 1994); United States v. Rudolph, 970 F.2d 467, 469 (8th Cir. 1992), *cert. denied*, 506 U.S. 1069 (1993); United States v. Savage, 863 F.2d 595, 598 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989); United States v. Bartlett, 794 F.2d 1285 (8th Cir.), *cert. denied*, 479 U.S. 934 (1986); United States v. Barket, 530 F.2d 189, 192 (8th Cir. 1976) (a pre-*Lovasco* case).

[167] United States v. Stierwalt, 16 F.3d 282, 285 (8th Cir. 1994); United States v. Meyer, 906 F.2d 1247, 1251 (8th Cir. 1990); Young v. Lockhart, 892 F.2d 1348, 1354 n.5 (8th Cir. 1989). *See also* United States v. Benshop, __ F.3d __, 1998 U.S. App. LEXIS 4469 at *9-10 (8th Cir. 1998).

[168] United States v. Pierre, No. 86-3086, slip op. at 4-5 (D.C. Cir. 1987), citing *Lovasco* and the dictum in United States v. $8,850, *supra*.

would still not foreclose relief solely due to an accused's failure to prove a deliberate government delay based on an improper motive.

The military authorities are also muddled in defining the elements of the *Marion-Lovasco* due process test, including whether proof of an improper government motive is mandatory. The Court of Military Appeals (now the Court of Appeals for the Armed Forces) has addressed pre-preferral delay as a potential violation of the Due Process Clause several times, with inconclusive results. In *United States v. Rachels*[169] and *United States v. McGraner*,[170] the court acknowledged that pre-preferral delay could violate due process, but summarily rejected the appellants' claims without extended analysis. In *United States v. Vogan*,[171] the court addressed the matter more directly. In *Vogan*, the accused was an inmate at the United States Disciplinary Barracks[172] who, among other arguments, contended his Fifth Amendment due process rights were violated by the delay between alleged offenses he committed as a prisoner and the date charges were preferred. Although noting that the Supreme Court had not provided specific guidance on the precise test for a due process violation, the court relied on passages from *Lovasco* to hold that no violation had occurred:

> "[A] 'tactical' delay . . . 'incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there exists an appreciable risk that delay would impair the ability to mount an effective defense'" would amount to a due process violation. We hold there was no violation of due process since no evidence has been presented to show an egregious pretrial delay or that appellant was unable "to mount an effective defense" due to the delay.[173]

Vogan's reliance on this language from *Lovasco* suggests that an improper motive, or at least a reckless disregard of circumstances prejudicing an accused's ability to put up defense, may be a required element for proving a due process violation. However, the court does not state that such circumstances are the *only* ways to demonstrate such a violation. Considering, as *Vogan* conceded, the lack of clear direction from the Supreme Court, *Vogan* cannot be considered as settling military law on the issue of whether improper motive is *per se* required.

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[169] United States v. Rachels, 6 M.J. 232 (C.M.A. 1979).
[170] United States v. McGraner, 13 M.J. 408 (C.M.A. 1982).
[171] United States v. Vogan, 35 M.J. 32 (C.M.A. 1992).
[172] The "U.S.D.B.," located at Fort Leavenworth, Kansas, is the primary military prison. Prisoners sentenced to confinement by court-martial remain subject to the U.C.M.J. even though their discharges from the armed forces may have been formally executed. 10 U.S.C. § 802(a)(7) (1994).
[173] *Vogan*, 35 M.J. at 34 (quoting *Lovasco*, 431 U.S. at 795 n.17) (citations omitted).

The Court of Appeals for the Armed Forces had a golden opportunity to resolve this ambiguity in the 1995 case of *United States v. Reed.*[174] Instead, the case produced a set of unclear and fragmented opinions which did little to clarify the question of whether an accused must prove "improper motive" as an element of a claim of due process violation.

Reed arose out of the rape of a sailor in Orlando, Florida, hotel room in November 1991. Several sailors, assigned to different ships, were present and the victim was unsure of her assailant. She did not report the attack until January 1992, and the Naval Investigative Service ("NIS") opened an investigation in March 1992. By this time, the various sailors involved, including Seaman Reed, were deployed with their ships throughout the world. The NIS investigation closed out in December 1992, but was reopened for follow-up investigation in January 1993. The investigation closed out for the last time in September 1993. Charges were preferred against Reed later that month. Also, he was put on "legal hold" for a period of 23 days before preferral. This resulted in an involuntary extension of Reed's enlistment and denial of opportunity to test for promotion. The charges were investigated under Article 32, UCMJ, and referred to trial.

At trial, Seaman Reed moved to dismiss the charges, asserting the pre-preferral delay violated due process. The military judge agreed and dismissed the charges. The government appealed the dismissal, and the Navy-Marine Corps Court of Military Review reversed. The accused appealed this decision to the Court of Appeals for the Armed Forces. That court affirmed the Court of Military Review in a 3-2 decision, Judge Crawford writing for the majority and Judges Sullivan and Wiss filing separate dissents.

The majority opinion held that, to make out a due process violation for pre-preferral delay, the accused had the burden of proving both an "egregious or intentional tactical delay and actual prejudice,"[175] and held that he had proven neither. In holding the first element unproven, the majority relied largely on the difficulties in coordinating the NIS investigation among several widely separated ships. Concerning the prejudice element, the majority noted the accused had asserted only an inference of prejudice in the form of faded witness memories, which was insufficient to satisfy this prong of the due process test. In its limited analysis, the majority did not elaborate on what would constitute "egregious" delay. Moreover, the majority omitted any discussion of whether personal or professional hardship could be considered under the prejudice prong, making only a passing reference to the accused's brief period on "legal hold" and its consequences.

In his brief dissenting opinion, Judge Sullivan did not address the standard for making out a due process violation or independently analyze the case. Instead, Judge Sullivan referred to the military judge's findings (attached

[174] United States v. Reed, 41 M.J. 449, (1995), *cert. denied*, 516 U.S. 820 (1995).
[175] *Id.* at 452.

as an appendix to the opinion) and, applying an abuse of discretion standard of review, opined that those findings established a due process violation. However, in that the military judge did not find the prosecution had a "bad motive" in delaying the preferral, it may be inferred that Judge Sullivan would not require an accused to prove such a motive as an element of the alleged due process violation.

In his more extensive dissent, Judge Wiss squarely addressed the issue side-stepped by both the majority and Judge Sullivan: ". . . the proper legal test to be applied to a claim that an accused was denied due process as a result of pre-preferral delay."[176] Concerning the first prong of the test stated by the majority, Judge Wiss interpreted that opinion as requiring proof of a bad motive, although he allowed that the majority was ambiguous on that point and may have anticipated that "egregious" delay would include circumstances other than intentional delay for tactical advantage. In any case, Judge Wiss disputes the majority's imposition on the accused of a burden to prove the prosecution's motive. On this first element of the due process standard, Judge Wiss neatly summarized his view:

> Thus, unlike the majority, I would not place the burden on the accused to divine and demonstrate the Government's reasons for its delay in preferring charges; that does not seem to me to be common sense. Also apparently unlike the majority, I would not block myself as a matter of law from finding a denial of due process in any particular case just because the delay resulted from something like the Government's gross negligence or recklessness, as opposed to bad motive.[177]

Concerning the prejudice element of the test, Judge Wiss also found the majority opinion ambiguous as to whether such prejudice was limited to the ability to defend at trial. However, Judge Wiss interpreted the majority as imposing that limitation and, without elaboration, agreed that personal or professional hardship should not be considered when addressing an alleged due process violation.

Regardless of the correctness of the *Reed* majority's standard, Judge Wiss considered that opinion as establishing a test that had not been applied by the military judge at trial. Accordingly, Judge Wiss would have remanded the case to the military judge for rehearing in accordance with the majority opinion.

After *Reed*, the Court of Appeals for the Armed Forces has remained equivocal whether proof of an improper prosecution motive was required to prove a due process violation. It is clear from the *Reed* opinions that Judges Sullivan and Wiss were opposed to such a requirement, but the converse was not clear from the majority opinion. The following year (after Judge Wiss'

[176] *Id.* at 458 (Wiss, J., dissenting).
[177] *Id.* at 460 (Wiss, J., dissenting).

death and before the appointment of Judge Effron), the court had another opportunity to clarify the standard, in the case of *United States v. Niles*.[178] The majority of the court (as per Judge Sentelle of the District of Columbia Circuit, sitting temporarily by designation[179]), avoided the issue by reversing the conviction on another ground. However, the majority opinion noted in passing that the record showed the accused's ability to defend at trial may have been affected by the pre-preferral delay and that the record raised the specter of deliberate prosecution delay to obtain tactical advantage. Judge Gierke filed a dissent, joined by Judge Crawford, which, among other disagreements with the majority ruling, opined that the pre-preferral delay issue should have been addressed and rejected because there had been no prejudice to the accused or intentional tactical delay by the prosecution.

Judges Gierke and Crawford were in the *Reed* majority and their *Niles* dissent is a fair indication that they are in the "bad motive" camp. But Chief Judge Cox, also a member of the *Reed* majority, has not yet clarified his view whether *Reed*'s "egregious or tactical delay" standard permits something other than prosecution bad faith as a basis for finding a due process violation in pre-preferral delay. With Judge Sullivan in apparent agreement with Judge Wiss' *Reed* dissent and Judge Effron still to be heard on this subject, the precedent in this area from the Court of Appeals for the Armed Forces remains uncertain.

The opinions of the services' Courts of Military Review and Courts of Criminal Appeals have been similarly equivocal. The Air Force court has not expressly analyzed this issue. However, it has suggested that the test for pre-preferral delay as a due process infraction is oriented toward prejudice to the accused, and not necessarily the government's motive for the delay.[180] The Army court has made a similar suggestion in dictum.[181] The Navy-Marine Corps court has written on the pre-preferral delay issue more often. In two cases, that court simply acknowledges that pre-preferral delay may raise due process implications, but summarily dismisses the appellants' claims without analysis of the test for violation.[182] In another case, there is an indication that

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[178] United States v. Niles, 45 M.J. 455 (1996).

[179] *See* Art. 142(f), U.C.M.J., 10 U.S.C. § 942(f) (1994).

[180] In United States v. Cantu, 15 M.J. 534 (A.F.C.M.R. 1982), *pet. denied*, 16 M.J. 120 (C.M.A. 1983), the court noted the military judge found "no substantial prejudice to the rights of the accused" and stated "[r]ecent opinions of the United States Supreme Court make it clear, in our judgement, that delays such as that in the instant case do not necessarily prejudice the rights of an accused." *Id.* at 536.

[181] "Of course, if there is prejudice *or* intentional governmental hindrance to this accused in the preparation of his defense, due process issues become a concern." United States v. Robinson, 26 M.J. 954, 958 n.10 (A.C.M.R. 1988), *aff'd on other grounds*, 28 M.J. 481 (C.M.A. 1989) (dictum) (emphasis added).

[182] United States v. Nelson, 28 M.J. 922 (N.M.C.M.R. 1988); United States v. Maresca, 26 M.J. 910 (N.M.C.M.R. 1988), *aff'd on other grounds*, 28 M.J. 328 (C.M.A. 1989).

the test should be "prejudice oriented."[183] In its two most recent published cases on the pre-preferral delay issue—*United States v. Reeves*[184] and *United States v. Devine*[185]—the Navy-Marine Corps court described the net effect of *Marion-Lovasco* as follows: "What is required to substantiate a due process claim is proof of actual prejudice to the accused and a consideration of the reasons for delay."[186] This language strongly implies a balancing test where the harm to the accused is balanced against the government's explanation for the pre-preferral delay, without requiring deliberate delay for tactical advantage or another invidious reason as a prerequisite to relief. However, this conclusion is undercut by the *Reeves* opinion, which went on to acknowledge the split of authority among the federal circuits concerning the requirement of improper motive, and expressly declined to make a choice. Instead, the *Reeves* court (like so many of the Seventh Circuit cases) simply held that the accused would lose regardless of the test applied.[187]

In summary, the federal and military courts have not reached a reliable consensus whether to interpret *Marion* and *Lovasco* to require proof of an improper motive before finding that pre-indictment or pre-preferral delay violates the Due Process Clause. The weight of opinion appears to be in favor of improper motive as a mandatory element of the test. However, the authority is far from conclusive. The military courts remain free to select the test that best satisfies the interests of justice and reflects the unique aspects of military society.

3. What Kind of "Prejudice?"

Marion and *Lovasco* both considered prejudice which allegedly

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[183] United States v. Berrey, 28 M.J. 714, 723 (N.M.C.M.R. 1989) (Rubens, J., concurring).
[184] United States v. Reeves, 34 M.J. 1261 (N.M.C.M.R. 1992).
[185] United States v. Devine, 36 M.J. 673 (N.M.C.M.R. 1992).
[186] *Reeves*, 34 M.J. at 1262; Devine, 36 M.J. at 677.
[187] *Reeves*, 34 M.J. at 1261. There has also been one unpublished case from the Navy-Marine Corps Court of Criminal Appeals handed down since the Court of Appeals for the Armed Forces' *Reed* opinion. In United States v. Busby, No. 9601087, 1996 CCA LEXIS 456 (N.M. Ct. Crim. App. 1996), the court heard a government appeal of a dismissal of two of four charges based on pre-preferral delay that the military judge ruled violated due process. The court stated the test as whether the accused had proven "egregious or tactical delay" and actual prejudice. Applying an abuse of discretion standard, the court upheld the military judge's dismissal for one of the affected charges, but reversed as to the other because of failure to prove prejudice. This result would support a standard that does not necessarily require "bad motive" as a prerequisite for a due process violation, as the military judge's findings did not include as finding of intentional delay for tactical advantage. Nonetheless, the standard stated in the opinion is still ambiguous. Moreover, according to the admonition printed by the court on its slip opinion, an unpublished opinion is not to be cited as precedent. In any event, *Busby* serves as an interesting curiosity as one of the very few "published" appellate decisions granting an accused any relief based on excessive pre-preferral or pre-indictment delay.

affected defendants' ability to defend themselves at trial. All civilian cases addressing pre-indictment delay have involved questions of prejudice which focused on factors undercutting a defendant's chances for a successful defense, or otherwise subjecting him or her to disadvantage when coming into court. Faded memory,[188] lost evidence,[189] inability to reconstruct events,[190] an intervening state conviction,[191] sentencing implications including denial of opportunity to serve federal and state sentences concurrently,[192] and the ever popular dead or missing witness(es)[193] have all been asserted as reasons that pre-indictment delay has violated due process, all with little success.[194] But

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[188] *See, e.g.*, United States v. Johnson, 120 F.3d 1107, 1109 (10th Cir. 1997); United States v. Bracy, 67 F.3d 1421, 1427 (9th Cir. 1995); United States v. Comosona, 848 F.2d 1110, 1113 (10th Cir. 1988); United States v. Antonio, 830 F.2d 798 (7th Cir. 1987); United States v. Shaw, 555 F.2d 1295 (5th Cir. 1977).

[189] *See, e.g.*, United States v. Crouch, 835 F.Supp. 938, 942 (S.D.Tex. 1993), *reversed*, 84 F.3d 1497 (5th Cir. 1996) (en banc), *cert. denied*, __ U.S. __, 117 S.Ct. 736 (1997); Bennet v. Lockhart, 39 F.3d 848, 851 (8th Cir. 1994), *cert. denied*, 514 U.S. 1018 (1995); United States v. Canoy, 38 F.3d 893, 902 (7th Cir. 1994); United States v. Mays, 549 F.2d 670 (9th Cir. 1977).

[190] United States v. Antonio, 830 F.2d 798 (7th Cir. 1987).

[191] *See* United States v. Perales, 838 F.Supp. 196 (M.D.Pa. 1992).

[192] *See, e.g.*, United States v. Stokes, 124 F.3d 39, 47 (1st Cir. 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 1103 (1998); United States v. Smith, 80 F.3d 1188, 1191-92 (7th Cir. 1996); United States v. Contreras, 63 F.3d 852 (9th Cir. 1995).

[193] *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); United States v. Benshop, __ F.3d __, 1998 U.S. App. LEXIS 4469 at *9-10 (8th Cir. 1998); United States v. Pardue, 134 F.3d 1316, 1319 (7th Cir. 1998); United States v. Trammell, 133 F.3d 1343, 1351 (10th Cir. 1998); United States v. 123 F.3d 1181, 1186 (9th Cir. 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 733 (1998); United States v. Rogers, 118 F.3d 466 (6th Cir. 1997); Jones v. Angelone, 94 F.3d 900, 905 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 736 (1997); United States v. Crouch, 835 F.Supp. 938 (S.D.Tex. 1993), *reversed*, 84 F.3d 1497 (5th Cir. 1996) (en banc), *cert. denied*, __ U.S. __, 117 S.Ct. 736 (1997); Biskup v. McCaughtry, 20 F.3d 245, (7th Cir. 1994), *cert. denied*, 516 U.S. 1172 (1996); United States v. Mills, 704 F.2d 1553 (11 Cir. 1983); United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983); United States v. Shaw, 555 F.2d 1295 (5th Cir. 1977); United States v. Barket, 530 F.2d 189 (8th Cir. 1976).

[194] According to a recent federal circuit court decision, there has only been two cases since 1975 where defendants have demonstrated prejudice from pre-indictment delay sufficiently severe to prove a due process violation. United States v. Henry, 815 F.Supp. 325, 327 n.3 (D.C. Ariz. 1993), citing *Barket*, 530 F.2d 189, and Howell v. Barker, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990). The author's research has disclosed no other federal cases. *Cf. Foxman*, 87 F.3d at 1222-23, where the Eleventh Circuit held that the trial judge had not abused his discretion in finding the defendant had been prejudiced by pre-indictment delay due to the deaths of several witnesses, but nonetheless reversed his due process dismissal of the indictment because of the defendant's failure to prove deliberate delay for tactical advantage. As described at footnote 187, *supra*, the Navy–Marine Corps Court of Criminal Appeals recently issued an unpublished decision partially upholding a military judge's dismissal of charges on pre-preferral delay grounds. United States v. Busby, No. 9601087, 1996 CCA LEXIS 456 (N.M. Ct. Crim. App. 1996).

what about the effects of such delay on a defendant *personally*—on his or her personal, professional and financial well being? May this kind of harm play a part in proving the "prejudice" prong, which is common to all variants of the *Marion-Lovasco* test?

The civilian cases clearly say "no." General notions of "mental anguish" have been seen as more pertinent to post-indictment speedy trial claims under the Sixth Amendment, and have been summarily dismissed as irrelevant to pre-indictment delay issues under the Fifth Amendment Due Process Clause.[195] This is completely consistent with the principle, stated by the Supreme Court in *Marion*, that the Sixth Amendment's Speedy Trial Clause is the constitutional provision which is intended to shield a citizen from oppressive delay which "may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends."[196] For a civilian defendant, short of a condition which impacts his or her ability to defend in court,[197] personal, professional, or family hardship caused by a pre-indictment delay will not count toward establishing a due process violation. "In sum, the defendant must demonstrate that the prejudice *actually impaired his ability to meaningfully present a defense*."[198]

This conclusion is not surprising and, in the civilian context, quite proper. After all, in the civilian world, the state's prosecutors and police are powerless to affect a citizen's life and livelihood—absent an arrest, indictment, or other action which triggers his or her Sixth Amendment speedy trial rights.[199] The military, however, is far a different society. Military commanders have vast discretion to inflict serious harm to members of their command, based only on a suspicion they may have committed offenses, and without any speedy trial accountability under the Sixth Amendment, Article 10 of the U.C.M.J., or Rule for Court-Martial 707.

Is the ability of *military* members to prove a denial of due process, like that of their civilian counterparts, strictly limited to matters impairing an effective defense? A pair of Air Force commentators has suggested that "the myriad administrative difficulties a military 'suspect' may encounter, *e.g.*, revocation of a security clearance, administrative hold, relief from duty, and withholding of promotion" should be considered in assessing the severity of

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[195] United States v. Pino, 708 F.2d 523, 528 n.8 (10th Cir. 1983).

[196] *Marion*, 404 U.S. at 320. *See also*, United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

[197] *See* United States v. Shaw, 555 F.2d 1295 (5th Cir. 1977) (defendant alleged deteriorating health over period of pre-indictment delay prevented intelligent assistance in his defense).

[198] *Bartlett*, 794 F.2d at 1290 (emphasis added).

[199] *See, e.g., MacDonald*, 456 U.S. at 10: Between the dismissal of Doctor MacDonald's military charges and his discharge from the Army, and his federal civilian indictment nearly five years later, "he was free to go about his affairs, to practice his profession, and to continue his life."

prejudice suffered by an accused from pre-preferral delay.[200] However, the military courts have not followed up on this suggestion.

In *United States v. Vogan*, the Court of Military Appeals disagreed with the argument of the appellant (a military prisoner in administrative segregation for several months before formal preferral of charges) that his due process rights had been denied by the pre-preferral delay, where "no evidence has been presented to show...that appellant was unable 'to mount an effective defense' due to the delay."[201] In *United States v. Reeves*, the Navy-Marine Corps Court of Military Review expressly rejected personal hardship as a basis for a claim that pre-preferral delay violated due process: "The form of prejudice with which the [Supreme] Court was concerned in *Marion* and *Lovasco* was the accused's ability to present a defense without being substantially hampered by a lapse of time."[202] As discussed earlier, a majority of the Court of Appeals for the Armed Forces in *United States v. Reed*[203] appears to have adopted this viewpoint, although not without still more ambiguity. As noted in Judge Wiss' dissent, the *Reed* majority does not clearly state that the prejudice element is limited to that which affects an accused's ability to defend at trial, but Judge Wiss interpreted to so state and agrees with that aspect of the majority opinion.[204]

From the above, it is apparent that the current state of military authority is not promising for military members, like Sergeant Croker, who would seek a remedy for oppressive pre-preferral delay involving "the myriad administrative difficulties" piled on by their commanders during the period. However, no military court has yet addressed a case of an accused who has been personally and professionally damaged by pre-preferral delay to a degree and for a time remotely approaching that inflicted on Sergeant Croker.[205] Accordingly, the suggestion is open that personal, family, and professional damage suffered during a period of pre-preferral delay may be so severe that it becomes relevant to whether such delay violates "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the

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[200] Captain Clinton C. Pearson & Captain William P. Bowen, *Unreasonable Prepreferral Delay—Don't Confuse It with Lack of Speedy Trial*, 10 A.F. JAG Reptr. 73, 77 (1981).

[201] United States v. Vogan, 35 M.J. 32, at 34 (C.M.A. 1992).

[202] United States v. Reeves, 34 M.J. 126, at 1263 (N.M.C.M.R. 1992). *Accord*, United States v. Devine, 36 M.J. 673, 677 (N.M.C.M.R. 1992) (due process is concerned with "whether the passage of time caused evidence to be lost, memories of witnesses to be impaired, or the loss of witnesses altogether").

[203] United States v. Reed, 41 M.J. 449, *cert. denied*, 516 U.S. 820 (1995).

[204] *Reed*, 41 M.J. at 461 (Wiss, J., dissenting). Also, in the Navy-Marine Corps Court of Criminal Appeals' unpublished *Busby* opinion (*see* fn. 187, *supra*), that court expressly rejected the military judge's reliance on hardship to satisfy the prejudice prong of the test. 1996 CCA LEXIS 456 at *14.

[205] The closest case is *Reed*, where the accused suffered a mere 23 days on "legal hold" before charges were preferred, thereby conferring the protection of the Sixth Amendment's Speedy Trial Clause and R.C.M. 707.

community's sense of fair play and decency." The military appellate courts await the right "Sergeant Croker" to step up to the bar.

VI. REMEDIES FOR OPPRESSIVE PRE-PREFERRAL DELAY

Up to this point, this article has illustrated the potential for injustice presented by lengthy pre-preferral delay, when coupled with administrative actions which have no speedy trial consequences for the government, but nonetheless inflict substantial damage on the lives and careers of military members. The foundations for a solution to this institutional flaw in the military justice system are present in military law. Refinements to either the law of "military due process," or the application of the Fifth Amendment's Due Process Clause in the military context, would provide the means for military members to hold the government accountable for unreasonable and oppressive delays in formalizing its court-martial prosecutions.

A. The "Military Due Process" Test

It should be a violation of military due process for the government to (1) deliberately withhold preferral of charges, (2) for an unreasonable period of time, (3) after it has made a firm decision to prosecute an accused, and (4) after the accused has demanded a prompt preferral of charges. If the government's actions violate military due process according to this test, then charges should be dismissed without requiring a showing of prejudice by the accused.

The legal basis for a deliberate delay in withholding preferral as a violation of military due process may be found in the Court of Military Appeals' decision in *United States v. Clay*, which announced the doctrine of "military due process" and listed an accused's right "[t]o be informed of the charges against him" as the first element of the doctrine.[206] This right necessarily implies that "charges" have been properly preferred. Other military court opinions support the proposition that military due process also includes a right to have charges properly signed under oath.[207]

The military due process implications should be especially clear when the government fails to properly sign and swear to charges in order to avoid triggering its speedy trial accountability, yet in all practical respects treats the case as an on-going prosecution. The Navy-Marine Corps Court of Military Review recognized the connection between military due process and government attempts to evade speedy trial responsibility in *United States v. Berrey*.[208] In *Berrey* (decided before Change 5 to the 1984 Manual for Courts-

[206] United States v. Clay, 1 C.M.R. 74, 77 (1951).
[207] United States v. Frage, 26 M.J. 924 (N.M.Crim.App. 1988); United States v. Olivieri, 10 C.M.R. 644, 646 (A.F.B.R. 1953); and United States v. Hill, 4 C.M.R. 597 (A.F.B.R. 1953).
[208] United States v. Berrey, 28 M.J. 714 (N.M.C.M.R. 1989).

Martial, when the R.C.M. 707 clock was triggered by *notice* of preferral as opposed to the *act of preferral* itself), the court held that the government had violated military due process when it had delayed notice of preferral. The court explained its ruling as follows:

> [W]here the Government deliberately delayed notifying the appellee of the charges preferred against him, as is required by Article 30(b), UCMJ, because it did not want to start the running of the speedy trial clock under R.C.M. 707, such intentional deferral of notification was a denial of a significant procedural requirement relating to the appellee's fundamental right to a speedy trial. This is so because the President, in prescribing R.C.M. 707, chose the 'notification of preferral of charges' as the triggering event to start the speedy trial clock. Thus, in its elevated state, the Article 30(b), UCMJ, requirement that such notification be given as soon as practicable, takes on greater procedural significance and becomes integrated into the R.C.M. 707 speedy trial scheme. Violation of this substantial procedural requirement, under these circumstances, constitutes error materially prejudicial *per se* to the substantial rights of the accused.[209]

The Change 5 amendment to R.C.M. 707 does not alter the effect of *Berrey*'s analysis. Simply replace references in the above quotation to "notification of preferral" and "Article 30(b)" with "preferral" and "Article 30(a)," and *Berrey* makes equal sense. The ultimate point of *Berrey* is that the government, when it is otherwise ready, willing, and able to prosecute, may not manipulate events to avoid speedy trial accountability without violating an accused's right to military due process. This should be the law, regardless of whether the R.C.M. 707 clock is triggered by "preferral" or "notification of preferral."

The proposed test will deter such manipulations, and hold the government accountable for unreasonable pre-preferral delay, while not imposing an unrealistic burden on the government. The "demand" element of the proposed test would put the initial burden on the accused to complain about the delay. This demand could take the form of a formal complaint to an inspector general,[210] to a Member of Congress,[211] or under Article 138, U.C.M.J.[212] However, a simple letter from the member to his or her commander would also suffice. Requiring a demand for a prompt preferral as a prerequisite to later claiming a denial of military due process also recognizes that pre-preferral delay, just like post-preferral/indictment delay, is not always detrimental to an accused. In contrast to Sergeant Croker, if a military member is not enduring significant hardship while awaiting for the initiation of formal

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[209] *Berrey*, 28 M.J. at 718.
[210] In the Air Force, see AFI 90-302, Inspector General Complaint System (1 February 1994).
[211] *See* 10 U.S.C. § 1034 (1994).
[212] 10 U.S.C. § 938 (1994). In the Air Force, *see also* AFI 51-904, Complaints of Wrongs Under Article 138, Uniform Code of Military Justice (30 June 1994).

prosecution, it would rarely be in his or her best interest to demand preferral. Even if the member's commander has initiated significant administrative actions against him or her, the member may still find it better not to push the government into doing something it might not do, if left to make the decision without prodding. In any case, if members are not willing to invoke military due process by such a demand at the outset, they should not be heard to complain later that their commanders failed to honor that principle by delaying preferral of charges. The "demand" prong of the test would also serve to raise an inference that further significant delay is deliberate, as opposed to the product of neglect or inattention.

If a military member makes a demand for prompt preferral, the burden would then shift to the government to prove that delay between the demand and preferral did not violate military due process. To violate military due process, delay in preferral would have to be *deliberate*, *unreasonable* in length under the circumstances, and follow a *firm decision to prosecute*.

Delay due to good faith investigation directed at whether or what offenses to prosecute would not run afoul of military due process, nor would good faith delay occasioned by connected prosecutions involving multiple accused.[213] However, "investigation" by prosecuting attorneys to round out their case or fill in holes revealed by their proof analysis would not serve as an excuse for unreasonable delay in preferral after a demand by an accused.

The government's firm decision to prosecute, prior to a formal preferral, could be shown by an express admission (such as occurred in the Croker case) or by inference from government actions which are only consistent with an on-going formal prosecution. Examples of the latter can be seen in both the Croker case and *Berrey*. Administrative actions which are justified by "pending" court-martial "charges", and correspondence concerning discovery, expert assistance, and witness attendance by signed lawyers calling themselves "Trial Counsel" and "Government Representatives," all are strong indicators that the government is pressing a *de facto* court-martial prosecution, with the only element missing being a formal preferral ceremony.

Whether the length of a delay after a demand is "unreasonable" would depend on the facts of each case. Following the reasoning in *Berrey* and the logical inference that delay not patently justified by investigation is motivated by a desire to avoid triggering the R.C.M. 707 clock, the more the post-demand delay exceeds 120 days, the more likely the delay will be looked upon

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[213] A common example of the latter situation would be a "drug bust" involving several persons where the evidentiary posture of the cases required certain trials to go before others, thus helping to perfect the prosecution cases in later trials. This type of delay, which is intended to enhance the availability of prosecution evidence (e.g., convicting Airman X first, thus providing her clemency incentive to testify against Sergeant Y), should be distinguished from bad faith delay designed to hamper an accused's ability to put on a defense (e.g., intentionally delaying preferral until the accused's supporters have been reassigned elsewhere).

as "unreasonable." Here also is where the nature and extent of any administrative sanctions imposed against the accused would come into play. The more sanctions, the more likely any post-demand delay will be seen as "unreasonable."

This "military due process test" for pre-preferral delay is an innovative test, requiring a significant extension of existing case law. It is also a very advantageous one for the military accused, for two reasons. First, it requires only a demand from an accused before the burden of proof shifts to the government. Second, as with any issue of military due process, the accused would not have to prove any harm before a violation would require dismissal of charges. For these reasons, such a test would not be an attractive option for the military courts. However, these same attributes would also make the "military due process test" the most effective deterrent of oppressive government conduct. In particular, unless a military member's commanders are confident that preferral of charges will occur within a foreseeably short period, they will think carefully before imposing a great many administrative sanctions lest they prompt a demand for preferral from their troop.

B. The Fifth Amendment Due Process Test

The foundations for the proper application of the *Marion-Lovasco* test in the military are in existing case law. The task before the military courts, given the proper set of facts, is to reexamine their precedents, resolve ambiguities, and firm up a test which properly interprets *Marion* and *Lovasco* and incorporates the realities of the military environment. This means adopting a test that balances the prejudice to an accused against the government's explanation for the delay, without a *per se* requirement that an accused show an improper motive behind the delay. It also means considering personal, family, and professional harm suffered by the military member because of the pre-preferral delay, as well as any impairment of his or her ability to mount an effective defense.

1. Rejecting "Improper Motive"

Adoption of a balancing test, and rejection of improper motive as a mandatory component of a due process violation, reflect the better analysis of Supreme Court precedent, as well as a more realistic view of the odds facing an individual citizen who is pitted against the power of the state. In *United States v. Townley*, a panel of the Fifth Circuit Court of Appeals expressly rejected the argument that a defendant must prove an improper motive in every case:

> *Lovasco* and *Marion* do not stand for the proposition that "governmental interests not amounting to an intentional tactical delay will automatically

> justify prejudice to a defendant." Here, the *Lovasco* balancing test would be reduced to mere words, if indeed the government's 41-month delay in bringing the indictment were excusable, whatever the prejudice caused the defendant, simply by a showing that the government was negligent, however grossly, and not bad-intentioned.[214]

The *Townley* theme was reiterated not long ago by the United States District Court for the Southern District of Texas. Although its reasoning was destined to fall on deaf ears at the Court of Appeals, the District Court eloquently rejected improper motive as a mandatory prerequisite to relief for excessive pre-indictment delay:

> In this Court's opinion, this is not, and should not be, the law. The due process protection of the Fifth Amendment was enacted, as part of the Bill of Rights, to protect citizens from the power of the federal government; it is restraint on improper government action, including prosecution. If the due process issue relative to the deprivation of a fair trial because of lengthy pre-indictment delay were to turn upon the need of the accused to show governmental malice, the protections of the Fifth Amendment would be seriously curtailed . . . . The Fifth Amendment protects an accused from overly stale charges, it does not insulate the government from the results of its negligence.[215]

To the Fourth Circuit Court of Appeals, it is simply illogical and unrealistic to require a defendant, in every case, to prove deliberate delay for tactical advantage or similar bad intention:

> Taking this [i.e., the prosecution's] position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecution motive.[216]

This last point is especially telling. How does a private citizen prove a pre-indictment/preferral delay was the product of a deliberate government effort to harass, gain tactical advantage, or some other insidious design? If

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[214] United States v. Townley, 665 F.2d 579, 582 (5th Cir.), *cert. denied*, 456 U.S. 1010 (1982) (citation omitted). Ironically, as has been discussed above, Fifth Circuit authority as a whole appears firmly in the "improper motive" camp.

[215] United States v. Crouch, 835 F.Supp. 938, 942 (S.D.Tex. 1993), *reversed*, 84 F.3d 1497 (5th Cir. 1996) (en banc), *cert. denied*, __ U.S. __, 117 S.Ct. 736 (1997) (citation omitted).

[216] Howell v. Barker, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990).

prosecutors are dishonest enough to delay formal charging with evil intent, it would naive to expect them to "'fess up" to it in open court. Short of such self-destructive candor, prosecutors would have to be profoundly clumsy to expose their improper motive to discovery and proof by defendants. The search for proof of such prosecutorial perfidy soon takes on the appearance of a quest for the proverbial Holy Grail, and is just about as likely to succeed. This reality has been amply illustrated in the courts—there is no published case where a defendant, who has been required to do so, has successfully proven an intent to harass, gain tactical advantage, or other improper motive behind pre-indictment delay.[217] The extreme difficulties inherent in any attempt to pry the lid off of prosecutorial thought processes is magnified in the military, where such an attempt would also inevitably involve confrontation between a service member and his or her commanders.

Finally, requiring proof of improper motive in every case plainly is not fair, and does not address society's need to hold the government accountable for abusing its citizens, whether deliberately or through neglect. One Seventh Circuit case, while declining to decide whether to require improper motive or adopt the flexible balancing test, nonetheless included this eloquent rationale for why the latter is preferable:

> We are loathe to impose judicial review on prosecutorial decisions such as the priority of cases for prosecution, yet we note that our balancing is a place of last resort for defendants whose cases have fallen between the prosecutorial cracks. An unintentional delay may work to the disadvantage of the government as well as the defendant, but the government can choose not to prosecute the case. The due process clause should provide the defendant with a similar escape, but only where the balance of prejudice to the defendant against the reason for delay, although unintentional, is so detrimental to the defendant's case as to be patently unfair.[218]

The military justice system has a special interest in deterring lackadaisical pre-preferral case processing, even where a military member does not protest or seems to encourage the delay. In the first Court of Military Appeals decision expressly considering pre-preferral delay as a possible violation of due process, the court found no prejudice to the accused and rejected his claim. In doing so, however, the court was highly critical of the delay, and included this admonition in its opinion:

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[217] *But see* United States v. Whitty, 688 F.Supp. 48, 57 (D.C.Me. 1988), which held the government's "improper motive" was shown by its *failure to explain* the pre-indictment delay. There has been no other case where a mere failure to explain has been equated to an "improper motive." The *Whitty* approach is flawed and, in the author's opinion, intellectually dishonest. It appears that the *Whitty* court in reality applied a balancing test, while paying lip service to the prevailing First Circuit rule requiring improper motive as a mandatory element of the *Marion-Lovasco* test.

[218] United States v. Williams, 738 F.2d 172, 175 n.2. (7th Cir. 1984).

> Perhaps the Government's lack of concern was generated by appellant's "sit and wait" strategy in the apparent hope that the Government would forget the matter. However, the Government's indifference cannot be excused by the appellant's strategy as such delays reflect adversely upon the military justice system, and we cannot condone an attitude of indifference simply because it is consistent with defense strategy . . . . Having found no prejudice to the appellant we are unwilling to reverse, but we caution the persons responsible that such delays will not be tolerated.[219]

Yet, as long as *Marion* and *Lovasco* are interpreted as requiring an accused to prove an improper motive, the military courts will have no choice but to "condone an attitude of indifference" resulting in protracted pre-preferral delay. Unless the military courts join the well-reasoned analysis of those federal circuits which have rejected improper motive as a mandatory element of the test, as a practical matter the government is free to delay formal charges against a military member indefinitely. Meanwhile, the individual's career and quality of life seeps away.

2. Personal and Profession Harm as "Prejudice"

In the military, the *Marion-Lovasco* test would also mean little unless harm caused by the "myriad administrative difficulties"[220] is considered, along with any impairment of the accused's ability to defend at trial, as proving the prejudice prong of the test. The civilian precedents, which have been taken at face value by many appellate judges in the military system as requiring rejection of personal hardship as "prejudice," are based on an bedrock assumption as to the relationship between a civilian citizen and his or her government: without an indictment, arrest, or other legal action triggering the government's Sixth Amendment speedy trial accountability, the government has no power to affect an individual's life, liberty, or livelihood. However, this assumption is completely inapposite in the military context.

Allowing an accused to prove personal and professional prejudice, and balancing it against the government's explanation for delay along with any adverse effects on the accused's ability to defend at trial, is crucial to imposing meaningful accountability for pre-preferral delay in the military. Otherwise, the military is free to "slow-roll" a case until, like Sergeant Croker, an accused's personal and professional life is in tatters, and without any consequences to its ability to eventually prosecute.[221]

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[219] United States v. Rachels, 6 M.J. 232, 236 (C.M.A. 1979).

[220] Pearson and Bowen, *supra* note 200, at 77.

[221] During the hearing before the military judge on Sergeant Croker's motion to dismiss, the author argued that "if the prosecution's contention [that only prejudice to Sergeant Croker's ability to defend himself at trial is relevant] is taken to its logical—or, in our view, illogical—

3. The Fifth Amendment Test: Summary

In addressing pre-preferral delay as a potential violation of the Due Process Clause of the Fifth Amendment, the military courts should adopt a two-part test. The accused must first prove he or she has been substantially prejudiced by pre-preferral delay. The prejudice must be actual, and not speculative. However, in satisfying his threshold requirement, an accused may prove the delay has impaired the ability to mount an effective defense, caused personal or professional harm, or a combination of both. After proving prejudice, the burden would then shift to the government to explain the delay in preferring charges. At that point, the harm to the accused would be balanced against the reasons for delay. An intent to harass, gain tactical advantage, or some other improper design would obviously weigh heavier against the government, even if the delay has been relatively short and the harm to the accused relatively less serious. However, a long delay from negligence, inattention, or because the accused's case has been assigned a low priority, could still violate due process if it resulted in grave prejudice to the military member. True to the dictates of *Lovasco*, whether a pre-preferral delay violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency" will depend on the specific facts of each case.

VII. CONCLUSION

Under the current state of the law, the quotation from Colonel Collins at the beginning of this article is all too true—"speedy trial" in the military justice system is a game lawyers play. The so-called "right" to speedy trial is indeed a myth, as long as the military can, with no legal accountability, continue to inflict one "administrative" action after another on military members—persons supposedly cloaked with a presumption of innocence, just like their civilian counterparts.[222] The body of law which delineates a military member's speedy trial rights—whether under the Sixth Amendment, Article 10 of the U.C.M.J., or R.C.M. 707—fails to supply the needed governmental accountability. No matter how creatively argued, the concept of "speedy trial" cannot be separated from the existence of formal charges or close forms of pretrial restraint.

The solution to this institutional flaw in the military justice system lies in the more flexible concept of "due process," either the Fifth Amendment variety or the collection of fundamental statutory rights known as "military due process." To utilize the latter doctrine, the military courts would have to break

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conclusion, then the government could cut him up in pieces and feed him to the *koi* fish in the pond in front of the Officers' Club without violating his due process rights."

[222] 10 U.S.C. § 851(c) (1994).

new ground to hold that a deliberate delay in preferring charges would violate military due process, and thereby require dismissal of charges without any showing of prejudice by an accused. Nonetheless, the analytical framework for such a result is present in the military court opinions that have addressed military due process.

It is a somewhat simpler task for the military courts to fashion a Fifth Amendment due process test, one that correctly applies the principles announced by the Supreme Court in *Marion* and *Lovasco* in a *military* context. It is only a matter of recognizing the profound difference between the power of civil government over civilians and that of military commanders over their subordinates, and selecting the elements of the test accordingly: a flexible, case-specific test where, after an accused proves legal, personal, or professional prejudice, the burden shifts to the government to explain the delay, and these reasons are then balanced against the harm to the accused.

Whichever proposed solution may be adopted, the result will be something now missing from military law—governmental accountability for oppressive pre-preferral delay. Military commanders and prosecutors need not fear this accountability. Under either test, only a very narrow class of accused service members will be successful in dismissing charges because of pre-preferral delay.[223] The proposed tests would open only a narrow window, but one which has, to date, been effectively and unfairly shut.

Commanders and military lawyers should not worry about explaining their actions. They are required to do this every day, in one fashion or another. However, commanders should think twice about automatically inflicting every "administrative" action in the book, just because a military member is suspected of an offense and *may* be convicted at court-martial, without regard to the duration of these actions, the effect on the member's life, and whether they are really necessary to protect the command's security and resources. Adoption of one of the proposed tests would provide commanders much needed incentive to do so.

Command staff judge advocates should also think twice about manipulations to avoid triggering a speedy trial "clock," while pressing on with a *de facto* prosecution. Such gamesmanship makes a fiction out of rules which have been solemnly promulgated for the protection of service members and undermines the credibility of the military justice system. Under either proposed test, the requirements of due process would deter this kind of sharp practice by military prosecutors, and impose accountability for extreme abuses of the system.

The law requires military members to be regularly briefed on the

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[223] Decisions of military trial judges to dismiss charges on this ground, as with any dismissal ruling, may be appealed by the government to the respective service's Court of Criminal Appeals and, if necessary, to the United States Court of Appeals for the Armed Forces. 10 U.S.C. § 862 (1994); R.C.M. 908, *supra* note 2.

military justice system.[224] During these briefings, our soldiers, sailors, airmen, marines, and coast guardsmen are told that the system strives to balance the needs of military discipline with fairness to the individual.[225] In the area of speedy trial, due process, and pre-preferral delay, the time has come to end the games and give the troops a reason to believe the company line.

[224] 10 U.S.C. § 937 (1994).

[225] The author has given these briefings many times, to Air Force enlisted personnel, senior and mid-level commanders, officer and noncommissioned officer professional military education courses, and classes of new military lawyers.

The Accomplice in American Military Law

COLONEL JAMES A. YOUNG III, USAF*

Soldier, scoundrel, scumbag, creep,
Doper, pusher, pigeon, cheat,
Actor, artist, liar, queer,
Testified before us here.[1]

I. INTRODUCTION

For almost 50 years, military appellate courts[2] have been trying to convince us that the law of accomplices[3] is "well established"[4] or "well settled."[5] While the concept that accomplices may have an interest in testifying that warrants special scrutiny by the factfinder is well settled, almost every other aspect of the law, from the definition of the term to the need for corroboration and instructions, has undergone significant modification. The numerous changes to the *Manual for Courts-Martial*, the many reported

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[1] From defense counsel's closing argument on findings in an Air Force special court-martial, circa 1978.

[2] As used in this article, military appellate courts refer to the service courts of criminal appeals (and their predecessors, the courts of military review and the boards of review) and the Court of Appeals for the Armed Forces (and its predecessor, the Court of Military Appeals).

[3] An accomplice is "[a] person who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime." BLACK'S LAW DICTIONARY 17 (6th ed. 1990). A more irreverent view: "One associated with another in a crime, having guilty knowledge and complicity, as an attorney who defends a criminal, knowing him guilty. This view of the attorney's position in the matter has not hitherto commanded the assent of attorneys, no one having offered them a fee for assenting." AMBROSE BIERCE, THE DEVIL'S DICTIONARY (1906) *quoted in* THE HARPER BOOK OF AMERICAN QUOTATIONS 165 (Gorton Carruth et al. eds., 1988).

[4] United States v. Aguinaga, 25 M.J. 6, 7 (C.M.A. 1987); United States v. Thompson, 26 M.J. 512, 515 (A.C.M.R. 1988) (citing Aguinaga); United States v. Hubbard, 18 M.J. 678, 683 (A.C.M.R. 1984); United States v. Rehberg, 15 M.J. 691, 693 (A.F.C.M.R. 1983); United States v. Mabra, 35 C.M.R. 823, 824 (A.F.B.R. 1964).

[5] United States v. Stephen, 15 U.S.C.M.A. 314, 35 C.M.R. 286, 290 (1965); United States v. Moore, 8 M.J. 738, 740 (A.F.C.M.R. 1980); United States v. Moore, 2 M.J. 749, 753 (A.F.C.M.R. 1977) (refers to law as settled rather than well settled); United States v. Newsom, 38 C.M.R. 833, 840 (A.F.B.R. 1967); United States v. Costello, 2 C.M.R. (A.F.) 177, 180 (A.F.J.C. 1949).

appellate cases, and the not infrequent dissents, are indicative of the lack of clear and unambiguous guidance on the subject.

This article will trace the development of the law of accomplices from early common law to its present status in the military and examine the rationale for the current rule. It will reveal how the appellate courts usurped the President's authority to establish the law of accomplices, suggest changes to the way military courts handle accomplice testimony, and propose additions to the Rules for Courts-Martial to clarify the rules.

II. HISTORICAL BACKGROUND

A. The Common Law

Criminal trials today bear little resemblance to those of yesteryear. At early common law, the accused was not permitted to be represented by counsel in felony cases[6] or to call witnesses in his own behalf.[7] The accused represented himself by addressing the jury, and speaking and answering questions as witnesses presented themselves; however, he was not placed under oath, and the courts expressly rejected the notion that such statements could be considered as evidence.[8] By the middle of the 1600s, the accused was permitted to call witnesses, but these witnesses were not permitted to take

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[6] Until 1695 for treason and 1836 for other felonies. 2 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 575 (Chadbourn rev. 1979) [hereinafter 2 WIGMORE, EVIDENCE]. At early common law, the term "felony" was limited to "offenses cognizable in the royal courts, conviction for which entailed forfeiture of life, limb and chattels and escheat of lands to the felon's lord after a year and a day in the king's hands." BLACK'S LAW DICTIONARY 617 (6th ed. 1990). Ironically, an accused charged with a misdemeanor was permitted the assistance of counsel. Apparently, it was thought that in felony cases "the potential threat to justice was too great to allow the obfuscations of lawyers to delay or deny justice." DAVID J. BODENHAMER, FAIR TRIAL 40 (1992).

> One day before the statute, already enacted, was to take effect, Sir William Parkins was brought to trial. He asked to be allowed counsel, quoting the preamble to the statute, which said it was just and reasonable that the defendant in a treason case have counsel. The court rejected the argument, and expressing some regret, informed Parkins that the old practice would remain in force for another twenty-four hours. They then denied his prayer for a postponement of the trial. Parkins was tried, found guilty, and executed.

CHARLES REMBAR, THE LAW OF THE LAND 383 n.* (1980).

[7] 2 WIGMORE, EVIDENCE, *supra* note 6, § 575 (Chadbourn rev. 1979). CHARLES REMBAR, THE LAW OF THE LAND 386-87 (1980).

[8] *Id.*

the oath until 1695 in treason cases and 1701 in other felony cases. Once defense witnesses were permitted to testify under oath, judges could still disqualify them from testifying if they had an interest in the outcome of the case.[9]

At early common law, both in England and the United States, convicted felons and persons having an interest in the outcome of a case were incompetent to testify in court.[10] Much of the history of this disqualification is obscure and inextricably intertwined with developments of several other features of the criminal law. While there is no evidence to pinpoint when disqualification of interested persons as witnesses in criminal cases began, it appears to have been adopted from civil law doctrine in the latter part of the 16th and early part of the 17th centuries.[11] Commentators suggest the rule was based on the belief that persons having an interest in a case would be more likely to lie than disinterested persons. Furthermore, at the time, courts were more likely to evaluate a party's case on the number of witnesses the party could muster rather than the quality of the testimony presented. It was thought to be unfair to have an unbiased witness's testimony cancelled out by one who had an interest in the outcome of the case.[12]

Such a rule of incompetency of interested persons would have had dire consequences for Crown prosecutions, especially in cases alleging treason or conspiracy, in which coconspirators are often the primary source of incriminating evidence. By judicial practice, and later pursuant to statutes, accomplices who were not indicted, or who were indicted in a separate indictment, were not disqualified; neither was a person who had been charged in the same indictment but ceased to be a party by the time he testified (by virtue of a *nolle prosequi*, an acquittal or discharge, or a conviction).[13]

In a practice known as "approvement," a person accused of committing a felony could exonerate himself by accusing others of participating in the offense and seeing that they were convicted.[14] The "approver" was taken out and immediately hanged if he failed to convict those he accused of participating in his felony, but that was no more than he could expect if he were convicted. Furthermore, the "approver" had little fear of being

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[9] *Id*.

[10] *Id.* §§ 575-80; 7 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2057 (3d ed. 1940) [hereinafter 7 WIGMORE, EVIDENCE]; WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 336 (2d ed. 1920).

[11] 2 WIGMORE, EVIDENCE, *supra* note 6, § 575.

[12] *Id.* § 576.

[13] *Id.* § 580.

[14] BLACK'S LAW DICTIONARY 102 (6th ed. 1990); United States v. Scoles, 14 U.S.C.M.A. 14, 33 C.M.R. 226, 231 (1963) (citing Guthrie v. Commonwealth, 171 Va. 461, 198 S.E. 481 (1938) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *330-31)).

contradicted because the persons he accused could not be represented by counsel, were disqualified from taking the stand to deny or explain their actions, and could not call witnesses to support their innocence. Under these circumstances, it "was natural, lawful, and just" that judges began commenting to their juries "sharply, and often indignantly, denouncing the worthlessness of the unconfirmed testimony of a witness who acknowledged himself a knave, and that he was testifying against his comrades in the hope of obtaining by this means a pardon for his own crimes."[15] In England and most jurisdictions in the American colonies, this was accepted as no more than the judge's obligation "to assist the jury, before their retirement, with an expression of his opinion (in no way binding them to follow it) upon the weight of the evidence."[16] It was not a rule of evidence, and the trial judge's omission of such a caution was not a ground for a new trial.[17]

Most likely as a result of the colonial experience, in which judges were often puppets of the Crown, starting in 1796, state legislatures began passing statutes enjoining judges from commenting upon the weight to be given to the evidence.[18] In order to bring the problems of accomplice testimony to the attention of the jury, American courts had to turn the English practice of commenting upon the weight of accomplice testimony into a rule of evidentiary law.[19] While the rule against summing up the evidence apparently never applied in federal[20] or military courts,[21] it appears that, to a great extent, judges in those courts have adopted the state practice of not summing up.[22]

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[15] 7 WIGMORE, EVIDENCE, *supra* note 10, § 2057 (quoting State v. Carey, 56 Atl 632, 76 Conn. 342 (1904)).

[16] 7 WIGMORE, EVIDENCE, *supra* note 10, § 2056.

[17] *Id*. *But see* 11 HALSBURY'S LAWS OF ENGLAND ¶¶ 453-57 (4th ed. 1976) (The practice of English judges warning jurors that it is dangerous to convict on the uncorroborated testimony of an accomplice now has the force of law. If the trial judge fails to warn the jury, "the conviction will be quashed by the Court of Appeal, even if in fact there was ample corroboration of the accomplice's evidence, unless the court holds that a reasonable jury would inevitably have arrived at the same conclusion with the instruction.")

[18] Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161 (1988); 7 WIGMORE, EVIDENCE, *supra* note 10, § 2056; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 137 (Touchstone 1973).

[19] 7 WIGMORE, EVIDENCE, *supra* note 10, § 2056.

[20] 9 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2551 (Chadbourn rev. 1981) [hereinafter 9 WIGMORE, EVIDENCE]; Weinstein, *supra* note 18. *See* Quercia v. United States, 289 U.S. 466, 53 S. Ct. 698, 77 L. Ed. 1321 (1933); Horning v. District of Columbia, 254 U.S. 135, 41 S. Ct. 53, 65 L. Ed. 185 (1920); Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951); United States v. Aaron, 190 F.2d 144 (2d Cir. 1951).

[21] United States v. Berry, 6 U.S.C.M.A. 638, 20 C.M.R. 354, 359 (1956); United States v. Andis, 2 U.S.C.M.A. 364, 8 C.M.R. 164 (1954). *See* MANUAL FOR COURTS-MARTIAL,

The incompetency of the accused persisted much longer than the other disqualifications (conviction of a felony and interest in the outcome of the case), but began to disappear in the United States around the end of the American Civil War.[23] Although the accused now could defend himself in court under oath, be represented by counsel, and call witnesses in his defense, judges continued to instruct on the unreliable nature of accomplice testimony.

B. The American Military Experience

In the American military, a witness was not incompetent to testify merely because he was the accused's accomplice. If the prosecution called upon the accomplice to testify against his co-accused in a joint trial, a *nolle prosequi* was entered or if not, and the witness testified in good faith, the court-martial order promulgating the action announced that further proceedings against the accomplice were discontinued.[24] While the accused was entitled to testify on his behalf since at least 1878,[25] the testimony of accomplices was still viewed with caution, and as a general rule, "such testimony [could not] safely be accepted as adequate for [conviction] unless corroborated by reliable evidence."[26]

UNITED STATES, 1969 REVISED EDITION ¶ 73*c*; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920(e) Discussion (1995 edition).

[22] Several factors may have encouraged federal judges to adopt the state rule: (1) before their appointments, many federal judges practiced more extensively in state courts; (2) judges are concerned that jury instructions are already too long without summing up the evidence; (3) summing up or commenting on the evidence is another ground on which the accused can appeal her conviction; and (4) Congress specifically declined to adopt the Supreme Court's proposal to codify the judge's right to summarize and comment on the evidence in Fed. R. Evid. 105. Weinstein, *supra* note 18; 9 WIGMORE, EVIDENCE, *supra* note 20, § 2551. Judge Sullivan of the United States Court of Appeals for the Armed Forces has extolled the virtues of the English practice and recommended that military judges use their authority "to give the jury a good, exhaustive, accurate, and fair view of the facts in the case so the jury can do its job on a more informed bases." United States v. Figura, 44 M.J. 308, 310-11 (1996) (Sullivan, J., concurring).

[23] It appears that the first statute in the United States which permitted an accused to testify in a criminal case was enacted in 1864 by the state of Maine. The English did not follow suit until 1898. 2 WIGMORE, EVIDENCE, *supra* note 6, § 579. As late as 1961, by statute, an accused in the state of Georgia was not permitted to testify in his own behalf. Ferguson v. Georgia, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961).

[24] WINTHROP, *supra* note 10, at 336.

[25] "By the Act of Congress of March 16, 1878, c. 37, it is provided that upon criminal trials and proceedings before not only 'United States courts' and 'Territorial courts,' but also 'courts-martial and courts of inquiry,' the accused '*shall, at his own request, but not otherwise, be a competent witness.*'" WINTHROP, *supra* note 10, at 335. *See* 18 U.S.C. § 3481 (1978).

[26] WINTHROP, *supra* note 10, at 357.

By 1921, corroboration apparently was no longer required: "While in Federal courts and courts-martial corroboration of the testimony of an accomplice need not be required, yet from the character of the associations formed the uncorroborated testimony of an accomplice should be received with great caution."[27]

The wording of the rule was modified slightly in 1928: "A conviction may be based on the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and is to be considered with great caution."[28]

In 1949, the rule was rewritten again.

> [A] conviction *should not* be based on the contradictory, uncertain or improbable testimony of but one witness if the contradiction or other fault is not explained. A conviction may be based upon the uncorroborated testimony of an accomplice, but such testimony, even though apparently credible, is of doubtful integrity and is to be considered with great caution.[29]

Just two years later, President Truman prescribed a new *Manual for Courts-Martial* to reflect the changes brought about by the enactment of the Uniform Code of Military Justice.[30] Based on previous Army appellate decisions, the new *Manual* "placed accomplices and victims of sexual offenses in the same category as far as credibility was concerned."[31] Specifically, the manual read:

> [A] conviction *cannot* be sustained solely on the self-contradictory testimony of a particular witness, even though motive to commit the offense is shown, if the contradiction is not adequately explained by the witness in his testimony. Also, a conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense, or upon the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable. The uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution.[32]

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[27] MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, 1921, ¶ 224. *See also*, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1940, Article of War 38, Witnesses § 397 (57).

[28] MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, 1928, ¶ 124*a*.

[29] MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, 1949, ¶ 139*a* (emphasis added). President Truman promulgated the same rule for the Air Force. MANUAL FOR COURTS-MARTIAL, UNITED STATES AIR FORCE, 1949, ¶ 139*a*.

[30] 10 U.S.C. §§ 801-946 (1950) (also referred to as "UCMJ" or "the Code").

[31] United States v. Rehberg, 15 M.J. 691, 694 (A.F.C.M.R. 1983).

[32] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 153*a* (emphasis added). Note the change from "should not" in the 1949 *Manual* to "cannot" in the 1951 *Manual*.

The last sentence in this version is reminiscent of the language in the 1921 *Manual* and made it clear that only uncorroborated accomplice testimony was to be treated with caution.

In 1963, in *United States v. Winborn*,[33] a divided Court of Military Appeals rewrote the law of accomplices in military practice. Winborn was convicted of two instances of theft of packages from the mail. The prosecution's evidence consisted of the testimony of Humphries, a fellow postal clerk, who admitted that he participated with Winborn in the thefts, and the accused's confession, which substantiated the testimony of the witnesses. The defense counsel requested an instruction that "the testimony of an accomplice is to be regarded with suspicion and be carefully scrutinized before accepting it." The law officer[34] refused, ruling that such an instruction was only necessary if the accomplice's testimony was uncorroborated, and in this case, the accused's confession corroborated the accomplice's testimony. The Court of Military Appeals was concerned that the only corroboration for the confession was the accomplice's testimony and the only corroboration of the accomplice's testimony was the confession.[35] The court held that it was prejudicial error for the law officer to refuse to give the requested instruction because "Humphries was an admitted accomplice, the only witness against the accused, and *the requested instruction was couched in the proper language*."[36] The basis for the court's decision is not clear. The court may have been saying no more than that the accused's pretrial confession was not sufficient corroboration for the judge to avoid giving the accomplice instruction. But, by approving of the defense proposed instruction, the court changed one of the basic tenets of military accomplice law, and after *Winborn*, even the corroborated testimony of an accomplice became suspect.

The 1969 *Manual* adopted the changes brought about by *Winborn* and its progeny:[37]

> [A] conviction cannot be based solely upon self-contradictory testimony given by a witness other than the accused, even if a motive on the part of the accused to commit the offense charged is shown, if the contradiction is not adequately explained by the witness in his testimony. Also, a conviction cannot be based upon uncorroborated testimony given by an alleged victim in a trial for a sexual offense or upon uncorroborated testimony given by an accomplice in a trial for any offense, if in either case the testimony is self-contradictory, uncertain, or improbable. *Even if apparently corroborated*

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[33] United States v. Winborn, 14 U.S.C.M.A. 277, 34 C.M.R. 57 (1963).

[34] The predecessor to the military judge. *See* UMCJ art. 67, 10 U.S.C. § 867 (1950).

[35] United States v. Winborn, 34 C.M.R. at 61.

[36] *Id*. (emphasis added).

[37] *See* Department of the Army Pamphlet 27-2, *Analysis of Contents Manual for Courts-Martial, United States, 1969 Revised Edition* 27-42 (1970).

> *and apparently credible*, testimony of an accomplice *which is adverse to the accused* is of questionable integrity and is to be considered with great caution. . . . *When appropriate, the above rules should, upon request by the defense, be included in the general instructions of the law officer or the president of a special court-martial.*[38]

In 1980, the military law of evidence underwent substantial changes. President Carter replaced Chapter XXVII of the *Manual*, a narrative summation of the evidentiary rules, with the Military Rules of Evidence.[39] The new rules were based on the Federal Rules of Evidence[40] which do not mention accomplice testimony. Furthermore, the rules set up a hierarchy of sources for military evidentiary law. If the *Manual*, the Uniform Code of Military Justice, and the rules of evidence fail to provide a governing standard, then, insofar as practical and not inconsistent with those three sources, courts must apply the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. Only after all four sources are exhausted can a court resort to the common law.[41]

The President made a conscious decision to retain specific rules regarding accomplice testimony by moving them, almost verbatim, from the evidence chapter to a chapter dealing with procedural matters.[42]

> **Findings; General; Weighing Evidence**: Also, a conviction cannot be based upon uncorroborated testimony given by an accomplice in a trial for any offense if the testimony is self-contradictory, uncertain, or improbable. Even if apparently corroborated and apparently credible, testimony of an accomplice which is adverse to the accused is of questionable integrity and is to be considered with great caution. When appropriate, the above consideration should, upon request by the defense, be included in the general

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[38] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 REVISED EDITION ¶ 153*a* (emphasis added). Actually, two manuals were promulgated for 1969. On 11 September 1968, President Johnson prescribed the MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, to be effective 1 January 1969. On 24 October 1968, he signed into law the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968), which required extensive changes to the *Manual*. Department of the Army Pamphlet 27-2, *Analysis of Contents Manual for Courts-Martial, United States, 1969 Revised Edition* iii (1970). The revised edition took effect 1 August 1969.

[39] Exec. Order No. 12198 (1980).

[40] By adopting the new rules, the President complied with his mandate to prescribe rules for the trial of cases, "including modes of proof, . . . which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." UCMJ art. 36(a), 10 U.S.C. § 836(a) (1950).

[41] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 101(b) (1995 ed.). *See* STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL 5 (4th ed. 1997).

[42] From ¶ 153*a* to ¶ 74*a*(2).

> instructions of the military judge or the president of a special court-martial without a military judge.[43]

In 1984, President Reagan promulgated a new *Manual*.[44] The expressed purpose of this revision was to thoroughly review military criminal practice, bring it up to date and conform it to federal practice where practical, and adopt a rule, as opposed to a narrative format. The Rules for Courts-Martial (hereinafter R.C.M.), are based, where possible, on the Federal Rules of Criminal Procedure.[45] As with the federal rules, the military rules themselves do not mention accomplices. The only specific reference to accomplices appears in the discussion to one of the rules: "Findings of Guilty may not be based solely on the testimony of a witness other than the accused which is self-contradictory, unless the contradiction is adequately explained by the witness. Even if apparently credible and corroborated, the testimony of an accomplice should be considered with great caution."[46]

III. WHO ARE ACCOMPLICES?

Since at least 1921, the *Manuals for Courts-Martial* had suggested that uncorroborated testimony of an accomplice should be received with great caution. However, nowhere in the *Manuals* was the term "accomplice" defined. During the first few years of its existence, the Court of Military Appeals was reluctant to decide upon a definition. When asked to choose between competing definitions, the court declined, finding the particular witness was an accomplice under both definitions.[47] The court did offer a tentative definition in 1955: "Generally speaking, an accomplice is one who aids or abets the principal wrongdoer in the commission of an offense."[48]

Finally, in *United States v. Scoles*,[49] after recognizing that "[t]here is no universally accepted definition of the term 'accomplice,'" the court chose a very broad definition. "[A] witness is an accomplice if he was culpably involved in the crime with which the accused was charged."[50] In a later case, the court further explained:

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[43] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 REVISED EDITION, ¶ 74*a*(2). Exec. Order No. 12198 (1980).

[44] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984. Exec. Order No. 12473 as amended by Exec. Order No. 12484 (1984).

[45] *Id.* at A21-1.

[46] *Id.* R.C.M. 918(c) Discussion.

[47] United States v. Bey, 4 U.S.C.M.A. 665, 16 C.M.R. 239, 243 (1954).

[48] United States v. Schreiber, 5 U.S.C.M.A. 602, 18 C.M.R. 226, 233 (1955).

[49] United States v. Scoles, 14 U.S.C.M.A. 14, 33 C.M.R. 226 (1963).

[50] *Id.* at 231.

> We measure the witness's involvement as an accomplice generally by the rule of whether he is subject to trial for the offense with which the accused is charged. While the various opinions speak in terms of indictment, conviction, being culpably involved, or similar phrases, the real issue presented is whether the evidence establishes that the witness was subject to criminal liability for the same crime as the accused. An affirmative answer establishes that he is an accomplice, while, with some exceptions, a negative answer determines that he is not.[51]

This is the test most often cited in recent cases.[52]

Having an established definition has not been a panacea. The courts have continued to struggle in applying that definition to particular cases. While looking to civilian case law, the military courts have, on occasion, reached contrary results based on the broader military definition and the fact that many offenses are prosecuted under one statute–Article 134.[53] For example, in civilian law, bribe-givers and bribe-takers are not regarded as accomplices of each other, and neither are persons who buy narcotics and those who sold the narcotics to them.[54] In military practice, they are accomplices.[55]

On the other hand, a witness charged with the same offense as the accused, named as a co-actor on the accused's charge sheet, and who was present at the scene of the offense, is not necessarily an accomplice because a witness must be presumed innocent until shown by the evidence to be an accomplice.[56] But, he cannot escape accomplice status merely because he is not amenable to military jurisdiction.[57] Likewise, the wife of an accomplice, "who, although aware that her husband plans to commit a crime but who does

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[51] United States v. Garcia, 22 U.S.C.M.A. 8, 46 C.M.R. 8, 10 (1972).

[52] *See* United States v. McKinnie, 32 M.J. 141, 143 (C.M.A. 1991); *accord* United States v. Hecker, 42 M.J. 640 (A.F.Ct.Crim.App. 1995).

[53] UCMJ art. 134, 10 U.S.C. § 934 (1950). Article 134 criminalizes "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital."

[54] CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 614 (14th ed. 1987).

[55] Bribery: United States v. Bey, 4 U.S.C.M.A. 665, 16 C.M.R. 239 (1954) (Although not strictly a bribery case, both parties and the court concluded that the law as applied to bribery applied. Since both could be prosecuted under Article 134, they were accomplices.). Drugs: United States v. Aguinaga, 25 M.J. 6 (C.M.A. 1987); United States v. Lee, 6 M.J. 96 (C.M.A. 1978). The cases cite *United States v. Allums*, 5 U.S.C.M.A. 435, 438, 18 C.M.R. 59, 62 (1955) for this proposition. In *Allums*, the Court of Military Appeals said it did not need to rule on the question; however, the court opined that it could not see much difference between the buyer and seller of drugs and the giver and receiver of bribes in *United States v. Bey*. Of course, at the time, most drug offenses were prosecuted under Article 134.

[56] United States v. Garcia, 22 U.S.C.M.A. 8, 46 C.M.R. 8, 10 (1972).

[57] United States v. Scoles, 33 C.M.R. at 231.

not enter into such planning or in the actual perpetration of the crime is not an accomplice."[58] An individual who acts under the auspices of a law enforcement organization is not criminally responsible for his participation in the crimes with which the accused was charged; therefore, he is not an accomplice.[59] A thief and the receiver of stolen property are not accomplices unless they enter into a prior agreement for the thief to steal the property and for the other to receive it.[60]

The courts have had the greatest difficulty resolving cases in which subordinates are called to testify against their military superiors. For the most part, they have held that subordinates are accomplices of their superiors. In *United States v. Urich*,[61] the accused was charged with wrongfully and unlawfully accepting compensation for performing his official duties, paying mustering out pay. He notified four airmen of delays in the payment of the mustering out pay which he could remedy if they paid him a sum of money. All four paid him, but one did so with marked money provided by the Air Force Office of Special Investigations. As it was not necessary for the resolution of the case, the Air Force Board of Review assumed *arguendo* that all four airmen were accomplices.[62]

In *United States v. Bey*,[63] the Court of Military Appeals was asked to decide whether a trainee, Private Nelson, who paid for a pass to leave the post, was an accomplice of the platoon sergeant who received the payment. Nelson knew that two of his friends had paid for passes. Nelson testified that after he received his pass, the accused asked for a gift of money. The court noted that Nelson had received training on the proper procedure for obtaining a pass and was aware that he was committing an offense if he paid for one. Believing the law of bribery to be analogous, the court decided that, as both the accused and Nelson would be chargeable under Article 134, Nelson was an accomplice.[64] Judge Latimer dissented, concluding that the trainee was not an accomplice, but a victim whose "cooperation can hardly be described as voluntary. He was told by his superior noncommissioned officer what to do and he complied. That is not the cooperation which I envisage makes a person a criminal."[65]

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[58] United States v. Petrie, 40 C.M.R. 991, 997 (A.F.B.R. 1969).

[59] United States v. Combest, 14 M.J. 927, 931 (A.C.M.R. 1982) (citing United States v. Kelker, 50 C.M.R. 410 (A.C.M.R. 1975)); United States v. Hand, 8 M.J. 701 (A.F.C.M.R. 1980), *rev'd on other grounds*, 11 M.J. 321 (C.M.A. 1981); United States v. Baker, 2 M.J. 360, 363 n.6 (A.F.C.M.R. 1977).

[60] United States v. Lell, 16 U.S.C.M.A. 161, 36 C.M.R. 317, 320 (1966).

[61] United States v. Urich, 8 C.M.R. 799 (A.F.B.R. 1953).

[62] *Id.* at 801.

[63] United States v. Bey, 4 U.S.C.M.A. 665, 16 C.M.R. 239 (1954).

[64] *Id.* at 243.

[65] *Id*. at 248 (Latimer, J., dissenting).

A year later, the Court of Military Appeals reviewed the conviction of a second lieutenant charged with the premeditated murder of a Korean national.[66] The Korean national had been captured by Air Police guarding an ammunition dump. The accused told Airman First Class Kinder to take the victim up the hill and shoot him. Kinder did so, and testified against the accused. The court, without discussion, held that Kinder was an accomplice.[67]

In *United States v. Wiley*,[68] the Court of Military Appeals recognized the coercive nature of the superior-subordinate relationship. Platoon Sergeant Wiley instructed Private Carter, a trainee, to collect money from each trainee in the platoon for the purchase of barracks supplies. Carter collected and gave approximately $100 to the accused. On other occasions, Wiley suggested to members of his platoon that he needed money.[69] Collections were taken up and the money provided to Wiley. Although citing *Bey*, the court reached the opposite conclusion. It found that the trainees were not accomplices because they were merely responding to pressure from Sergeant Wiley and did not benefit from the collections.[70]

More recently, the superior-subordinate accomplice issue has been raised in two Army fraternization cases. In *United States v. Adams*,[71] the Army Court of Military Review examined the status of a female trainee subordinate who testified that she had socialized and had sexual intercourse with the accused, a noncommissioned officer responsible for her training, in violation of a general regulation which prohibited fraternization of permanent party personnel and trainees. After recognizing that the proscription against such fraternization is based on "the tender age, military naivete, and overall vulnerability of trainees, as well as the requirement to maintain an atmosphere of impartiality toward trainees,"[72] the court nevertheless found the witness to be an accomplice. "Regardless of the underlying rationale for the proscription, the regulation does not reveal any distinction in culpability among those who violate it."[73]

In a similar case,[74] Staff Sergeant McKinnie, an instructor, was convicted of violating a general regulation prohibiting instructors and students from fraternizing. At trial, three female students and another instructor, who

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[66] United States v. Schreiber, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955).

[67] *Id*. at 233.

[68] United States v. Wiley, 16 U.S.C.M.A. 449, 37 C.M.R. 69 (1966).

[69] *Id.* at 70-71.

[70] *Id*. at 71.

[71] United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985).

[72] *Id.* at 998.

[73] *Id*.

[74] United States v. McKinnie, 32 M.J. 141 (C.M.A. 1991).

participated in the parties with the female students and the accused, testified against McKinnie. The military judge instructed the members that the other instructor was an accomplice, but refused to do so as to the three trainees, claiming they were victims.[75] The Court of Military Appeals disagreed, ruling that, by the explicit terms of the regulation, students were also responsible for acts of fraternization. Therefore, the students were accomplices.[76]

IV. WHO DECIDES IF THE WITNESS IS AN ACCOMPLICE?

In the majority of jurisdictions, if the evidence clearly establishes that a witness is an accomplice, the judge determines that the witness is an accomplice as a matter of law, and so instructs the court. When the evidence is in dispute, the question of whether a witness is an accomplice is for the factfinder to resolve.[77] The military courts adopted that position in numerous cases, but refused to find error when the law officer or military judge left the question for the court members to determine despite undisputed evidence that the witness was an accomplice.[78]

In 1992, without overruling or even citing previous cases to the contrary, the Court of Military Appeals specifically "reject[ed] the notion that the military judge should 'label' a witness an accomplice as a matter of law."[79] The court claimed that attaching a label to the testimony implies that the judge believes the witness committed a crime with the accused. Thus, "whenever the evidence raises a reasonable inference that a witness may have been an accomplice or claims to have been an accomplice of the accused," the issue should be presented to the factfinder for resolution.[80]

V. CORROBORATION

Within the United States, the rules for weighing accomplice testimony fall generally into three categories. Under common law, and federal law, a conviction may be based solely upon the uncorroborated testimony of an accomplice. On the other hand, many states have passed statutes which require corroboration of accomplice testimony before it can be considered at

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[75] *Id*. at 142 (C.M.A. 1991).

[76] *Id*. at 144.

[77] CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 611 (14th ed. 1987).

[78] *See* United States v. Palmer, 16 M.J. 501, 503 (A.F.C.M.R. 1983) (error not to find witness was an accomplice as a matter of law, but accused was not prejudiced); United States v. Diaz, 22 U.S.C.M.A. 52, 46 C.M.R. 52, 56 (1972); United States v. Tellier, 34 C.M.R. 800, 804 (A.F.B.R. 1964); United States v. Graalum, 19 C.M.R. 667, 693 (A.F.B.R.1955).

[79] United States v. Gillette, 35 M.J. 468, 470 (C.M.A. 1992).

[80] *Id*.

all.[81] The military law fell somewhere between these two theories: A conviction could be based on the uncorroborated testimony of an accomplice as long as it was not self-contradictory, uncertain, or improbable.[82]

Despite this concern for corroboration, neither the *Manual* nor the early decisions of the Court of Military Appeals provided a definition of the term in relation to accomplice testimony. So, the military appellate courts borrowed a definition from civilian case law. The corroboration "must be independent of the accomplice's testimony and connect the accused with the commission of the offense."[83]

Although corroboration is only necessary if the accomplice's testimony is "self-contradictory," "uncertain," or "improbable," the appellate courts have spent little time evaluating those terms or the type of evidence required to establish them. Instead, the courts have tended to review the totality of the evidence, and, in conclusory statements, held that the evidence did or did not meet the standard.[84] Appellate courts reviewed the offenses with which the accomplice could be charged, his character, his previous statements, his testimony, and the type of deal that was being offered by the prosecution in exchange for his testimony. Then, the court would ask if a reasonable factfinder could have found that the accomplice's testimony was not self-contradictory, uncertain, or improbable.[85]

The Army Court of Military Review was the first to take a different approach. In *United States v. McPherson*,[86] it was asked to set aside the accused's conviction because the testimony of the two accomplices differed as to some of the details, and at least one of them had made contradictory, pretrial, sworn statements. The court declined to provide the accused any

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[81] CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 611 (14th ed. 1987).

[82] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 918(c) Discussion (1995 ed.); United States v. Rehberg, 15 M.J. 691, 693 (A.F.C.M.R. 1993).

[83] United States v. Wilson, 2 M.J. 683, 685 (A.F.C.M.R. 1976). *See also* United States v. Thompson, 44 C.M.R. 732, 737 (N.C.M.R. 1971); CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 611 (14th ed. 1987); United States v. Aguinaga, 25 M.J. 6, 8 (C.M.A. 1987).

[84] *See* United States v. Lee, 6 M.J. 96, 98 (C.M.A. 1978) (finding "testimony unequivocally established the appellant's participation in the criminal venture); United States v. Allums, 5 U.S.C.M.A. 435, 18 C.M.R. 59, 62 (1955); United States v. Henderson, 4 U.S.C.M.A. 268, 15 C.M.R. 268, 272-73 (1954) (using totality of circumstances test to determine if rape complainant's testimony was self-contradictory, uncertain, or improbable); United States v. Baker, 2 M.J. 360, 364 (A.F.C.M.R. 1977); United States v. Moore, 2 M.J. 749, 754 (A.F.C.M.R. 1977).

[85] United States v. Diaz, 22 U.S.C.M.A. 52, 46 C.M.R. 52, 57 (1972) (Fact that testimony of accomplice differed from testimony of other prosecution witnesses and that "some reasonable minds may not find a part or all of his testimony believable" does not provide "a predicate for a legal conclusion that the testimony is improbable.").

[86] United States v. McPherson, 12 M.J. 789, (A.C.M.R. 1982).

relief, holding that "the self-contradictory factor relates solely to the testimony of the witness during the trial."[87] By eliminating the need to consider the accomplice's prior inconsistent statements and reputation for truth and veracity, this test made it much less likely that an accomplice's testimony would have to be corroborated. So far, the Court of Military Appeals has found it unnecessary to rule on this issue.[88]

There has been considerable debate over whether the existence of corroboration is a question for the law officer/military judge or the court members to decide. In 1955, the Court of Military Appeals suggested the matter should not be submitted to the members. Corroboration is a technical concept that is difficult to apply, is beyond the expertise of most court members, and would only serve to confuse the members. Under this view, the law officer would determine whether corroboration existed. If it did not, he would instruct the court that, as a matter of law, they must acquit. If he found corroboration, the case would go to the court members. After discussing the issue in some detail, however, the court decided that it did not need to resolve the issue in that particular case.[89] The Air Force Court of Military Review, however, ruled that the existence of corroboration is a matter for the military judge.[90]

Another tenet of civilian law adopted by the military is that one accomplice cannot corroborate the testimony of another accomplice.[91] Does that mean that an accused's pretrial statements are not sufficient to corroborate an accomplice's testimony? In *United States v. Allums*,[92] the Court of Military Appeals suggested the accused's pretrial statement corroborated the accomplice's testimony, although the court seemed to rely more on the

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[87] *Id.* at 791; *accord* United States v. Rehberg, 15 M.J. at 693.

[88] United States v. Aguinaga, 25 M.J. at 7 n.1.

[89] United States v. Allums, 5 U.S.C.M.A. 435, 18 C.M.R. 59, 62-63 (1955).

[90] United States v. Sanders, 34 M.J. 1086, 1093 (A.F.C.M.R. 1992); *see* United States v. Wilson, 2 M.J. 683, 686 (A.F.C.M.R. 1976) (holding military judge technically erred by submitting the question of corroboration to the court members rather than informing them as a matter of law that the accomplice's testimony was uncorroborated).

[91] United States v. Devine, 36 M.J. 673, 675 (N.M.C.M.R. 1992); United States v. Sanders, 34 M.J. 1086, 1094 (A.F.C.M.R. 1992); United States v. Williamson, 2 M.J. 597, 599 (A.F.C.M.R. 1976); United States v. Thompson, 44 C.M.R. 732, 736 (N.C.M.R. 1971) (citing Arnold v. United States 94 F.2d 499, 507 (1938)). *But see* United States v. McKinnie, 32 M.J. 141, 145 (1991) (Court concludes that all four accomplices gave consistent testimony and there was no evidence that they collaborated or plotted amongst themselves. Query whether the court meant to suggest that one accomplice can corroborate the testimony of another accomplice.)

[92] United States v. Allums, 5 U.S.C.M.A. 435, 18 C.M.R. 59, 62 (1955).

accused's trial testimony. Eight years later, in *United States v. Winborn*,[93] the court expressed its reservations.

> Here we have a situation reminiscent of a circle. Winborn could not be convicted on his uncorroborated confession and the testimony of the accomplice supplied that corroboration. But this testimony is suspect and had the court not believed it, it could not then have considered the confession for the record would have been devoid of any evidence, direct or circumstantial, that the offense charged had probably been committed by someone.[94]

By 1978, the Court of Military Appeals apparently overcame its reservations, at least when the defense failed to request an accomplice instruction.

> While one may argue whether the confession corroborates the accomplice's testimony or the accomplice's testimony establishes the prerequisite for the admission of the confession, such circuity [sic] does not preclude the admission into evidence of each. . . . [T]he confession is a proper factor in evaluating whether the "plain error" exception should be applied.[95]

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[93] United States v. Winborn, 14 U.S.C.M.A. 277, 34 C.M.R. 57, 61 (1963).

[94] *Id*.

[95] United States v. Lee, 6 M.J. 96, 98 (C.M.A. 1978). The Air Force had reached the same conclusion in United States v. Wilson, 2 M.J. 683, 686 (A.F.C.M.R. 1976) (citing United States v. Allums, 5 U.S.C.M.A. 435, 18 C.M.R. 59, 62 (1955) and not mentioning United States v. Winborn, 14 U.S.C.M.A. 277, 34 C.M.R. 57, 61 (1963).

VI. INSTRUCTIONS

What instructions must be given are at the heart of the accomplice issue. Understandably, the accused wants the military judge to caution the court members about the credibility of the prosecution's witnesses, but not to do so for defense witnesses. In this section, we will examine the evolution of the case law requiring military judges to give accomplice instructions, the developing revolt from the early decisions, and the rules governing instructions for defense witnesses.

A. The Requirement for Instructions

Initially, under the UCMJ, the service appellate courts refused to require that accomplice instructions be given, even if raised by the evidence and requested by the defense.[96] These decisions were supported by federal precedent[97] and the 1951 *Manual*.[98] The service appellate courts recognized that it would be best to give the instruction when appropriate,[99] but were

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[96] United States v. Sarae, 9 C.M.R. 633, 637-38 (A.F.B.R. 1953); United States v. Urich, 8 C.M.R. 799 (A.F.B.R. 1953).

[97] Caminetti v. United States, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917); Holmgren v. United States, 217 U.S. 509, 30 S. Ct. 588, 54 L. Ed. 861 (1910); United States v. Block, 88 F.2d 618 (2d Cir.), *cert. denied*, 301 U.S. 690, 57 S. Ct. 793, 81 L. Ed. 1347 (1937); United States v. Pine, 135 F. 2d 353 (5th Cir.), *cert. denied*, 320 U.S. 740, 64 S. Ct. 40, 88 L. Ed. 439 (1943).

[98] "The law officer is not required to give the court any instructions other than those required by Article 51c [¶ 73*a*, *b*]. However, when he deems it necessary or desirable, he may give the court such additional instructions as will assist it in making its findings." MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 73*c*. UCMJ art. 51(c) provides:

> Before a vote is taken on findings, the law officer of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge [the court]–
>
> 1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;
>
> 2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;
>
> 3) that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and
>
> 4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government.

[99] United States v. Sarae, 9 C.M.R. 633, 637-38 (A.F.B.R. 1953); United States v. Phillips, 9 C.M.R. 186, 197 (A.B.R. 1952), *rev'd on other grounds*, 3 U.S.C.M.A. 137, 11 C.M.R. 137 (1953).

reluctant to impose additional instructional rules which "must perforce apply also to special courts-martial, where the president is, more often than not, without legal training."[100] As the service appellate courts could "affirm only such findings . . . as it finds correct in law and fact," they could apply the rules governing accomplice testimony on appeal.[101]

The Court of Military Appeals was not as reluctant. In *United States v. Bey*,[102] the Court of Military Appeals found it was prejudicial error "for a law officer to refuse, in a proper case, a request for an instruction on accomplice testimony, which reasonably puts him 'on notice' that the issue is essential to a proper finding."[103] "To hold otherwise would destroy the very purpose of the rule on accomplice testimony."[104] The court refused to accept a short instruction on witness credibility as sufficient to place the court members on notice that they should view the accomplice's testimony with great caution,[105] and specifically rejected the federal practice which required that the defense requested instruction be a correct statement of the law.[106] This did not put the issue to rest.

Six months later, in *United States v. Allums*,[107] the Court of Military Appeals upheld the conviction of a confessed distributor of marijuana despite

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[100] United States v. Urich, 8 C.M.R. 799, 803 (A.F.B.R. 1953) (quoting United States v. Ginn, 1 U.S.C.M.A. 453, 4 C.M.R. 45, 48 (1952)). Until 1968, the president of the court presided over both general and special courts-martial. In general courts-martial, the convening authority was required to appoint a judge advocate to act as law officer. UCMJ art. 26(a), 10 U.S.C. § 826(a) (1950). During trial, the law officer ruled on all interlocutory questions except challenges, and advised the court on questions of law and procedure. The law officer was also responsible for instructing the court before the court closed to deliberate on findings and sentence. UCMJ art. 51(c), 10 U.S.C. § 851(c) (1950). In special courts-martial, no law officer was appointed. The president of the court, the senior member and usually a person without any legal training, assumed the duties of the law officer, including instructing the court. UCMJ art. 51(b) and (c), 10 U.S.C. §§ 851(b) and (c) (1950). As part of the Military Justice Act of 1968, the military judge replaced the law officer in general courts and was required to preside over any special court-martial which could adjudge a bad-conduct discharge. UCMJ arts. 18 and 26, 10 U.S.C. §§ 819 and 826 (1968).

[101] UCMJ art. 66(c), 10 U.S.C. § 866(c) (1950). Of course, the service appellate courts only review those cases "in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." UCMJ art. 66(b), 10 U.S.C. § 866(b) (1950).

[102] United States v. Bey, 4 U.S.C.M.A. 665, 16 C.M.R. 239 (1954).

[103] *Id.* at 245.

[104] *Id*.

[105] *Id*. at 246. The law officer gave the following credibility instruction: "Further, I would like to instruct the court that the credibility of a witness is his worthiness of belief. The court may ordinarily draw its own conclusions as to the credibility of a witness and attach such weight to his evidence as his credibility may warrant." *Id*. at 242.

[106] *Id*. At 245.

[107] United States v. Allums, 5 U.S.C.M.A. 435, 18 C.M.R. 59 (1955).

the law officer's refusal to give the two defense requested accomplice instructions.[108] Citing *Bey*,[109] the court found error in the failure to give the instruction concerning the need for close scrutiny of an accomplice's testimony, but a lack of prejudice to the accused due to the compelling evidence of guilt.[110] Although, the accomplice's testimony was "uncertain" as to some matters, the court held, as a matter of law, that it was corroborated.[111] Judge Brosman, writing for the court, suggested that the *Manual* provision concerning corroboration was probably intended to be applied only by the law officer and the appellate courts, not the court members.[112] Under this view, the law officer would determine whether the testimony was corroborated. If it was, he would submit the case to the court members; if it was not, he would direct the court to return a finding of not guilty.[113]

In 1963, after Judges Kilday and Ferguson replaced Judges Brosman and Latimer, the Court of Military Appeals held that it was prejudicial error for the law officer to refuse to give a defense requested instruction on the credibility of accomplice testimony, despite the presence of corroboration in the form of the accused's pretrial confession.[114] The majority reasoned that, although the admissibility of the confession was for the law officer to decide, the credibility of a government witness was for the court to assess.[115] The court adopted the federal rule for evaluating the refusal of the law officer to give a defense requested instruction. "Refusal 'may be regarded as reversible error if, but only if, (1) it is in itself a correct charge, (2) it is not substantially covered in the main charge, and (3) it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.'"[116]

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[108] The first instruction stated that "the accused cannot be convicted of this offense upon the uncontested testimony of an accomplice, if such testimony is self-contradictory, vague, or uncertain." The second instruction was that the "uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution." United States v. Allums, 18 C.M.R. at 60.

[109] United States v. Bey, 4 U.S.C.M.A. 665, 16 C.M.R. 239 (1954).

[110] United States v. Allums, 18 C.M.R. at 63.

[111] *Id.* at 62.

[112] *Id.* at 63.

[113] *Id.* This suggested approach was consistent with the way courts-martial handled admissibility of an accused's confession. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 140*a*.

[114] United States v. Winborn, 14 U.S.C.M.A. 277, 34 C.M.R. 57, 60 (1963).

[115] *Id*.

[116] *Id*. at 62 (quoting Pine v. United States, 135 F.2d 353, 355 (5th Cir.), *cert. denied*, 320 U.S. 740, 64 S. Ct. 40, 88 L. Ed. 439 (1943)). In *Winborn*, the proposed instruction was not a correct statement of the law, unless the court meant to find that a pretrial confession is not

In *United States v. Stephen*,[117] the Court of Military Appeals went even further. It reversed the accused's larceny conviction because the law officer failed to give an accomplice instruction even though the defense never requested such an instruction. While emphasizing the general rule that the absence of a request for special instructions precludes raising this issue on appeal, the court found an accomplice instruction "of vital importance" where the accused was connected to the offense by the testimony of only one witness-accomplice.[118] The court held that, under the circumstances of this case, it was plain error–a miscarriage of justice–for the law officer to fail to give the accomplice instruction.[119] The court brushed aside the prosecution's contention that, when an accused takes the stand to deny his guilt, the defense may not want the law officer giving an accomplice instruction because it suggests to the court members that the law officer believes the accused was implicated.[120]

Although courts still paid due homage to the general rule that failure to request a special instruction waived the issue on appeal, the exceptions began to overwhelm the rule. In most cases, the accomplice is either the sole evidence against the accused or is corroborated only by the accused's confession. In *United States v. Lell*,[121] the Court of Military Appeals reversed the accused's conviction for receiving stolen property because the law officer failed *sua sponte* to instruct on the credibility of accomplice testimony. Despite independent evidence that the items were stolen and a pretrial statement in which the accused admitted receiving the stolen property, the court held that the testimony of the accomplice in this case was of such "vital importance," that an instruction was required.[122]

Having won an almost *per se* requirement for a *sua sponte* instruction on accomplice credibility, defense counsel turned their attention to an instruction on corroboration. In *United States v. Newsom*,[123] the law officer gave an instruction which cautioned the court members on the credibility of accomplice testimony.[124] Despite the repeated urging of the defense counsel,

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sufficient to corroborate the testimony of an accomplice. Until the decision in *Winborn*, only the uncorroborated testimony of an accomplice needed to be considered with caution.

[117] United States v. Stephen, 15 U.S.C.M.A. 314, 35 C.M.R. 286 (1965).

[118] *Id.* at 290.

[119] *Id*.

[120] *Id*. at 291. This theory would later find favor with the court in *United States v. Wiley*, 16 U.S.C.M.A. 449, 37 C.M.R. 69, 72 (1966).

[121] United States v. Lell, 16 U.S.C.M.A. 161, 36 C.M.R. 317 (1966).

[122] *Id.* at 322.

[123] United States v. Newsom, 38 C.M.R. 833 (A.F.B.R. 1967).

[124] The instruction read:

he refused to instruct the court on corroboration.[125] The Air Force Board of Review noted that the "Court of Military Appeals has repeatedly expressed reservations as to whether this rule is an appropriate matter upon which to instruct a court-martial but has not resolved the question."[126] The board assumed, without deciding, that the instruction would be required in appropriate cases, but found no such requirement in this case because the testimony was not self-contradictory, uncertain, or improbable, and the accomplice's testimony was corroborated.[127] In another case, a defense attack upon the law officer's failure to *sua sponte* instruct on the corroboration prong failed as well since there was no conflict in the testimony, there was some corroboration, and the testimony was not, in its essential aspects, self-contradictory, uncertain, or improbable.[128]

The 1969 *Manual* clarified the requirement for instructing on corroboration. "When appropriate, the above *rules* should, upon request by the defense, be included in the general instruction of the military judge . . . ."[129] But, the Court of Military Appeals held that an instruction on corroboration was not necessary if the accomplice's testimony was not self-contradictory, uncertain, or improbable, and the military judge had no duty to give the instruction *sua sponte* unless the failure to do so would amount to plain error or a miscarriage of justice.[130]

> Evidence has been received tending to indicate that Airman Spain who testified as a witness in this case was an accomplice in the commission of the offenses charged. The court is advised that a witness is an accomplice if he was culpably involved in the crime. You are advised that, under the state of the evidence, Airman Spain is an accomplice as a matter of law. The testimony of an accomplice even though apparently credible, is of doubtful integrity and is to be considered with great caution. A witness' testimony need not be rejected, however, simply because he is an accomplice and the weight to be give to such testimony is a matter for your determination.

Id. at 838.

[125] The proposed defense instruction read: "You should note, however, that a conviction cannot be based upon the uncorroborated testimony of an accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable." *Id.*

[126] *Id*.

[127] *Id*. at 839.

[128] United States v. Lippincott, 39 C.M.R. 932, 933 (A.F.B.R. 1968).

[129] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 REVISED EDITION ¶ 153*a* (emphasis added). In 1980, with the adoption of the Military Rules of Evidence, similar language regarding accomplice testimony was placed in ¶ 74*a*(2).

[130] United States v. Diaz, 22 U.S.C.M.A. 52, 46 C.M.R. 52, 56 (1972).

Different panels of the Air Force Court of Military Review decided two cases[131] in 1977 which demonstrated the boundaries of the plain error doctrine as applied to the accomplice instruction. Moore and Baker were tried one day apart, before the same judge, for various illegal drug transactions. Two of the witnesses who testified against Moore also testified against Baker. In both cases, the judge instructed that the two witnesses were accomplices whose testimony was "of doubtful integrity" and should "be considered with great caution." He failed to give the corroboration prong of the accomplice rule or advise the court that the caution in weighing accomplice testimony applied even if it was "apparently corroborated."[132] The defense did not object to the instructions or request additional instructions in either case. Nevertheless, since the uncorroborated testimony of these two accomplices was the sole evidence against the accused with regard to some of the specifications, the court concluded that an unabbreviated accomplice instruction was essential.[133] In *Moore*, the court found that the failure to *sua sponte* instruct amounted to prejudicial error, and reversed.[134] In *Baker*, the court affirmed the conviction based on the accused's admissions on the stand while trying to establish the defense of agency.[135] The difference in the cases is a result of the different manner in which we evaluate judicial admissions and pretrial confessions. A judicial confession need not be corroborated and is not viewed with as much suspicion as a confession made to law enforcement agencies.

B. The Developing Revolt

The first assault on the accomplice instruction occurred two years before the adoption of the Military Rules of Evidence. In 1978, the Court of Military Appeals held that, when the defense had not requested an accomplice

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[131] United States v. Moore, 2 M.J. 749 (A.F.C.M.R. 1977) (decided 14 January) and United States v. Baker, 2 M.J. 360 (A.F.C.M.R. 1977) (decided 19 January 1977).

[132] United States v. Moore, 2 M.J. at 753; United States v. Baker, 2 M.J. at 363.

[133] United States v. Moore, 2 M.J. at 754; United States v. Baker, 2 M.J. at 364. Both accomplices testified under grants of immunity, testified to their extensive drug usage (including heroin), and admitted lying in pretrial statements about the extent of their drug involvement.

[134] United States v. Moore, 2 M.J. at 754.

[135] United States v. Baker, 2 M.J. at 365. At the time, the sale of drugs was prosecuted under Article 134 (UCMJ art. 134, 10 U.S.C. § 934) as conduct prejudicial to good order and discipline. It was a defense to selling illegal drugs that the accused was acting merely as an agent or conduit for the seller or buyer. United States v. Fruscella, 21 U.S.C.M.A. 26, 44 C.M.R. 80, 81 (1971). Since the possession of the illegal drugs was not a lesser-included offense of sale, this could be a very effective defense. As of 1 October 1982, the military began prosecuting sales of drugs as transfers. *See* Exec. Order No. 12,383 (1982). The term was later changed to "distribute." UCMJ art. 112a, 10 U.S.C. § 912(a) (1983). This successfully eliminated the agency defense.

instruction, the appellant had made a pretrial confession, and the military judge had pointed out to the court members some impeaching factors relating to the accomplice's character, it was not plain error for the military judge to fail, *sua sponte*, to give a special accomplice instruction.[136] Chief Judge Fletcher concurred in the result, but asserted "that an instruction on the testimony of an accomplice should not be given, requested or not. It is improper to call attention to the testimony of any witness."[137] The testimony of all witnesses should be weighed using the general credibility instruction.

In *United States v. Young*,[138] the Air Force Court of Military Review confirmed its position regarding the giving of accomplice instructions. Finding this case to be the "exceptional situation where an accomplice is the crucial prosecution witness upon whose credibility the ultimate question of the accused's guilt or innocence depends," the court held it was plain error for the military judge not to give the accomplice instruction *sua sponte*.[139] Judge Mahoney dissented. Citing Chief Judge Fletcher's concurring opinion in *Lee*, Judge Mahoney questioned the necessity for, and appropriateness of, giving such a special instruction when the court members are given a detailed instruction on witness credibility and were selected to serve as "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[140] He asserted that the terms "plain error" and "miscarriage of justice" "are employed by appellate courts without factfinding powers to mean 'we're not sure we would have convicted the accused based solely on the testimony of this weasel.'"[141] Such an approach is not necessary in the service appellate courts because they have factfinding powers. If the evidence is not sufficient to convince the court of the accused's guilt beyond a reasonable doubt, the court can set aside the verdict.[142]

Two years later, in *United States v. Rehberg*,[143] another panel of the Air Force Court of Military Review questioned the military approach taken in dealing with accomplices. Judge Raichle reviewed the varying rules for weighing accomplice testimony in different jurisdictions and recommended that the military return to our roots and adopt the federal rule as found in the 1921 *Manual*.[144]

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[136] United States v. Lee, 6 M.J. 96 (C.M.A. 1978).

[137] *Id*. at 98 (Fletcher, C.J., concurring).

[138] United States v. Young, 11 M.J. 634 (A.F.C.M.R. 1981).

[139] *Id.* at 636-37.

[140] *Id*. at 637 (quoting UCMJ art. 25(d)(2), 10 U.S.C. § 825(d)(2)).

[141] *Id*.

[142] *Id*. (citing UCMJ art. 66(c), 10 U.S.C. § 866(c)).

[143] United States v. Rehberg, 15 M.J. 691 (A.F.C.M.R. 1983).

[144] *Id*. at 693.

As we have noted, how appellate courts viewed the failure of a military judge to *sua sponte* instruct on accomplice testimony was greatly dependent on how they interpreted the concept of plain error. In 1986, the Court of Military Appeals clarified the application of this concept. In *United States v. Fisher*,[145] without defense objection, the judge failed to instruct the members to vote on the proposed sentences beginning with lightest.[146] Failure to so instruct "generally [had] been regarded as plain error *per se*, warranting the Court to overlook the absence of defense objection."[147] But,

> "a *per se* approach to plain error review is flawed." This approach permits counsel for the accused to remain silent, make no objections, and then raise an instructional error for the first time on appeal. This undermines "our need to encourage all trial participants to seek a fair and accurate trial the first time around." Moreover, without reviewing the error in the context of the facts of the particular case, "[it] is simply not possible for an appellate court to assess the seriousness of the claimed error."
>
> In order to constitute plain error, the error must not only be both obvious and substantial, it must also have "had an unfair prejudicial impact on the jury's deliberations." The plain error doctrine is invoked to rectify those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings. As a consequence, it "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."[148]

Despite emphasizing that the military judge has a *sua sponte* duty to instruct the members on the proper procedures for voting, after evaluating the entire record, the court found the error did not justify reversing the accused's conviction.[149]

The Navy-Marine Corps Court of Military Review had the first opportunity to apply the new plain error doctrine to accomplice testimony. In *United States v. Oxford*,[150] the accused was convicted of wrongfully using and distributing cocaine based almost entirely on the testimony of one witness, Schmidt, who had been convicted of drug offenses three months earlier. The accused did not request, and the military judge did not give, an accomplice instruction. After reviewing *Stephen*[151] and *Lell*,[152] the court held that the

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145 United States v. Fisher, 21 M.J. 327 (C.M.A. 1986).

146 MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1006(d)(3)(A) (1995 ed.), ormerly found in ¶ 76b(2) of the1951 and 1969 *Manuals*.

147 United States v. Fisher, 21 M.J. at 328.

148 *Id.* at 328-29 (citations omitted).

149 *Id.* at 329 n.2.

150 United States v. Oxford, 21 M.J. 983 (N.M.C.M.R. 1986).

151 United States v. Stephen, 15 U.S.C.M.A. 314, 36 C.M.R. 286 (1965)

152 United States v. Lell, 16 U.S.C.M.A. 161, 36 C.M.R. 317 (1966).

military judge's failure to give the accomplice instruction was prejudicial error.[153] It incorrectly cited *Fisher*[154] as direct support for the proposition that, under the circumstances, an accomplice instruction was relevant and "all-important" to the accused's defense.[155]

A year later, a different panel of the Navy-Marine Corps Court of Military Review reached a different conclusion, doubting that failure of the military judge to give a *sua sponte* instruction on uncorroborated accomplice testimony would be plain error under the *Fisher* plain error test. "The lesson of *Fisher* is that error which has been treated in the past as plain error justifying reversal in spite of lack of timely objection will no longer be treated as such, unless the plain error test set forth in that case is satisfied."[156]

In *United States v. McKinnie,*[157] for the first time since adopting the new plain error doctrine of *Fisher*, the Court of Military Appeals examined the accomplice instruction issue. The military judge had given an accomplice instruction as to an instructor who had joined the accused in fraternizing with students, but refused to give the instruction with regard to the students, finding they were actually victims. The court held that, by the express terms of the regulation which the accused was charged with violating, the students were also accomplices. But, after examining the entire record, the court found the refusal to give the instruction was not prejudicial error.[158] The instructional error "only affected the evalution of the credibility of certain witnesses," rather than an element of an offense or a defense; the military judge gave a detailed instruction on evaluating the credibility of the witness; the civilian defense attorney brought the reliability of the trainee's testimony to the attention of the court members with skillful cross-examination; the military judge had instructed the members that the other instructor was an accomplice; and the three trainees gave consistent testimony against appellant.[159]

In a case of first impression, the Air Force Court of Military Review, in *United States v. Sanders,*[160] was asked to determine whether the 1984 *Manual* had eliminated the corroboration prong of the accomplice instruction. Over a defense objection, the military judge gave an abbreviated instruction to the effect that if the members found the witnesses to be accomplices their testimony should be considered with great caution. The Air Force court reviewed the history of the instruction and determined that the instructional

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153 United States v Oxford, 21 M.J. at 987.

154 United States v. Fisher, 21 M.J. 327 (C.M.A. 1986).

155 United States v. Oxford, 21 M.J. at 987.

156 United States v. Jordan, 24 M.J. 573, 576 (N.M.C.M.R. 1987).

157 United States v. McKinnie, 32 M.J. 141 (C.M.A. 1991).

158 *Id.* at 144.

159 *Id*. at 144-45.

160 United States v. Sanders, 34 M.J. 1086 (A.F.C.M.R. 1992).

requirement arose from case law. The court found that "the drafters of the MCM 1984 did not intend to eliminate any portion of the prior instructional requirements for accomplice testimony and that the need for instructions concerning such testimony still arises from military case law."[161] "If the accomplice's testimony is corroborated, the military judge need not give the court members instruction on corroboration or determination of self-contradiction, uncertainty, or improbability."[162] Since corroboration was lacking in this case, and the court determined the witnesses were uncertain, the failure to give the corroboration prong of the instruction was prejudicial error.

In *United States v. Gillette*,[163] three civilian witnesses testified under grants of immunity that they had observed the accused using cocaine. The military judge instructed that one of the witnesses was an accomplice as a matter of law, but left the issue on the other two for the court members to decide. He gave the corroboration prong of the instruction. The Air Force Court of Military Review held it was error not to instruct that all three witnesses were accomplices as a matter of law, but, finding no prejudice, affirmed the accused's convictions.[164] The accused appealed. The Court of Military Appeals held that it is improper for a military judge to "label" a witness as an accomplice; the decision should be made by the court members upon proper instruction.

> Thus we hold that, whenever the evidence raises a reasonable inference that a witness may have been an accomplice or claims to have been an accomplice of the accused, and upon request of either the Government or defense, the military judge shall give the members a cautionary instruction regarding accomplice testimony. First, the members shall be instructed how to determine whether a witness is an accomplice. Second, they shall be given the standard instruction regarding the suspect credibility of accomplice testimony.[165]

In *United States v. Gittens*,[166] the Court of Military Appeals held that following *Gillette*, failure to request an accomplice instruction waives the issue, although there might be some case in which the failure of the military judge to give the instruction *sua sponte* would be plain error.[167]

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[161] *Id.* at 1091.

[162] *Id*. at 1093.

[163] United States v. Gillette, 35 M.J. 468 (C.M.A. 1992).

[164] *Id.* at 469.

[165] *Id*. at 470.

[166] United States v. Gittens, 39 M.J. 328 (C.M.A. 1994).

[167] *Id.* at 331.

C. Instructions for Defense Witnesses

The status of an accomplice-witness for the defense is different. Although such a witness normally would not have the same expectation of favorable treatment from the government as would a prosecution witness, she still might have motive to falsify her testimony. For example, the witness may want the accused to testify favorably at her trial or may be a friend of the accused who is no longer amenable to prosecution.[168] Only a few military cases have addressed the issue, probably because most judges do not give an accomplice instruction for defense witnesses.

In *United States v. McCue*,[169] the Air Force Court of Military Review, citing federal case law,[170] held that it was within the military judge's discretion to give an accomplice instruction for a defense witness. "It is clear that an accomplice's credibility may be suspect, regardless of whether he testifies for the prosecution or the defense."[171] The court set aside the accused's conviction, however, because the military judge's instructions failed to advise the court members to determine whether the witness was in fact an accomplice, and there was no evidence showing he was culpably involved in all the offenses to which he testified.[172]

The Court of Military Appeals has addressed the issue on two occasions. In *United States v. Allison*,[173] the military judge proposed to instruct the members that a defense witness was an accomplice. The defense counsel agreed that such an instruction was appropriate. On appeal, the court noted the conflicting authorities cited by the parties,[174] but declined to decide whether it was appropriate to give an accomplice instruction for a defense witness. Instead, the court held that even if the instruction was erroneous, the accused was not prejudiced.[175] "This instruction did not shift the burden of

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[168] United States v. Gillespie, 47 M.J. 750 (A.F.Ct.Crim.App. 1997) (citing United States v. Harman, 627 F.2d 7 (6th Cir. 1980); United States v. Stulga, 584 F.2d 142 (6th Cir. 1978)).

[169] United States v. McCue, 3 M.J. 509 (A.F.C.M.R. 1977).

[170] United States v. Nolte, 440 F.2d 1124 (5th Cir.), *cert. denied*, 404 U.S. 862, 92 S. Ct. 49, 30 L. Ed. 2d 106 (1971).

[171] United States v. McCue, 3 M.J. at 511 (quoting United States v. Nolte, 440 F.2d at 1126).

[172] United States v. McCue, 3 M.J. at 512.

[173] United States v. Allison, 8 M.J. 143 (C.M.A. 1979).

[174] The defense cited the *Manual* which limited its discussion to prosecution witnesses and state cases, while the government cited federal cases: United States v. Urdiales, 523 F.2d 1245 (5th Cir. 1975), *cert. denied*, 426 U.S. 920, 96 S. Ct. 2625, 49 L. Ed. 2d 373 (1976); United States v. Nolte, 440 F.2d 1124 (5th Cir.), *cert. denied*, 404 U.S. 862, 92 S. Ct. 49, 30 L. Ed. 2d 106 (1971).

[175] United States v. Allison, 8 M.J. at 144.

proof to the appellant, which was the defect in the accomplice instruction condemned by the United States Supreme Court."[176]

In *United States v. Davis*,[177] the accused and Barrett, who was awaiting trial on the exact same allegations, were charged with unlawful entry and rape. Barrett, testifying under a grant of immunity, claimed that the intercourse they had with the complainant was consensual. The military judge cautioned the court members about the weight to give to Barrett's testimony. "Because the defense did not object at trial to these instructions (which in any event do not involve elements of offenses or defenses), appellant is not entitled to relief unless the instruction is plain error."[178] The Court of Military Appeals held that even if the instruction should not have been given, the accused was not prejudiced.

The last reported case concerning the giving of an accomplice instruction for a defense witness was decided by the Air Force Court of Criminal Appeals at the end of 1997.[179] Major Gillespie was convicted of battery, communicating a threat, and disorderly conduct, and acquitted of carrying a concealed weapon. His wife testified on his behalf, in part contradicting and in part offering an exculpatory interpretation of the events testified to by prosecution witnesses. Over the objection of the defense, the military judge instructed the court members that if they found the accused's wife to be an accomplice, they should consider her testimony with great caution. The Air Force court found that *McCue* was still binding precedent, so it was within the military judge's discretion to caution the members as to the credibility of an accomplice who testifies for the defense. Although the facts were similar to those of *United States v. Davis*,[180] and the instruction was the same, the Air Force Court of Criminal Appeals held that the military judge erred by not tailoring the instruction to "the situation of an accomplice providing testimony both adverse and favorable to [the accused]."[181] The court found the error to be harmless, but suggested the military judge should have given the following instruction:

> I further charge you that, to the extent, if any, that you find the testimony of an accomplice tends to support the contention of the [accused], that is, tends

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[176] *Id.* at 144-45 n.1 (citing Cool v. United States, 409 U.S. 100, 103, 93 S. Ct. 354, 357, 34 L. Ed. 2d 335 (1972)). The instruction condemned in *Cool* advised the jury that "testimony of an accomplice may alone and uncorroborated support your verdict of guilty of the charges in the Indictment if believed by you to prove beyond a reasonable doubt the essential elements of the charges in the Indictment."

[177] United States v. Davis, 32 M.J. 166 (C.M.A. 1991).

[178] *Id.* at 167.

[179] United States v. Gillespie, 47 M.J. 750 (A.F.Ct.Crim.App. 1997).

[180] United States v. Davis, 32 M.J. 166 (C.M.A. 1991).

[181] United States v. Gillespie, 47 M.J. at 756-57.

> to show the [accused] to be not guilty, you may consider such testimony in that respect and weigh such testimony, along with the other evidence in the case, under the rules given you in this charge, and you may find the [accused] not guilty based on an accomplice's testimony.[182]

VII. ANALYSIS

A. Who has the Authority to Make the Rules?

Before analyzing the law of accomplices today, we need to review the legal framework in which the rules exist. In other words, who has the power to make the rules concerning accomplice testimony?

The President has statutory authority to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof" for courts-martial. The law of accomplices has been a rule of evidence, and more recently a rule of procedure.[183] "[S]o far as he considers practicable," these rules should "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with" the Uniform Code of Military Justice.[184] The Supreme Court has specifically recognized the President's authority to promulgate these rules.[185]

The President's evidentiary rule in the 1951 *Manual* provided that the uncorroborated testimony of an accomplice was to be considered with caution.[186] Without citation to any authority granting it the power to change the rule, the Court of Military Appeals did so by judicial fiat in *United States v. Winborn*.[187] In 1969, the President changed the *Manual* to reflect the court's decision,[188] but it is unclear whether the President meant to express his agreement with the decision or merely wished to conform the *Manual* to the law as applied by the appellate courts. The *Manual for Courts-Martial* is more than just a compendium of the President's procedural and evidentiary rules; its

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[182] *Id*. at 756 (quoting United States v. Stulga, 584 F.2d 142, 144 (6th Cir. 1978)).

[183] The law of accomplices was found in the *Manual*'s evidentiary chapters until the Military Rules of Evidence were adopted in 1980. Since then, the rules were found in chapters covering procedural rules and then, in 1984, the discussion to the Rules for Courts-Martial.

[184] UCMJ art. 36(a), 10 U.S.C. § 836(a) (1950). In addition to statutes, the President has traditionally exercised power to make rules for courts-martial pursuant to his authority as commander-in-chief. MANUAL FOR COURTS-MARTIAL, UNITED STATES, A21-1 (1995 ed.) (citing U.S. CONST. art. II, § 2, cl. 1).

[185] United States v. Scheffer, 523 U.S. __, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998).

[186] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 153*a*.

[187] United States v. Winborn, 14 U.S.C.M.A. 277, 34 C.M.R. 57 (1963).

[188] Department of the Army Pamphlet 27-2, *Analysis of Contents Manual for Courts-Martial, United States, 1969 Revised Edition* 27-42 (July 1970).

fundamental purpose is to serve as a "comprehensive body of law governing the trial of courts-martial and as a guide for lawyers and nonlawyers in the operation and application of such law."[189] When an appellate court decision contravenes his rule making authority, the President faces a difficult dilemma. He can leave the *Manual* unchanged to reflect the rule as he, acting within his statutory authority, promulgated it, or he can change it to reflect the law as the appellate courts have stated they will apply it. To maintain the usefulness of the *Manual*, the President must acquiesce to the change.[190]

B. The Law

1. Accomplice Witnesses Adverse to the Accused

As previously mentioned at the end of Section II, the President's procedural and evidentiary rules currently do not contain any reference to accomplices, but the discussion accompanying R.C.M. 918(c) does: "Findings of guilty may not be based solely on the testimony of a witness other than the accused which is self-contradictory, unless the contradiction is adequately explained by the witness. Even if apparently credible and corroborated, the testimony of an accomplice should be considered with great caution."[191]

In analyzing the current law of accomplices, there are three basic positions to consider: (1) no special attention should be paid to accomplice testimony; (2) accomplice testimony should be considered with caution; and, (3) the cautionary and corroboration prongs of the law of accomplices did not change as a result of the adoption of the Rules for Courts-Martial. It may be helpful, as a point of reference and to show the incongruity of the law of accomplices, to keep in mind the following examples, which will be discussed later. (1) The accused is charged with using cocaine. The prosecution's sole evidence is the testimony of the accused's best friend, Fred Noncom, who is also charged with using cocaine at the same time and place. (2) The prosecution's sole witness is the accused's estranged wife, who alleges that she saw the accused use cocaine. The accused's wife is currently in a vicious custody dispute with the accused over their child. (3) The prosecution's sole witness is Bill Airman who is generally regarded as a liar.

An argument can be made that no special rules are to be applied to accomplice testimony. The President has the statutory authority to establish the rules of evidence and procedure. Since he failed to make any reference to accomplices in the rules themselves, the President has determined that their

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189 MANUAL FOR COURTS-MARTIAL, UNITED STATES, A21-1 (1995 ed.).

190 Since 1983, decisions of the Court of Military Appeals may be appealed to the Supreme Court. UCMJ art. 67a, 10 U.S.C. § 867a (1983).

191 Manual for Courts-Martial, United States, R.C.M. 918(c) Discussion (1995 ed.).

testimony does not warrant any special attention. Considering the enormous changes that have been made to the legal system since judges initially decided to warn jurors of the credibility of accomplice testimony, the elimination of the special accomplice rules make sense. The accused is no longer prohibited from being represented by counsel, or from testifying and calling witnesses to testify in his behalf. Counsel are quite imaginative in their ability to cross-examine such a witness and vilify him during closing arguments. In addition, military judges now give a much more robust credibility instruction than was formerly the standard. That instruction fully advises court members on factors they should consider in assessing the credibility of a witness.[192]

Others have argued, and at least the Air Force appellate court has ruled, that "the drafters of [*The Manual for Courts-Martial*] 1984 did not intend to eliminate any portion of the prior instructional requirements for accomplice testimony and that the need for instructions concerning such testimony still arises from military case law."[193] Under this theory, both the cautionary and corroboration prongs of accomplice testimony are alive and well. The court based its opinion on a reading of R.C.M. 918(c) and the discussion following it; its predecessor, paragraph 74*a* of the *Manual*; R.C.M. 920(e) and its discussion,[194] and the failure of the drafters' to state that they intended to

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[192] An example of the old standard: "Further, I would like to instruct the court that the credibility of a witness is his worthiness of belief. The court may ordinarily draw its own conclusions as to the credibility of a witness and attach such weight to his evidence as his credibility may warrant." United States v. Bey, 4 U.S.C.M.A. 665, 16 C.M.R. 239, 242 (1954). The current credibility instruction reads:

> You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court, and prejudices and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict. In weighing a discrepancy (by a witness) (or) (between witnesses), you should consider whether (it) (they) resulted from innocent mistake or deliberate lie. Taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth. The believability of the witness' testimony should be your guide in evaluating testimony and not the number of witnesses called. (These rules apply equally to the testimony given by the accused.)

Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* ¶ 7-7-1 (Sept. 30, 1996).

[193] United States v. Sanders, 34 M.J. 1086, 1091 (A.F.C.M.R. 1992).

[194] R.C.M. 920(e) gives a list of required instructions. It contains no mention of an instruction on accomplice testimony or the weighing of the credibility of witnesses. R.C.M. 920(e)(7) provides that instructions on findings shall include "Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the

change the law.[195] Of course the discussion and the analysis in the *Manual* are part of the "nonbinding" supplementary materials which do not necessarily reflect the views of the President, do not create rights and responsibilities, and with which a failure to comply "does not, of itself, constitute error."[196]

The Air Force court's decision does not make sense. Unless the evidentiary or procedural rules violate the Constitution or the Uniform Code of Military Justice, appellate courts are not entitled to substitute their judgement for that of the President.[197] Furthermore, in the military, corroboration historically related to accomplice testimony in two respects: First, a conviction could not be based solely on the uncorroborated testimony of an accomplice which is self-contradictory, uncertain, or improbable; and second, the factfinder was required to treat the uncorroborated testimony of an accomplice with great caution. But, the second aspect was rendered moot by *Winborn*.[198] If the testimony of all accomplices, corroborated or not, is to be considered with great caution, the existence of corroboration is irrelevant for purposes of instructing the court. Further, the first aspect is nothing more than another way of saying that the accused's guilt must be established beyond a reasonable doubt before he can be convicted of any offense. If the sole evidence against an accused is uncorroborated accomplice testimony which was self-contradictory, uncertain or improbable, a trial court would not be able to find the accused guilty beyond a reasonable doubt. If it did, the service court of criminal appeals could right the wrong by setting the conviction aside for factual insufficiency.[199]

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military judge determines, sua sponte, should be given." The discussion to R.C.M. 920(e) states: "See R.C.M. 918(c) and discussion as to reasonable doubt and other matters relating to the basis for findings which may be the subject of an instruction." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920 (1995 ed).

[195] United States v. Sanders, 34 M.J. at 1092.

[196] MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part I ¶ 4 Discussion (1995 ed.); *see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, A21-3 (1995 ed.).

[197] UCMJ art. 36(a), 10 U.S.C. § 836(a) (1950); United States v. Davis, 47 M.J. 484, 486 (C.A.A.F. 1998).

[198] United States v. Winborn, 14 U.S.C.M.A. 277, 34 C.M.R. 57 (1963).

[199] The service courts of criminal appeals have fact-finding powers under the Code. The service courts of criminal appeals:

> may affirm only such findings of guilty . . . as it finds correct in law and fact and determines, on the basis of the entire record should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

UCMJ art. 66(c), 10 U.S.C. § 866(c). Of course, the service courts of criminal appeals may exercise this authority only in cases in which the approved sentence includes death, a punitive discharge, or confinement for one year or more. UCMJ art. 66(b), 10 U.S.C. § 866(b).

In between these two extremes, there is another theory–that only the cautionary prong of the law survives. There is much to support this theory. First, the supplementary material in the *Manual* supports treating an accomplice's testimony with caution. Second, so far as the President considers practicable and when not contrary or inconsistent with the UCMJ, the President's evidentiary and procedural rules should apply the rules generally recognized in the United States district courts. While there is considerable disagreement in the circuit courts of appeal over the wording of the instructions, they generally agree that juries need only be instructed to treat the testimony of accomplices with caution.[200] In addition, the Court of Military Appeals in *Gillette* held that the military judge shall give "the standard instruction regarding the suspect credibility of accomplice testimony."[201] One can speculate as to whether the court meant to suggest that the corroboration prong was dead.

Now turning back to the examples, under the first theory, the witnesses would be treated alike in each. The court members would evaluate the testimony of the witnesses after hearing their testimony, cross-examination, arguments of counsel, and the judge's general credibility instruction. The second and third theories result in incongruent treatment of the witnesses. The military judge would have to instruct the court members to consider the testimony of the accused's best friend with great caution. No such instruction would be required for either the accused's wife or the liar, even though the reasons to consider their testimony with caution appear to be as compelling. We trust court members to appropriately weigh the potential interests of all witnesses except accomplices.

2. *Accomplice Witnesses Whose Testimony is Exculpatory*

At least in the Air Force, the military judge has discretion to give an accomplice instruction for a witness whose testimony is favorable to the defense.[202] But, the Air Force court seems to require that the military judge give the following, specially tailored, instruction:

> I further charge you that, to the extent, if any, that you find the testimony of an accomplice tends to support the contention of the accused, that is, tends to show the accused to be not guilty, you may consider such testimony in that respect and weigh such testimony, along with the other evidence in the case,

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[200] FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 32 (1988); EDWARD J. DEVITT & CHARLES B. BLACKMAR, 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.06 (3d ed. 1978).

[201] United States v. Gillette, 35 M.J. 468, 470 (C.M.A. 1992).

[202] United States v. McCue, 3 M.J. 509 (A.F.C.M.R. 1977); *accord* United States v. Gillespie, 47 M.J. 750 (A.F.Ct.Crim.App. 1997).

> under the rules given you in this charge, and you may find the accused not guilty based on an accomplice's testimony.[203]

This instruction is awkward, subject to misunderstanding, and the need for it is based on a misreading of federal case law. In *Gillespie*, the military judge gave an accomplice instruction for a defense witness which defined the term accomplice, explained that an accomplice's testimony should be considered with caution because such a witness may have a reason to falsify her testimony, and told the members they should consider her testimony with caution if they found her to be an accomplice. The Air Force Court of Criminal Appeals held that the military judge committed error, although it did not prejudice the accused. The court based its opinion on a federal case, *United States v. Stulga*.[204] In that case, the accused was charged with four others of burglary, stealing savings bonds, and transferring those bonds. Two of the participants testified for the prosecution and admitted their part in the scheme. Their testimony with regard to Stulga was almost completely exculpatory. During the original trial in that case, as part of his accomplice instruction, the trial judge stated:

> On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict a defendant upon the unsupported testimony of an accomplice, unless you believe the unsupported testimony beyond all reasonable doubt.[205]

The Sixth Circuit found the "lack of precision in the charge could very well have confused the jurors, they might have erroneously concluded that they had to believe the accomplice's exculpatory testimony beyond a reasonable doubt before it could support a defense for Appellant."[206] The Sixth Circuit based its opinion on the Supreme Court's decision in *Cool v. United States*.[207]

In *Cool*, the judge instructed the jury that, if they were convinced beyond a reasonable doubt that the accomplice's testimony was true beyond a reasonable doubt, they could consider it like that of a witness who was not implicated, and that the testimony of an accomplice alone, if believed beyond a

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[203] United States v. Gillespie, 47 M.J. at 756 (quoting the instruction given in United States v. Stulga, 584 F.2d 142, 144 (6th Cir. 1978).

[204] United States v. Stulga, 584 F.2d at 144 (6th Cir. 1978).

[205] United States v. Stulga, 531 F.2d 1377, 1380 (6th Cir. 1976).

[206] *Id*.

[207] Cool v. United States, 409 U.S. 100, 93 S. Ct. 354, 34 L. Ed. 2d 335 (1972).

reasonable doubt to prove the elements of the offense could support a conviction. The Supreme Court found such instructions improperly shifted the burden of proof to the defense–the jury would have to believe the exculpatory material beyond a reasonable doubt before it could acquit.

At Stulga's retrial, the judge gave the instruction quoted by the Air Force court in *Gillespie*, and the Sixth Circuit did no more than say the instruction was not error.[208] But, in *Gillespie*, there was no need for such a special instruction. The military judge's instruction did not in any way shift the burden of proof to the appellant. It simply told the members that if they determined the witness was an accomplice, they should consider her testimony with caution.

VIII. WHAT IS A JUDGE TO DO?

When confronted with an accomplice issue, a military judge has three basic options. First, treat the witness as any other and give no special accomplice instruction. Second, give an abbreviated instruction as the supplementary materials in the *Manual* would suggest is appropriate. And third, give the full instruction with both the corroboration and cautionary prongs.

There is no need for a special accomplice instruction. All of the reasons for giving such an instruction have long since disappeared. Furthermore, "[s]ince the testimony of children, lunatics, drunks, friends and relatives of the accused, victims of sex crimes, and witnesses testifying under a grant of immunity is evaluated under normal rules of witness credibility, it defies logic to engraft additional credibility requirements on the testimony of accomplices."[209]

However, giving no accomplice instruction is risky. Although the appellate courts are far less likely than in the past to set aside a conviction merely because the military judge failed to give an accomplice instruction, there is no good reason to tempt fate. Until the President makes clear his intent to eliminate any special accomplice instructions or the military appellate courts issue a more definitive ruling, the following abbreviated instruction, which comports with the practice in federal courts, can be used.

> Members of the court, you should view with great caution the testimony of any witness who claims to have been culpably involved in the commission of any offense with which the accused is charged. Such a witness may have a stake in the outcome of the case which would give him/her a motive to

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[208] United States v. Stulga, 584 F.2d at 144.

[209] United States v. Rehberg, 15 M.J. 691,694 (A.F.C.M.R. 1983); *see also* United States v. Matias, 24 M.J. 356, 359 (C.M.A. 1987) ("There is no additional legal requirement that the testimony of a competent witness who is also generally regarded as a 'liar' be corroborated.").

> falsify his/her testimony. However, you should not reject such testimony without first evaluating its credibility. You should give it the weight you determine to be appropriate, keeping in mind my other instructions on witness credibility.

The term accomplice is not used in the instruction because it is not necessary in explaining the concept to the court members. There is no reference to corroboration, because the testimony of all accomplices, whether corroborated or not, must be considered with caution, and, if the uncorroborated accomplice testimony is self-contradictory, uncertain, or improbable, the court members will not be able to find beyond a reasonable doubt that the accused committed the offense.

Colonel J. Jeremiah Mahoney, a military trial and appellate judge of considerable experience, and a long time critic of the accomplice instruction,[210] suggests a more conservative approach. He has deleted the term corroboration from the instruction, but retained the concept that the accused cannot be convicted on the uncorroborated testimony of an accomplice if that testimony is self-contradictory, uncertain, or improbable. He has also rewritten portions of the standard benchbook instruction to eliminate the awkward sentence construction.

> You are advised that a witness is an accomplice if he or she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor bearing upon the witness' believability. An accomplice may have a motive to falsify his or her testimony in whole or in part, because of his or her self-interest in the matter. [For example, an accomplice may be motivated to falsify testimony in whole or in part because of (his/her) own self-interest in (deflecting or minimizing guilt) (receiving immunity from prosecution) (receiving leniency/clemency in his/her prosecution.) ( ).] Whether or not (name witness(es)), who testified as (a) witness(es) in this case, (was/were) (an) accomplice(s) is a question for you to decide. If (he/she/they) shared the criminal intent or purpose of the accused–if any–or aided, encouraged, or in any other way criminally involved (himself/herself) in the offense with which the accused is charged, then (he/she/they) would be an accomplice.
>
> As I indicated previously, it is your function to determine the credibility of all the witnesses, and the weight–if any–you will accord the testimony of each witness. Although you should consider the testimony of an accomplice with caution, you may convict the accused based solely upon the testimony of an accomplice, as long as that testimony wasn't self-contradictory, uncertain, or improbable.
>
> [NOTE: If the testimony of the accomplice can be construed as both exculpatory and inculpatory:]

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[210] *See* United States v. Young, 11 M.J. 634, 637 (A.F.C.M.R. 1981) (Mahoney, J., dissenting).

> [On the other hand, you may find that the testimony of an accomplice–either alone or in conjunction with other evidence or the lack thereof–is sufficient to raise a reasonable doubt as to the accused's guilt.]

The "standard" accomplice instruction used in the military is long, complicated, and convoluted. It sounds more like an instruction to disregard the testimony of an accomplice than to consider it with caution, and court members have advised me that was its effect.

> You are advised that a witness is an accomplice if he/she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness' believability, that is a motive to falsify his/her testimony in whole or in part, because of an obvious self-interest under the circumstances. (For example, an accomplice may be motivated to falsify testimony in whole or in part because of his/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) (__)).
>
> The testimony of an accomplice, even though it may be ((apparently) (corroborated) and) apparently credible is of questionable integrity and should be considered by you with great caution.
>
> In deciding the believability of (state the name of the witness), you should consider all the relevant evidence (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).
>
> Whether or not (state the name of the witness), who testified as a witness in this case, was an accomplice is a question for you to decide. If (state the name of the witness) shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved himself/herself with the offense with which the accused is charged, he/she would be an accomplice whose testimony must be considered with great caution.
>
> (Additionally, the accused cannot be convicted on the uncorroborated testimony of a purported accomplice if that testimony is self-contradictory, uncertain, or improbable).
>
> (In deciding whether the testimony of (state the name of the witness) is self-contradictory, uncertain, or improbable, you must consider it in the light of all the instructions concerning the factors bearing on a witness' credibility.)
>
> In deciding whether or not the testimony of (state the name of the witness) has been corroborated, you must examine all the evidence in this case and determine if there is independent evidence which tends to support the testimony of this witness. If there is such independent evidence, then the testimony of this witness is corroborated; if not, then there is no corroboration.
>
> (You are instructed as a matter of law that the testimony of (state the name of the witness) is uncorroborated.)

Giving an accomplice instruction for defense witnesses is problematic and unnecessary. A judge must be careful not to shift the burden of proof to

the accused. Judge Mahoney's instruction clearly does not shift the burden of proof to the defense. Neither does the other abbreviated instruction, although it is open to question whether, after *Gillespie*, the Air Force Court of Criminal Appeals would concur. Normally, there is no good reason to give such an instruction. Surely, the prosecutor would be able to question the motives of the witness during cross-examination and in her final argument to the court members.

IX. CONCLUSION

Contrary to the comforting statements of the appellate courts, the law of accomplices is not well settled in the military. It has been continuously changing over the past 50 years. Even today, questions remain as to the parameters of the doctrine and, at least in the minds of the appellate court judges, who has the authority to determine the law of accomplices.

This is an opportune time for the President to clarify his rule. On 31 March 1998, the Supreme Court reaffirmed the President's authority to determine the rules of evidence and procedure.[211] The President could exercise that authority by eliminating the reference to accomplices in the discussion to R.C.M. 918(c), inserting a new R.C.M. 920(e)(4), and renumbering the remaining subparagraphs accordingly. Rule for Courts-Martial 920(e) lists instructions that the military judge must give on findings.

If the President decided to eliminate special consideration for accomplice testimony, R.C.M. 920(e)(4) should be amended to read:

> (4) A description of matters that should be considered in evaluating the credibility of witnesses. No special instruction on accomplice testimony need be given.

If the President adopted the federal rule, R.C.M. 920(e)(4) might read:

> (4) A description of matters that should be considered in evaluating the credibility of witnesses. In cases in which an accomplice testifies, court members shall be advised to treat such testimony with great caution. Corroboration of the testimony of an accomplice is not required to sustain a conviction.

If the President wanted to adopt the rule from *United States v. Winborn*[212] and the 1969 *Manual*, then R.C.M. 920(e)(4) should read:

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[211] United States v. Scheffer, 523 U.S. __, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (affirming President's authority to promulgate Mil. R. Evid. 707 prohibiting admission of polygraph evidence).

[212] United States v. Winborn, 14 U.S.C.M.A. 277, 34 C.M.R. 57 (1963).

(4) A description of matters that should be considered in evaluating the credibility of witnesses. In cases in which an accomplice testifies, court members shall be advised to treat such testimony with great caution, and advised that a conviction cannot be sustained on the uncorroborated testimony of an accomplice if it is self-contradictory, uncertain, or improbable.

The law of accomplices is an evidentiary matter which is the prerogative of the President, not the courts. It is time for the President to reassert his authority and provide military justice practitioners with clear guidance.

Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed

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"Communis error facit jus."[1]

I. INTRODUCTION

Few areas in military law are as confusing as multiplicity. Scholars have likened it to the Gordian Knot[2] and have bemoaned it as a concept "shrouded in a fog of judicial obfuscation."[3] Military appellate judges have bemoaned the need to descend "into the inner circle of that Inferno where the damned endlessly debate multiplicity."[4] Courts have described multiplicity as "The Sargasso Sea of Military Law."[5] Attempts by lower courts to clarify the issue have not been well received. In one case, a judge of the Air Force Court of Military Review compared an attempt at clarification to "a new runway, with lights to be installed later."[6] This confusion is nothing new. Indeed, the debate in the well-known *Baker*[7] case prompted Judge Cook to exclaim: "This is not justice; this is chaos!"[8]

The essence of this confusion arises, as it so often does, from the inaccurate use and misunderstanding of words. Specifically, the term "multiplicious" has been misconstrued to apply both to issues of *multiplicity* and the distinct concept of *unreasonable multiplication of charges*.[9]

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[1] "Common error, repeated many times, makes law." BLACK'S LAW DICTIONARY 254 (5th ed.1979).

[2] William T. Barto, *Alexander the Great, The Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1 (Spring, 1996).

[3] James A. Young, III, *Multiplicity and Lesser-Included Offenses*, 39 A.F.L. REV. 159 (1996).

[4] United States v. Bernard, 32 M.J. 530, 537 (A.F.C.M.R. 1990) (referring to multiplicity for sentencing).

[5] *See* Albernaz v. United States, 450 U.S. 333, 343 (1981); United States v. Baker, 14 M.J. 361, 373 (C.M.A. 1983) (Cook, J., dissenting); United States v. Roberson, 43 M.J. 732, 734 (A.F. Ct. Crim. App. 1995).

[6] United States v. Weymouth, 40 M.J. 798, 805 (A.F.C.M.R. 1994) (Snyder, J., concurring in the result).

[7] United States v. Baker, 14 M.J. 361 (C.M.A. 1983).

[8] *Id*. at 372 (Cook, J., dissenting).

[9] The authors intend "multiplicity" to refer to the legal concepts arising from Double Jeopardy and "unreasonable multiplication" refers to military policy based on fairness.

The courts of criminal appeals have recognized the distinction between the issues of *multiplicity* arising as a matter of law, and *unreasonable multiplication of charges*, arising from a policy decision of the military.[10] In *United States v. Erby*,[11] the Air Force Court discussed the differences between these concepts, and noted:

> The teaching point for all this is that practitioners must distinguish between the constitutional framework underpinning the concept of multiplicity, grounded in an analysis of the statutes themselves and the intent of Congress, and the unique attribute of military jurisprudence empowering trial judges to adjust the maximum sentence available in a given case based upon equitable considerations—that is, the *unreasonable* multiplication of charges.[12]

Unfortunately, many military justice practitioners do not appreciate the distinction between these two concepts.

This article will explore the historical basis for the confusion between the two distinct concepts of multiplicity and unreasonable multiplication of charges in military law. Thereafter, this article will set out a framework for examining multiplicity issues, to show that it is a relatively simple process, and propose a test for analysis of issues relating to unreasonable multiplication of charges. Finally, this article will discuss the lingering confusion in the law today, and propose a simple remedy.

II. HISTORICAL DEVELOPMENT

The concept of *multiplicity* derives from the Double Jeopardy Clause of the Constitution, preventing defendants from being twice punished for a single offense.[13] In contrast, *unreasonable multiplication of charges* is a policy established by the President in successive editions of the *Manual for Courts-Martial* designed to promote equity in sentencing.

A. Multiplicity in Federal Law

The Supreme Court has provided consistent guidance on multiplicity, from the earliest cases to the present time. In *Carter v. McClaughry*,[14] an Army captain convicted under the Articles of War argued, *inter alia*, that conspiracy to defraud the United States and making fraudulent claims against the United States were one offense.[15] The Supreme Court held the offenses were separate, because each required separate evidence

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[10] United States v. Wilson, 45 M.J. 512, 514 (Army Ct. Crim. App. 1996);United States v. Oatney, 41 M.J. 619, 622-23, 630 (N.M. Ct. Crim. App. 1994); United States v. Erby, 46 M.J. 649 (A.F. Ct. Crim. App. 1997).
[11] *Erby*, 46 M.J. at 649.
[12] *Id.* at 652.
[13] Albernaz v. United States, 450 U.S. 333, 344 (1981); North Carolina v. Pearce, 395 U.S. 711, 717 (1969); United States v. Weymouth, 40 M.J. 798, 801 (A.F.C.M.R. 1994).
[14] Carter v. McClaughry, 183 U.S. 365 (1902).
[15] *Id*. at 390.

which the other did not.[16] "The fact that both charges related to and grew out of one transaction made no difference."[17] The Court then quoted with approval a decision of the supreme judicial court of Massachusetts: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."[18]

In *Gavieres v. United States*,[19] the defendant was convicted of both drunken and disorderly conduct and insulting a public official for conduct arising out of a single boisterous incident on a streetcar. The Court ruled, "[w]hile it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other."[20]

The Supreme Court has specifically rejected any analysis based upon the offender's intent, or the scope of the transaction. In *Ebeling v. Morgan*,[21] the Court ruled that where the defendant cut open six mail bags successively, intending to steal their contents, each act was a separate offense. In *Morgan v. Devine*,[22] the defendant, in one transaction, broke into a post office intending to commit larceny, and stole government funds from the building. He was convicted of both burglary and larceny. Although granted relief on a *habeas corpus* petition by the District Court, the Supreme Court reversed, finding it was Congress' intent to create two distinct offenses. The Court specifically rejected any "continuous transaction" or "single impulse" test. "[A]lthough the transaction may be in a sense continuous, the offenses are separate, and each is complete in itself."[23] The test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress.

In *Albrecht v. United States*,[24] where the defendant was convicted of both possessing and selling the same liquor, the Court held each was a separate offense. "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."[25]

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[16] *Id.* at 394-95.
[17] *Id.* at 395.
[18] *Id.* (*citing* Morey v. Commonwealth, 108 Mass 433 (1871).
[19] Gavieres v. United States, 220 U.S. 338 (1911).
[20] *Id.* at 345.
[21] Ebeling v. Morgan, 237 U.S. 625 (1915).
[22] Morgan v. Devine, 237 U.S. 632 (1915).
[23] *Id.* at 639-40.
[24] Albrecht v. United States, 273 U.S. 1 (1927).
[25] *Id* at 11. *See also* United States v. Michener, 331 U.S. 789 (1947) (holding *per curiam* that offense of manufacturing counterfeit plate separate from possessing the same plate, reversing Michener v. United States, 157 F.2d 616 (8th Cir 1946); and Pereira v. United States, 347 U.S. 1 (1954) (stating that a single act of depositing the proceeds of a fraudulent scheme through a check put into a bank, knowing it would be forwarded through the mails, violated two separate statutes).

The leading Supreme Court case on multiplicity is *Blockburger v. United States.*[26] In that case, the defendant was convicted of two offenses—selling narcotics not from its original stamped package, and not in pursuance of a written order—both arising from the same sale. The Court ruled that a single act may be punished under two different statutes without violating the Double Jeopardy Clause when each of the statutory offenses requires proof of a different element.[27]

In *Gore v. United States*,[28] the Court reaffirmed *Blockburger* as the test for determining whether Congress intended to impose multiple punishments for a single act, stating: "The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means of dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic."[29]

In *Albernaz v. United States*,[30] the Supreme Court considered a case where the petitioners had been convicted of conspiracy to import marijuana, in violation of 21 U.S.C. § 963 (1976), and conspiracy to distribute the marijuana, in violation of 21 U.S.C. § 846 (1976), each of which authorized a separate punishment. After receiving consecutive sentences for each offense, petitioners appealed, arguing that Congress had not expressed "unambiguous intent to impose multiple punishment."[31] The Court upheld the separate convictions and sentences, and reaffirmed the *Blockburger* test as the rule of statutory construction to be applied, absent clearly expressed legislative intention to the contrary.[32]

In applying the *Blockburger* test for separateness, the Court has consistently reaffirmed the fundamental principle that the legislature has the authority to define crimes and establish the punishment for such offenses. "Simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes . . . . Legislatures, not courts, prescribe the scope of punishments."[33]

B. Multiplicity in Military Law—In the Beginning

The military originally adopted the *Blockburger* test for determining lesser-included offenses. The 1949 *Manual for Courts-Martial*[34] provided, "[t]he test as to whether an offense found is necessarily included in that charged is that it is included only

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[26] Blockberger v. United States, 284 U.S. 299 (1932).
[27] *Id.* at 304-05.
[28] Gore v. United States, 357 U.S. 386 (1958).
[29] *Id.* at 389.
[30] Albernaz v. United States, 450 U.S. 333 (1981).
[31] *Id.* at 336.
[32] *Id.* at 337. *See also* American Tobacco v. United States, 328 U.S. 781 (1946).
[33] Missouri v. Hunter, 459 U.S. 359, 368 (1983).
[34] MANUAL FOR COURTS-MARTIAL, United States, (1949). Hereinafter, the manuals for courts-martial will be referred to in the text by their date of publication and the word *Manual*.

if it was necessary in proving the offense charged to prove all the elements of the offense found."[35] In the sentencing procedure, however, the 1949 *Manual* seemed to provide servicemembers relief from an inflexible application of the *Blockburger* rule. Paragraph 80a of the 1949 *Manual*, pertaining to sentencing, provided: "If an accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court will impose punishment only with reference to the act or omission in its most important aspect."[36]

Additionally, Paragraph 27 of the 1949 *Manual* expressed the policy that:

> One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person . . . . There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses.[37]

Thus, from the outset the drafters of the *Manual for Courts-Martial* distinguished between legal limits arising from double jeopardy concerns and policies relating to sentencing. Unfortunately, the distinction would soon be lost.

A new Uniform Code of Military Justice (UCMJ) was enacted on 5 May 1950. The new *Manual for Courts-Martial*, effective 31 May 1951, set out rules for charging and sentencing which were consistent with the Supreme Court's guidance in this area. Paragraph 74 of the 1951 *Manual* concerned findings, and subparagraph 74b(4) provided: "*Offenses arising out of the same act or transaction*.—The accused may be found guilty of two or more offenses arising out of the same act or transaction, without regard to whether the offenses are separate. In this connection, however, see 76*a*(8)."

Paragraph 76 of the 1951 *Manual* discussed sentencing. Echoing the Supreme Court's ruling in *Blockburger*, subparagraph 76*a*(8) provided:

> The maximum authorized punishment may be imposed for each of two or more separate offenses arising out of the same act or transaction. The test to be applied in determining whether the offenses of which the accused has been convicted are separate is this: The offenses are separate if each requires proof of an element not required to prove the other . . . . An accused may not be punished for both a principal offense and for an offense included therein because it would not be necessary in proving the included offense to prove any element not required to prove the principal offense.

At the same time, Paragraph 26a of the 1951 *Manual* repeated the basic admonition against an unreasonable multiplication of charges: "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person." The paragraph went on to provide examples of unreasonable multiplication of charges, and also referred to paragraphs 74b(4) and 76a(8), above.

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[35] *Id.*, at ¶ 78c.
[36] *Id.* at ¶ 80a.
[37] *Id.* at ¶ 27.

Considering the issue of multiplicity after the enactment of the new UCMJ, the (then) Court of Military Appeals specifically adopted the *Blockburger* test in *United States v. Larney*.[38] The Court held that if the offenses were separate, an accused may be sentenced for each.[39] "The general test for separateness, as stated in paragraph 76a(8), [1951 *Manual*], is that offenses are to be treated as separate if each 'requires proof of an element not required to prove the other.'"[40] In *United States v. McVey*,[41] after a detailed review of the Supreme Court's decisions in this area, the Court of Military Appeals held that: "(1) separate acts of a single transaction may be separately punished, and (2) separate aspects of a single act may also be separately punished."[42]

C. Multiplicity in Military Law—A More Generous Test

Shortly after the Court of Military Appeals adopted the *Blockburger* test for *multiplicity*, it departed from the strict *Blockburger* standard and adopted a more "generous" test for what constitutes a lesser included offense. In *United States v. Duggan*,[43] the Court acknowledged its departure from the 1951 *Manual* provisions and established legal concepts: "While the standards we have adopted in considering whether one offense is included in another may be more generous than those prescribed by other courts, in an unbroken line of decisions we have made the test turn on both the charge and the evidence."[44]

The Court described the new test in this way: "When both offenses are substantially the same kind so that accused is fairly apprised of the charges he must meet and the specification alleges fairly, and the proof raises reasonably, all elements of both crimes, we have held they stand in the relationship of greater and lesser offenses."[45] Ultimately, this became known as the "fairly embraced" test for lesser included offenses.[46]

At the same time, the Court of Military Appeals began to exercise creativity in regards to *unreasonable multiplication of charges.* In *United States v. Redenius*,[47] the Court considered whether convictions for desertion with intent to remain away permanently and desertion with the intent to shirk hazardous duty constituted an unreasonable multiplication of charges. The Court invented an "identification of duty" test to determine whether the offense were separate, and rationalized that since the

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[38] United States v. Larney, 2 U.S.C.M.A. 563, 10 C.M.R. 61 (1953).
[39] United States v. Soukup, 2 U.S.C.M.A. 141, 7 C.M.R. 17 (1953); United States v. Wallace, 2 U.S.C.M.A. 595, 10 C.M.R. 93 (1953).
[40] *Soukup*, 7 C.M.R. at 21.
[41] United States v. McVey, 4 U.S.C.M.A. 167, 15 C.M.R. 167 (1954).
[42] *Id*. at 171.
[43] United States v. Duggan, 4 U.S.C.M.A. 396, 15 C.M.R. 396 (1954).
[44] *Id.* at 399.
[45] *Id.* at 399-400.
[46] *See* United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983).
[47] United States v. Redenius, 4 U.S.C.M.A. 161, 15 C.M.R. 161 (1954).

accused's duty was to remain with his organization, there was really only one offense.[48] *United States v. Kleinhans*,[49] involved a case where the accused unlawfully opened a letter in the mail and removed $4,886.00 in currency, leaving $2,000.86 behind. He was convicted of both wrongful opening of mail and larceny. The Court of Military Appeals considered the question of whether the offenses were multiplicious for punishment purposes, and concluded the offenses were not separately punishable because they arose from a "single impulse."[50]

The drafters of the *Manual for Courts-Martial* responded to the new law created by the Court of Military Appeals, and made significant changes in this area to the 1969 *Manual*. The language of paragraph 74b(4), *Findings*, was identical to the language in the 1951 *Manual*, allowing findings of guilt for two or more offenses arising out of the same act. However, substantial changes were made in the paragraphs dealing with sentencing. Paragraph 76a(5) of the 1969 *Manual* relating to sentencing included the same language as paragraph 76a(8) of the 1951 *Manual*, indicating that the maximum authorized punishment may be imposed for each of two or more separate offenses arising out of the same act or transaction. But a 1975 amendment to the 1969 *Manual* inserted the following language:

> Care must be exercised in applying the general rule stated in the above paragraph as there are other rules which may be applicable, with the result that in some instances a final determination of whether two offenses are separate can be made only after a study of the circumstances involved in the individual case.[51]

The newly inserted language went on to describe two "rules," to wit: (a) when the intent for each of several offenses is to be inferred from the same fact; and (b) when two offenses are committed as the result of a single impulse or intent.[52] The new section of the rule concluded by stating: "When an accused is convicted of two or more offenses which are not separate, the maximum punishment for all of those offenses which merge is the maximum prescribed in the Table of Maximum Punishments for the one carrying the most severe punishment."[53]

The drafters' comments to the new rules indicate they were added in response to caselaw set down by the Court of Military Appeals. It does not appear that these new tests were conceived and generated by the President in the exercise of his power under Article 56, UMCJ, to prescribe limits on punishments for courts-martial. Rather, they were an acquiescence to the decisions of the Court of Military Appeals.[54]

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[48] *Id.* at 167.
[49] United States v. Kleinhans, 14 U.S.C.M.A. 496, 34 C.M.R. 276 (1964).
[50] *Kleinhans*, 34 C.M.R. at 278. *See also* United States v. Beene, 4 U.S.C.M.A. 177, 15 C.M.A. 177 (1954) (employing a "societal norm" test for separateness).
[51] MANUAL FOR COURTS-MARTIAL, ¶ 76a(4) (1969) (Change 1, effective 27 January 1975).
[52] *Id.*
[53] *Id.*
[54] *See* United States v. Baker, 14 M.J. 361, 372 (C.M.A. 1983) (Cook, J., dissenting).

One of the most significant military cases on multiplicity and unreasonable multiplication of charges was *United States v. Baker*.[55] In that case, the Court fashioned a test for determining when there was an *unreasonable multiplication of charges*. It has been the misapplication of *Baker* which has caused the most profound impact on the law in this area.

In *Baker*, the accused was convicted of assault and battery of Jacqueline Cooper, aggravated assault on Donna Shipp, and communication of a threat to Donna Shipp. At issue was whether the offenses of aggravated assault and communication of a threat against Donna Shipp were separate for findings and sentencing. Although historically cited as the seminal case on multiplicity in the armed forces, *Baker* was primarily concerned with the concept of unreasonable multiplication of charges.[56] Clearly, the Court was aware of the distinction between unreasonable multiplication of charges and multiplicity. The Court noted,

> The defense broadly asserts that these two offenses were multiplicious. Multiplicity is a term which is barren of substantive meaning unless it is considered within a particular procedural context. For example, a multiplication of charges as a matter of pleading may infringe on the defendant's right to a fair trial or his right to prepare a defense. . . . Multiple convictions may raise questions concerning Double Jeopardy under the Fifth Amendment and Article 44, UCMJ. . . .[57]

In determining whether there was an unreasonable multiplication of charges in that case, the Court first considered whether the offenses were multiplicious as a matter of law. It was this juxtaposition of related, but distinct, issues that caused considerable confusion.[58] The *Baker* Court, Judge Fletcher writing for the majority, relied upon the new rules set out in Paragraph 76a(5) of the 1969 *Manual* for determining the separateness of offenses for punishment purposes.[59] Judge Fletcher expressly rejected the Government's assertion that the *Blockburger* rule applied, and instead relied on the "single impulse" test to decide that, because the accused threatened and assaulted Ms. Shipp for the single purpose of forcing her to drive him somewhere, he could not be punished separately for each offense.[60] In a stinging dissent, Judge Cook declared that "multiplicity for sentencing is a mess in the military justice system" and he listed numerous examples where the proliferation of tests for multiplicity resulted in chaos in the system.[61] He blamed the Court of Military Appeals for the current problems, and

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[55] *Id.*

[56] The Court did mention the "fairly embraced" test for double jeopardy concerns previously set forth in *United States v. Duggan*, 4 U.S.C.M.A. 396, 15 C.M.R. 396 (1954), which was an expansion of the *Blockburger* "elements" test, but it was not the primary thrust of the decision.

[57] *Baker*, 14 M.J. at 364 n.1, (citations omitted).

[58] *Compare* MANUAL FOR COURTS-MARTIAL, United States, (1995 ed.), Rules for Courts-Martial [hereinafter "R.C.M."] 307(c)(4), Discussion, R.C.M. 907b(3)(B), Discussion; R.C.M. 1003c(1)(C) and Discussion.

[59] *Baker*, 14 M.J. at 369-70.

[60] *Id.* at 370.

[61] *Id.* at 372-73 (Cook, J. dissenting).

pointed to the example set by the federal courts as a way to navigate out of this "Sargasso Sea."

> The difference, it seems to me, is that the Federal courts strive to effectuate the will of the legislature. We, on the other hand, have attempted to create rules on an *ad hoc* basis to achieve what we believe to be a proper result in a given case. In the first place, as I have indicated, this is not our charter. In the second place, with each new rule we have established a precedent which has only compounded the confusion. It is evident that no single rule can be created which will adequately accommodate everyone's notion of justice in every situation. For this reason, I presume, Congress reposed in the courts-martial, convening authorities, and Courts of Military Review substantial discretion in imposing and approving sentences. This Court, on the other hand, is limited to review for legal sufficiency approved sentences based upon the criteria established by Congress and the President. Achieving justness in a given sentence is left to others—within the limits provided by Congress and the President.[62]

Casting the deciding vote for the majority, Judge Everett acknowledged that the Court was responsible for the "mess in the military justice system regarding multiplicity for sentencing" but felt it was "more appropriate to endure the present 'mess,' rather than to expose military accused to the harshness of a strictly applied *Blockburger* rule."[63]

Applying the *Baker* tests for multiplicity for sentencing generated considerable confusion in the law, as new tests sprang up to allow courts to fashion remedies to reach what the court felt was a fair result in each case. In *United States v. Johnson*,[64] the accused attempted suicide by injecting himself with heroin. He was convicted *inter alia* of malingering for the suicide attempt, as well as the use and possession of heroin. Chief Judge Everett, writing for the Court, employed a "means" test in determining whether the offenses were separate, and concluded that since the use of heroin was the means used for the malingering, the conviction for heroin use could not stand. Judge Cox, concurring in part and dissenting in part, took issue with the "means" test, pointing out that the Supreme Court had never adopted a "means" test or a "fairly embraced" test to determine multiplicity.[65]

The proliferation of new "tests" for multiplicity resulted in a great amount of appellate litigation in this area, and considerable confusion. The terms "multiplicity" and "multipliciousness" were used to refer both to issues of multiplicity and unreasonable multiplication of charges.[66] Multiplicity truly was a "mess" in the military justice system.

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[62] *Id.* at 375 (Cook, J., dissenting) (citations omitted).
[63] *Id.* at 370-71 (Everett, C.J., concurring).
[64] United States v. Johnson, 26 M.J. 415 (C.M.A. 1988).
[65] *Id.* (Cox, J., concurring in part, dissenting in part).
[66] *See also* United States v. Allen, 16 M.J. 395 (C.M.A. 1983) (setting aside specifications of bad checks where they were the false pretense by which airplane tickets were stolen); United States v. Glover, 16 M.J. 397 (C.M.A. 1983) (holding aggravated assault was not multiplicious with rape, but was not separate for sentencing because it "flowed from a single impulse"); United States v. Ward, 15 M.J. 377 (C.M.A. 1983) (setting aside 13 specifications of uttering bad checks because they were the "false pretense" upon which 13 larceny specifications were based).

A new *Manual for Courts-Martial* was published in 1984. Although it provided a major reorganization of material, the 1984 *Manual* did little to clarify the confusion generated by the many cases on "multipliciousness." The guidance on multiplicity for findings was not included in the new rules relating to findings, but was included in R.C.M. 907(b)(3) relating to motions to dismiss improper specifications. The new rule on sentencing, R.C.M. 1003, contained guidance on how multiplicity affects the maximum punishment. The new rule seemed to adopt the *Blockburger* standard:

> When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense. Except as provided in paragraph 5 of Part IV, offenses are not separate if each does not require proof of an element not required to prove the other. If the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment.[67]

The rule repeats the test for *multiplicity* (i.e. the elements test for separateness) first seen in Paragraph 76a(8) of the 1951 *Manual* and repeated in Paragraph 76a(5) of the 1969 *Manual*. The "single impulse" and "single transaction" tests were eliminated from the rules themselves, and were relegated to the Discussion section following R.C.M. 1003(c)(1)(C) relating to sentencing. The policy guidance on unreasonable multiplication of charges was included in the new *Manual*, but it was also relegated to the Discussion section following R.C.M. 307(c)(4) concerning charging policies.

At this point in time, the Court of Military Appeals seemed content to allow this issue to wallow in the oft-mentioned Sargasso Sea. In *United States v. Jones*,[68] the Navy-Marine Corps Court of Military Review bravely challenged the rationale behind the *Baker* line of cases, and held that by promulgating R.C.M. 307(c)(4), 907(b)(3)(B) and 1003(c)(1)(C), the President intended to adopt the multiplicity doctrine of the federal courts and *Blockburger*, notwithstanding the *Baker* decision. The Court of Military Appeals made short work of this move to bring the military in line with federal practice. The Court specified an issue for review asking whether the lower court could refuse to follow precedent, and promptly dismissed the lower court's rationale, while agreeing with the ultimate result.[69]

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[67] R.C.M. 1003(c)(1)(C).
[68] United States v. Jones, 20 M.J. 602 (N.M.C.M.R. 1985), 23 M.J. 301 (C.M.A. 1987).
[69] *Jones*, 23 M.J. at 301.

D. Multiplicity in Military Law—Back to *Blockburger*

Finally, in the wake of the Supreme Court's decision in *Schmuck v. United States,*[70] the Court of Military Appeals decided *United States v. Teters,*[71] and concluded "the time has passed for a separate military-law doctrine to prevent multiplicious specifications."[72] The Court rejected the *Baker* test, and instead re-adopted the *Blockburger* test for multiplicity. The application of the "elements" test in the military was later refined in *United States v. Weymouth,*[73] *United States v. Morrison,*[74] and *United States v. Foster*.[75] At long last, the Court brought military practice back in line with federal practice, at least with regard to the concept of multiplicity based upon Double Jeopardy concerns.

The Court of Appeals for the Armed Forces has not squarely addressed the distinction between *multiplicity* and *unreasonable multiplication of charges* since the *Teters* case.[76] The Court has alluded to such a distinction in several cases, which caution military judges that they still have the discretion to consider whether charges have been *unreasonably multiplied,* even though charges may not be multiplicious. For example, in *United States v. Foster,*[77] the Court addressed the issue of whether indecent assault was a lesser-included offense of forcible sodomy. After deciding the indecent assault was a lesser included offense, the Court took pains to note:

> There is another elementary concept of justice which none of us should forget, when one act of an accused violates several penal statutes. It is that there is prosecutorial discretion to charge the accused for the offense(s) which most accurately describe the misconduct and most appropriately punish the transgression(s) . . . . *United States v. Teters* notwithstanding, military judges must still exercise sound judgment to ensure that imaginative prosecutors do not needlessly "pile on" charges against a military accused. A fair result remains not only the objective, but indeed the justification of the military justice system.[78]

Similarly, in *United States v. Morrison,*[79] the Court considered whether two charges, missing movement and willful disobedience of the order of a superior commissioned officer, were multiplicious. After applying the "elements" test set forth in *Blockburger*

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[70] Schmuk v. United States, 489 U.S. 705 (1989).
[71] United States v. Teters, 37 M.J. 370 (C.M.A. 1993).
[72] *Id.* at 376.
[73] United States v. Weymouth, 43 M.J. 329 (1995) (establishing a "pseudo-elements" test).
[74] United States v. Morrison, 41 M.J. 482 (1995) (stating if offenses are separate for findings, they are also separate for sentencing).
[75] United States v. Foster, 40 M.J. 140 (C.M.A. 1994) (explaining that when conducting analysis of Article 134 offenses, the service discrediting/prejudice to good order element is presumed in all specifically enumerated offenses).
[76] The one exception is Judge Effron's concurrence in *United States v. Britton,* 47 M.J. 195, 201-05 (1997) (Effron, J., concurring), discussed in Section V, *infra*.
[77] *Foster*, 40 M.J at 140.
[78] *Id*. at 144 n. 4.
[79] *Morrison*, 41 M.J. at 482.

and *Teters*, the Court noted, "[o]ur holding should not be read as *carte blanche* for unreasonable multiplication of charges by creative drafting."[80]

Unlike the higher court, the service courts have specifically recognized and discussed the distinction between *multiplicity* and *unreasonable multiplication of charges*.[81] As discussed later in this article, the difficulty for courts and practitioners arises in properly applying the tests for the distinct concepts, and the confusion that results when a question of law is confused with a question of policy.

III. DISTINCTION BETWEEN MULTIPLICITY AND UNREASONABLE MULTIPLICATION OF CHARGES

There is an enormous difference between *multiplicity* and *unreasonable multiplication* of charges. Multiplicity is an issue of law, arising from double jeopardy limitations, preventing an accused from being twice punished for one offense if it is contrary to the intent of Congress. Unreasonable multiplication of charges is a limitation on the military's discretion to charge separate offenses. The Discussion to R.C.M. 307(c)(4) provides the policy guidance that "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Unreasonable multiplication of charges is based on the equitable concepts of "fairness" and "justice."[82]

Unreasonable multiplication of charges is a discretionary review by a military judge of the prosecution's charging decision.[83] Whether the manner in which otherwise appropriate offenses have been charged is fundamentally unfair is a matter within the discretion of the military judge. Thus, appellate courts review a military judge's exercise of discretion on an "abuse of discretion" standard.[84]

A. A Simple Multiplicity Analysis

By keeping in mind the distinction between multiplicity and unreasonable multiplication of charges, trial practitioners may begin to dispel the "fog" which has surrounded a multiplicity analysis in military practice.[85] A multiplicity analysis must be approached in a logical, linear manner. While a step-by-step analysis will help establish some clarity to the question of multiplicity, whether or not a particular set of charges violates the Double Jeopardy Clause is based on the facts of each particular case. "Multiplicity analysis involves an ad hoc, case-by-case assessment of factual circumstances and the relationship of those facts to the elements of two or more court-

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[80] *Id.* at 484 n.3.
[81] *See* United States v. Erby, 46 M.J. 649 (A.F. Ct. Crim. App. 1997); United States v. Dean, 44 M.J. 683, 684 n. 2 (Army Ct. Crim. App. 1996); United States v. Wilson, 45 M.J. 512, 514 (Army Ct. Crim. App. 1996); and United States v. Oatney, 41 M.J. 619 (N.M. Ct. Crim. App. 1994) *aff'd* 45 M.J. 185 (1996).
[82] *Foster*, 40 M.J. at 144.
[83] *Erby*, 46 M.J. at 651-52.
[84] *Id.*
[85] *See* supra n.3 and accompanying text.

martial offenses."[86] With this *caveat* in mind, it is still possible to formulate a simple analytical framework that will help put the "multiplicity genie" back in the bottle.[87]

1. Are there separate acts?

The first question in any multiplicity analysis should be: are there separate acts?[88] If charged offenses are based on separate acts, there is no need to go into a lengthy multiplicity analysis. Separate acts that constitute violations of different criminal statutes may be charged and punished separately, even when the charged offenses arise from the same set of circumstances.[89] No further multiplicity analysis is necessary.[90]

The *Blockburger*[91] case illustrates this principle. The defendant in Blockburger was convicted on counts two, three and five of a five-count indictment. Counts two and three alleged Blockburger sold an illegal drug to the same buyer, but at different times. Count five alleged Blockburger sold a drug that was not in its original stamped package, in violation of Federal statute. Blockburger challenged his conviction on two grounds. He alleged counts two and three were the same offense, since the sale was to the same person. He also argued that the third count and the fifth count were a single offense because the underlying sale charged in count five was the same sale charged in count three. In responding to Blockburger's argument that his convictions for the two sales were unlawful, the Supreme Court held,

> The sales charged in the second and third counts, although made to the same person, were distinct and separate sales made at different times. It appears from the evidence that shortly after delivery of the drug which was the subject of the first sale, the purchaser paid for an additional quantity, which was delivered the next day. But the first sale had been consummated, and the payment for the additional drug, however closely following, was the initiation of a separate and distinct sale completed by its delivery.[92]

The Court reasoned that separate and distinct prohibited acts are each separately punishable.[93] The Court found that the "test" for what constitutes separate acts is

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[86] United States v. Britton, 47 M.J. 195, 201 (1997).
[87] *See* United States v. Perkins, 1977 CCA LEXIS 579 (A.F. Ct. Crim. App. 4 November 1997) (unpub. op.).
[88] United States v. Teters, 37 M.J. 370, 373 (C.M.A. 1993).
[89] United States v. Gardner, 65 F.3d 82, 85 (8th Cir. 1995).
[90] *Id.*
[91] Blockburger v. United States, 284 U.S. 299 (1932).
[92] *Id.* at 301.
[93] *Id.* at 302. *See also* Ebeling v. Morgan, 237 U.S. 625 (1915). In *Ebeling* the Supreme Court looked at a statute making it a crime to willfully tear or cut into a mailbag with the intention of stealing mail. They found that each cut into any one mailbag with the requisite intent is a single offense, even if there were multiple bags cut at any one time. In the second part of the *Blockburger* opinion, the court looked at Blockburger's second challenge, a different question than whether the acts were separate. It is this second part that gives rise to the "*Blockburger* element's test."

"whether the individual acts are prohibited, or the course of action which they constitute."[94]

A good example of separate acts is found in an unpublished Air Force case. In *United States v. Augostini*,[95] the accused was charged with use of methamphetamine and willful dereliction of duty for going to work under the influence of the drug. Augostini was convicted of both offenses, among others. On appeal he challenged his conviction, arguing that the use of methamphetamine was multiplicious with the dereliction of duty. The Air Force court disagreed. They explained,

> In this case, each offense was based on separate acts and contained different element. Appellant was not convicted of dereliction of duty because he used methamphetamine. The willful dereliction was reporting for duty under the influence of the drug, which it was his duty not to do. Had he waited for the effects to wear off, he would not have been guilty of dereliction. From a multiplicity standpoint, these were separate acts, not a single act charged under two different punitive articles.[96]

Military practice allows charging several acts constituting a course of conduct in a single specification.[97] However, do not confuse a specification alleging a course of conduct with a specification alleging a single offense that is committed over a continuous period of time.[98] Continuous conduct crimes are different from multiple single offenses charged as a course of conduct.[99] A continuous conduct crime is one where the offense itself, as defined by statute, is committed by conduct occurring over a period of time.[100] For example, operating a gambling business in violation of Federal statute is a continuous conduct crime.[101] A defendant does not violate the statute every day she opens her illegal gaming den. Rather, the act of conducting an illegal business extends over the course of time, and she commits only one offense: that of operating an illegal gambling establishment. The statutory language defining the crime makes the participation in a gambling business a single criminal act.[102]

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[94] *Blockburger*, 284 U.S. at 302.

[95] United States v. Augostini, 1996 CCA LEXIS 381 (A.F.Ct. Crim. App. 1996) (unpub. op.).

[96] *Id*. (internal citations omitted).

[97] United States v. Maynazarian, 12 U.S.C.M.A. 484, 31 C.M.R. 70 (1961).

[98] Although technically duplicitous, a course of conduct specification inures to the benefit of the accused, in most cases. Rather than face a separate specification for each separate act, with a corresponding increase in potential punishment, the accused faces a single specification alleging criminal acts on divers occasions. For example, several different uses of marijuana may be charged as a single violation of Article 112a, UCMJ, alleging divers acts between two periods of time. To do so, however, bars conviction for any single offense alleging the same conduct during the same period of time.

[99] United States v. Neblock, 45 M.J.191, 199 (1977).

[100] *Id.* at 197.

[101] Sanabria v. United States, 437 U.S. 54 (1977); *see also* In re Snow, 120 U.S. 274 (1887) (holding that cohabitation is an inherently continuing offense, and that the government could not arbitrarily divide the offense into separate time periods).

[102] *Sanabria*, 437 U.S. at 70. *See also Neblock*, 45 M.J. at 197; *Gardner*, 65 F.3d at 85 (explaining that under the mail fraud statute, 18 U.S.C. § 1341, does not punish the plan or scheme, but punishes the each individual use of the mails in furtherance of the scheme to defraud).

Military caselaw has also emphasized the question whether the charged offenses are based on the same act is the first step in a multiplicity analysis. In *United States v. Neblock*, the Court of Appeals for the Armed Forces held that if a crime is "a distinct or discrete-act offense, separate convictions are allowed in accordance with the number of discrete acts."[103] Again, if the accused committed several crimes in separate acts, it does not violate the Double Jeopardy Clause to charge each separate act in a separate specification.[104]

2. What is Congress' Intent

Congress has the authority to define military offenses and to prescribe punishments for those offenses.[105] That authority gives Congress the ability to determine that a particular act can violate, and may be punished under, two different criminal statutes. As the Fifth Circuit Court of Appeals has explained:

> When Congress enacts a criminal law, pursuant to an enumerated power, Congress determines the appropriate punishment or range of punishments for that crime. If Congress defines multiple crimes that may be implicated by the same conduct, there is a strong presumption that Congress intended that each criminal provision apply. Only by enforcing every law violated by certain conduct can the prosecutor effectively vindicate the interests served by each distinct criminal enactment.[106]

Therefore, the second question in a multiplicity analysis must be: what is Congress' intent?

There are several ways to determine congressional intent. First, the language of the statute itself may demonstrate Congress' intent.[107] For example, Article 120(a) of the Uniform Code of Military Justice defines rape as "an act of sexual intercourse by force and without consent." [108] Article 120(b) defines carnal knowledge as an act of sexual intercourse with a person under sixteen years old, "under circumstances not amounting to rape."[109] By defining carnal knowledge as excluding those acts which may be defined as rape, Congress expressed its intent that a particular act may be either rape or carnal knowledge, but cannot be both.[110] Even when the two offenses have different elements,

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[103] United States v. Neblock, 45 M.J. 191, 197 (1996).

[104] *Id*.; *see also* United States v. Morris, 99 F.3d 476, 480 (1st Cir. 1996) ("Whether a particular course of conduct involves one or more distinct offices depends on congressional choice, and the Double Jeopardy Clause offers little limitation on that choice."). *But see infra* Section IIIB and discussion of unreasonable multiplication of charges.

[105] United States v. Teters, 37 M.J. 370, 373 (C.M.A. 1993).

[106] United States v. Henderson, 19 F.3d 917, 926 (5th Cir. 1994).

[107] Albernaz v. United States, 450 U.S. 333, 336 (1981) ("In resolving petitioners' initial contention that Congress did not intend to authorize multiple punishment for violations of §§ 846 and 923, our starting point must be the language of the statutes.").

[108] Article 120, UCMJ,10 U.S.C. § 920(a).

[109] *Id*.at § 920(b).

[110] United States v. Morris, 40 M.J. 792, 795 (A.F.C.M.R. 1994) *pet. denied* 42 M.J. 103 (1995). *But see* United States v. Bell, 38 M.J. 523 (A.C.M.R. 1993) (applying the *Blockburger* elements test in concluding

if the plain language of the statute indicates the legislature intended for a single act to be punished under one statute or the other, but not both, an accused cannot be separately convicted and punished for both offenses.[111] Conversely, when a legislature specifically indicates that the same act can violate two different statutes, an accused may be convicted and punished under both statutes without regard to the statutory elements.[112] When the legislature expresses its intent, that expression of intent controls.[113]

Congress may also overtly express its intent in the legislative history of the statute defining the crime.[114] In *Garrett v. United States*,[115] the United States Supreme Court looked at the legislative history of the Comprehensive Drug Abuse and Prevention Control Act of 1970[116] to determine that Congress intended to allow prosecution for engaging in a "continuing criminal enterprise" as well as the predicate drug offenses underlying the enterprise. Under the statute, a person who participates in a continuing series of defined drug felony drug offenses, acting as a supervisor or organizer in concert with five or more other people, and who obtains substantial income from the offenses, engages in a "continuing criminal enterprise."[117] The offense is "a carefully crafted prohibition aimed at a special problem. [The statute] is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers."[118] The sponsor of the amendment adopted in the statute described his approach to a continuing criminal enterprise as one "which embodies a new separate criminal offense with a separate criminal penalty."[119] The legislative history could not be more clear. Congress intended a continuing criminal enterprise to be a separate crime in order to add an enforcement tool to the prosecutorial toolbox.[120] The Court held that it does not violate the Double Jeopardy Clause to prosecute a continuing criminal enterprise offense as well as the underlying predicate offenses.[121]

Of course not all criminal statutes will have such a clear expression of legislative intent. When Congress is not so clear, their intent can be "inferred based on the elements

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that rape and carnal knowledge are not multiplicious for findings purposes). Considering the plain language of Article 120, the better precedent is the *Morris* decision. Compare *Morris* with United States v. Colbert, 1997 CCA LEXIS 251 (A.F.Ct. Crim. App. 1997) (f.rev), an unpublished decision where the Air Force court distinguished *Morris* in affirming rape and carnal knowledge convictions. The court found that *Morris* involved only a single act of intercourse, where the accused in *Colbert* had engaged in several acts of intercourse with his stepdaughter. Some of the acts constituted rape, while the evidence showed other acts were initiated by the minor victim to get some benefit. Both of these specifications alleged divers acts over a specified period of time.

[111] Garrett v. United States, 471 U.S. 773, 779 (1985).
[112] Missouri v. Hunter, 459 U.S. 359 (1983).
[113] *Id.* at 368.
[114] United States v. Teters, 37 M.J. 370, 376 (C.M.A. 1993).
[115] Garrett v. United States, 471 U.S. 733 (1985).
[116] 21 U.S.C. § 848 *et seq.*
[117] 21 U.S.C. § 848(b).
[118] 471 U.S. at 781.
[119] *Id*. at 784 (quoting from 116 Cong. Rec. 333630 (1970)).
[120] *Id.*
[121] *Id*. at 793.

of the violated statutes and their relationship to each other."[122] The starting point is the language of the criminal statutes involved.[123] The test enunciated in *Blockburger v. United States*[124] has become the standard for determining congressional intent absent a clear expression in the statute itself or the legislative history. The defendant in *Blockburger* was convicted, among other things, for violations of two statutory provisions based on the same act of selling a narcotic. One provision prohibited selling a narcotic without the narcotic being in the original stamped package and the other provision prohibited selling a narcotic without a written order from the buyer. The defendant argued that the single act should constitute only one offense and should not be separately punished.[125] The Supreme Court held that the statute created two distinct offenses, announcing "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not."[126]

The *Blockburger* test is a rule of statutory construction.[127] The assumption underlying the rule is that "Congress ordinarily does not intend to punish the same offense under two different statutes."[128] As the Supreme Court explained:

> The test articulated in *Blockburger v. United States* serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, *Blockburger* requires that courts examine the offenses to ascertain "whether each provision requires proof of a fact with the other does not." As *Blockburger* and other decisions applying its principle reveal, . . . the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.[129]

In *United States v. Teters*,[130] the then Court of Military Appeals adopted the *Blockburger* elements test as the test for determining legal multiplicity. In *Teters*, the accused challenged his conviction of both larceny[131] and forgery,[132] arguing that the two offenses were multiplicious since he committed larcenies by forging checks. The court

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[122] *Teters*, 37 M.J. at 376-77.
[123] Albernaz v. United States, 450 U.S. 333, 336 (1981).
[124] Blockburger v. United States, 284 U.S. 299 (1932). *See also* the discussion found in Section IIIA, *infra.*
[125] This challenge is different than the challenge made to Blockburger's conviction for two different sales to the same person. *Supra* note 91.
[126] *Blockburger*, 284 U.S. at 304. This is the famous "*Blockburger* Rule" or "elements test." Many courts rely on this "black-letter rule for use in determining when double jeopardy principles prohibit prosecution under two distinct statutory provisions." United States v. Morris, 99 F.3d 476, 479 (1st Cir. 1996).
[127] Whalen v. United States, 445 U.S. 684 (1979); Britton, 47 M.J. at 197.
[128] Ball v. United States, 470 U.S. 856, 861 (1985).
[129] Iannelli v. United States, 420 U.S. 770, 785, n.17 (1975) (citations omitted).
[130] United States v. Teters, 37 M.J. 370 (C.M.A. 1993).
[131] Article 121, UCMJ, 10 U.S.C. § 921.
[132] Article 123, UCMJ, 10 U.S.C. § 923.

applied the *Blockburger* test and compared the elements of the two offenses. Larceny requires an element of wrongful taking, obtaining or withholding and forgery does not. Similarly, forgery requires a false writing that, if genuine, would impose a legal liability on someone else. Larceny does not require this element. "Thus the *Blockburger* rule is clearly satisfied in this case, and separate offenses warranting separate convictions and punishment can be presumed to be Congress' intent."[133]

A simple multiplicity analysis answers only these two questions: "Are there separate acts?" and "What is Congress' intent?" However, things are often not so simple. There are several factors that complicate a simple multiplicity analysis.

3. Lesser Included Offenses.

It is important to keep in mind both the relationship, and the distinction, between legal multiplicity and lesser included offenses. Doing so will keep the multiplicity analysis simple, and will clarify the determination of whether an offense is "necessarily included" in another. A lesser included offense will always be multiplicious, but offenses do not have to be lesser included to be multiplicious.

Courts use the *Blockburger* elements test to determine whether an offense is "necessarily included" in another offense and therefore constitutes a lesser included offense.[134] The "elements test for determining lesser-included offenses, is the counterpart of the multiplicity test … announced long ago in *Blockburger v. United States.*"[135] Although a counterpart of the multiplicity test, the elements test for lesser included offenses may be applied differently from the elements test in a multiplicity context. Specifically, it may be that pleadings and proof are considered part of the elements used to compare offenses only in the lesser included offense context and not when comparing statutory elements for a multiplicity analysis.

Acknowledging this distinction between the two applications of the elements test is logical. When defining a crime by enacting statutory elements, Congress does not concern itself with proof or pleadings in a particular case. The only question is the definition of the crime and whether a single act could be the basis for two convictions and punishments.[136] On the other hand, lesser included offenses are concerned with proof and pleading, considering an important aspect of the analysis is whether the accused had notice that he or she must defend against the lesser offense as well as the greater offense.[137] Merely because a lesser included offense will also, by definition, be

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[133] *Teters*, 37 M.J. at 377-78.
[134] Schmuck v. United States, 489 U.S. 705 (1989).
[135] United States v. Weymouth, 43 M.J. 329, 331 (1995).
[136] *Blockburger*, 284 U.S. at 304.
[137] Consider the explanation of Article 79, UCMJ, found in *Manual*, *supra* note 58, Part IV ¶ 3b. This discussion focuses on whether the specification of the charged offense contains "expressly or by fair implication" allegations that will put an accused on notice to be prepared to defend against a lesser offense necessarily included in the charged offense. The explanation goes on to describe the various ways this notice requirement is met, including when all the elements of the lesser offense are included in the elements of the greater offense and the common elements are identical.

legally multiplicious with its greater offense does not mean that the two analytical frameworks should be confused.

The current state of the law on this issue is unsettled. The Supreme Court has struggled with the application of the *Blockburger* elements test in a lesser included offense analysis.[138] In *United States v. Dixon*[139] the Court considered two unrelated cases where the defendants, Dixon and Foster, had been convicted of criminal contempt charges and then subsequently convicted of offenses upon which the contempt charges were based. Justice Scalia, joined by Justice Kennedy, found that Dixon's criminal contempt conviction could not be separated from the underlying substantive criminal offense and was thus "a species of lesser-included offense."[140] However, Foster's criminal contempt offense was based on only one of the criminal charges for which he was subsequently convicted. The two Justices found that only the criminal charge underlying the contempt conviction was improper and that Foster could be convicted of the other four counts in his subsequent indictment.[141]

In reaching these conclusions, the two Justices looked at the underlying conduct used to prove the criminal contempt conviction as well as the language of the contempt order.[142] Chief Justice Rehnquist, along with Justices O'Connor and Thomas, dissented from this portion of Justice Scalia's opinion. These three Justices applied a straightforward *Blockburger* elements comparison, without recourse to proof or pleadings. They found that "*Blockburger's* same-elements test requires us to focus not on the terms of the particular court orders involved, but on the elements of contempt of court in the ordinary sense."[143] As the "generic" criminal contempt offense has different elements from the substantive criminal offenses charged in the subsequent cases, the three Justices would have found them to be separate offenses.[144]

The confusion over whether to consider proof and pleadings when applying the *Blockburger* elements test during a lesser included offense analysis was clarified somewhat in *Rutledge v. United States*.[145] In *Rutledge* the Supreme Court found that two statutes define the "same offense" when one offense is a lesser included offense of the other.[146] Although not specifically holding that the lesser included offense analysis looks

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[138] *See* Ball v. United States, 470 U.S. 856 (1985) (holding convictions for receipt of a firearm and possession of same firearm violated Double Jeopardy Clause as proof of receipt was necessarily included in proof of possession); Whalen v. United States, 445 U.S. 684 (1980) (stating felony murder alleging death in the act of rape and the underlying rape could not be separately charged and punished since the felony element of the murder required proof of the rape); Brown v. Ohio, 432 U.S. 161 (1977) (holding "joyriding" is a lesser included offense of auto theft).

[139] United States v. Dixon, 509 U.S. 688 (1992).

[140] *Id*. at 698.

[141] *Id.* at 701.

[142] *Id.* at 698-99.

[143] *Id*. at 714 (Rehnquist, C.J. concurring in part and dissenting in part.)

[144] *Id*. The other four Justices, Blackmun, White, Stevens and Souter concurred in part and dissented in part. All felt that the Double Jeopardy Clause applied to bar subsequent prosecution of the substantive criminal offense in these two cases, although their analysis differed.

[145] Rutledge v. United States, 517 U.S. 292 (1996).

[146] *Id*. at 297.

at proof and pleading when comparing statutory elements, the Court looked at the proof underlying both offenses in determining that a conspiracy charge was a lesser included offense of a continuing criminal enterprise offense.[147]

Based on the lack of a clear majority in *Dixon*, and the use of proof in the *Rutledge* case, it would seem that the Court is still unclear whether to include proof or pleadings when comparing elements in the lesser included offense context. However, the *Rutledge* holding can be reconciled with the lack of a clear opinion in *Dixon* if there is a clear distinction between the analysis for lesser included offenses and that for legal multiplicity. *Rutledge* applied the elements-proof test in a lesser included offense context, even though the majority of the Court did not agree in *Dixon* that the *Blockburger* elements test should look beyond the statutory elements of the offense. *Rutledge* is a lesser included offense case. *Dixon* is not.

The Court of Appeals for the Armed Forces' decision in *Weymouth* demonstrates similar confusion.[148] In *Weymouth*, the Court adopted a "pleadings-elements" test after finding that military practice requires certain elements to be specifically plead in order to place an accused on notice of necessarily included offenses.[149] The Court considered the different applications of the *Blockburger* test to be the same whether occurring in the lesser included offense context or not.[150]

Like the two Supreme Court decisions, the Court's adoption of a "pleading-elements test" in *Weymouth* is understandable only if there is a distinction between a lesser included offense analysis and a multiplicity analysis. Because *Weymouth* is a lesser included offense case, the Court's analysis is geared toward lesser included offenses, although the holding also recognizes that lesser included offenses are also legally multiplicious in violation of the Double Jeopardy Clause. Pleadings and proof are relevant in comparing greater and lesser offenses, but are irrelevant when comparing elements to determine congressional intent.

The confusion that has accompanied the different uses of the *Blockburger* elements test can complicate the multiplicity analysis. Confusion lends itself to imprecise uses of the different tests with the consequence that the lesser included offense analysis using statutory elements along with proof and pleadings may be applied in a non-lesser included offense case. The problem arises because although lesser included offenses are always multiplicious, the converse is not true. An offense that is legally multiplicious with another is not always a lesser included offense. For example, rape and carnal knowledge are not lesser included offenses. Rape and carnal knowledge have different statutory elements.[151] Rape is sexual intercourse by force and without consent.[152] Carnal knowledge is sexual intercourse with a person under the age of 16.[153] You need not prove force and lack of consent to prove carnal knowledge, nor need you

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[147] *Id*. at 300.
[148] United States Weymouth, 43 M.J. 329 (1995).
[149] *Id.* at 334.
[150] *Id*. at 336-37.
[151] *Compare* Article 120(a) with 120(b).
[152] Article 120(a), UCMJ; 10 U.S.C. § 920(a); *see Manual, supra* note 58, ¶ 45b(1).
[153] Article 120(b), UCMJ, 10 U.S.C.§ 920(b); *see Manual, supra* note 58, ¶ 45b(2).

prove the victim's age to prove rape. Nevertheless, the offenses are legally multiplicious. Congress has explicitly indicated a person may not be convicted or punished for both rape and carnal knowledge based on a single act of sexual intercourse.[154] The two offenses are multiplicious without being lesser included offenses.

4. Same Statutory Provisions.

Offenses based on the same statutory provision also complicate a simple multiplicity analysis. This complication can arise in two ways: when Congress has combined otherwise distinct crimes into one statute,[155] and general offenses defined by Articles 133 and 134 which include inumerable offenses.[156] In addressing this complication, the important question remains: what is Congress' intent?

In *Albrecht*, the accused argued that his conviction for two specifications of forgery by making false checks was multiplicious with two specifications alleging forgery by uttering the same checks. Forgery by making and forgery by uttering are both violations of Article 123, UCMJ.[157] The Court, in looking for that "oft-sought-after but frequently elusive intent of Congress" looked to the language of the statute itself, finding that the "carefully organized structure of Article 123—which, on its face proscribes various alternative ways to do two qualitatively distinct acts—would seem to reflect a congressional intent to perpetuate the common-law approach of two offenses, but simply place their prohibition with one stautory provision for convenience."[158] Thus the Court found that Congress intended to establish alternative ways to commit forgery. Therefore the accused's conviction for forgery by making was a separate offense from his conviction for forgery by uttering.[159]

Congressional intent is also the determining factor when considering whether offenses charged under Article 133 and 134 are multiplicious. However, with general article offenses, Congress has not expressed specific statutory elements. Instead, the required elements are delineated in Part IV of the Manual for Courts-Martial. In *United States v. Oatney*,[160] the Court of Appeals for the Armed Forces held that Part IV of the Manual is "the appropriate source from which to draw the elements of these offenses for purposes of determining their multiplicity for findings."[161] In *Oatney*, the Court compared the elements of obstruction of justice with the elements of communicating a threat, both Article 134 offenses. The Court found the two offenses were not

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[154] *See* discussion regarding Congressional intent, *supra*, Section IIIA.
[155] *See* Article 123, UCMJ, 10 U.S.C. § 923 where Congress combined two different methods of committing forgery into different subsections of the same statute. United States v. Albrecht, 43 M.J. 65 (1995).
[156] United States v. Oatney, 45 M.J. 185 (1996).
[157] 10 U.S.C. § 923.
[158] *Albrecht*, 43 M.J. at 67.
[159] *Id*. at 68.
[160] *Oatney*, 45 M.J. at 188.
[161] *Id.*

multiplicious, based on a "technical comparison" of their elements even though the threat was the "means" by which the accused obstructed justice.[162]

5. The Effect of Guilty Pleas.

The final factor that must be considered by trial practitioners is the effect of a guilty plea on a legal multiplicity issue. Although not part of a multiplicity analysis, the impact of a guilty plea on multiplicity issues should be recognized and considered prior to making pleas.

Multiplicity issues are normally raised through a motion to dismiss the multiplicious specification.[163] An unconditional guilty plea waives any objection (whether the objection is raised prior to the guilty plea or not), when the objection relates to the factual issue of guilt.[164] This waiver rule is logical. By entering a guilty plea, an accused not only admits to all the elements of the offenses to which he or she pleads guilty, the accused also admits guilt to the substantive crime itself.[165] In *United States v. Lloyd*,[166] the Court of Appeals for the Armed Forces recognized a "guilty plea waiver doctrine" holding that an unconditional guilty plea waives appellate consideration of any multiplicity issue, unless the offenses are "facially duplicative."[167]

"Facially duplicative" means the factual component of the charged offense shows the offenses are the same.[168] If an offense is "facially duplicative," multiplicity issues are still waived, absent application of the plain error doctrine.[169] However, the guilty plea waiver doctrine is a less demanding standard than that required under the plain error doctrine.[170]

B. Proposed Analysis for Unreasonable Multiplication of Charges

The policy guidance and case law suggests a three-step analysis: 1) the specifications must not violate Double Jeopardy concerns; 2) the offense must arise from

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[162] *Id.* Other complicating factors include compound and predicate type offenses, such as felony murder. In *United States v. Teters*, 37 M.J. at 378, the court recognized that although a compound offense and its underlying predicate offense may have different statutory elements, convictions for both may violate the Double Jeopardy Clause.

[163] R.C.M. 907(b)(3).

[164] R.C.M. 910(j); United States v. Lloyd, 46 M.J. 19 (1997). Similarly, even when a case is litigated, the Court of Appeals for the Armed Forces held in *United States v. Britton*, 47 M.J. 195 (1997), that "multiplicity is waived by failure to raise the issue by a timely motion to dismiss." *Id.* at 198.

[165] United States v. Broce, 488 U.S. 563, 570 (1989) (explaining that "a defendant who pleads guilty to a single count admits guilt to the specified offense, so to does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes.").

[166] *Lloyd*, 46 M.J. at 19.

[167] *Id.* at 24; *See also*, United States v. Grant, 114 F.3d 323 (1st Cir. 1997).

[168] *Lloyd*, 46 M.J. at 24; United States v. Harwood, 46 M.J. 26 (1997).

[169] *Harwood*, 46 M.J. at 28.

[170] Lloyd, 46 M.J. at 23 n.3.

what is substantially one transaction, and 3) the charging of the otherwise separate offenses must be "unreasonable."

It is only logical that before engaging in an analysis of whether charges have been unreasonably multiplied one first look to see if multiplicity is an issue. Obviously, if the charged offenses are multiplicious as a matter of law (i.e. if they violate Double Jeopardy concerns), then a court would never have to address the question of whether there was an unreasonable multiplication of charges. Put another way, if the charges are unlawful, they must also violate a policy against unreasonable charging. Only if the charges do ***not*** violate concepts of multiplicity would a court go on to consider the issue of unreasonable multiplication of charges. The test for multiplicity has been discussed above.

It is not too difficult to determine what constitutes "substantially the same transaction."[171] *Baker* and its progeny provide a surfeit of suggestions on how to determine whether otherwise separate offenses are part of "substantially one transaction." At this time, however there is considerable doubt of the continuing validity of any part of the *Baker* decision.[172] In fairness it should be observed that *Baker* really adddressed the issue of unreasonable multiplication of charges—it was the misapplication of the *Baker* test to the separate concept of multiplicity which created chaos in military law. However, should military courts fear resurrecting any part of the *Baker* rationale, practitioners may determine whether offenses arose from "substantially the same transaction" by considering factors such as their factual similarity, their proximity in time, or other circumstances.

Despite the great number of cases on "multiplicity," there is little guidance on what makes charging otherwise separate offenses "unreasonable." Initially, the question of what charges to bring to trial is within the discretion of the convening authority.[173] As discussed above, if charges do not violate Double Jeopardy concerns, it means Congress intended that the specific offenses be subject to separate convictions and separate punishments. If Congress wants separate punishments, it is difficult to see at a glance what would prevent charging otherwise separate crimes.

The *Baker* decision did not offer any guidance on what made the charging "unreasonable."[174] The Discussion to R.C.M. 307c(4) provides one example, suggesting that it would be unreasonable to charge an accused with both absence without leave and a failure to report to an appointment, where the appointment fell within the greater absence. The predecessor to R.C.M. 307 was paragraph 26b, Manual for Courts-Martial, 1969 (Revised edition), which provided additional examples illustrating the unreasonable multiplication of charges. Examples in the 1969 *Manual* suggested it was inappropriate

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[171] R.C.M. 307(c)(4), Discussion.

[172] In *United States v. Morrison* the Court noted they had earlier rejected the "single impulse test" in *United States v. Traeder*, 32 M.J. 455, 456-77 (C.M.A. 1991). United States v. Morrison, 41 M.J. 482 at 484 (1995). Also in *Morrison*, the Court ruled the "ultimate offense" doctrine did not apply. *Id*. More recently, the Court in *Oatney* held that *Blockburger* and *Teters* applied to sentencing. United States v. Oatney, 45 M.J. 185 (1996).

[173] *See* Ball v. United States, 470 U.S. 856, 859 (1985).

[174] United States v. Baker, 14 M.J. 361, 367 (C.M.A. 1983). (The Court said, "The third step in the application of this rule need not be undertaken…").

to charge the larceny of several articles at one time in separate specifications, instead of combining them in a single specification, or charging separately the repeated disobedience of the same order.[175]

Case law has also provided some examples of what constitutes an unreasonable multiplication of charges. Where an accused was charged with dishonorable failure to pay a just debt in two specifications, and where the cut-off date separating the charged periods was meaningless, the Court found multiple charges are unreasonable, and ordered the specifications merged.[176] Thus it would seem that when charging two offenses instead of one is arbitrary, it would be unreasonable.

In *United States v. Johnson,*[177] the accused committed BAQ fraud, resulting in over payment of BAQ and VHA payments for eight months. He was charged with eight specifications of larceny, on the theory that each receipt of an overpayment was a separate theft. The Navy-Marine court found such charging to be unreasonable, and ordered the specifications consolidated. The principle suggested by this decision is that if an offense is broken into separate specifications for the primary purpose of increasing the maximum punishment, that may constitute unreasonable charging.

None of the examples can be considered definitive, however, since it depends upon the facts in each case to determine whether the charging decision is "unreasonable." Indeed, the Discussion to R.C.M. 307 (and its predecessor) states "[t]here are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses."

Lacking more particular guidance, military appellate courts simply defer to the judgment of military judges. Whether the charges against an appellant have been "piled on," so as to be unreasonable, is a question for the military judge in the exercise of his sound discretion.[178] In other words, the military judge has the discretion to determine whether the government abused its prosecutorial discretion, such that the charges against an accused have been unreasonably multiplied. Case law has not clearly established the remedies available to a military judge faced with an unreasonable multiplication of charges. It is suggested that the remedy should be tailored to fit the wrong—that is, the "cure" imposed by the military judge should take away whatever made the charging unreasonable. If a single offense is unreasonably broken into multiple specification so as to make the accused's offenses look more serious, consolidation may be the remedy. If the charging is unreasonable because it was done solely to exaggerate the maximum punishment, limiting the maximum punishment may solve the problem. If the combination of offenses is somehow unfair to the accused, severance or dismissal may be the proper course.

The features of multiplicity and unreasonable multiplication of charges may be summarized in the following chart:

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[175] MANUAL FOR COURTS-MARTIAL, PART IV, ¶ 26B (1969).
[176] United States v. Raynor, 42 M.J. 389 (1995).
[177] United States v. Johnson, 39 M.J. 707, 711 (N.M.C.M.R. 1993).
[178] *Morrison*, 41 M.J. at 484; *Foster*, 40 M.J. at 144 n. 4; *Oatney*, 41 M.J. at 623.

	Multiplicity	***Unreasonable Multiplication of Charges***
Legal Basis:	Double Jeopardy Clause	Policy Guidance: R.C.M. 307(c)(4) (Discussion)
Type of Issue:	Issue of Law	Equitable Issue
Test:	1. Are they separate acts? 2. What is Congress' intent? • express language of statute • legislative history • Blockburger/Teters elements analysis	1. Do offenses violate Double Jeopardy Clause? 2. Do offenses arise from what is substantially one transaction? and 3. Are separate convictions and punishments for the offenses unreasonable? • an abuse of prosecutorial discretion • arbitrary • improper purpose
Effect on Sentencing:	Not a factor—may be separately convicted and punished for separate offenses.[179]	Effect on sentence may be a factor in determining "unreasonableness" of the prosecutor's charging decision
Standard of Review on Appeal:	*de novo*	Abuse of discretion[180]
Effect on Failure to Raise the Issue at Trial":	Waived.[181] • Unless offenses are "facially duplicative," then test for plain error.[182]	Forfeited.[183]
Remedies:	• Dismiss multiplicious offense[184] • Consolidate specifications into one offense	• Consolidate/amend specifications to include separate acts of "substantially one transaction"[185] • Dismiss offending specification • Limit maximum punishment

[179] *Blockburger*, 284 U.S. at 304; *Morrison*, 41 M.J. at 482.
[180] *Erby*, 46 M.J. at 652.
[181] *Lloyd*, 46 M.J. at 24; *Britton*, 47 M.J. at 198.
[182] *Harwood*, 46 M.J. at 28.
[183] *Erby*, 46 M.J. at 652.
[184] Ball v. United States, 470 U.S. 856 (1985).
[185] This will eliminate the "unreasonableness" of the charging decision. *See Erby*, 47 M.J. at 651-52.

IV. LINGERING CONFUSION

Despite the clear language of *Teters* bringing the military in line with *Blockburger*, military justice practitioners still confuse the concepts of *multiplicity* and *unreasonable multiplication of charges.* It is not difficult to understand why: the *Baker* decision has become so great a part of our military jurisprudence it is difficult to trace current case precedent back to that now-rejected source.

A. Confusion in the Courts

Judges from military appellate courts, including the Court of Appeals for the Armed Forces, have fallen victim to the confusion between these concepts. For example, in *United States v. Oatney*,[186] the majority analyzed the multiplicity issue using the *Blockburger/Teters* elements test. Indeed, the case is an excellent example of the classic multiplicity analysis. Interestingly, the dissent cited *Blockburger*, but then employed the analysis for *unreasonable multiplication of charges*, concluding it was "Piling on! 15-yard penalty!"[187] Before that, in *United States v. Weymouth*[188] the Court considered the question whether various assault offenses were lesser-included offenses of attempted murder.[189] Although this is an issue of law, and the Court found that the offense of assault in which grievous bodily harm is intentionally inflicted was not "technically" included within attempted murder, the majority resolved the case against the government on the grounds the military judge did not "*abuse his discretion*" in finding these charges to be lesser included offenses.[190] Of course, the "abuse of discretion" standard is used for reviewing the *unreasonable multiplication of charges*; multiplicity issues are issues of law, reviewed *de novo*.

The decision of the Air Force Court of Criminal Appeals in *United States v. Clemente*,[191] is an example of the error which can result when *multiplicity* is confused with *unreasonable multiplication of charges.* In that case, the accused wrongfully took ATM cards belonging to different victims and used them to withdraw money from automatic teller machines. After the accused had taken that money, the machine displayed the prompt, "Do you want to make another transaction?" Without removing the card from the machine, the accused punched the buttons attempting to withdraw more money from the same machine. Sometimes the accused received cash; on other occasions the subsequent request was denied. Each successful transaction was charged as a larceny, while the unsuccessful tries were charged as attempted larcenies. At trial, the accused moved the court to dismiss as multiplicious all but one specification for each separate visit to an ATM. The military judge carefully analyzed the specifications in

[186] United States v. Oatney, 45 M.J. 185 (1996).
[187] *Id.* at 190.
[188] United States v. Weymouth, 43 M.J. 329 (1995).
[189] *Id.* at 338.
[190] *Id.* at 340.
[191] United States v. Clemente, 46 M.J. 715 (1997).

light of the facts employing the proper test for multiplicity, concluded that each withdrawal from the ATM was a separate act, and denied the motion to dismiss.

On appeal, the Air Force court made no distinction between *multiplicity* and *unreasonable multiplication of charges*. The court described the issue as the "*Multiplicity* of Offenses During One Visit to an ATM," based upon the Discussion to R.C.M. 307(c)(4) that "what is substantially one transaction should not be made the basis for an *unreasonable multiplication of charges* against one person."[192] The Court framed the question as being whether "closely related acts of removing money several times from an ATM … can be charged as multiple thefts under Article 121, UCMJ."[193] Of course, the controlling question for any multiplicity analysis is whether the offenses arose from the same act—not whether they are "closely related," or "substantially the same transaction." These latter tests relate to the question of whether there was an unreasonable multiplication of charges. The Court's juxtaposition of concepts and tests resulted in an opinion that further darkens already murky waters.[194]

This confusion is also found in other service courts, even though they recognize the difference between multiplicity and unreasonable multiplication of charges. In *United States v. Owen*,[195] the Army Court of Criminal Appeals appears to have blended the concepts of multiplicity and unreasonable multiplication of charges in analyzing whether the charges were multiplicious in that case.[196]

It appears that the Court of Appeals for the Armed Forces still recognizes the distinct concept of unreasonable multiplication of charges. However, the Court has not dictated how it is to be applied, except that the tests espoused in *Baker* and its progeny have been rejected.[197]

B. Confusion in the Manual for Courts-Martial

The confusion surrounding multiplicity has been a part of military case law so long that it has found its way into the *Manual for Courts-Martial*, as its drafters incorporated decisions from military appellate courts into the *Manual's* guidance. Unfortunately, the source of the guidance is obscured by time, leaving as authority rules which tend to perpetuate the confusion.

Some examples are quite easy to spot. The Discussion to R.C.M. 907(b)(3)(B), states, "A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other. A specification may also be multiplicious with

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[192] *Id.* at 717 (emphasis added).
[193] *Id.* at 718.
[194] The Air Force court's approach is baffling, especially since, only 23 days before, the same panel had released the decision in United States v. Erby, 46 M.J. 649 (1997), which clarified the distinction between multiplicity and unreasonable multiplication of charges.
[195] United States v. Owen, 47 M.J. 501 (Army Ct. Crim. App. 1997).
[196] *Id.* at 503-04 (discussing the "elements test" and "piling on" as one legal standard, and "applying the law of multiplicity so as to reach a fair result in each specific case.")
[197] *Morrison*, 41 M.J. at 484 (rejecting "ultimate offense" doctrine); *Traeder*, 32 M.J. at 456-57 (abandoning the single-impulse test); *Teters*, 37 M.J. at 376 (rejecting "fairly embraced" test).

another if they describe substantially the same misconduct in two different ways." Obviously, whether specifications "describe substantially the same misconduct in two different ways" is not the test for a violation of the Double Jeopardy clause. Nor is it a complete analysis for an unreasonable multiplication of charges, since it does not require a finding that charging two otherwise separate offenses is unreasonable. Instead, the language appears to be the quintessence of *Baker*, yet to be expunged.

R.C.M. 1003 concerns punishments, and sets forth methods for determining the maximum possible punishment during sentencing. R.C.M. 1003(c)(1)(C) is entitled, "Multiplicity," and states, "the maximum authorized punishment may be imposed for each separate offense." The rule goes on to define separate offenses this way: "offenses are not separate if each does not require proof of an element not required to prove the other." Thus, it seems the rule strictly follows the *Blockburger* test. But a glance at the Discussion to R.C.M. 1003(c)(1)(C) would quickly lead one astray. It begins by defining the concept of "multiplicity in sentencing," even though the Court specifically rejected that as part of a Double Jeopardy analysis in *United States v. Morrison*.[198] The Discussion declares that offenses "arising out of the same act or transaction may be multiplicious for sentencing depending on the evidence." To further confuse matters, the Discussion then elaborates on the *Blockburger* elements test, followed by an equally detailed analysis of now-outdated tests for unreasonable multiplication of charges, including the "single impulse test," the "unity of time" test, and the "connected chain of events." While these may be circumstances which a military judge may consider in arriving at a maximum possible sentence in a case, the point is that the Discussion jumbles the concepts.

Some guidance in the *Manual for Courts-Martial* is nearly impossible to spot as being derived from a confusion of distinct concepts. One such example is guidance in Part IV, the Punitive Articles section, dealing with multiple article larceny. The paragraph states:

> When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several persons or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.[199]

The same language appears in the discussion of larceny in the 1949 *Manual*, the 1951 *Manual*, and the 1969 *Manual*. Unfortunately, it does not indicate whether this guidance is in keeping with concepts of *legal multiplicity* or general considerations of *unreasonable multiplication of charges*.[200]

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[198] United States v. Morrison, 41 M.J. 482 (1995).

[199] *Manual*, *supra* note 58, Part IV, Paragraph 46c(1)(h)(ii).

[200] In the indices of the 1949, 1951 and 1969 Manuals, under "Larceny—singleness of offense although articles belong to several persons," or its equivalent, are references to the discussion of larceny, above, and a companion reference to the rule concerning *unreasonable multiplication of charges*.

As discussed above, *multiplicity* is concerned with separate acts, while *unreasonable multiplication of charges* allows consideration of a series of acts seen as "substantially one transaction." The scenario involving theft of articles from different owners contained in a single suitcase is consistent with the law regarding multiplicity, because there would be only *one act* which comprised the theft of the suitcase, and only one offense—larceny—was committed. The second scenario about entering a room and taking property belonging to several persons lacks sufficient detail to provide meaningful guidance, because it does not indicate whether each taking was the result of a single act or whether there were multiple acts. The decisions of the Supreme Court discussed in Section II, above, illustrate the point that successive crimes do not create a single offense for the purposes of the Double Jeopardy Clause. Thus, the cited discussion from the 1984 *Manual for Courts-Martial*, standing alone, does not indicate whether the guidance about charging multiple thefts in a single specification is based upon Double Jeopardy concerns or the general policy against unreasonable multiplication of charges. However, a glance at the discussion of *unreasonable multiplication of charges* in both the 1951 and 1969 *Manuals* reveals the source of this guidance—both state: "The larceny of several articles should not be alleged in several specifications, one for each article, when the larceny of all of them can properly be alleged in one specification."[201] Given this source, it appears the language of Paragraph 46c(1)(h)(ii) simply restates the policy about *unreasonable multiplication of charges*. However, inserting policy guidance on multiplication of charges in the discussion of larceny does not create some new standard under the Double Jeopardy Clause.

Still, the language about multiple article larceny in the *Manual for Courts-Martial*, Part IV, Paragraph 46c(1)(h)(ii), is relied upon by military courts as guidance on issues of *multiplicity*. In *United States v. Martin*,[202] the (then) Court of Military Appeals cited the reference to support its conclusion that charging the theft of money using another's ATM card, and the theft of the ATM card itself, were multiplicious. In a very short decision, the Court simply relied on earlier two cases resolved by summary disposition as precedent. The first case cited by the *Martin* court was *United States v. Huggins*.[203] There, the Court of Military Appeals, employing the vague terminology of "multiplicious" pleadings, and without discussing the unique facts, ordered the three specifications of larceny consolidated. The opinion did not indicate whether this was done to cure an error involving *multiplicity* or *unreasonable multiplication of charges*, undoubtedly because, in light of *Baker* and its progeny, the distinction between the two concepts was lost. By examining the lower court's opinion however, it appears the disposition of the *Huggins* case was premised upon an *unreasonable multiplication of charges.* In *United States v. Huggins*,[204] the Army Court of Military Review set out the facts of the case. The accused was charged with three specifications of larceny: stealing

[201] MANUAL FOR COURTS-MARTIAL, United States, Chapter IV, Paragraph 26b (1951); MANUAL FOR COURTS-MARTIAL, United States, Chapter IV, Paragraph 26b (1969).
[202] United States v. Martin, 36 M.J. 315 (C.M.A. 1993)
[203] United States v. Huggins, 17 M.J. 345 (C.M.A. 1984).
[204] United States v. Huggins, 12 M.J. 657 (A.C.M.R. 1981).

a radio from Private Gannon, stealing a radio from Specialist Floyd, and stealing $597.00 in currency from Specialist Floyd. The Army court wrote of "multipliciousness" generally, and referred to the *Manual* discussion of thefts of multiple articles, without analyzing whether the offenses arose from separate acts. Instead, the majority decided the case on the basis of waiver by failing to object at trial. Interestingly, the singularly insightful concurring opinion by Judge O'Donnell clearly identified the issue as one of an unreasonable multiplication of charges, and the legal effect of failing to object on those grounds at trial.

The *Martin* case also relied upon the Court of Military Appeals' summary disposition in *United States v. Orr*.[205] Once again, the Court did not develop the facts, although it appeared that the three charged thefts involved distinct property taken during the course of a single housebreaking. Instead, the Court relied on its summary disposition in the *Huggins* case described above, and again consolidated the three thefts into a single specification. Had the Court undertaken a review appreciating the distinction between *multiplicity* and *unreasonable multiplication of charges*, the result may have been different. Clearly, breaking into a house, going through and selectively stealing various items would constitute separate offenses. Larceny is not an offense requiring a continuous course of conduct—it is complete when there is taking (caption) and carrying away (asportation) of personal property with the intent to permanently deprive another of possession.[206] The Supreme Court has specifically rejected any test based upon a "continuous transaction" or a "single impulse."[207] The Supreme Court also clearly stated in *Blockburger* that crimes defined as single acts are complete upon the occurrence of that single act.[208] Successive thefts, like successive slashing of mail bags, do not turn separate offenses into one offense for the purposes of the Double Jeopardy Clause.[209] Nevertheless, the precedent established by decisions like those of the Court of Military Appeals in *Martin*, *Huggins* and *Orr* continue to perpetuate the confusion surrounding these concepts.

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[205] United States v. Orr, 20 M.J. 139 (C.M.A. 1985)
[206] MANUAL FOR COURTS-MARTIAL, United States, Part IV, ¶ 46b (1984).
[207] Morgan v. Devine, 237 U.S. 632 (1915).
[208] *Blockburger*, 284 U.S. at 302.
[209] Ebeling v. Morgan, 237 U.S. 625 (1915); Tesciona v. Hunter, 151 F.2d 589 (1945); McKee v. Johnson, 109 F.2d 273 (1939) *aff'd* 125 F.2d 282 (1942); United States v. Hammock, 13 C.M.R. 816 (A.F.B.M.R. 1953). *pet. denied*, 15 C.M.R. 431 (1954).

V. THE REMEDY

The remedy is a simple one: military courts need to distinguish carefully and consistently, between the separate concepts of multiplicity arising from Double Jeopardy and the policy against unreasonable multiplication of charges. This same distinction also needs to be carried over into the language of the *Manual for Courts-Martial.*

Over the years, several military justice scholars have proposed legislative or regulatory changes to fix the multiplicity problem. However, the authors suggest a legislative or regulatory remedy, while helpful, is not the best solution, and would be futile if the military courts do not begin to distinguish these concepts. What is necessary is that military courts distinguish carefully between the separate concepts of multiplicity based on Double Jeopardy concerns, and policy considerations against the unreasonable multiplication of charges.

Major William T. Barto, a professor at the U.S. Army Judge Advocate General's School, has suggested the President include in the *Manual for Courts-Martial* a "Table of Equivalent Offenses," similar to the Table of Commonly Included Offenses.[210] Promulgated under the President's authority under Article 56, UCMJ, to make rules for sentencing, the Table would identify combinations of offenses that could not be the subject of separate punishment at courts-martial if they arise from the same act of transaction.[211] The difficulty with the proposal is that it would apply to complaints regarding both multiplicity (Double Jeopardy) and unreasonable multiplication of charges. Also, it concerns itself only with the problems associated with the sentence and Double Jeopardy concerns also affect the findings—the Double Jeopardy Clause protects an accused from carrying two convictions for what was a single offense.[212] Thus, sentencing relief under this plan, however meaningful to the accused, would not end appellate litigation on this issue. Because multiplicity issues potentially have completely different impact than issues relating to unreasonable multiplication of charges, it is still necessary that military practitioners employ the proper terminology and tests to differentiate between the two.

In *United States v. Britton,*[213] Judge Effron, in a concurring opinion, recommended amending the *Manual* to use a word other than "multiplicious" to describe offenses that are combined by a military judge as a matter of discretion during sentencing.[214] At the same time, Judge Effron discusses the prohibitions against double

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[210] William T. Barto, s*upra* note 2 at 29.
[211] *Id.*
[212] Rutledge v. United States, 517 U.S. 860 (1996); Ball v. United States, 470 U.S. 856, 861 (1985).
[213] United States v. Britton, 47 M.J. 195, 201-05 (1997) (Effron, J., concurring).
[214] *Id.* at 204 Note that although Judge Effron maintained such power was well within the inherent authority of appellate courts, he also proposed that the President amend the *Manual for Courts-Martial* to authorize military judges to order the "conditional dismissal" of offenses found to violate double jeopardy concerns. This is an intriguing proposal--although it is not clear whether this would discourage or encourage the "piling on" of charges, it would certainly reduce appellate litigation on this issue. This proposal is not addressed at length herein, since the thrust of this article is the confusion between multiplicity and unreasonable multiplication of charges.

jeopardy and multiple charges growing out of the same transaction as being two aspects of multiplicity.[215] It is certainly true that both multiplicity and unreasonable multiplication of charges have historically been considered two parts of the concept of multiplicity. However, it is the authors' suggestion that the co-mingling of these separate concepts is the heart of the problem. Rather than promoting that confusion of concepts, military courts should be distinguishing them. It should be noted that, if the word "multiplicious" is used in the *Manual for Courts-Martial* to refer to both multiplicity and unreasonable multiplication of charges, it is because military courts have historically confused the two in case law. As Judge Cook noted in his dissent in *Baker*, the *Manual* provisions followed the case law; "The additional tests for multiplicity in sentencing [in the *Manual for Courts-Martial*] are not attributable to the President, but merely represent acquiescence to decisions of this Court."[216] Originally, the *Manual for Courts-Martial* did distinguish between the legal concept of multiplicity and the policy against unreasonable multiplication of charges. Only the confusion generated by military case law, and its subsequent inclusion in the discussion sections of the *Manual*, has brought the law to its current state. Nonetheless, the authors heartily concur with the suggestion that the *Manual* be amended so that the word "multiplicious" is not used in connection with unreasonable multiplication of charges. However, unless military courts begin using these terms precisely, their meanings and the legal analysis which follow will remain confused.

VI. CONCLUSION

"The medieval philosopher Maimonides wrote a famous work called *Guide to the Perplexed*. That label could certainly apply to the military justice practitioner trying to puzzle out the complexities of multiplicity."[217] The perplexed practitioners among us who need a guide to navigate the multiplicity maze should remember that a multiplicity analysis is much simpler if the distinction between multiplicity and unreasonable multiplication is maintained. The failure to keep these two concepts distinct is what has caused multiplicity to become lost in a judicial fog. Keeping these two different concepts separate allows for a linear multiplicity analysis, with clearly defined tests and remedies. The need for the accurate use of words and a clear understanding of distinct concepts is important in multiplicity jurisprudence at all levels of military practice. Applying this simple analysis for both multiplicity and unreasonable multiplication of charges will facilitate proper charging of a case, benefit the trial practitioner and the military judge, and provide much-needed appellate clarification of these confusing concepts.

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[215] *Id.* at 199.

[216] *Baker*, 14 M.J. at 372 ("The additional tests for multiplicity in sentencing [in the Manual for Courts-Martial] are not attributable to the President, but merely represent acquiescence to decisions of this Court.)."

[217] United States v. Bauer, 1998 CCA LEXIS 164 (A.F. Ct. Crim. App. 1998) (unpub. op.).

The "Exculpatory No" – Where Did It Go?

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I. INTRODUCTION

The Supreme Court recently ended nearly fifty-seven[1] years of controversy surrounding the "exculpatory no"[2] exception to 18 U.S.C. §1001 when it decided the case of *Brogan v. United States.*[3] Writing for the Court, Justice Scalia stated "[i]n sum, we find nothing to support the 'exculpatory no' doctrine except the many Court of Appeals decisions that have embraced it…the plain language of §1001 admits of no exception for an 'exculpatory no.'"[4]

How did the "exculpatory no" exception arise in the first place, and what impact, if any, does the Court's decision in *Brogan* have on the military's own use of the "exculpatory no" exception in trials by court-martial?

II. FEDERAL CIVILIAN COURTS

A. 18 U.S.C. § 1001

In federal civilian courts, prosecutions for making false statements generally fall under 18 U.S.C. §1001.[5] While the statute on its face appears

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[1] As measured from the date of the opinion in United States v. Gilliland, 61 S. Ct. 518 (1941), the first reported case to interpret the 1934 amendment to 18 U.S.C. §1001, which gave rise to the "exculpatory no" exception. *See infra* note 17 and accompanying text.

[2] The term "exculpatory no" is actually something of a misnomer, since the exception has been applied to cases where the defendant made statements other than simply saying "no." A review of the case law indicates this term is used to apply to any situation where a suspect lies about his or her own culpability when questioned, whether in the classical "Q. Did you do it? A. No." sense, or when the suspect goes further, by making affirmative statements such as "Q. Did you do it? A. I had nothing to do with it, don't know anything about it, and wasn't even around when it happened." In this article, "exculpatory no" and "exculpatory no" exception are both used in reference to this term.

[3] Brogan v. United States, 118 S. Ct. 805 (1998).

[4] *Id.* at 811.

[5] 18 U.S.C.A. § 1001 (1996) in pertinent part provides:

straightforward, litigation concerning its meaning, and specifically its application, has been frequent.[6] For a clear understanding of the development of the "exculpatory no" exception to §1001, one must first look briefly at the evolution of the statute.

The statute that was to eventually become §1001[7] was enacted in 1863 "in the wake of a spate of frauds upon the Government."[8] The original Act[9] prohibited both false claims against the government, and the use of falsifications in support of claims against the government. This latter falsification portion of the original statute was revised in 1934.[10] It was then,

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> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the of the United States, knowingly and willfully—
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> > (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> > (2) makes any materially false, fictitious, or fraudulent statement or representation; or
> > (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title or imprisoned not more than 5 years, or both.

[6] *See generally* United States v. Citron, 221 F. Supp. 454 (S.D.N.Y. 1963); Green v. United States, 236 F.2d 708 (D.C. Cir. 1956); Brogan v. United States, 118 S. Ct. 805 (1998); and United States v. Stark, 131 F. Supp. 190 (D. Md. 1955), as well as those cases discussed *infra* Part II.C. These cases are representative of the multitude of those from every federal jurisdiction that have discussed the "exculpatory no" exception to §1001 and the predecessors to §1001. For a more complete listing of the various cases applying the "exculpatory no" exception, *see* 18 U.S.C.S. §1001 (1998), Interpretive Notes and Decisions.

[7] For simplicity, this article throughout refers to the false statement portion of the statute as §1001, even though the earlier versions of the statute were not so numbered.

[8] United States v. Bramblett, 75 S. Ct. 504, 506 (1955). This case also discusses the various changes made to the Act over the years between 1863 and 1934.

[9] Act of March 2, 1863, 12 Stat. 696 (1863). This Act made it a crime for

> any person in the land or naval forces of the United States . . . [to] make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; . . . any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry.

[10] 18 U.S.C.A. §35 (1934). The amendment read:

at the behest of the Secretary of the Interior, that the scope of the Act was broadened to cover false statements on reports submitted in accordance with Interior Department regulations regarding the interstate transportation of oil.[11] Prior to the 1934 amendment, there was no law prohibiting the filing of such statements.[12] Indeed, the Supreme Court had held prior to 1934 that the Act applied only to false statements made in a claim against or to defraud the government.[13]

After the 1934 change, however, the Court upheld an indictment alleging false statements on reports filed under the "Hot Oil" Act of 1935,[14] holding that the 1934 change was intended to broaden the statute's applicability beyond those cases involving pecuniary or property loss to the Government.[15] In deleting any requirement that the falsification be made in furtherance of a claim against the government, the statute appeared to make criminal any false statement made "in any matter within the jurisdiction of any department or agency of the United States . . . ."[16]

B. The 1934 Amendment

It was as a result of the 1934 amendment that the courts created the "exculpatory no" exception. Those charged with making false statements under §1001 after the 1934 amendment, especially those charged with lying to

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> [O]r whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder.

In 1948 the statute was again revised, putting the statute into its present form. *See* 18 U.S.C. §1001 (1948). The false statement portion of the Act became §1001. No major substantive changes pertinent to this article were made to the section after 1934.

[11] 75 S. Ct. at 507. *See also* United States v. Gilliland, 61 S. Ct. 518 (1941) and *infra* note 17. The Secretary of the Interior instituted the reporting requirements in an effort to enforce the "Hot Oil" Act of 1935, which regulated the amount of oil that could be transported across state lines. Apparently the thinking was that the filing of reports would be an easy way for the Interior Department to oversee transportation of petroleum, and that a law that made it illegal to include false information on the reports would ensure the integrity of the reports. *See* Brogan v. United States, 118 S. Ct. 805, 814 (1998) (Ginsburg, J., and Souter, J., concurring in judgment).

[12] 61 S. Ct. at 522.

[13] *See* United States v. Cohn, 46 S. Ct. 251 (1926).

[14] 61 S. Ct. 518. *See also* Act of Feb. 22, 1935, ch. 18, 49 Stat. 30 (1935).

[15] *See* 61 S. Ct. 518. *See also* United States v. Bramblett 75 S. Ct. 504 (1955) and United States v. Stark, 131 F. Supp. 190 (D. Md. 1955).

[16] 18 U.S.C.A. §35 (1934).

government investigators about their own criminal culpability, challenged the applicability of the "new" statute to their situations.[17]

The first reported case to rule on the meaning and effect of the 1934 amendment to 18 U.S.C. §1001 was *United States v. Gilliland*.[18] In *Gilliland*, the defendants were charged with making false statements on reports they provided to the Interior Department regarding petroleum. The Secretary of the Interior, acting under authority from the President of the United States, had established Department regulations requiring such reports in order to enforce the "Hot Oil" Act of 1935.[19] At the trial level, the court dismissed the counts of the indictment charging the false statements, holding the charges did not state an offense under the statute. The prosecution appealed the case to the Supreme Court.[20]

The Court held that the statute did encompass false statements made on the reports filed with the Department of the Interior, despite the defendants' contention that

> the broad language of the statutory provision here involved should be restricted by construction so as to apply only to matters of a nature similar to those with which other provisions of [§1001] deal, "such as claims against, rights to, or controversies about funds involved in 'operations of the Government,'" that is, to matters in which the Government has some financial or proprietary interest.[21]

Because the 1934 amendment deleted the words "cheating and swindling," and made §1001 applicable to "false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States . . .,'"[22] the Court believed there was no longer a requirement that the

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[17] *See generally* 61 S. Ct. 518; 131 F. Supp. 190; United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957); United States v. McCue, 301 F.2d 452 (2d Cir. 1962) *cert. denied*, 370 U.S. 939 (1962); Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962), *overruled by* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994). These cases are representative of those where the defendants challenged the applicability of the statute to their circumstances. The applicability of the statute has been challenged for a variety of reasons, such as whether the statute applies only to false statements made to an agent of the executive branch (*Bramblett)*, whether there must still exist a loss to the government (*Gilliland)*, and whether the statute is intended to protect the processes of government from interference and obstruction (*McCue)*.

[18] 61 S. Ct. 518. The Court in *Gilliland* did not use the term "exculpatory no," nor did it specifically address the issues that led to this exception. The main issue in *Gilliland* was whether the statute as amended was broadened to cover the type of statements charged in that case. In ruling that it had been so broadened, however, the Court opened the door that ultimately led to the lower courts' creation of the "exculpatory no" exception.

[19] *Id.* at 521. *See supra* note 10.

[20] 61 S. Ct. at 520. Appeal was directly to the Supreme Court since the district court's ruling was based on construction of the statute. *Id.*

[21] *Id.* at 521 (quoting appellant's brief quoting 18 U.S.C. §1001).

[22] *Id.* at 522 (quoting 18 U.S.C. §35 (1934)).

false statements be used or intended to affect the financial or pecuniary interests of the Government. Instead, the Court concluded, "the amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described"[23] in §1001.

The Court was equally unmoved by the argument that violation of §1001 carried a stiffer penalty than violation of the "Hot Oil" Act itself, and that it therefore made no sense for §1001 to apply to false statements made on reports filed under the "Hot Oil" Act. The Court held that it was up to Congress to determine what penalties it chose to prescribe and that the penalty prescribed "has no significance in connection with the construction and application of [§1001].[24]

The reach of §1001 after the 1934 amendment was defined by the Supreme Court in *United States v. Bramblett*.[25] In that case, a former member of Congress was convicted of making false statements to the Disbursing Office of the House of Representatives when he had it pay a salary to a woman he claimed worked for him as his official clerk.[26] The defendant asserted that §1001 did not apply to the legislative or judicial branches of government, but only to the executive branch, mainly because of 18 U.S.C. §6.[27] That section gave general definitions for use in Title 18, and defined "department" as applying to the executive branch unless otherwise indicated.[28] The defendants argued that the term "department" as used in §1001 should be given this narrow interpretation. In holding that §1001 applied equally to the legislative and judicial branches as to the executive, the Court said "[t]he context in which this language is used calls for an unrestricted interpretation."[29]

The first major case limiting the scope of §1001 was *United States v. Stark.*[30] In *Stark*, the defendant had obtained contracts for construction projects with the Federal Housing Administration (FHA). While under investigation, he lied to FBI agents when questioned about giving bribes to

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[23] *Id.*

[24] *Id.* at 523. This portion of the Court's opinion is interesting in that lower courts in later opinions would refuse to apply §1001 to false statements in part because the penalty for violation of §1001 exceeded that for committing perjury. *See, e.g.*, United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953).

[25] United States v. Bramblett, 75 S. Ct. 504 (1955). Aside from its extending the application of §1001 to the judicial and executive branches, the *Bramblett* case is most noteworthy for its analysis of the history and evolution of §1001.

[26] Apparently, she didn't.

[27] 75 S. Ct. 508.

[28] *Id.*

[29] *Id.*

[30] United States v. Stark, 131 F. Supp. 190 (D.Md. 1955). Albert Stark's partner, Harry Bart, was also charged and his case was joined with Stark's, so the district court's opinion talks about false statements in the plural. For simplicity, this article refers only to Albert Stark and his false statement.

FHA employees, saying he had not done so, when in fact he had. He was charged under §1001 for this false statement.[31]

The case was before the district court through a request for a preliminary trial without a jury on the general issue of the applicability of §1001 to Stark's situation.[32] The court distilled the questions stipulated to by counsel for resolution down to two:

> [W]hether the Baltimore office of the FBI was duly authorized to make the investigation of the alleged bribery or attempts to bribe officials of the Baltimore office of the FHA; and . . . whether the [answer] allegedly made by the [defendant] constituted [a statement] in a "matter within the jurisdiction" of the FBI, within the meaning of section 1001.[33]

The court ruled in favor of the prosecution on the first issue, seeing no obstacle to the authority of the FBI to investigate the case**.** On the second question, however, the court expressed misgivings about whether the statute should be construed so broadly as to allow such a prosecution.

In refusing to apply §1001 to Stark's situation, Justice Chesnut, writing for the court, first discussed the evolution of the statute itself, citing extensively from *Bramblett*, then went on to discuss the holding in *Gilliland.* While conceding that *Gilliland* made it clear false statements charged under §1001 were no longer required to relate to the financial interests of the United States, he nevertheless believed some harm to the Government was necessary for a prosecution under §1001. Paraphrasing the Court in *Gilliland*, he said that for false statements to be charged under §1001, they must still "have important relation to the protection of the authorized functions of the governmental departments and agencies from perversion which might result from this kind of deceptive practices which are prohibited."[34]

According to Justice Chesnut, it was the potential or intended harm of the statement to governmental agencies that mattered. He saw a common theme running through the statute that showed a "congressional purpose to (1) protect the government against false pecuniary claims and (2) as stated in the Gilliland case, to protect governmental agencies from perversion of their normal functioning."[35] Justice Chesnut's interpretation of this theme led him to conclude that §1001 applied only to positive statements made by someone who voluntarily, affirmatively, and aggressively took the initiative to victimize the Government.[36]

Using this interpretation as his guide, Justice Chesnut found it significant that Stark did not volunteer the statement, but rather was

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[31] *Id.* at 191.
[32] *Id.* at 192.
[33] *Id.* at 194.
[34] *Id.* at 202.
[35] *Id.* at 205.
[36] *Id.*

responding to questions put to him. He was not seeking any action by the Government nor was he making any claim against the Government. In short, Justice Chesnut concluded:

> [T]he legislative intent in the use of the word "statement" does not fairly apply to the kind of statement involved in this case where the [defendant] did not volunteer any statement or representation for the purpose of making claim upon or inducing improper action by the government against others. Nor [was he] legally required to make the statement.[37]

None of the cases discussed above specifically created the "exculpatory no" exception. The significance of the holding in each was its role in the ultimate development of the exception. It was the Supreme Court's extension of § 1001 to situations other than those involving pecuniary loss to the government (*Gilliland*), and its application of §1001 to all branches of the Government (*Bramblett*), coupled with the Maryland District Court's limiting of §1001's applicability (*Stark*), that opened the door for the creation of the "exculpatory no."

C. "Exculpatory No"

The actual term "exculpatory no" was first used in the case of *United States v. McCue.*[38] In that case, Mr. James O. McCue, Sr., and his son, Mr. James O. McCue, Jr., were convicted of making false statements to special agents of the Internal Revenue Service in violation of §1001. Both gentlemen had appeared before Treasury agents investigating the tax returns of a company whose stock was owned mainly by the McCues. Evidence at trial showed the company had paid to have wells drilled on the private property of each defendant, and then had written off the cost as a business deduction. When asked whether he'd had anything to do with arranging to have the company pay for the drilling of the well on his private property, McCue Sr., answered, "[n]ot a thing."[39] His denials were proven at court to be false. His son also falsely denied any involvement with the drilling of the wells and additionally made false statements regarding travel vouchers he'd filed with the company for reimbursement for alleged business travel.[40]

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[37] *Id.* at 206.

[38] United States v. McCue, 301 F.2d 452 (2d Cir. 1962), *cert. denied*, 370 U.S. 939 (1962). The two individual cases were apparently combined on appeal. Although the court in *McCue* placed quote marks around the words "exculpatory no," and immediately cited to United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957) and United States v. Stark, 131 F. Supp. 190 (D. Md. 1955), neither of those courts actually used the term in their opinions.

[39] 301 F.2d at 453. The specific questions asked by the investigators and the exact answers are set forth in the text of the opinion.

[40] *Id.* at 454. The questions put to him and the answers he gave are also in the text of the opinion.

The defendants challenged their convictions, urging that 18 U.S.C. §1001 was not intended to apply to the type of false statements they had made. They used language from *Stark* in arguing that §1001 was "intended to protect the processes of government from interference and obstruction and not to require 'the citizen to speak truthfully to police officers.'"[41]

Ironically, while the court in *McCue* named the exception that would eventually be carved from §1001, it did not create it. In upholding the convictions, the court first of all stated that the statute was unambiguous on its face and seemed to apply to the McCues' situation. And, while it accepted the defendants' argument, derived from *Stark*, that some interference to the Government was required, the court held**,** contrary to the reasoning in *Stark*, that the statements made by the McCues were covered by the statute. The court said:

> There is no reason to believe that the administration of the tax laws and the collection of taxes is not one of the processes of government which the statute was designed to protect, or that making false statements about taxes to the representatives of the Treasury is not the kind of interference and obstruction which the statute was intended to prevent.[42]

It seemed important to the court, in refusing to adopt the defendants' views of §1001's applicability, that the McCues had appeared voluntarily before Treasury representatives and were fully aware of what they were going to be questioned about. They were accompanied by counsel and they made their statements under oath. The court said "[i]t does not seem to us that a statute which requires truthful answers in such a situation tends in any way 'to distort the relationship in this country between a citizen and his government,' as the appellants would have us believe."[43] Reasoning that the McCues' situation was not such a case, the court decided that "[t]he case of the citizen who replies to the policeman with an 'exculpatory no' can be left until it arises."[44]

Such a case did arise, but fortunately for Eldred J. Paternostro, it arose in a different circuit from *McCue.* In *Paternostro v. United States*,[45] Mr.

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[41] *Id.* at 455 (quoting from appellant's brief quoting United States v. Stark, 131 F. Supp. 190 (D. Md. 1955)).
[42] *Id.*
[43] *Id.* (quoting appellant's brief).
[44] *Id.*
[45] Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962), *overruled by* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994). *Paternostro* is of note for two reasons. First, it can fairly be said to be the "father" of the "exculpatory no" exception to §1001, since it was the first to limit §1001's applicability in situations where the false statements were mere denials in response to questions asked by criminal investigators. (While *Stark* was actually the first case to place limits on §1001's applicability, the statement Stark made was not a simple "no," but was rather a complete sentence to the effect "that he had never made any payment of money or given anything of value to any employee or official of the FHA for any

Paternostro was charged with violation of §1001 after he lied to a special agent from the Internal Revenue Service who was investigating Paternostro's receipt of illicit income. Paternostro was under oath at the time and essentially answered in the negative to questions asked by the agent. Those negative answers were later proven to be false. The court framed the issue before it by saying "[t]his case squarely places before this Court the question of whether mere negative answers to certain questions propounded by Federal agents constitute 'statements' within the meaning of that word as it appears in §1001."[46]

Obviously more sympathetic to Paternostro's situation than the court in *McCue* would likely have been, the *Paternostro* court began by reviewing the history of the statute, stating that it was clear Paternostro's statements would not have "been within the terms of the statute prior to the 1934 amendment."[47] It then discussed the cases that had considered the impact of the 1934 amendment on false statements, including *Gilliland*, *Bramblett*, and *Stark*, ultimately agreeing that §1001 still required some Governmental interference to sustain a false statement conviction. Departing from the courts that had found such Governmental interference in situations roughly similar to Paternostro's, the court cited with favor the cases of *United States v. Levin*,[48] *United States v. Davey*,[49] *United States v. Philippe*,[50] and *United States v. Allen*.[51]

The court also cited extensively from Justice Chesnut's opinion in *Stark*, and particularly from its reasoning that the word "statement," as it appeared in §1001, required some affirmative action rather than a mere answer to a question.[52] This part of the *Stark* opinion provided the starting point for the *Paternostro* court's eventual holding that Paternostro's statements did not fall within the proscription of §1001.[53]

In *United States v. Levin*,[54] the court had held a false statement made to an FBI agent was not a "statement" within the meaning of §1001. It said if it were to "hold otherwise, any inquiry into cases of a minor nature, even civil

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reason whatsoever . . . ." United States v. Stark, 131 F. Supp. 190, 191 (D. Md. 1955)). Second, the same court that wrote *Paternostro* later overruled it, becoming the first circuit to specifically spurn the "exculpatory no" exception. *See* 14 F.3d 1040.

[46] 311 F.2d at 300-01. The Fifth Circuit Court of Appeals framed the issue as one requiring it to define the term "statement" as it is used in §1001, as opposed to the Second Circuit's framing of the issue as one requiring it to determine the intended scope of the statute. *See* United States v. McCue, 301 F.2d 452 (2d Cir. 1962), *cert. denied*, 370 U.S. 939 (1962).

[47] *Id.* at 302.

[48] United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953).

[49] United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957).

[50] United States v. Philippe, 173 F. Supp. 582 (S.D.N.Y. 1959).

[51] United States v. Allen, 193 F. Supp. 954 (S.D. Cal. 1961).

[52] 311 F.2d at 302.

[53] *Id.* at 305.

[54] United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953).

cases, if the citizen interrogated wilfully falsified his statements, would constitute a violation, and such person would be subject to a prison term of five years and a fine of $10,000, either or both."[55] The court in *Levin* believed such an interpretation of §1001, with its lack of a requirement of an oath and its punishment greater than that for perjury, would essentially subsume or devour the "age-old conception of the crime of perjury."[56]

The court in *United States v. Davey*,[57] had a different concern about giving §1001 such a broad reach. In holding that mere negative answers to questions asked by the FBI were not statements within the meaning of § 1001, the court believed it unlikely that being lied to actually impeded an investigator. It asked:

> [C]an it be said that when an accused person, a potential defendant, a suspect, grants an agent of the Federal Bureau of Investigation an interview and, in reply to an incriminating question, knowingly makes a negative answer, when truth and morality, but not the law, requires an affirmative reply, such answer perverts the authorized function of the Bureau? Is the authorized function of the Bureau to extract from the suspect only the truth, or, in view of the Fifth Amendment proscribing compulsory self-incrimination, to hear and record only such statement as the accused desires freely and voluntarily to make?[58]

By its holding, the court answered its first rhetorical question "no." Apparently**,** the investigator was stuck with whatever statement a suspect decided to make.

The court in *United States v. Philippe*[59] was even less sympathetic to the plight of the investigator faced with an untruthful suspect. In holding that the false denials of the defendant to a special agent of the Internal Revenue Service (IRS) were not subject to prosecution under §1001, the court said:

> While the Special Agent may have been disappointed that the defendant would not truthfully answer himself into a felony conviction, we fail to see that his investigative function was in any way perverted. The only possible effect of exculpatory denials however false, received from a suspect such as defendant is to stimulate the agent to carry out his function.[60]

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[55] *Id.* at 90.
[56] *Id.*
[57] United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957).
[58] *Id.* at 178. Notice the reference to Fifth Amendment rights. Many cases used the concern the impact an unrestricted interpretation of §1001 would have on a suspect's Fifth Amendment rights to justify the "exculpatory no" exception. *See, e.g.*, United States v. Manasen, 909 F.2d 1357 (9th Cir. 1990).
[59] United States v. Philippe, 173 F. Supp. 582 (S.D.N.Y. 1959).
[60] *Id.* at 584.

The *Paternostro* court, after favorably discussing these cases, went on to distinguish the various cases that had upheld convictions for false statements under §1001. For example, in *Brandow v. United States*,[61] the defendant had given an affidavit to IRS investigators, wherein he falsely stated that a former IRS employee had not wrongfully offered to reveal the IRS's case to defaulting taxpayers, when in fact the former employee had. The *Paternostro* court distinguished *Brandow* by noting that the affidavit was

> apparently a deliberate, voluntary written statement under oath which did not constitute mere negative responses to questions. The statement related to the activities of a former agent of Internal Revenue, the appellant who was engaged in the business of an auditor, and Attorney Rau. It is difficult to see how there could be a case more suited to a prosecution under §1001 than the Brandow case.[62]

It also distinguished *United States v. Van Valkenburg*,[63] where the defendant had made a false accusation against a third party, trying to get the United States Attorney's office to prosecute, by noting Van Valkenburg's actions were the "positive, deliberate, voluntary, aggressive action"[64] contemplated by *Stark*. It distinguished *Marzani v. United States*[65] as well, saying that in that case the defendant undertook "aggressive, deliberate, positive and voluntary"[66] action when he sought an audience with a superior in an effort to retain his job. During this meeting, Marzani said he had never been a member of a communist party, when in fact he had been.[67] The *Paternostro* court felt Marzani's affirmative act of seeking the meeting was sufficient to bring his statements within the scope of §1001.

The court admitted that while it had not examined every case that had decided the issue, it believed it had sufficiently reviewed the leading opinions to hold that Paternostro's negative replies to the special agent were not statements within the meaning of §1001. The court stated:

> The appellant in the case at bar made no statement relating to any claim on his behalf against the United States or an agency thereof; he was not seeking to obtain or retain any official position or employment in any agency or department of the Federal Government, and he did not aggressively and deliberately initiate any positive or affirmative statement calculated to pervert the legitimate functions of Government.[68]

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[61] Brandow v. United States, 268 F.2d 559 (9th Cir. 1959).
[62] 311 F.2d at 304.
[63] United States v. Van Valkenburg, 157 F. Supp. 599 (D. Alaska 1958).
[64] 311 F.2d at 304.
[65] Marzani v. United States, 168 F.2d 133 (Cir. 1948), *aff'd* 69 S. Ct. 299 (1948).
[66] 311 F.2d at 305.
[67] *Id.*
[68] *Id.*

From these humble beginnings, the "exculpatory no" took on a formidable life of its own. Every federal circuit has faced the issue in some form or other. Only one circuit has clearly rejected it.[69] Most courts have acknowledged the existence of the exception, while holding that the statement before them would not fall within the exception in any case.[70] In other cases, the rationale and holdings have not always been consistent, even within a circuit.[71] Nevertheless, to appreciate how deeply ingrained the concept of the "exculpatory no" became in the federal courts, a brief look at an opinion from each circuit is helpful.[72]

The First Circuit, in the case of *United States v. Chevoor,*[73] manifested roundabout acceptance of the "exculpatory no." Robert Chevoor was questioned informally by Federal Bureau of Investigation (FBI) agents about whether he owed money to a loan shark the FBI was investigating.[74] Unbeknownst to Chevoor, the FBI had tapped a phone conversation with the loan shark in which Chevoor had discussed his own indebtedness as well as another's. Chevoor lied to the agents and told them he did not owe any money and didn't know anyone who did. Chevoor was then subpoenaed to testify before a grand jury. He repeated his lies there and was subsequently charged with perjury. The district court dismissed the perjury indictment against Chevoor based upon its belief that Chevoor was unfairly placed "upon the horns of . . . a triceratops"[75] by "facing perjury, self-incrimination, or contempt . . . ."[76] The appellate court had no such concern, because it believed Chevoor was ***not*** likely to implicate himself by admitting he'd lied to the FBI agents. It felt that his statements to the FBI agents during their interview would fall within the "exculpatory no" exception, and would therefore not subject him to prosecution. Because of this, the court reasoned, Chevoor's options before the

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[69] *See* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994).

[70] For an extensive listing of each circuit's "exculpatory no" case law broken down into subject matter, see 102 ALR Fed 742 (1997).

[71] Giles A. Birch, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990). "[E]ven courts that use the same definition of the exculpatory no have reached contradictory conclusions in cases with similar facts." *Id*. at 1274.

[72] No attempt is made in this article to conduct an analysis in depth of all the holdings in every case from each of the federal circuits that have dealt with the "exculpatory no" issue. It is sufficient to cite to only one case from each of the circuits in order to illustrate the pervasive nature of the "exculpatory no."

[73] United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975).

[74] They also asked him if he knew anyone else who owed money to the loan shark. *Id.*

[75] *Id.* at 182 (citing 8 J. Wigmore, Evidence, §2251 at 316 (McNaughton rev. 1961)).

[76] *Id.* "Self-incrimination" is where §1001 and the "exculpatory no" exception come in. The district court concluded that since Chevoor had already lied to the FBI agents when initially questioned, admitting to them now that he'd lied to them so that he could tell the truth before the grand jury would open him up to prosecution under §1001 for the false statements he'd already made.

grand jury were to tell the truth or lie. Reversing the lower court's dismissal of the indictment, the court chose not to forgive Chevoor for his choice to lie.[77]

The Second Circuit gave us *United States v. McCue.*[78] That Circuit's resistance to the "exculpatory no" exception did not weaken with time.[79]

In the Third Circuit case of *United States v. Barr*[80] the court avoided rejecting or adopting the "exculpatory no" doctrine. Barr's lies occurred when he was filling out the Government paperwork necessary for him to assume a position as Assistant to the Attorney General of the United States in Washington, D.C. One of the questions on one of the forms was whether he had used illegal drugs, which he marked "no." Later, he was interviewed by an FBI agent for a security clearance and asked the same question, which he again answered "no."[81] It turned out that he had in fact used illegal drugs, and that his denials were false. He was convicted under §1001 for these false statements. The court, in upholding his conviction, said "this court has not taken a position on the 'exculpatory no' doctrine. We conclude, however, that, given the facts of this case, Barr would not be able to invoke this doctrine, as it has been interpreted in other circuits, as a defense to the violations of 18 U.S.C. §1001 charged . . . ."[82]

The Fourth Circuit, in *United States v. Cogdell,*[83] wholeheartedly embraced the exception. Eva Shaw Cogdell had received and cashed her tax return, then filed a claim saying she'd never received it. She was issued a replacement check, which she also cashed. When being investigated, the Secret Service agent told her he suspected she'd cashed the original check and had filed a false claim. She denied she'd received or cashed the first check. She was convicted under §1001 for these lies.[84]

The appellate court reversed her false statement convictions, holding that her responses fell within the "exculpatory no" exception to the statute. The court adopted the five-part test developed by the Ninth Circuit[85] when

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[77] *Id.* at 185. The appellate court apparently expected Chevoor to know instinctively that he wouldn't be opening himself to prosecution for making a false statement to the FBI agents, and was therefore appearing before the grand jury with a clean slate and an opportunity to do the right thing.

[78] United States v. McCue, 301 F.2d 452 (2d Cir. 1962).

[79] *See* United States v. Adler, 380 F.2d 917 (2d Cir. 1967) (rejecting "exculpatory no" exception in 2d Circuit), and United States v. Capo, 791 F.2d 1054 (2d Cir. 1986) ("While this Court has never quite embraced the 'exculpatory no' exception, we have consistently stated that if we did adopt it we would construe it narrowly, ruling that any statement beyond a simple 'no' does not fall within the exception.") *Id.* at 1069.

[80] United States v. Barr, 963 F.2d 641 (3rd Cir. 1991).

[81] *Id.* at 644.

[82] *Id.* at 647.

[83] United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988).

[84] *Id.* at 180.

[85] *Id.* at 183 (citing United States v. Medina De Perez, 799 F.2d 540 (9th Cir. 1986)). The fifth part of the test is whether the statement is "made in a situation in which a truthful answer would have incriminated the declarant." *Id.* This question is the tie to the Fifth Amendment

applying the "exculpatory no" exception. The court was "persuaded . . . that the 'exculpatory no' doctrine is a narrow yet salutory limitation on a criminal statute which, because of its breadth, is subject to potential abuse."[86]

The Fifth Circuit, in a surprising and bold departure from its past, overruled *Paternostro v. United States,*[87] and flat out rejected the "exculpatory no" exception. In *United States v. Rodriguez-Rios,*[88] the court said "[t]oday we overrule the 'exculpatory no' exception to 18 U.S.C. §1001 as the law in this circuit."[89]

The significance of the Fifth Circuit's move was not lost on the Sixth Circuit,[90] although that court, in *United States v. LeMaster,*[91] dodged the question of whether the Sixth Circuit would adopt or reject the "exculpatory no" doctrine. Instead, it joined the ranks of those courts that held the exception, if there was one, would not apply in the case before it.[92] In *LeMaster*, the defendant was asked whether he'd accepted bribes for votes on pending legislation in the Kentucky General Assembly. LeMaster said he'd spent a day at the races, gone on a boat ride, eaten some food and had some drinks, but specifically denied taking any money.[93] The court held since LeMaster said more than just "no" when asked if he'd taken bribes, the "exculpatory no" exception would not apply to his case.[94]

The Seventh Circuit implicitly adopted the "exculpatory no" exception in its opinion in *United States v. King*.[95] In that case, the defendant lied to Social Security claims representatives about receiving income from a source other than Supplemental Security Income, saying he had no other source of income when in fact he was receiving workman's compensation. He was charged and convicted under §1001 for these false statements. The court upheld his conviction in the face of his claim that his statements were within the "exculpatory no" exception, saying "[o]ur reading of the case law indicates that the doctrine is limited to simple negative answers . . . without affirmative discursive falsehood . . . under circumstances indicating that the defendant is unaware that he is under investigation . . . and is not making a claim against, or

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that many of the courts applying the "exculpatory no" exception were concerned with, and served as another basis for the development of the exception.

[86] *Id.* (footnote omitted).

[87] Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962), *overruled by* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994).

[88] United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994).

[89] *Id.*

[90] The Sixth Circuit said, "[i]nterestingly, the Fifth Circuit, the first to adopt the ["exculpatory no"] doctrine, was the first to reject it." United States v. LeMaster, 54 F.3d 1224, 1228 (6th Cir. 1995).

[91] United States v. LeMaster, 54 F.3d 1224 (6th Cir. 1995).

[92] *Id.* at. 1229.

[93] *Id.*

[94] *Id.*

[95] United States v. King, 613 F.2d 670 (7th Cir. 1980).

seeking employment with the government."[96] They held that "the 'exculpatory no' doctrine is inapplicable where, as here, the defendant initiated the contact with the government for the purpose of making a statutory claim for benefits."[97]

The Eighth Circuit expressly adopted the "exculpatory no" exception in *United States v. Taylor*.[98] There, Felix Taylor forged his wife's signature to motions filed in a bankruptcy case, but when asked if he knew anything about the motions or who signed them, he answered no. He was charged with violation of §1001 for these false statements, but the district court dismissed the indictment. The court believed his statements fell within the "exculpatory no" exception and could not therefore be prosecuted under §1001.[99] The appellate court agreed, holding, "[w]e are satisfied that Taylor's exculpatory denials of guilt, made in a judicial proceeding in which he reasonably believed that affirmative responses would have been incriminatory, were not the type of false statements which section 1001 was intended to proscribe."[100]

The Ninth Circuit recognized the "exculpatory no" exception and developed a five-part test to determine when it applied.[101] The court stated the exception applies when:

> (1) the false statement [is] unrelated to a claim to a privilege or a claim against the government;
> (2) the declarant [is] responding to inquiries initiated by a federal agency or department;
> (3) the false statement [does] not impair the basic functions entrusted by law to the agency;
> (4) the government's inquiries [do] not constitute a routine exercise of administrative responsibility; and
> (5) a truthful answer would have incriminated the declarant.[102]

The Tenth Circuit manifested acceptance of the exception, although it actually called the "exculpatory no" exception the "exculpatory no" ***defense*** in *United States v. Fitzgibbon*.[103] In that case, the defendant had entered the country carrying more than $5,000 in currency, but in answer to the question on the customs form whether he was carrying more than $5,000, he marked the "no" block. He additionally answered "no" to the same question asked him by customs officials. He was convicted under §1001 for these false statements.[104]

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[96] *Id.* at 674 (citations omitted).
[97] *Id*. at 674-75.
[98] United States v. Taylor, 907 F.2d 801 (8th Cir. 1990).
[99] *Id*. at 802.
[100] *Id.* at 807.
[101] *See* United States v. Alzate-Restreppo, 890 F.2d 1061 (9th Cir. 1989). *See also* United States v. Equihua-Juarez, 851 F.2d 1222 (9th Cir. 1988).
[102] United States v. Manasen, 909 F.2d 1357, 1359 (9th Cir. 1990).
[103] United States v. Fitzgibbon, 619 F.2d 874, 876 (10th Cir. 1980).
[104] *Id*.

The court upheld Fitzgibbon's conviction, saying "[i]n our view, the facts of the instant case do not 'fit the mold' of the 'exculpatory no' exception."[105] The court based its holding on the fact that the acts of filling out and turning in the form were administrative in nature and did not involve a criminal investigation or police action. Also, Fitzgibbon knew he had to complete the form to enter the United States, the intent of the false statements was to "conceal information relevant to the administrative process…,"[106] and that a truthful answer by Fitzgibbon would not have incriminated him.[107]

The Eleventh Circuit apparently recognizes the exception. In *United States v. Tabor*,[108] the court dismissed Tabor's conviction for making false statements. Tabor, a notary, had said two persons whose signatures she'd notarized had appeared before her. In reality, one of the persons had died weeks before the notarization and the other had also never appeared before Tabor. The court applied the "exculpatory no" exception to her case because of its belief that §1001 was not meant to apply to false statements where a truthful answer would incriminate the declarant. Tabor's act of notarizing a document without having the signing parties before her was a violation of state law. The agent interviewing her knew this, and also knew that she had violated the law, but did not warn her before questioning her.[109]

Finally, the Court of Appeals for the District of Columbia Circuit can be added to the list of courts that, while recognizing the existence of the concept of the "exculpatory no," declined to affirmatively reject or accept the exception. The court, in *United States v. White*,[110] said, "[w]e need not set law for the circuit in this case because the doctrine, in any event, does not shield from prosecution under section 1001 false responses to questions in an administrative rather than investigative proceeding."[111] In *White*, Lester H. Finotti, Jr., a government employee, was convicted of falsely answering "none" on a standard General Services Administration form that asked him to list corporations in which he had a financial interest or with which he had an employment relationship. At the time he had unlawfully entered into a "consulting" relationship with a private company whereby he received regular payments in exchange for using his government job to further the company's business interests.[112] The court believed his completion of the form was administrative in nature and unprotected by the "exculpatory no" exception.[113]

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[105] *Id.* at 880.
[106] *Id.* at 879.
[107] *Id.*
[108] United States v. Tabor, 788 F.2d 714 (11th Cir. 1986).
[109] *Id.* at 718.
[110] United States v. White, 887 F.2d 267 (D.C. Cir. 1989).
[111] *Id.* at 273-74.
[112] *Id.* at 268.
[113] *Id.* at 274. The court also discussed the possibility that Finotto would have incriminated himself by truthfully answering the question on the form. It said, "Finotti could have refused to answer the incriminating question. Or, if he reasonably believed that he would lose his job

D. *Brogan v. United States*[114]

In *Brogan v. United States*,[115] the Supreme Court faced the "exculpatory no" exception head on and dealt it a death blow. In that case, which arose in the Second Circuit, the defendant was an officer in the local union. He was charged with falsely telling federal agents he had not received bribes from a company whose employees were members of the defendant's union.[116] He was charged under §1001 for this false statement. On appeal, three basic arguments were advanced by Brogan: "that [§1001] criminalizes only those statements that 'pervert governmental functions," and that simple denials of guilt do not do so . . . that a literal reading of §1001 violates the 'spirit' of the Fifth Amendment . . . [and] that the 'exculpatory no' doctrine is necessary to eliminate the grave risk that §1001 will be abused by overzealous prosecutors . . . ."[117]

In dealing with the first argument, the Supreme Court said:

> Petitioner's argument . . . proceeds from the major premise that §1001 criminalizes only those statements to Government investigators that "pervert governmental functions"; to the minor premise that simple denials of guilt to government investigators do not pervert governmental functions; to the conclusion that §1001 does not criminalize simple denials of guilt to Government investigators. Both premises seem to us mistaken . . . . We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function . . . . In any event, we find no basis for the major premise that only those falsehoods that pervert governmental functions are covered by §1001.[118]

The Court next addressed Brogan's concerns that §1001, if applied literally, violated the intent of the Fifth Amendment, because it placed a suspect in a position of "admitting guilt, remaining silent, or falsely denying guilt."[119] To this concern, Justice Scalia had this to say:

> This "trilemma" is wholly of the guilty suspect's own making, of course. An innocent person will not find himself in a similar quandary (as one commentator has put it, the innocent person lacks even a "lemma," . . .)

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for refusing to answer, he could have answered without waiving his Fifth Amendment privilege." *Id.* The court doesn't say how he could have answered the question without waiving his Fifth Amendment privilege, or, more to the point, what the connection might be between waiving his Fifth Amendment rights and losing his job.

[114] Brogan v. United States, 118 S. Ct. 805 (1998).

[115] *Id.*

[116] *Id.* at 806-07.

[117] *Id.* at 807.

[118] *Id.* at 808.

[119] *Id.* at 809-810.

> And even the honest and contrite guilty person will not regard the third prong of the "trilemma" (the blatant lie) as an available option.[120]

Justice Scalia noted that the term "cruel trilemma" was initially used in referring to a suspect's Fifth Amendment right not to testify before a grand jury.[121] That right was necessary to keep the suspect from being placed in the position of having to either admit wrongdoing, lie, or be held in contempt for refusing to testify.[122] Justice Scalia concluded:

> In order to validate the "exculpatory no," the elements of this "cruel trilemma" have now been altered--ratcheted up, as it were, so that the right to remain silent, which was the liberation from the original trilemma, is now itself a cruelty. We are not disposed to write into our law this species of compassion inflation . . . . Whether or not the predicament of the wrongdoer run to ground tugs at the heart strings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie.[123]

Justice Scalia then turned his attention to the last argument advanced by Brogan, that the Court needed to limit §1001's applicability in order to prevent prosecutorial abuse. The Court stated that in the first place it was Congress that had given this apparent broad authority to prosecutors by the wording of the statute, and secondly, Brogan failed to establish that in all the years the statute had been in existence prosecutorial abuse had been a problem.[124] According to the Court, even if prosecutorial abuse was a problem, the "exculpatory no" exception would not prevent it. As the Court saw the exception, if it applied at all, it applied only to the classic "no" responses, and not to any other statement made. Therefore, Justice Scalia reasoned, if an investigator was really out to get someone, he would simply press a suspect beyond his simple "no" answer until he got more of a statement that would not be barred by the "exculpatory no" exception.[125]

Brogan, as far as it goes, is helpful in assessing the role of the "exculpatory no" in future federal civilian prosecutions under §1001.[126] But

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[120] *Id.* at 810 (quoting Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 1016 (1996)).
[121] *Id.*
[122] *Id.* (citing Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964)).
[123] *Id.* at 810.
[124] *Id.*
[125] *Id*.
[126] But see the concurring opinion by Justices Ginsburg and Souter, which discusses unanswered questions that leave room for defense counsel to argue the underlying concerns that gave rise to the "exculpatory no" in the first place, even if the "exculpatory no" label is gone. For example, is "knowledge" an element of §1001? If so, would mere denial of culpability be sufficient to show knowledge? This concurrence also points out the policy of the United States Attorney's office not to prosecute "exculpatory no" cases, so that in the end, regardless of the Court's ruling, these cases may still be kept outside the scope of §1001. 118 S. Ct. at 812-817.

what of the military? To what extent does the federal civilian treatment of the "exculpatory no" translate into military courts-martial?

III. MILITARY COURTS-MARTIAL

The military's version of §1001 is Article 107 of the Uniform Code of Military Justice (UCMJ).[127] There are similarities in the text of the two statutes, and the military courts have from the beginning interpreted Article 107 as being analogous to §1001.[128] As in the federal civilian court system, the "exculpatory no" exception evolved from the military courts' attempts to interpret the meaning and scope, as well as the application, of Article 107.

In *United States v. Hutchins*,[129] the first reported case in the military's development of the "exculpatory no," the United States Court of Military Appeals[130] (COMA) was faced with deciding whether or not Article 107 was meant to apply to a false statement given by the accused during a line of duty determination. The issue then before the court was whether or not a false statement had to be material to be charged as a violation of Article 107, but the

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[127] Article 107, U.C.M.J., 10 U.S.C. §907 (1956). "Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct."

The elements of the offense of false official statement, as set forth in paragraph 31(a) of the 1995 Edition of the Manual for Courts-Martial, are as follows:

> 1. That the accused signed a certain official document or made a certain official statement;
> 2. That the document or statement was false in certain particulars;
> 3. That the accused knew it to be false at the time of signing it or making it; and
> 4. That the false document or statement was made with the intent to deceive.

Paragraph 31(c)(6)(a) goes on to say, "[a] statement made by an accused or suspect during an interrogation is not an official statement within the meaning of the article if the person did not have an independent duty or obligation to speak."

And paragraph 31(c)(6)(b) says:

> If a suspect or accused does have an independent duty or obligation to speak, as in the case of a custodian who is required to account for property, a statement made by that person during an interrogation into the matter is official. While the person could remain silent (Article 31(b)), if the person chooses to speak, the person must do so truthfully.

MANUAL FOR COURTS-MARTIAL, United States (1995 ed.) [hereinafter MCM].

[128] *See* United States v. Hutchins, 18 C.M.R. 46 (U.S.C.M.A. 1955), United States v. Aronson, 25 C.M.R. 29 (U.S.C.M.A. 1957).

[129] United States v. Hutchins, 18 C.M.R. 46 (U.S.C.M.A. 1955).

[130] Now called the Court of Appeals for the Armed Forces, or CAAF.

significance of this case in the development of the "exculpatory no" was its linking of Article 107 to §1001. The court said:

> In United States v. Gilliland, . . . the Supreme Court of the United States held that the purpose of the false statement statute is "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." We think that also succinctly states the purpose of Article 107."[131]

The court reaffirmed the link between Article 107 and §1001 two years later when it decided *United States v. Arthur*.[132] In that case, a commissioned officer witnessed the accused strike a woman, and placed him under apprehension. While the officer was attempting to place the accused under apprehension, the accused told the officer he could not apprehend him, that he, the accused, was an air policeman, and therefore knew the law. The accused was not an air policeman, and was charged with violation of Article 107 for this falsehood.[133]

In holding that the statement by the accused to the officer was not "official," and therefore not punishable under Article 107, the court cited *Hutchins*, asserting that it had limited Article 107's scope to the protection of governmental functions. The court found that:

> As an officer, Captain Campbell had the right to arrest the accused on "probable cause." . . . But the rights and the obligations of a person as an officer are separate from his performance of a governmental function . . . . If it is to be regarded as 'official' within the meaning of Article 107, a statement must be concerned with a governmental function.[134]

The court concluded that "there [was] no semblance of an official governmental function"[135] in the officer's apprehension of the accused. However, the court, in *dicta*, added, "[h]ere, Captain Campbell was not acting as a law enforcement agent. What the situation might be if he were so acting need not detain us at this time."[136]

A situation in which the accused lied to someone who ***was*** acting as a law enforcement agent arose soon enough. In *United States v. Aronson*,[137] the accused was responsible for accounting for funds belonging to a nonappropriated fund instrumentality. Over $500 was missing, and an agent from the Air Force Office of Special Investigations (AFOSI) was brought in to investigate. When the agent questioned the accused about the loss, the accused

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[131] 18 C.M.R. at 51.
[132] United States v. Authur, 24 C.M.R. 20 (U.S.C.M.A. 1957).
[133] *Id*. at 21.
[134] *Id*. (citations omitted).
[135] *Id*.
[136] *Id*.
[137] United States v. Aronson, 25 C.M.R. 29 (U.S.C.M.A. 1957).

denied taking any money. He later admitted he had taken the money. He was subsequently charged with making a false statement in violation of Article 107 for the false denial.[138]

Continuing the analogy between Article 107 and §1001, the court concluded that the word "official" in Article 107 was "the substantial equivalent of the phrase 'any matter within the jurisdiction of any department or agency of the United States'"[139] contained in §1001. It held that since the accused was under a duty to account for the money, "[t]he interview between the accused and the Office of Special Investigations agent . . . bore the stamp of officiality . . . ."[140]

The accused argued that his duty to account was "superseded"[141] by his right not to incriminate himself. In rejecting this assertion, the court noted, with what now seems uncanny prescience, "(s)urely, Congress did not intend Article 31 to be a license to lie."[142] The court went on to note that the accused could exercise his rights under Article 31 and remain silent, or speak "in accordance with his 'legal obligation,'"[143] but could not thereafter assert that Article 31 protected him from the consequences of his lie.

Aronson was subsequently cited in *United States v. Collier* for the proposition that "a statement made by a suspect or accused during an interrogation is not 'official' unless there was an independent duty or obligation to speak concerning the matter under inquiry."[144] *Aronson* was followed in *United States v. Washington.*[145] There the accused was being investigated for bad checks. While being interviewed, he falsely told the investigator he'd opened a savings account and at the time of the interview, had approximately $1,100 in that account. He was charged under Article 107 for this false statement.[146]

Without much discussion, the court cited to *Aronson,* saying, "the Court held that a statement of the kind in question was not within the scope of the Article. That case controls the situation here."[147] With that, the court dismissed the accused's conviction.

Another case citing *Aronson*, *United States v. Geib,*[148] involved a situation where the accused falsely filled out a form requesting discontinuance of his "Class Q" allotment to his wife, saying he had obtained a divorce, when

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[138] *Id.*
[139] *Id.* at 32.
[140] *Id.* at 33.
[141] *Id.*
[142] *Id.* at 33.
[143] *Id*. *See supra* note 127.
[144] United States v, Collier, 48 C.M.R. 112, 113 (A.C.M.R. 1973). *See also* United States v. Washington, 25 C.M.R. 393 (U.S.C.M.A. 1958).
[145] United States v. Washington, 25 C.M.R. 393 (U.S.C.M.A. 1958).
[146] *Id*. at 394.
[147] *Id.* at 395.
[148] United States v. Geib, 26 C.M.R. 172 (U.S.C.M.A. 1958).

in fact he had not. In addition, he told an AFOSI agent investigating him that he was divorced and that his wife had presented him with a copy of the divorce decree.[149] He was charged under Article 107 for these false statements.

The court distinguished between the statements the accused made on the form to terminate his allotment, and those to the AFOSI agent. It said:

> In United States v Washington . . . and United States v Aronson . . . we held that a statement to a law enforcement agent by a person accused or suspected of an offense is not within the scope of Article 107. We pointed out, however, that when the declarant has an independent, official obligation in the matter under inquiry, and he agrees to speak in response to that obligation rather than remain silent, as he has a right to under Article 31, Uniform Code of Military Justice, . . . his statement falls within Article 107.[150]

In holding that the statements made to the AFOSI agent were not official, the court said, "[t]he later representations were unquestionably made in an investigation into the accused's commission of an offense, not in an inquiry into whether he desired to end his allotment. Therefore, the statements to the agent were not official within the meaning of Article 107."[151] The court upheld the accused's conviction for making the false statements on the form, however, saying, "[t]hese earlier statements, not those to the agent, were the official statements which provide the operative facts to effect discontinuance of the allotment."[152]

Another case similar to *Geib* was *United States v. Osborne.*[153] In *Osborne*, the accused, having been earlier acquitted at court-martial of other charges, was discovered to have made several false entries in Air Force paperwork as to his civilian criminal history. When asked by his commander about these entries, after being advised of his Article 31 rights, the accused denied that the entries were false. He was subsequently charged under Article 107 for his false denial. In reversing his conviction, the court held that while a military person has a duty to correctly fill in required official forms, there is no corresponding duty that obligates him to later speak truthfully regarding false entries made on those forms.[154]

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[149] *Id.* at 173.
[150] *Id.* at 173-74.
[151] *Id.* at 174.
[152] *Id.*
[153] United States v. Osborne, 26 C.M.R. 235 (U.S.C.M.A. 1958).
[154] *Id.* at 237. In a short—and again, prescient—dissent, Judge Latimer noted "[The accused] may rely on his privilege and remain silent, but if he speaks he must tell the truth . . . It must be a strange concept indeed which underlies the principle that a serviceman may with impunity falsify to his commander . . . I prefer to believe that Congress . . . intended to hold service personnel to a higher standard." *Id.* at 238. Because of the holdings in these cases, the following language was placed in the MCM: "A statement made by a suspect or an accused person during an interrogation is not official within the meaning of this article if he did not

The first military case to actually use the term "exculpatory no" was *United States v. Collier*.[155] In *Collier*, the accused made a false report to base police that a stereo reverberation unit had been stolen from his automobile while on post.[156] He was charged with, and convicted of, making a false official statement in violation of Article 107. On appeal the accused argued that his conviction should not stand because he was under no duty to make the report, and therefore the statement was not official within the meaning of Article 107.[157]

The court noted this was a case of first impression in the military, since it found no other case where an accused had been charged under Article 107 for filing a false police report. It turned to federal civilian precedents, stating that "[w]hen determining the purpose and scope of Article 107 the United States Court of Military Appeals has generally referred to its similarity to 18 U.S.C. §1001 and looked to federal cases interpreting that statute for guidance."[158]

The court found inconsistent application of §1001 within the federal circuits, however, even when dealing with the specific situation of an accused filing a false report.[159] In holding that Article 107 did apply to false police reports, the court decided to follow the reasoning in *United States v. Adler*.[160] The court quoted from *Adler*, particularly where that court had distinguished the case of a defendant who initiates a false report, and is thereby subject to prosecution under §1001, from the "exculpatory no" cases, where some courts had prohibited prosecution under §1001.[161] The *Collier* court concluded:

> Article 107 should be construed as being sufficiently broad to encompass the making of a false report of a crime to a military investigative agency. We believe the reasoning applied in *Adler* to be a far more logical application of section 1001 and that the same considerations apply with respect to Article 107.[162]

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have an independent duty or obligation to speak concerning the matter under inquiry." United States v. Kupchik, 6 M.J. 766, 769 (A.C.M.R. 1978). This has continued to be the view in the military up until the present. *See* MCM, *supra* note 127, discussion section under Article 107.

[155] United States v. Collier, 48 C.M.R. 112 (A.C.M.R. 1973). While the court in *Collier* used the term "exculpatory no," it did so while citing to and quoting from United States v. Adler, 380 F.2d 917 (2d Cir. 1967). Application of the "exculpatory no" exception was not actually an issue before the *Collier* court.

[156] *Id.* at 113.

[157] *Id.*

[158] *Id.*

[159] *Id.* 114.

[160] United States v. Adler, 380 F.2d 917 (2d Cir. 1967).

[161] 48 C.M.R. at 114.

[162] *Id*. at 115.

The term "exculpatory no" made its next appearance in the military in the case of *United States v. Davenport.*[163] In *Davenport*, the accused was absent without authority from his unit. A corrections officer sent to return him to military control asked him his name to make sure he had the right person. The accused lied and gave a false name to the corrections officer. He was convicted under Article 107 for this lie. On appeal, the accused challenged his conviction, saying that the statement he had made was not official within the meaning of Article 107. The Court of Military Appeals upheld his conviction, holding that his false identification was official since a service member has a duty to correctly identify himself so that the military could make use of his services.[164] It further held that Article 31 did not protect his false identification since it did not believe Article 31 was intended to apply to a request for one's name.[165]

The court next discussed the application of the "exculpatory no" exception to Davenport's case. It asserted that ". . . like 18 U.S.C. 1001, Article 107 should be construed narrowly and the 'exculpatory no' doctrine should be recognized"[166] However, even as it made this pronouncement, the court held that the doctrine didn't apply in Davenport's case because Davenport's ". . . false statement to Staff Sergeant Welch–a statement which went beyond a mere denial–tended to impede a 'governmental function.' Since Davenport had a duty to account to the armed forces for his time and whereabouts so that he could be utilized for military service, his falsehood impeded performance of that duty."[167]

Later, COMA further expanded the reach of Article 107 in the case of *United States v. Jackson*.[168] In *Jackson*, the accused was asked when was the last time she had seen a murder suspect who was a friend of hers, and she falsely said it had been a couple of weeks, when in fact she'd seen the suspect just after the murder. She was convicted for making this false statement. In holding that the "exculpatory no" exception did not apply to her situation, the court said, "even if not subject to an independent 'duty to account,' a servicemember who lies to a law-enforcement agent conducting an investigation as part of his duties has violated Article 107."[169]

The court later called the holdings of some of these prior cases into question, at least to the extent they had suggested that statements given to investigators were not official in the absence of an independent duty to

[163] United States v. Davenport, 9 M.J. 364 (C.M.A. 1980).
[164] *Id*. at 368.
[165] *Id*. at 369.
[166] *Id.* at 370.
[167] *Id.* at 369.
[168] United States v. Jackson, 26 M.J. 377 (C.M.A. 1988).
[169] *Id.* at 379.

account.[170] In *United States v. Prater*,[171] the accused had received benefits at the married rate while holding himself out as married to a woman that he was in fact not married to. He was charged with making false statements to investigators when he was asked, after rights advisement, if he was married to the woman. He answered that he was. He was charged under Article 107 for his false statements. In rejecting the accused's claim that his false statements fell within the "exculpatory no" exception,[172] the court looked to federal civilian cases construing the "exculpatory no" exception to §1001 and noted that:

> [T]his defense . . . is not available in all situations involving criminal investigation of a suspect . . . some [federal] circuits hold that this defense does not exist where the false statement is made with respect to a previously submitted claim against the Government . . . . Others hold that it does not apply to situations where a suspect is given warnings concerning his rights against self-incrimination . . . . Finally, others hold that it does not extend beyond mere negative responses to questions by a criminal investigator.[173]

The court then said:

> Our court has recognized this defense and its possible application to a false-official-statement charge under Article 107. Yet, we too have never suggested that it applies to all questioning of a suspect by criminal investigators. All three of the above noted exceptions or limitations on this defense existed in this case. The challenged questions were asked by the military police in regards to earlier submitted military dependency claims. They were asked after appellant was advised of his rights under Article 31, UCMJ, 10 USC §831. Also, appellant's response was much more than a simple "no."[174]

In addressing the accused's closely related argument that his false statements were not official, the court stated that the accused relied upon its decisions rendered prior to the Supreme Court's ruling in *United States v. Rodgers.*[175] Noting that the trial record was not sufficiently developed for the court to determine whether the accused had a duty to report his lack of

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[170] *See, e.g.* United States v. Solis, 46 M.J. 31 (1997) ("Although this Court at one time held that Article 107 did not apply to statements made to military investigators, . . . we long since have abandoned that position . . . .). *Id*. at 32-33. (footnote omitted).

[171] United States v. Prater, 32 M.J. 433 (C.M.A. 1991).

[172] *Id.* at 437. Here the court uses the term defense rather than exception.

[173] *Id.* (citations omitted).

[174] *Id*. (citations omitted).

[175] United States v. Rodgers, 104 S. Ct. 1942 (1984). Rodgers held that false statements given by the defendant to FBI investigators that his wife had been kidnapped and was plotting to kill the President, when in fact she had voluntarily left him to get away from him, were prosecutable under § 1001. The earlier cases cited to the court by the accused were *Osborne*, *Washington*, and *Aronson*.

entitlements,[176] the court said, "even if our older cases are still binding, post-trial speculation on the question of the officiality of the statements is not appropriate."[177] It added:

> Moreover, since those decisions and the decision of this court in *United States v. Jackson*, . . . statements to military criminal investigators can now be considered official for purposes of Article 107. Finally, where warnings under Article 31 are given to the criminal suspect, . . . his duty to respond truthfully to criminal investigators, if he responds at all, is now sufficient to impute officiality to his statements for purposes of Article 107."[178]

Later, in *United States v. Dorsey*,[179] COMA held that lying to an investigator as to the reason for declining to take a polygraph was an official statement, relying on its earlier decisions in *Jackson* and *Prater*. In *Dorsey*, the accused had earlier agreed to take a polygraph, but when the investigator called to schedule it, the accused said he was not going to take the polygraph, since his commander and first sergeant had told him he was "off the hook because the victim had received all the monies back."[180] This statement was false and the accused was convicted under Article 107.

The accused argued that his statement was not official because conducting polygraphs was not part of the investigator's normal duties. In upholding his conviction, the court said, "[a]ppellant's reasoning is strained beyond the point of rupture."[181] It concluded that the "[a]ppellant could have voluntarily taken the polygraph examination requested of him, or he could have declined. But he could *not*, in the course of purporting to explain his declination, lie about his reason and, in the process, potentially affect the investigation that was underway."[182]

Finally, in *United States v. Solis*,[183] the court backed completely away from excusing false statements, even the exculpatory variety. In *Solis*, the accused had falsely denied using drugs. He challenged his conviction for making this false statement, arguing that Article 107 did not apply to denials of wrongdoing that fall within the "exculpatory no" exception. In full retreat from the "exculpatory no" in military courts, the court said, "…we hold today that the 'exculpatory no' doctrine is not supported by the language of Article 107 and is not compelled by any self-incrimination concerns."[184]

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[176] The accused had pleaded guilty at trial.
[177] *Id.* at 438. (citations omitted).
[178] *Id.* (citations omitted).
[179] United States v. Dorsey, 38 M.J. 244 (C.M.A. 1993).
[180] *Id*. at 247.
[181] *Id.* at 248.
[182] *Id*.
[183] United States v. Solis, 46 M.J. 31 (1997).
[184] *Id.* at 36.

IV. CONCLUSION

The "exculpatory no" exception to both §1001 and Article 107 is clearly no longer available to a mendacious accused. The concept never fit comfortably in the military culture, where honesty and trustworthiness are both necessary and expected. The military high court's retreat from the concept was almost simultaneous with the Supreme Court's rejection of it. Nevertheless, the Supreme Court's decisive ruling in *Brogan* should effectively eliminate further litigation of the issue in courts-martial. At last we've seen the end of the "exculpatory no."[185]

[185] *But see infra* note 126. The question of whether and how creative defense counsel might seek to resurrect the concept of the "exculpatory no" exception, under another name, is left for another day.

A Primer on Methods of Impeachment

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I. INTRODUCTION

> The rules governing this subject—cross-examining a criminal defendant about prior wrongs—are among the most complex and confusing in the entire law of evidence. The main reason is that they represent not a logical pattern but a series of ad hoc accommodations arrived at by the common law over the course of centuries in dealing (differently) with several related problems. Worse still, the Federal Rules of Evidence have retained the common law structure, with a few modifications, but expressed it in four different rules—Fed. R. Evid. 404, 405, 608 and 609—whose relationship and content are not models of clarity.[1]

Whether one practices under the Federal Rules of Evidence, or the comparable Military Rules of Evidence, [2] the rules of impeachment—which include the proper use of prior statements as well as other means of attacking a witness's credibility—are frequently confusing even to more seasoned trial attorneys.

As an aid to trial practitioners we will present a description of the proper working of these rules, dividing them into two analytical categories. First, we will consider impeachment methods focusing on the truthfulness of the witness himself. These include character for untruthfulness (Mil. R. Evid. 608(a)); prior conviction (Mil. R. Evid. 609(a)); prior misconduct (Mil. R. Evid. 608(b)); prior inconsistent statements (Mil. R. Evid. 613(b)); and impeachment by contradiction. Second, we will consider two classes of impeachment which focus on the perceptions of the witness—bias (Mil. R. Evid. 608(c)) and deficiencies in the elements of competency. We hope to

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[1] United States v. Cudlitz, 72 F.3d 992, 995 (1st Cir. 1996).

[2] MANUAL FOR COURTS-MARTIAL, United States (1995 ed.) [hereinafter MCM], Part III, Military Rules of Evidence [hereinafter Mil. R. Evid.].

provide, through case discussion and examples, a starting point for mastery of a complicated body of law vital to the trial process.

II. IMPEACHMENT BASED ON TRUTH AND VERACITY

A. Opinion and Reputation Evidence of Character Under Military Rule of Evidence 608(a)

Military Rule of Evidence 608(a) reads:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

It is commonplace in American evidentiary law that a party may not offer evidence of a person's bad character in order to demonstrate that on the day in question he was acting in accordance therewith. This principle is embodied in Mil. R. Evid. 404(a) and in Fed. R. Evid. 404(a).[3] However there are numerous occasions in which character evidence is nevertheless admissible, one prominent instance being that of impeachment under Mil. R. Evid. 608(a). This provision does not make character evidence admissible wholesale, but rather restricts it to "matters relating to truthfulness or untruthfulness of the witness." This rule applies to all witnesses and not merely to the accused.

A fairly recent case which considered the use of character witnesses and reputation evidence was *United States v. Toro.*[4] In *Toro,* the accused was charged with use and distribution of amphetamines. The case hinged on the testimony of five undercover informants and accomplices, whose credibility the defense attacked through prior inconsistent statements.

The prosecution then sought to rehabilitate these witnesses by eliciting opinion testimony from an Air Force Office of Special Investigations (OSI) Special Agent who was familiar with the witnesses. The agent testified that in his opinion, these witnesses were "reliable, credible, and trustworthy." He also stated that "they were among 'the very best sources' that he had worked with

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[3] *See* United States v. Maden, 114 F.3d 155 (10th Cir. 1998); United States v. Procopio, 88 F.3d 21 (1st Cir. 1996); United States v. Betts, 16 F.3d 748 (7th Cir. 1994); United States v. Pruitt, 46 M.J. 148 (1997); United States v. Rivera, 23 M.J. 89 (C.M.A. 1986); United States v. Hunter, 21 M.J. 240 (C.M.A. 1986); United States v. Shields, 20 M.J. 175 (C.M.A. 1985); United States v. Everage, 19 M.J. 189 (C.M.A. 1985); United States v. Thomas, 11 M.J. 388 (C.M.A. 1981).

[4] United States v. Toro, 37 M.J. 313 (C.M.A. 1993).

in over 10 years."[5] The accused was convicted and sentenced to a dishonorable discharge, confinement for seven years, total forfeitures, and reduction to the lowest enlisted grade.

On appeal the accused asserted that the judge erred by admitting the OSI agent's opinion testimony. The United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) examined the requirements of Mil. R. Evid. 608(a). While acknowledging the two limitations stated explicitly in the rule, the Court pointed out the additional requirement for a proper foundation. The proponent must show that the character witness who will testify as to the witness's reputation resides or works in the same community as the witness and has done so long enough to have become familiar with the witness's reputation in that community.[6]

The court went on to observe that the prosecution had not laid a proper foundation: it had not established that the OSI agent possessed the requisite knowledge of the witnesses to have a meaningful opinion consistent with the requirements of the rule. The court stated that such a foundation means that the character witness knows the witness personally "and is acquainted with the witness well enough to have had an opportunity to form an opinion of the witness's character for truthfulness."[7] The court provided a broad definition of community as "an area where a person is well known and has established" his reputation.[8] It is not necessarily limited to any particular geographical area, a concession to the nature of military service.

The court also noted that the OSI agent's statement that the witnesses were the "very best sources" he had worked with did not constitute opinion as to truthfulness. However, the court held that the defense's failure to raise this objection at trial waived the issue on appeal and the conviction was affirmed.[9]

Opinion evidence as to a witness's untruthful character becomes relevant whenever the witness testifies. To testify under oath automatically places one's character for truthfulness in contention. In contrast, evidence of character for *truthfulness* may only be elicited after the witness's truthful

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[5] *Id*. at 317.
[6] *Id*.
[7] *Id*.
[8] *Id*. *See also* U.S. v. Crowell, 6 M.J. 944 (A.C.M.R. 1979).
[9] *Toro*, 37 M.J. at 318.

> The testimony that the informants were the "very best sources" appears to violate the rules because it does not involve traditional veracity evidence. Moreover, the prosecutor did not seek to lay a proper foundation for reputation or opinion evidence as to the witness' truthfulness. Had an objection been made to the lack of a proper foundation or to the testimony that they were the "very best sources" the judge could have taken curative measures. However, the defense did not object and thereby waived the error. . . .

See also United States v. Allard, 19 M.J. 346 (C.M.A. 1985).

character has been attacked. This provision has been the source of confusion among practitioners. In *United States v. Robertson*,[10] the accused was charged with use of cocaine. The government's case was based upon the positive results of the accused's random urinalysis test. The chosen defense was that the accused had unknowingly ingested the cocaine. During the trial the defense counsel summoned the accused's landlady to the witness stand and this colloquy followed:

> Q: Mrs. McCullough, do you have an opinion as to the defendant's character and honesty in the community?
>
> A: Well, like I said, he lives with me now and he goes to church with me, and I know I can speak for while he's living with me, because, you know, he goes to church with me, and everything, and he doesn't do anything there.
>
> Q: What is your opinion of his character?
>
> TC: Your honor, what character trait?
>
> MJ: Mr. Jenkins, what character trait are we asking about?
>
> CDC: How do you describe his character as far as honesty?
>
> TC: Your honor, the accused hasn't placed his character for honesty in issue, because he hasn't taken the stand.
>
> MJ: Mr. Jenkins, what's your response to that?
>
> CDC: Your honor, I think the defendant's honesty is in question because his credibility, as well as whether or not he ingested cocaine back on, or at least had cocaine in his system back on April 18th, 1990, whether or not he did, knowingly. I would suggest to this court that his honesty is in question, as to whether or not he's telling the truth.
>
> MJ. Well, the government objection is sustained. His character for honesty and veracity hasn't been placed in issue because he hasn't testified.
>
> CDC: I agree with that.[11]

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[10] United States v. Robertson, 39 M.J. 211 (C.M.A. 1994).

[11] *Id*. at 216. "[T]he burden is upon the proponent to set forth or make an offer of proof of his or her evidence. Mil. R. Evid. 103(a)(2). Here the judge specifically asked defense counsel to lay a proper foundation for Mrs. Mcculloughs opinion of appellant's reputation, but defense counsel failed to do so. In order to be admitted on the merits, character evidence must relate to a 'pertinent [character] trait.' Mil. R. Evid. 404(a). The judge asked what character trait civilian defense counsel was seeking to prove by Mrs. McCullough's testimony; counsel asserted it was 'character as far as honest.' The judge responded that this would not be admissible because appellant's character for honesty had not yet been placed in issue because appellant had not testified. Counsel neither sought to have Mrs. McCullough's testimony introduced to prove what was at issue nor to recall her following appellant's testimony or ask for conditional admission of the evidence based on appellant's anticipated testimony." *Id*. at 217.

It is plain to see that the defense counsel violated the second limitation set forth in Mil. R. Evid. 608(a) because until a witness testifies and his credibility is attacked there is clearly nothing to bolster.

In applying this rule, therefore, we suggest the following as examples of its proper application. The first example illustrates an attack upon a witness's character for truthfulness after he has testified under oath.

Q: Mr. Jones, how long have you known the witness, Mr. Henderson?

A: I have known Mr. Henderson for four years.

Q: How do you know him?

A: He is my next door neighbor.

Q: How often do you see him?

A: I see him almost every day.

Q: Under what circumstances?

A: Well, for the last year we have worked in the same office at the post office and I deal with him every day there. In addition, we see each other as we do yard work or things like that. We have seen each other socially on several occasions and our sons are members of the same scout troop.

Q: In his dealings with you does he ever have an opportunity to make representations of fact to you concerning work or other matters?

A: Yes, he does.

Q: Based upon your knowledge of Mr. Henderson do you have an opinion as to his character for honesty and truthfulness?

A: Yes, I do.

Q: What is that opinion?

A: My opinion is that he is not truthful.

Insofar as Mr. Henderson's character for truthfulness has now been attacked, the proponent of his testimony has an opportunity to bolster Mr. Henderson's credibility by introducing opinion or reputation evidence. The following example demonstrates this technique.

Q: Mr. Edwards, how do you know Mr. Henderson?

A: I have attended the same church, the Fifth Street Presbyterian Church, for eight years, where we both serve on the board of elders. I see him four or five times a week on church related business. He also serves as the church treasurer and teaches a Sunday School class. He is an assistant scout master for the scout troop which our sons attend, along with the Jones boy.

Q: Do you know whether or not during his association with the Presbyterian Church Mr. Henderson has acquired a reputation for truthfulness?

A: Yes, he has.

Q: Do you know what that reputation is?

A: Yes, I do.

Q: What is it?

A: He has a reputation for being a truthful person.

In both examples, the proponent laid an adequate foundation, both for the opinion as well as the knowledge of the witness's reputation in the community. In addition, the bolstering represented by the latter hypothetical is utilized only after the witness's credibility has first been impeached following his testimony under oath.[12]

B. Impeachment Using a Prior Conviction Under Military Rule of Evidence 609

Military Rule of Evidence 609 allows a party to impeach a witness, including a testifying accused,[13] with evidence of the witness's prior conviction. Both Rule 609 and case law define when impeachment using a prior conviction is permissible, and when it is not. The general rule, which was amended in 1991,[14] reads:

> **(a) General rule.** For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Mil. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by a court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the

[12] The same rules also apply to the accused. "Generally, the accused who elects to testify is subject to impeachment just like any other witness. . . Thus, the accused opens the door to his or her character for truthfulness merely by testifying. However, the accused may not bolster credibility through character for truthfulness evidence until the prosecutor has attacked it, either through character evidence or some other means." United States v. Pruitt, 43 M.J. 864, 868 (A.F.Ct.Crim.App. 1996). *See also* United States v. Gleason, 43 M.J. 69 (1995) and *see* United States v. Birdsall, 47 M.J. 404 (1998), (concerning the inadmissibility of opinion testimony by expert as to truthfulness of witness).

[13] United States v. Ross, 44 M.J. 534 (A.F.Ct.Crim.App. 1996).

[14] "The December 1, 1990, amendment to Fed. R. Evid. 609 became part of the Military Rules of Evidence by operation of law on May 30, 1991." United States v. Miller, 48 M.J. 49, 56, n.3 (1998).

> time of the conviction applies without regard to whether the case was tried by general, special or summary court-martial.[15]

Convictions pending appeal are admissible under this rule. This rule applies only to prior convictions admitted to impeach a witness,[16] even if the conviction is pending appeal.[17] Rule 609 does not apply when the reason for the admission of the evidence is for something other than impeachment.

1. Admissibility of Prior Conviction Based on Penalty for the Crime (Mil. R. Evid. 609(a)(1))

Under Rule 609(a)(1), counsel may impeach a witness using the witness's prior conviction, if the witness was convicted of a crime carrying a penalty of death, dishonorable discharge or over one year of confinement.[18] Under subsection (a)(1), there is no requirement that the crime be one involving dishonesty or false statement. Thus, a prior conviction for any offense meeting the criteria in (a)(1) can be used to impeach, even if the conviction does not involve a dishonesty-type offense. In determining whether a crime meets the (a)(1) criteria, the courts look at what penalty was authorized, rather than at what punishment was actually imposed.[19] For example, a conviction for the use of marijuana, a violation of Article 112a, Uniform Code of Military Justice,[20] carries the potential for a dishonorable discharge. Hence, a prior conviction for a violation of Article 112a qualifies for admission under Rule 609(a)(1).[21]

This subsection of Rule 609 contains two different balancing tests. One balancing test is applied if the witness is someone other than the accused and the other test is applied if the accused testifies.[22] The need for a different balancing test for an accused is

> a reflection of how important and potentially devastating conviction evidence can be on guilt or innocence determinations. Criminal defendants face unique prejudicial risks when [Rule] 609 evidence is offered against

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[15] Mil. R. Evid. 609(a), *supra* note 2.

[16] STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL, 763 (4th Ed. 1997).

[17] Mil. R. Evid. 609(e), *supra* note 2.

[18] Mil. R. Evid. 609(a)(1), *supra* note 2.

[19] United States v. Brenizer, 20 M.J. 78 (C.M.A. 1985). In *Brenizer*, the accused's prior conviction was imposed by a court that did not have the authority to adjudge a punitive discharge. Nevertheless, the court found the prior conviction qualified for admission under the former version of Mil. R. Evid. 609(a)(1).

[20] Uniform Code of Military Justice, 10 U.S.C. § 912a (1994).

[21] United States v. Ross, 44 M.J. 534, 535 (A.F. Ct. Crim. App. 1996). A conviction for absence without leave for more than 30 days, a violation of Article 86, UCMJ, *supra* note 19, could also be used to impeach under Rule 609(a)(1). *Brenizer*, 20 M.J. at 80.

[22] Mil. R. Evid. 609(a), *supra* note 2.

> them. Factfinders may misinterpret conviction evidence as proof of the accused's criminal propensity or disposition to commit criminal offenses. This is so even where the military judge provides tailored limiting instructions.[23]

Because of this concern, Rule 609(a) has a special balancing test for when the accused testifies.

In contrast, for a witness other than the accused, the court is not as concerned with questions regarding propensity or criminal disposition, which may taint an adjudication of guilt or innocence. For such a witness, the Rule uses the balancing test found in Mil. R. Evid. 403. According to that Rule, an ordinary witness's prior conviction is excluded only if the prejudicial effect substantially outweighs the probative value of the prior conviction.

When an accused testifies and counsel wants to impeach with a prior conviction, the military judge must weigh the probative value of admitting the conviction against the prejudicial effect to the accused. If the probative value outweighs the prejudice to the accused, the evidence is admitted.[24] If not, the evidence is rejected. An even balance favors exclusion.[25] Another way of looking at the accused's balancing test is to consider the reason for the special rule—to avoid problems with a factfinder misusing the conviction. If considered in this manner the balancing test becomes: "a previous conviction's *impeachment* value must outweigh its criminal character *propensity* prejudicial effect."[26]

Although "this balancing process is obviously not amenable to precise mathematical application,"[27] courts have established factors for a judge to consider when applying the accused's balancing test found in Rule 609(a)(1).[28] In *Brenizer*, the Court of Military Appeals set forth this list of factors:

> (1) The impeachment value of the prior crime.
>
> (2) The point in time of the conviction and the witness's subsequent history.
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> (3) The similarity between the past crime and the charged crime.
>
> (4) The importance of the defendant's testimony.

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[23] STEPHEN A. SALTZBURG, ET AL., *supra* note 16 at 767 (footnote omitted).
[24] Mil. R. Evid 609(a)(1), *supra* note 2.
[25] United States v. Sitton, 39 M.J. 307 (C.M.A. 1994). The court notes that the accused's balancing test is similar to that found in the prior Rule 609. That prior Rule favored exclusion when evenly balanced.
[26] STEPHEN A. SALTZBURG, ET AL., *supra* note 16 at 767.
[27] *Brenizer*, 20 M.J. at 82.
[28] *Id*. at 80. The Ninth Circuit has established a virtually identical list of factors in *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995) (citing United States v. Cook, 608 F.2d 1175, 1185 n.8 (9th Cir. 1979) (*en banc*), *cert. denied*, 444 U.S. 1034 (1980), *overruled on other grounds*, Luce v. United States, 469 U.S. 38 (1984)).

(5) The centrality of the credibility issue.[29]

The court noted that this "list is not claimed to be exhaustive and other pertinent factors may in the future be identified."[30] The proponent of the evidence has the "burden of showing, based on these factors, that the proffered evidence's probative value substantially outweighs its prejudicial effect."[31]

In a particularly illustrative case, *United States v. Ross,*[32] the United States Air Force Court of Criminal Appeals applied the five *Breziner* factors in determining the admissibility of a prior conviction under Rule 609(a)(1). The accused in *Ross* was charged with use of marijuana on or about 22 July 1994, based on a positive urinalysis result. During her direct testimony, the accused reflected, "I didn't—I couldn't figure out any reason why it [her urinalysis result] should be positive."[33] Trial counsel requested permission to cross-examine the accused about a prior conviction for using marijuana, also based on a positive urinalysis. Trial counsel argued the May 1994 conviction was admissible under Rule 609(a)(1) to impeach the accused's claim that she did not know why her urine tested positive. The military judge allowed the cross-examination, using the "more restrictive" Rule 609(a)(1) balancing test.[34] The court found that there was a high degree of prejudice, due to the similar nature of the offenses. However, the court also considered the other *Breziner* factors, stating:

> Considering the other balancing factors, the impeachment value of the prior drug conviction was high, particularly when [the accused] went beyond a basic denial of marijuana use to a "hear no evil, see no evil," don't know how it could have gotten there explanation of her positive urinalysis. [The accused's] use of marijuana while a non-commissioned officer also showed a failure to adhere to basic military law and discipline . . . . Furthermore, the prior conviction was so close in time to the current offense that [the accused] hardly had time to reestablish a track record of compliance with the law.
>
> Since [the accused] testified, the military judge did not deprive the members of her evidence. On the contrary, [the accused's] denials, when matched against the lack of breaks in the urinalysis chain of custody or real missteps in the testing procedure, made her credibility the key issue in the case. If the

[29] *Brenizer*, 20 M.J. at 80. *See also Sitton*, 38 M.J. at 308-09 (extending these factors balancing probative value against prejudicial effect when the witnesses is someone other than the accused).
[30] *Id.* at 80-81.
[31] *Alexander*, 48 F.3d at 1488.
[32] United States v. Ross, 44 M.J. 534 (A.F.Ct.Crim.App 1996).
[33] *Id.* at 535.
[34] *Id.* at 536. Although the military judge erroneously cited Mil. R. Evid 403 in making his findings, the Air Force court found that he actually applied the correct language of the Mil. R. Evid. 609(a)(1) balancing test.

> members believed her, as opposed to the urinalysis lab results, they acquitted.[35]

Although this "juggling feat" was a "close call" the Air Force court upheld the admission of the prior conviction.[36]

2. Admissibility of Prior Conviction Based on the Nature of the Crime (Mil.R.Evid. 609(a)(2))

Counsel may use a witness's prior conviction to impeach, regardless of the crime's penalty, if the crime involves dishonesty or false statements.[37] This rule applies to any witness or accused that testifies. The only criteria for admission under Rule 609(a)(2) is whether the prior conviction was for a crime involving dishonesty or false statement. Although all criminal acts would seem to have an element of dishonesty, the term "dishonesty" in Rule 609(a)(2) is narrowly defined.[38] Rule 609(a)(2) refers to those convictions which are "'particularly probative of credibility,' such as those for 'perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness or falsification bearing on the accused's propensity to testify truthfully.'"[39]

In a pre-rules case, the Court of Military Appeals similarly defined those crimes bearing on truthfulness as "[a]cts of perjury, subornation of perjury, false statement, or criminal fraud, embezzlement or false pretense . . . ."[40] These acts are "generally regarded as conduct reflecting adversely on an accused's honesty and integrity. Acts of violence or crimes purely military in nature, on the other hand, generally have little or no direct bearing on honesty and integrity."[41] This definition is logical. Remember, the purpose of impeachment by using a prior conviction is not to show the witness was a "bad" person. Instead, the purpose of this type of impeachment is to show something in the witness's background that directly impacts whether the fact

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[35] *Id.*
[36] *Id.*
[37] Mil. R. Evid. 609(a)(2), *supra* note 2; Convictions for crimes involving dishonesty are often called *crimen falsi* convictions. BLACK'S LAW DICTIONARY 335 (5th ed. 1979).
[38] United States v. Frazier, 14 M.J. 773 (A.C.M.R. 1982), *pet. denied* 16 M.J. 93 (C.M.A. 1983); Daniels v. Loizzo, 986 F. Supp. 245 (S.D.N.Y. 1997).
[39] United States v. Hayes, 553 F.2d 824, 827 (2nd Cir. 1977), *cert. denied* 434 U.S. 867 (1977) (quoting Conf. Rep. No. 93-1597, 93d Cong., 2d Session. 9, reprinted in U.S. Code Cong. & Ad. News, 7098, 7013.).
[40] United States v. Weaver, 1 M.J. 111, 118 n.6 (C.M.A. 1975). Although a pre-rules case, *Weaver* discussed the proposed Federal Rule of Evidence 609, and concluded that the then existing court-martial practice was no different.
[41] *Id.*

finder should believe the witness.[42] The key question when looking at the admissibility of a crime under Rule 609(a)(2) thus becomes: does the crime, including the circumstances surrounding the commission of the crime, tend to show the witness cannot be believed?

In some jurisdictions, including the military courts, crimes other than perjury, false statement, criminal fraud, embezzlement, or false pretense may also be admissible under Rule 609(a)(2). If the prior conviction was for a crime that did not *per se* involve dishonesty as an element of the crime, these jurisdictions have held that a trial court may look beyond the elements to determine whether the crime actually involved dishonesty.[43] Other jurisdictions limit the inquiry to whether the statutory elements or the crime, as charged, contain an element of dishonesty.[44] Military courts have taken the view that Rule 609(a)(2) applies to "those convictions involving some element of untruthfulness or falsification which would tend to demonstrate that [a witness] would be likely to testify untruthfully."[45] Nevertheless, military courts are still willing to look beyond the pure statutory elements of the crime to determine if the crime, as committed, contained some element of dishonesty impacting the witness's credibility.[46]

Several courts have ruled that Rule 609(a)(2) does not require a balancing of probative value against prejudicial effect.[47] This position is based on the plain language of Rule 609(a)(2) that mandates the admission of a qualifying conviction regardless of the prejudicial effect. The holding is also

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[42] *Id.* at 117.

[43] *Frazier*, 14 M.J. at 778 n.9; United States v. Dunson, No. 97-1163, 1998 U.S. App. LEXIS 7867 (10th Cir. Colo. Apr. 24, 1998) (holding shoplifting offense did not involve deceit or dishonesty and was not admissible under Rule 609(a)(2)).

[44] United States v. Lewis, 626 F.2d 940 (D.C. Cir. 1980).

[45] *Frazier*, 14 M.J. at 778; United States v. Huetten-Rauch, 16 M.J. 638 (A.F.C.M.R. 1993) (noting proponent of impeachment evidence was unable to establish that shoplifting offense involved dishonesty or false statement).

[46] *Frazier*, 14 M.J. at 778 n.9. *See also Brenizer*, 20 M.J. at 80, where the Court of Military Appeals held that "an unauthorized absence does not *ordinarily* involve dishonesty or false statement" and is thus not admissible under Rule 609(a)(2). With the use of the word "ordinarily" it would appear that the Court of Military Appeals would also look to the factual basis of an offense and not limit the inquiry to the elements of the offense. *Accord* United States v. Ross, 44 M.J. 534, 535 ("Use of marijuana is *usually* not a crime involving dishonesty or false statement."). For a listing of offenses which have and have not qualified for admission, or not, see the cases cited in *Frazier*, 14 M.J. at 778 nn.6-8.

[47] *Frazier*, 14 M.J. at 776; United States v. Guardia, 135 F.3d 1326 (10th Cir. 1998). Interpreting the impact of Fed. R. Evid. 403 on Fed. R. Evid. 414 and 415, the 10th Circuit Court of Appeals held, "Rule 403 applies to all evidence admitted in federal court, except in those rare instances when other rules make an exception to it. *See, e.g.*, Fed. R. Evid. 609(a)(2) (mandating that prior conviction of a witness be admitted for impeachment purposes if prior crime involved dishonesty)." *Guardia*, 135 F.3d at 1329. *See also* United States v. Rochelle, No. 96-30329, 1997 U.S. App. LEXIS 33175, at *3 (9th Cir. Or. Nov. 19, 1997) ("A conviction for any crime involving dishonesty or a false statement, such as wire fraud, is admissible under Rule 609(a)(2) without any balancing analysis.").

based on the notion that convictions for crimes involving dishonesty or false statement do not need a balancing test since, by their vary nature, their probative value outweighs any prejudicial effect. However, the courts require close scrutiny of the nature of the conviction, because of this lack of a balancing test. At least one commentator has an opposite view, reasoning that the admission of *crimen falsi* convictions must be balanced against questions of constitutional problems, military due process, and fundamental fairness.[48] The commentator argues further that unless the crime contains a statutory element indicating dishonesty or false statement, evidence of a conviction for that crime should not be admitted without going through Rule 609(a)(1)'s balancing test.[49]

3. Other Considerations Under Mil.R.Evid. 609.

Rule 609 also contains provisions that restrict the use of a prior conviction to impeach. First, under Rule 609(b), a conviction that is more that ten years old, even if otherwise admissible under Rule 609(a), is normally not admitted into evidence.[50] The proponent of an aged conviction must give notice of the intent to use the conviction to impeach.[51] The ten-year time period for excluding stale convictions starts to run from either the date of the conviction or the date the witness was released from any confinement imposed as a result of the conviction, which ever is later.[52] If a conviction is "old" under this criteria, the conviction may still be used to impeach a witness, but only if "the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect."[53] In *Weaver*, the Court of Military Appeals, anticipating the enactment of the Military Rules of Evidence, considered this balancing requirement for aged convictions. The court proposed factors for the military judge to use in balancing the probative against the prejudicial. The court suggested weighing,

> the nature of the conviction itself in terms of its bearing on veracity, its age, its propensity to influence the minds of the jury improperly, the necessity for the testimony of the accused in the interests of justice, and the circumstances of the trial in which the prior conviction is sought to be introduced.[54]

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[48] STEPHEN A. SALTZBURG, ET AL., *supra* note 16, at 770. *See also* United States v. Toney, 615 F.2d 277, 283 (5th Cir. 1980) (Tuttle, J. dissenting).
[49] STEPHEN A. SALTZBURG, ET AL., *supra* note 16 at 771.
[50] Mil. R. Evid. 609(b), *supra* note 2.
[51] *Id.*
[52] *Id.*
[53] United States v. Weaver, 1 M.J. 111, 117 (C.M.A. 1975); Mil. R. Evid. 609(b), *supra* note 2.
[54] *Weaver*, 1 M.J. at 117-118 (footnotes omitted).

More recently, one federal district court listed relevant balancing factors such as "the nature, age, and severity of the crime and its relevance to the witness' credibility, the importance of credibility as an issue in the case, the availability of other means to impeach the witness, and whether the witness has 'mended his ways' or engaged in similar conduct recently."[55] Whatever factors are used to draw the balance, the important point is that an aged conviction may be admitted, but only after full consideration of the probative value versus the prejudicial effect.

The second restriction is that a conviction that has been pardoned, annulled, or the subject of a certificate of rehabilitation, based on a finding that the witness has rehabilitated himself, may not be used to impeach as long as the witness has not committed a subsequent crime punishable by death, dishonorable discharge, or confinement of more than a year.[56] The Army Court of Military Review has held that an accused who satisfactorily completed his return to duty program did not qualify for exclusion of his conviction under this rule.[57] If the pardon, annulment or certificate of rehabilitation was based on a finding that the witness was innocent, the prior conviction cannot be used to impeach at all.[58]

Third, a juvenile conviction is generally not admissible to impeach.[59] However, a juvenile conviction may be admitted to impeach a witness, other than the accused, if the conviction would have been admissible had the offender been an adult and if the military judge is satisfied the admission is necessary.[60] This exception allows the military judge to balance "society's interest in not stigmatizing youthful misconduct and the [accused's] confrontation rights."[61]

Finally, after determining a prior conviction is admissible, the court must then focus on how to present the information to the fact finder. Counsel may use an admissible prior conviction to impeach a witness during cross-examination. However, cross-examination is normally limited to questions concerning the number of prior convictions, the nature of the crime committed, and the date and time of each conviction.[62] It is usually considered error for counsel to cross-examine the witness about the details of the witness's

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[55] Daniels v. Loizzo, 986 F.Supp. 245, 252 (S.D.N.Y. 1997).
[56] Mil. R. Evid. 609(c)(1), *supra* note 2.
[57] United States v. Rogers, 17 M.J. 990 (A.C.M.R. 1984), pet. denied, 19 M.J. 110 (C.M.A. 1984).
[58] Mil. R. Evid. 609(c)(2), *supra* note 2.
[59] Mil. R. Evid. 609(d), *supra* note 2.
[60] *Id*.
[61] United States v. Miller, NMCMA 91 00783, 1995 CCA LEXIS 426 (N.M.C.C.A. Sept. 15, 1995); *see also*, Davis v. Alaska, 415 U.S. 308 (1974).
[62] *See* United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983), *aff'd* 20 M.J. 330 (C.M.A. 1985); *accord* United States v. Robinson, 8 F.3d 398 (7th Cir. 1993).

conviction,[63] unless the witness tries to minimize his guilt regarding the prior conviction. In those instances, "some latitude in cross-examination [is] appropriate."[64]

Counsel may also offer extrinsic evidence of the witness's prior conviction.[65] When offering extrinsic evidence, counsel may offer a "record embodying the judgment or a copy thereof."[66] In some cases, counsel may also prove the fact of a conviction by "evidence of an admission by the person convicted, or in rare cases, recollection testimony from a person who witnessed announcement of the judgment."[67]

C. Impeachment by Prior Misconduct Under Military Rule of Evidence 608(b)

Rule 608(b) reads:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Mil. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.[68]

This rule is sometimes confusing, not so much on its face, but in the manner in which it interacts with other rules which would allow extrinsic evidence. Rule 608(b) itself is limited to cases in which a witness, having testified and thereby having placed his character for truthfulness at issue, is subjected to cross-examination as to prior instances of conduct which would demonstrate that his character for truthfulness is poor. In *United States v. Robertson*,[69] the Court of Military Appeals set forth a two-prong test for the proper application of this rule. The court stated that, first, the proponent of the evidence must have a good faith belief the conduct occurred and, second, the conduct must relate to untruthfulness.[70]

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[63] *Rojas*, 15 M.J. at 908-9.
[64] United States v. Ledford, Nos. 96-5659/96-6589, 1997 U.S. App. LEXIS 29167, at *10 (6th Cir. Tenn. Oct. 22, 1997).
[65] United States v. Barnes, 33 M.J. 468 (C.M.A. 1992).
[66] *Id* at 473.
[67] *Id.*
[68] Mil. R. Evid. 608(b), *supra* note 2.
[69] United States v. Robertson, 39 M.J. 211 (C.M.A. 1994).
[70] *Id*. at 214. *See also* United States v. Weaver, 1 M.J. 111 (C.M.A. 1975); United States v. Owens, 21 M.J. 117 (C.M.A. 1985) (providing a good example of 608(b) questioning); United States v. Page, 808 F.2d 723 (10th Cir 1987); United States v. Leake, 642 F.2d 715 (4th Cir.

The court went on to describe several offenses, which, by their nature, are probative of untruthfulness. They included perjury, suborning perjury, false statement, criminal fraud, embezzlement, and false pretenses. On the other hand, purely military offenses or acts of violence "generally have little or no direct bearing on honest and integrity" and therefore would fail the second prong of the test.[71]

In *Robertson*, the court held that the prosecutor, who was attempting to impeach the testimony of a defense witness by questioning her about an alleged prior act of fraud, had an insufficient basis for asking the question. This was due to the fact that he was relying solely on an arrest record that did not recite the underlying facts.[72]

As the rule itself states, however, even if the questioner has a good faith basis for asking the question and the underlying conduct pertains to truthfulness, the questioner is still bound by the witness's answer and may not prove the conduct by extrinsic evidence. Consider, for example, the following exchange in a capital murder case, in which the accused testified on the merits.

> Q. Now, you have lied before concerning your relationship with Sharon when you thought you were in trouble, haven't you?
>
> A. No, sir.
>
> Q. Well, do you recall an incident in June 1993 when the police were called to your house?
>
> A. Yes, sir.

1981). In *United States v. Feagans*, 15 M.J. 667 (A.F.C.M.R. 1983), the accused testified under oath during sentencing. On direct he was asked if he had ever been arrested or been in jail, to which he replied, "No, I've never even had a traffic ticket prior to this." *Id.* at 668. The prosecution was permitted to question the accused about his falsification of a drug abuse certificate prior to entry on active duty. "When the accused testified under oath, he placed his credibility in issue, and the fact that he lied on an officer candidate certificate was a proper matter for impeachment. Specific instances of conduct of a witness, including the accused, may be inquired into in cross-examination for the purpose of attacking the credibility of the witness if the conduct is probative of untruthfulness." *Id.* *See also* United States v. Boone, 17 M.J. 567 (A.F.C.M.R. 1983): In that case the Air Force Court of Military Review held that the trial judge should have permitted cross-examination of a witness by questioning him about a false denial of preservice drug use. "[A] military judge's decision as to whether to allow cross-examination into specific acts of misconduct is a discretionary matters. However, when such a specific act of misconduct is, in and of itself, directly probative of the witness' truthfulness, a military judge must allow it because, by definition, it is always relevant to the issue of that witness' credibility." *Id.* at 569. *See also* United States v. Mergucz, NMCM 96 00191, 1997 CCA LEXIS 415 (N.M.C.C.A. July 7, 1997); United States v. Dennis, 625 F.2d 782 (8th Cir. 1980).

[71] *Robertson*, 39 M.J. at 215.

[72] *Id*. A rap sheet might furnish a good faith belief that the conduct occurred "if it details the underlying facts of the arrest . . . . A prosecutor who is not using a detailed rap sheet or is not acting in good faith can be called to the witness stand at an Article 39(a) session to furnish the basis for his information." *Id*. at 214.

Q. Sharon had reported to them that you had a gun and were threatening her with that gun, isn't that true?

A. Yes, sir.

Q. And they came out and they asked you if you had a gun, didn't they?

A. Yes, sir.

Q. And you told them no.

A. Initially, I did, yes, sir (sic).

Q. You told them no; isn't that true?

A. Initially.

Q. And they actually found the gun, didn't they?

A. I told them where the gun was.

Q. I want to get this straight, because Officer Sims is going to be in here and you are telling us that you told them before they found the gun that you had a gun?

A. I told them where the gun was, yes, sir.

Q. And so if this San Antonio police officer comes in here and says something different—

DC. Objection, Your Honor.

Q. --would she be lying?

MJ. Objection? Argumentative?…Sustained.[73]

Viewed purely in the context of impeachment under Rule 608(b) this general line of questioning is admissible to rebut the implication of truthful character that necessarily attaches whenever a witness testifies under oath. While the underlying assault with the gun is a crime of violence which would not satisfy the *Robertson* test, the apparent false statement to the police officer is pertinent to the question of the accused's character for truthfulness and was, therefore, a proper matter to be inquired upon. The good faith basis for asking the question can be obtained through the prosecutor's prior interview of the police officer to whom the statement was made. However, viewed simply in the light of Rule 608(b) it would be improper to call the officer as his testimony would be considered extrinsic evidence. The accused partially denied the false statement and, therefore, the prosecutor may not bring in extrinsic evidence to prove the making of the false statement.

To summarize, therefore, under Rule 608(b) a witness who has testified under oath and therefore placed his or her character for truthfulness in issue

[73] United States v. Hamilton, ACM 31768, 1996 CCA LEXIS 243 at *4-5. "An accused who testifies opens the door to his or her character for truthfulness . . . . Additionally, counsel may attack or support the credibility of a witness by inquiring into specific instances of conduct on cross-examination. Normally, counsel is bound by the witness's answer and may not introduce extrinsic evidence to prove the conduct." *Id*. at *7.

may be impeached by questions about prior incidents of misconduct. These incidents must be probative on the issue of truthfulness—such as perjury, false statement, etc. The questioner must have a good faith basis for asking the question. If the witness denies the misconduct, the questioner is stuck with that answer and may not prove it by extrinsic evidence.[74]

The practitioner should bear in mind that evidence not admissible under Rule 608(b) may still be admissible to rebut a statement which the witness had made under oath. For example, in *United States v. Trimper,*[75] the accused, an officer accused of using cocaine and marijuana, was asked about specific allegations of drug use within the time frame alleged in the charges. The accused answered categorically "I have never used cocaine."[76] Under these circumstances, the prosecution was permitted to introduce extrinsic evidence, in this case a lab report of a urinalysis obtained by the accused from a civilian hospital at his own expense. The court reasoned that there were two events that would allow the use of extrinsic evidence of a specific instance of conduct to impeach. The first is when a witness makes a broad collateral assertion on direct examination that he has never engaged in a certain type of misconduct. The second is when he gratuitously responds to a narrowly tailored cross-examination question with broad information.[77] Thus, while extrinsic evidence may not be used to prove acts of misconduct to rebut a witness's general character for truthfulness, should a witness either on direct or through gratuitously volunteering information on cross-examination deny certain misconduct, counsel may rebut the same with extrinsic evidence. [78]

D. Impeachment by Prior Inconsistent Statements Under Military Rule of Evidence 613(b)

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[74] *But see* discussion of impeachment by contradiction, *infra*, section E.

[75] United States v. Trimper, 28 M.J. 460 (C.M.A. 1989).

[76] *Id.* at 462.

[77] *Id.* at 467.

[78] *See* U.S. v. Pruitt, 43 M.J. 864 (A.F.Ct.Crim.App. 1996) (concerning the theory of specific contradiction). "[C]ounsel may introduce extrinsic evidence to contradict the witness who denies committing certain misconduct on direct examination or gratuitously volunteers information in response to a narrow cross-examination." United States v. Hamilton, ACM 31768, 1996 CCA LEXIS 243 at *7; "The theory of 'specific contradiction' is a method separate from impeachment by instances of misconduct under Mil.R.Evid. 608(b). It is a common-law theory recognized by this Court and many commentators." United States v. Welker, 44 M.J. 85, 89 (citations omitted) (C.A.A.F. 1996); "[I]n showing such contradiction either on a material issue or a collateral matter asserted on direct-examination, Fed. R. Evid 608(b) does not bar the use of extrinsic evidence of specific acts of a witness' conduct." United States v. Banker, 15 M.J. 207, 211 (citations omitted) (C.M.A. 1983); United States v. Ramos, 47 M.J. 474 (1998). *See also* United States v. Diaz, 39 M.J. 1114 (A.F.C.M.R. 1994) (explaining for the interplay of the right of impeachment with Mil.R.Evid. 412, which restricts admission of the past sexual behavior of a rape victim); United States v. Castillo, 29 M.J. 145 (C.M.A. 1989). *See* Section E *infra* for an in-depth discussion of this type of impeachment.

Rule 613(b) governs the use of extrinsic evidence of a witness's prior inconsistent statement as a method of impeachment. The rule reads:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate he witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Mil. R. Evid. 801(d)(2).

The limitation on extrinsic evidence imposed by Rule 613(b) recognizes the fact that such evidence is, in part, hearsay. Even in those circumstances in which it is admissible under this rule, it should not be considered for the truth of the matter asserted. In other words, even if a witness denies making a prior inconsistent statement, the subsequent use of that statement under this rule is limited to impeachment purposes only. It may not be used as substantive evidence. For example, consider *United States v. Button,*[79] in which the accused was tried for, among other offenses, indecent acts and sodomy with his stepdaughter. Prior to trial the victim made numerous statements—to her mother, the Security Police, the OSI, and the Article 32, UCMJ, investigating officer—all of which implicated the accused. However, when called to the stand at trial as a witness for the prosecution, the victim denied that the accused had sexually abused her and recanted her previous inculpatory statements. She admitted to having made the statements, but averred that they were lies. The government offered her Article 32 testimony as well as the statement to the OSI, which were admitted into evidence.[80]

The Court of Military Appeals subsequently held that the prior statement to the OSI was erroneously admitted under 613(b) insofar as the victim had admitted making it and also admitted that it was inconsistent. Before making its ruling in this regard, the court adopted the prevailing position of the federal courts that "'extrinsic evidence of a prior inconsistent statement should not be admitted for impeachment when (1) the declarant is available and testifies; (2) the declarant admits making the prior statement: and (3) the declarant acknowledges the specific inconsistencies between the prior statement and his or her in-court testimony.'"[81]

Whenever such evidence is admitted the judge should instruct the members that they are not to consider the statement as substantive evidence, but merely for its impeachment value.

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[79] U.S. v. Button, 34 M.J. 139 (C.M.A. 1992).

[80] *Id*. at 140.

[81] *Id*., (quoting United States v. Soundingsides, 820 F.2d 1232 (10th Cir. 1987)). "In adopting this interpretation of Mil.R.Evid. 613(b), we have considered that the 'prevailing view' and 'the more expedient practice' is to disallow extrinsic evidence of a prior inconsistent statement if the witness admits making the statement." *Button*, 34 M.J. at 140.

However, there is an exception to be found in the distinction between prior inconsistent statements in general and prior inconsistent testimony. Rule 801(d)(1) states:

> A statement is not hearsay if: (1) Prior statement by a witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . [82]

In other words, if the prior inconsistent statement was made at an Article 32, UCMJ, Investigation or otherwise satisfies the requirements of this rule, the statement can be admitted not merely for impeachment but also as substantive evidence. In *Button* the court properly admitted the verbatim Article 32 testimony of the child victim for the members' consideration as substantive evidence on the merits.[83] Another example, *United States v. Ureta*,[84] was also a child sexual abuse case in which the accused allegedly made certain inculpatory admissions to his wife. Although she testified under oath and was cross-examined about those statements at the Article 32, UCMJ, Investigation, at trial she claimed that her former testimony had been a lie. The trial counsel questioned her extensively on the Article 32, UCMJ, testimony and, in light of her unequivocal recantations, the military judge admitted the transcript of her former testimony as substantive evidence.

To impeach a witness with a prior inconsistent statement the proponent must lay a proper foundation. The following colloquy from a noted trial advocacy handbook is a good example of the proper use of this technique:

> Q: Mr. Jones, you say you were about 50 feet from the accident when it happened?
>
> A: Yes.
>
> Q: There is no doubt in your mind about that?
>
> A: No.
>
> Q: Weren't you actually *over 100 feet* away?
>
> A: No.
>
> Q: Mr. Jones, you talked to a police officer right at the scene a few minutes after the accident, didn't you?
>
> A: Yes.
>
> Q: Since you talked to him right after the accident, everything was still fresh in your mind, right?

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[82] Mil. R. Evid. 801(d)(1), *supra* note 2.
[83] *Id.*
[84] United States v. Ureta, 44 M.J. 290 (1995). *See also* United States v. Kelly, 45 M.J. 275 (1996).

A: Yes.

Q: You knew the police officer was investigating the accident?

A: Yes.

Q: And you knew it was important to tell the facts accurately as possible?

A: Yes.

Q: Mr. Jones, you told that police officer, right after the accident, that you were *over 100 feet away* when the accident happened, didn't you?

A: Yes.

At this point extrinsic evidence would not be admissible to impeach the witness, insofar as he has admitted the inconsistency. Had the witness denied making the statement to the Security Police or denied that it was inconsistent, then the statement could be admitted as impeachment evidence. It could be admitted either through the witness himself, if it was a written statement, or through the police officer to whom it was made or through some other competent witness. However, the statement could not be used as substantive evidence,[85] unless the prior statement is in the form of prior inconsistent testimony which satisfies the requirements of Rule 801(d)(1). In that case, the statement may be admitted not merely to demonstrate the inconsistency, but to prove the matters asserted therein.[86]

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[85] In *Ureta* the court stated: "[W]e hold that the Article 32 transcript could 'not be admitted for impeachment' under Mil.R.Evid. 613(b) but was admissible as substantive evidence in its own right under Mil.R.Evid. 801(d)(1)(A). Under the circumstances, it was proper for trial counsel to use Mrs. Ureta to lay the foundation for admission of her Article 32 testimony and for the military judge to admit the transcript as substantive evidence." *Ureta*, 44 M.J. at 299. Extrinsic evidence is generally not admissible when the witness admits making the inconsistent statement. However, when the admission is "grudging" or otherwise fails to convey the extent of the inconsistency the extrinsic evidence may be admitted. In a situation such as this the "interests of justice" may be said to require admission of the extrinsic evidence. United States v. Gibson, 39 M.J. 319 (C.M.A. 1994); "When a witness denies making a prior inconsistent statement, the opponent may call another witness to introduce extrinsic evidence through testimony or a document of the prior statement, that is, the denial may be disproved by a third party." United States v. Taylor, 44 M.J. 475, 479 (1996). *See also* United States v. Jones, ACM 31646, 1996 CCA LEXIS 232, (A.F.C.C.A. July 29, 1996) (concerning the extent impeachment is within the discretion of the trial judge); United States v. Mings, ACM 31047, 1997 CCA LEXIS 78 (A.F.C.C.A. Feb. 20, 1997) (recognizing that the trial judge will be held to an abuse of discretion standard in ruling on impeachment matters); Fletcher v. Weir, 455 U.S. 603 (1983) (concerning prior inconsistent acts). Prior inconsistent acts often involve silence in the face of questioning. When the accused has a right not to answer questions due to Miranda/Article 31, UCMJ, warnings, silence will not be held against him. *See* Doyle v. Ohio, 426 U.S. 610 (1976) (regarding cross-examination as to post-warnings silence).

[86] STEPHEN A. SALTZBURG, ET AL., *supra* note 16, at 761 (1991).

E. Impeachment by Contradiction

Impeachment by contradiction or impeachment by specific contradiction[87] is a legitimate method of impeaching a witness's testimony that

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> These statements must have been given under oath and subject to the penalty of perjury "at a trial, hearing, or other proceeding, or in a deposition." There is no requirement that there has been an opportunity for prior cross-examination. The oath is an absolute requirement, and the only other requirement is that there has been some kind of formal proceeding. Apparently, the formal proceeding guarantees an accurate record and suggests to the person who makes the statement the importance of telling the truth and thus adds to the oath requirement a guarantee of trustworthiness.

Although outside the scope of this article we suggest the following as an example of a proper foundation for admission of prior testimony in a child molestation case:

> Q: Mr. Smith, what is your job?
> A: I am the court reporter here in the base legal office.
> Q: On 26 March 1998 did you have an opportunity to transcribe testimony in the Article 32 investigation of this case?
> A: Yes, I did.
> Q: And the witness, Mr. Jones, testified at that hearing?
> A: Yes, he did.
> Q: Was he under oath?
> A: Yes.
> Q: I am now showing you a five page document. Can you identify it?
> A: This is a transcript of Mr. Wilson's testimony at the Article 32 investigation.
> Q: Who prepared this transcript?
> A: I prepared it from my stenographic notes which I took during the hearing.
> Q: Is this transcription an accurate presentation of the testimony which Mr. Wilson gave at the hearing?
> A: Yes, it is.

Although the court reporter is clearly competent to present evidence of the prior testimony, the investigating officer could also be called or the prior testimony introduced through the witness himself. Sworn statements adopted by the witness as part of his testimony should also be admissible, though statements made to law enforcement personnel standing alone are not. United States v. Connor, 27 M.J. 378 (C.M.A. 1989); United States v. Powell, 17 M.J. 975 (A.F.C.M.R. 1984); United States v. Luke, 13 M.J. 958 (A.F.C.M.R. 1981); STEPHEN A. SALTZBURG, ET AL., *supra* note 16, at 761, n.2. *But see*, United States v. Austin, 35 M.J. 41 (C.M.A. 1992) (holding that verbatim transcripts of Article 32 testimony should not be presented to the jury in deliberations).

[87] United States v. Sojfer, 47 M.J. 425 (1998).

is often misunderstood and either misused or not used at all.[88] This type of impeachment is not a new concept,[89] nor is it a difficult concept. Simply speaking, impeachment by contradiction "involves showing the tribunal the contrary of a witness's asserted fact, so as to raise an inference of a general defective trustworthiness."[90] Contradictory evidence used to impeach a witness may be presented to the "tribunal" in the form of cross-examination of the witness[91] or through the introduction of extrinsic evidence.[92]

Impeachment by contradiction is not governed by a specific rule of evidence, but rather is based on common law principles.[93] Indeed, if there were a need for a rule of evidence to support impeachment by contradiction, there would be no need to go further than Military Rules of Evidence 401 and 402. Both are rules of relevancy. Relevant evidence is admissible, irrelevant evidence is not.[94] Relevant evidence is evidence that tends to make a material fact more or less probable than it would be without the evidence.[95] If a witness testifies to a relevant material fact, then evidence disproving that material fact would also be relevant. This is impeachment by contradiction.

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[88] In *United States v. Moulton*, 47 M.J. 227 (1997), the Court of Appeals for the Armed Forces found that the military judge did not abuse his discretion in precluding questioning into the victim's past sexual behavior under Mil. R. Evid. 412. However, in *dicta* the court noted:

> We note, however, that a different result might well have obtained if defense counsel had pursued the matter at trial. The prosecution opened the door to this area of inquiry by raising the issue of the victim's relationships with other men. Implicit in the opinion of the court below is recognition that the defense might have articulated a theory of admissibility under one of the exceptions in Mil. R. Evid 412. *It is possible that defense counsel might have developed a plausible theory of admissibility based upon impeachment by contradiction, if supported by proffered evidence of expected testimony relevant to that theory.*

Moulton, 47 M.J. at 228-9 (emphasis added.) Although the Court of Appeals went on to find the defense counsel was effective, clearly the defense counsel missed the boat by not pursuing admission of impeachment evidence under all available theories.

[89] *See* United States v. Lyon, 15 U.S.C.M.A. 307, 35 C.M.R. 279 (1965); United States v. Banker, 15 M.J. 207 (C.M.A. 1983).

[90] *Banker*, 16 M.J. at 210.

[91] United States v. Cudlitz, 72 F.3d 992 (1st Cir. 1996).

[92] *See* Boggs v. Brigano, No. 94-4000, 1996 U.S. App. LEXIS 12151 (6th Cir. Ohio Apr. 4, 1996). In *Boggs*, the court described "appropriate impeachment by contradiction" as including "testimony by another witness that (if credited) rebuts or undercuts or limits, or raises doubt about…the testimony of another witness…even though it amounts to 'extrinsic evidence.'" *Id.* at *31 (quoting CHRISTOPHER B. MULLER & LAIRD C. KIRKPATRICK, EVIDENCE, § 6.58 (1995)).

[93] United States v. Sojfer, 47 M.J. 425 (1998). *See also* United States v. Perez-Perez, 72 F.3d 224, 227 (1st Cir. 1995) (discussing the legal basis of impeachment by contradiction).

[94] Mil. R. Evid. 402, *supra* note 2.

[95] Mil. R. Evid. 401, *supra* note 2.

It is immaterial that common law concept of impeachment by contradiction was not specifically codified in the Military Rules of Evidence. As stated in the Analysis of the Military Rules of Evidence:

> It should be noted that the Federal Rules [of Evidence] are not exhaustive, and that a number of different types of techniques of impeachment are not explicitly codified.
>
> The failure to so codify them does not mean that they are no longer permissible . . . . Thus, impeachment by contradiction . . . and impeachment via prior inconsistent statements . . . remain appropriate. To the extent that the Military Rules [of Evidence] do not acknowledge a particular form of impeachment, it is the intent of the Committee to allow that method to the same extent it is permissible in the Article III Courts.[96]

Some of the problems associated with the use of impeachment by contradiction may stem from the treatment it receives from those Article III Courts. Some federal circuits acknowledge that the codification of evidentiary rules does not eliminate the use of other methods of impeachment accepted at common law. Other circuits accept the principle of impeachment by contradiction, but try to shoehorn the type of impeachment into either Rule 608(b)[97] or Rule 613.[98]

Military courts have not been immune to the confusion. For example, in *United States v. Garcia-Garcia*,[99] the appellant argued that the prosecution's rebuttal evidence, appellant's use of marijuana two years prior to his trial for cocaine use, was improperly admitted. The appellant, who denied any drug use at all, argued that Rule 608(b) restricted the introduction of this extrinsic evidence. The Air Force Court of Military Review did not directly address whether Rule 608(b) applied under these facts, but did hold the introduction of the evidence was proper impeachment. The court said, "[t]he appellant's gratuitous statement that he had never used drugs allowed the prosecution to introduce evidence contradicting it."[100]

In *United States v. Crumley*,[101] the Army Court of Military Review held that "[e]xtrinsic evidence of uncharged misconduct is admissible as an exception to . . . Military Rule of Evidence 608(b) if offered solely to impeach the credibility of a witness who voluntarily denies involvement in similar

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[96] MCM, *supra* note 2, pg. A22-44.
[97] *See, e.g.*, United States v. Grover, No. 95-5096, 1996 U.S.App. LEXIS 10327 (4th Cir. Md. May 6, 1996).
[98] United States v. Higa, 55 F.3d 448 (9th Cir. 1995); United States v. Scott, 74 F.3d 175 (9th Cir. 1996).
[99] United States v. Garcia-Garcia, 25 M.J. 652 (A.F.C.M.R. 1987) *pet. denied* 26 M.J. 85 (C.M.A. 1988).
[100] *Garcia-Garcia*, 25 M.J. at 653.
[101] United States v. Crumley, 22 M.J. 877 (A.C.M.R. 1986).

misconduct . . . ."[102] Although the court reached a correct result, the ruling should not have been based on Rule 608(b). Instead, the court should have based its ruling on the common law concept of impeachment by contradiction. In both of these examples, the courts failed to maintain the distinction between impeachment by contradiction and impeachment using specific instances of conduct.[103]

Although this may seem like a distinction without a difference, or a simple matter of semantics, there is an important distinction between these two methods of impeachment that should be maintained. Rule 608(b) allows a witness to be cross-examined about specific acts committed in the past in order to demonstrate a witness's character for truthfulness or untruthfulness. In contrast, evidence offered to impeach by contradiction shows that a witness's in-court testimony was not correct. "The inference to be drawn is not that the witness was lying, but that the witness made a mistake of fact, and so perhaps her testimony may contain other errors and should be discounted accordingly."[104] Demonstrating that the witness's testimony was not correct also impeaches a witness's credibility, but does so without attacking the witness's character for truthfulness or untruthfulness.

More important to the trial practitioner in maintaining the distinction between the two methods of impeachment is the admission of extrinsic evidence. Rule 608(b) prohibits the introduction of extrinsic evidence to attack or support a witness's credibility.[105] The prohibition against using extrinsic evidence found in Rule 608(b) is grounded in the idea that "while certain prior good or bad acts of a witness may constitute character evidence bearing on veracity, they are not evidence of enough force to justify the detour of extrinsic proof."[106] On the other hand, impeachment by contradiction permits the use of extrinsic evidence, with some limitations.[107] Thus, extrinsic

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[102] *Id.* at 878 (footnote omitted).

[103] *See Sojfer*, 47 M.J. 427 (distinguishing the two methods of impeachment).

[104] Simmons, Inc. v. Pinkertons, Inc., 762 F.2d 591, 604 (7th Cir. 1985).

[105] *See* Section C, *supra*. It is also important to remember that Rule 608(b) is not an exclusionary rule. *See Cudlitz*, 72 F.2d at 966.

[106] *Perez-Perez*, 72 F.3d at 227.

[107] Boggs v. Brigano, 1996 U.S. App. LEXIS 12151 at *31 (6th Cir. Ohio Apr. 4 1996). In *Boggs*, the appellant challenged his rape conviction by arguing the he was denied his Sixth Amendment right to confrontation because the trial court refused to allow either cross-examination about, or admission of extrinsic evidence of, the victim's prior false allegations of rape. The Sixth Circuit Court of Appeals reversed and remanded to the district court on another issue. However, in a separate opinion, Judge Rosen explained the difference between the two methods of impeachment:

> More importantly, if the witness denies [during cross-examination] having previously made false accusations of rape, the defendant is not precluded by Rule 608(b)'s "take the answer" doctrine from presenting "extrinsic evidence" showing otherwise. Rule 608(b) addresses only one means of impeachment: impeaching a witness' credibility by showing an untruthful disposition. The rule does not regulate impeachment by

evidence may, or may not, be admitted before the trier of fact, depending on the theory of admission. The Sixth Circuit Court of Appeals explained that "Rule 608(b), which under some circumstances, requires the cross-examiner to 'take the answer' given by the witness, does not transform admissible evidence into inadmissible evidence simply because the evidence also contradicts cross-examination testimony and undermines the witness' credibility."[108]

Keeping differences between the two methods of impeachment firmly in mind will aid the trial practitioner in making an appropriate argument when meeting other objections or seeking the admission of evidence. As the Court of Military Appeals said in *United States v. Banker*, "[t]he failure of the parties at trial to distinguish between these different methods of impeachment led the military judge to bar the testimony . . . in the present case."[109]

Banker is an excellent example of what can go wrong when trial practitioners do not understand the varying methods of impeachment. In *Banker*, the accused was charged with selling drugs to another airman on three different occasions. The government's primary evidence was the testimony of a government source. The source testified that he started working undercover for investigators because he wanted to help get rid of drug dealing. On cross-examination the defense counsel, among other things, asked the source if he had used or bought drugs since starting undercover work. The source denied using or buying drugs from anyone, other than the accused. The defense counsel then specifically asked the source whether he had bought "speed" on a specific day from a specific individual while another individual watched. The source again denied he bought drugs from anyone else. He also denied using drugs with specific individuals on a specific day. In light of the source's answers to these cross-examination questions, the defense counsel wanted to call a witness who would testify he observed the source buy "speed" from another airman. The prosecution argued that under Rule 608(b), a witness could not be impeached by extrinsic evidence of acts of misconduct. The military judge agreed and the testimony was not admitted.

On appeal, the accused argued the military judge should have admitted the evidence. Although ultimately upholding the conviction, the Court of Military Appeals discussed impeachment at length and opined that had the defense counsel asserted a correct theory of impeachment, the evidence might well have been admissible.[110]

During its discussion, the court clearly distinguished impeachment by contradiction from other methods of impeachment, including those that show a

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contradiction, and the reference in the rule to "extrinsic evidence" does not apply to contradictory counterproof directed to a material issue.

[108] *Id.* at *30-1.
[109] U.S. v. Banker, 15 M.J. 207, 210 (C.M.A. 1983).
[110] *Id.* at 212 n.2.

witness's bad character for truthfulness,[111] show a prior inconsistent statement,[112] and show bias, prejudice or a witness's motive.[113] The court held that impeachment by contradiction is one of four methods of impeachment. Impeachment by contradiction, "involves showing the tribunal the contrary of a witness's asserted fact, so as to raise an inference of a general defective trustworthiness."[114] The court made clear that impeachment by contradiction does not entail attacking the witness's character for truthfulness.[115] Instead, this method of impeachment allows the introduction of extrinsic evidence to show the witness's assertion of a fact during the witness's testimony was not correct.

The court also distinguished impeachment by contradiction from impeachment by introduction of a prior inconsistent statement under Rule 613. The court noted:

> Not a single case was offered at trial or on appeal to show that such a statement falls within this rule of evidence. This statement was purportedly made by [the source] during the very incident which was in issue. It was not evidence of a prior assertion of fact but was evidence of the fact asserted . . . . Accordingly, we hold the proffered testimony was not admissible under [Rule 613] to show [the source] was capable of error in his testimony.[116]

Since *Banker*, the court has continued to recognize contradiction as a separate method of impeachment.[117]

Impeachment by contradiction is not, however, unlimited. "The normal rule of impeachment by contradiction is that a witness may not be contradicted by extrinsic evidence on a collateral matter."[118] This "collateral evidence rule" is "easy to state and difficult to apply."[119] "[O]ne may not contradict for the sake of contradiction; the evidence must have an independent purpose and an independent ground for admission."[120] Simply speaking, extrinsic evidence

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[111] Mil. R. Evid. 608(a) and (b), *supra* note 2.
[112] Mil. R. Evid. 613, *supra* note 2.
[113] Mil. R. Evid. 608(c), *supra* note 2.
[114] Banker, 15 M.J. at 210.
[115] *Id.*
[116] *Id.* at 211 (citations omitted).
[117] *Sojfer*, 47 M.J. at 427. "The theory of 'specific contradiction' is a method separate from impeachment by instances of misconduct under Mil. R. Evid. 608(b). It is a common-law theory recognized by this Court and many commentators." United States v. Welker, 44 M.J. 85, 89 (1996). *See also* United States v. Toro, 37 M.J. 313 (C.M.A. 1993); United States v. Williams, 23 M.J. 362 (C.M.A. 1987).
[118] United States v. Jones, ACM 31646 (A.F.Ct.Crim.App. July 29, 1996). *See also* United States v. Tyler, 26 M.J. 680 (A.F.C.M.R. 1988); The Seventh Circuit Court defines the rule as "the collateral evidence rule [and it] limits the extent to which the witness' testimony about non-essential matters may be contradicted by extrinsic proof." *Simmons*, 762 F.2d at 604.
[119] *Higa*, 55 F.3d at 452.
[120] United States v. Kozinski, 16 F.3d 795, 806 (7th Cir. 1994); *accord* United States v. Payne, 102 F.3d 289, 294 (7th Cir. 1996).

"is not collateral 'if it contradicts on a matter that counts in the case.'"[121] The rule is designed to allow trial court judges the discretion to reject evidence that will distract the trier of fact from the issue to be determined.[122] In essence then, the collateral evidence rule is a rule of materiality.

If an accused testifies to matters during direct examination that may be impeached by contradiction, the collateral evidence rule usually will not apply.[123] Testimonial evidence elicited on direct examination is usually considered material and may be contradicted using questions during cross-examination or by introducing extrinsic evidence.[124] "[W]here a defendant in his direct testimony falsely states a specific fact, 'the prosecution will not be prevented from proving, either through cross-examination or by calling its own witnesses, that he lied as to that fact.'"[125] As the Second Circuit Court of Appeals said in *United States v. Beno*, "[t]he rationale behind this rule is not difficult to perceive, for even if the issue injected is irrelevant or collateral, a defendant should not be allowed to profit by a gratuitously offered misstatement."[126]

The case of Glenn Arthur McClintic, Jr., is a good example of this principle. After his participation in several swindles came to light, McClintic was charged in federal court with several counts of wire and mail fraud, interstate transportation of stolen property, receiving stolen property, and interstate transportation of stolen property. McClintic, and others, set up false

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[121] *Boggs*, 1996 U.S. App. LEXIS 12151, at *30.

[122] *Kozinski*, 16 F.3d at 806. In *Perez-Perez*, the First Circuit Court of Appeals called the measure one of "efficiency," allowing admission of extrinsic evidence only when the prior testimony being contradicted was itself material to the case. *Perez-Perez*, 72 F.3d at 227; *see also Tyler*, 26 M.J. at 681. The *Simmons* court explains the collateral evidence rule as "a particular misstatement may or may not be probative of the witness' general accuracy, depending on the circumstances, and thus may or may not be worth the time it takes to establish it." *Simmons*, 762 F.2d at 604.

[123] Taylor v. Natural Railroad Passenger Corp., 920 F.2d 1372, 1375 n. 3 (7th Cir. 1990). Impeachment by contradiction is not limited, however, to impeachment of an accused. Witnesses may also open the door to impeachment by contradiction on a material matter. *See* United States v. Benson __ M.J. __, 1998 CCA LEXIS 226 (A.F.Ct. Crim. App. May 29, 1998).

[124] Note, however, that even some facts elicited on direct may have so little bearing on the issues to be decided in the case that they should be considered collateral. For example, assuming the color of a particular car was not directly relevant to any substantive issue in the case and the parties had stipulated that the car was red. It would not be worthless and a waste of judicial resources to have a "mini-trial" on the issue of the car's color simply to prove that a witness mistakenly believed the car was blue. *See, e.g., Simmons*, 762 F.2d at 604. Nevertheless, it may be possible to impeach the witness by showing that her perception was faulty as to the car and thus may be faulty as to other, more relevant, facts. For a discussion on impeachment by showing deficiencies in the elements of competency, *see* Section III B, *infra*.

[125] United States v. Cuadrado, 413 F.2d 633, 635 (2nd Cir. 1969) (quoting United States v. Beno, 324 F.2d 582, 588 (2nd Cir. 1963), *cert. denied* 387 U.S. 880 (1964)).

[126] *Beno*, 324 F.2d at 588.

companies, ordered goods from wholesalers, and then sold the goods without paying for them. They were also involved in a check-kiting scheme where they would set up bogus companies, write payroll checks and then cash them at retail stores over a weekend and abscond with the money. McClintic testified on his own behalf, claiming that his involvement in the first swindle at Rockford, Illinois was the first time he had done anything illegal. The trial court allowed cross-examination into a prior act of misconduct where McClintic tried to sell a $200.00 ring for $8,000.00 to a Federal Bureau of Investigation undercover agent. The United States Court of Appeals for the Eighth Circuit held the inquiry was proper impeachment by contradiction. They reasoned that "[b]y painting a picture of himself as an innocent who succumbed to sympathy for [his accomplice] in the Rockford Illinois scheme, the defendant invited cross-examination concerning this previous misconduct."[127]

In *McClintic*, the defendant's direct examination tried to paint a false picture, thereby allowing the prosecution to correct the false impression through introduction of extrinsic evidence. This is classic impeachment by contradiction, "presenting evidence that a part of all of a witness's testimony is incorrect."[128]

A recent Air Force case also provides an excellent illustration of impeachment by contradiction.[129] A1C Brian D. Benson was charged with using a loaded firearm to assault a 20-year old civilian named Heywood. Benson was convicted, despite evidence that he fired the gun into the air after Heywood threatened to kill him. At trial, the military judge granted a prosecution motion to limit inquiry into an incident that happened about a month after the shooting. Heywood had approached Benson's roommate at a convenience store, displayed a gun tucked into his pants, and said "Brian [Benson] missed but I won't." After Heywood testified on direct examination that he wasn't the kind of person who would threaten someone's life, the defense asked to cross-examine Heywood on the convenience store incident. The military judge denied the defense request, ruling that Heywood's act of drawing a gun on Benson's roommate was irrelevant and that the relevance of the evidence was outweighed by the ancillary nature of the incident and the risk of starting a mini-trial.[130]

The Air Force Court of Criminal Appeals disagreed. They found that Heywood's statement on direct opened the door to the evidence as impeachment by contradiction. The court also held that the military judge's

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[127] United States v. McClintic, 570 F.2d 685, 691 (8th Cir. 1978). The court also held admission of the prior misconduct was appropriate under Rule 608(b).
[128] *Simmons*, 762 F.2d at 604.
[129] *Benson*, 1998 CCA LEXIS at 226.
[130] *Id.*

ruling the evidence was collateral "misses the mark."[131] Heywood's responses on direct examination painted a picture of someone who would not buy a gun, threaten someone with a gun, or do "this and that with a gun."[132] Evidence that he would approach a person at a convenience store, display a gun, and make threatening comments directly contradicted that picture. Heywood's testimony about the shooting incident was crucial to the government's case and thus his credibility was also a material issue. The Air Force court also found that the military judge's determination that the relevance of the evidence was "merely" outweighed by the possibility of a mini-trial applied the wrong standard.[133] A military judge conducting a Mil. R. Evid. 403 balancing must find that relevant evidence is *substantially* outweighed by other concerns.[134]

The collateral evidence rule often comes into play when a witness makes an assertion of fact during cross-examination. Some courts are extremely restrictive, holding that the collateral evidence rule will *per se* prohibit contradiction of facts asserted during cross-examination.[135] Other courts hold the collateral evidence rule applies only when the fact or assertion to be contradicted arose during the witness's cross-examination rather than during direct examination.[136] These courts will allow impeachment by contradiction as long as the fact elicited during cross-examination is not collateral. This is the approach taken by military courts.[137]

Whatever the approach taken with contradicting facts elicited through cross-examination, most courts, including military courts, allow introduction of extrinsic evidence to contradict broad statements volunteered by an accused during direct[138] or on cross-examination.[139] However, the broad statement must be material, in other words not collateral. This rule represents a

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[131] *Id*.
[132] *Id.*
[133] *Id*.
[134] *Id. See also* United States v. Shaner, 46 M.J. 849 (N.M.Ct. Crim. App. 1997). In *Shaner*, the Navy-Marine Corps Court of Criminal Appeals held the entire tenor of the male accused's case was based on the fact that he was a sexually inactive heterosexual and had not been physically intimate with the teenaged victim. The court held the admission of evidence during the prosecution's case-in-chief that a witness had observed the male teenager and the accused hugging, kissing and fondling each other while partially clothed was admissible. They described the evidence as "powerful impeachment-by-contradiction evidence". *Shaner*, 46 M.J. at 852.
[135] *Simmons*, 762 F.2d at 604; United States v. Rovestuso, 768 F.2d 809, 818-19 (7th Cir. 1985).
[136] *Taylor v. National Railroad Passenger Corporation*, 920 F.2d at 1375.
[137] United States v. Banker, 15 M.J. 207, 211(C.M.A. 1983); *Shaner*, 46 M.J. at 852.
[138] United States v. Pruitt, 43 M.J. 864 (A.F.Ct.Crim.App. 1996). *See also Cudlitz*, 72 F.3d 992 (1st Cir. 1996), where the prosecutor's cross-examination went "marginally beyond" the scope of direct but the court still held the contradictory impeachment was proper because "[t]he government may have sharpened the edge slightly but Cudlitz himself proffered the weapon" by his denials in direct. *Cudlitz*, at 996.
[139] United States v. Trimper, 28 M.J. 460 (C.M.A. 1989).

compromise between the need to keep a trial focused on material issues and the need to deny an accused the ability to profit from a gratuitously offered misstatement.[140] According to the Navy-Marine Corps Court of Military Review the compromise resulted from a

> Hobson's choice of admitting prior uncharged misconduct or of opening the door to presentation of evidence of such acts in rebuttal. The net effect of such a rule would be to permit the introduction of specific acts of prior misconduct whenever the defendant took the stand. That result could not be squared with the provisions of Rule 404(b) . . . . For these reasons federal courts which have considered the question have limited use of otherwise inadmissible evidence for impeachment by contradiction "to contradiction of specific false statements made by defendants on direct examination" or to statements volunteered by the defendant on cross-examination.[141]

The *Trimper* case is an excellent example of the way an accused can be his own worst enemy. Trimper was an Air Force judge advocate charged with wrongful use of cocaine and marijuana on divers occasions. The prosecution presented several witnesses who testified that they had observed Trimper using drugs during the relevant time frame. Trimper testified during direct and on cross-examination that these witnesses had lied and that all had motives for their perjury. He also made several sweeping denials of drug use. The following is illustrative:

> Q. Are you aware that tachycardia or accelerated heart rate is a symptom of cocaine use?
>
> A. I have heard that.
>
> Q. Did you use cocaine *at any time the night before* [the feared heart attack]?
>
> A. *I have never used cocaine.*[142]

Trimper also repeated his sweeping denials of drug use in response to other cross-examination questions and again on redirect. In response to these broad denials, the prosecution sought to cross-examine Trimper about a positive urinalysis performed at a local civilian hospital at Trimper's request. The military judge allowed the cross-examination and the introduction of the report, finding that they contradicted Trimper's denials of drug use. The Court of Military Appeals, relying on *Walder v. United States,*[143] held the evidence of Trimper's positive urinalysis was proper, even though the evidence may not

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[140] United States v. Bowling, 16 M.J. 848 (N.M.C.M.R. 1983) (citing United States v. Beno, 324 F.2d. 582 (2d. Cir. 1963), cert. denied 379 U.S. 880 (1964)).
[141] *Bowling*, 16 M.J. at 853 (quoting United States v. Pantone, 609 F.2d 675, 683 (3rd Cir. 1978) (citations omitted).
[142] *Trimper*, 28 M.J. at 462.
[143] Walder v. United States, 347 U.S. 62 (1954).

have been otherwise admissible.[144] The court said, "[i]f a witness makes a broad collateral assertion on direct examination that he has never engaged in a certain type of misconduct or if he volunteers such broad information in responding to appropriately narrow cross-examination, he may be impeached by extrinsic evidence."[145]

The *Trimper* court's holding has also been echoed in other cases.[146] The availability of impeachment by contradiction adds a useful, and highly effective, tool to the litigator's toolbox. However, a good litigator must know when it's use is appropriate and when it is not.

III. IMPEACHMENT BASED ON PERCEPTION

A. Impeachment by Showing Bias Under Military Rule of Evidence 608(c)

Although bias clearly relates to truthfulness, we include it in this section because it can color a witness's testimony even without an effort to distort the truth. Sympathy, induced by a variety of factors, can affect how a witness perceives facts which are the subject of his testimony. This is especially true in the case of children called to testify against an abusive parent. Of course, as the cases below illustrate, bias can establish not merely that one's perceptions are unreliable but also that the witness has a motive to prevaricate. Bias is, therefore, a more wide-open form of impeachment, whose rules are based on basic relevance rather than the more technical foundational requirements of other rules.[147]

Rule 608(c) reads:

> Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.[148]

The sort of facts which establish bias are broad in scope. Bias can arise from wide array of circumstances such as the salary and employment circumstances of an expert witness[149] or of a principal government witness;[150]

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[144] *Trimper*, 28 M.J. at 466-7.
[145] *Id*, at 467.
[146] *See* United States v. Stroh, 46 M.J. 643 (A.F.Ct.Crim.App. 1997), United States v. Bowling, 16 M.J. 848 (N.M.C.M.R. 1983); United States v. Garcia-Garcia, 25 M.J. 652 (A.F.C.M.R. 1987); United States v. Crumley, 22 M.J. 877 (A.C.M.R. 1986).
[147] *See* United States v. Alis, 47 M.J. 817 (A.F.Ct.Crim.App. 1998).
[148] Mil. R. Evid. 608(c), *supra* note 2.
[149] *See* United States v. George, 40 M.J. 540 (A.C.M.R. 1994).
[150] *See* United States v. Bins, 43 M.J. 79 (1995). In that case, the defense attempted to present evidence that the U.S. government provided a prosecution witness with "substantial financial

a woman's fear of physical abuse by her husband as a motive to claim that sex with another man was rape;[151] or threats by one parent against a child sexual abuse victim to prevent her from testifying against the other parent.[152] The courts have held that to exclude evidence of bias may rise to the level of a denial of the right of confrontation, in that in effect it is part and parcel of the right of cross-examination.[153] The Supreme Court has observed:

> Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. The "common law of evidence" allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to "take the answer of the witness" with respect to less favored forms of impeachment.[154]

As stated above, the mere fact that evidence is inadmissible for one purpose does not prevent its admission for another. In the case of extrinsic evidence, Rule 608(b)'s prohibition of its use to establish a bad character for truthfulness does not prevent its being admitted to show that the witness's testimony is motivated by bias. Sometimes these two rules are intertwined.

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support, including money, lodging, meals, travel, and employment opportunities . . . The defense argued that his information tended to impeach [the witness's] credibility by showing she used the attack [which was the subject of the trial] as an opportunity to obtain money . . . by making and maintaining the allegations against [the accused]." *Id*. at 83. The Court of Appeals for the Armed Forces therefore held that the trial court exclusion of such evidence was error. *Id*. at 86.

[151] *See* United States v. Everette, 41 M.J. 847 (A.F.C.M.R. 1994). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination under the sixth amendment . . . . Seeking counseling for marital difficulties is not much of a motive to engage in an extramarital sexual liaison and then misrepresent it as rape. Engaging in consensual sex with another because of the infidelity of her spouse, and claiming the sex was nonconsensual for fear that her physically abusive spouse would discover her infidelity, would present a much stronger motive." *Id*. at 850.

[152] United States v. Welker, 44 M.J. 85 (1996). "When called as a defense witness on direct examination, [the prosecutrix] testified that she did not want her father 'to go to jail,' but rather 'to stay' with the family. It was appropriate cross-examination to impeach her by showing that she had been threatened by her mother." *Id*. at 89. *See also* United States v. Brown, 41 M.J. 1 (C.M.A. 1994) (concerning demonstrating bias through religious affiliation).

[153] *See George*, 40 M.J. at 542. "Exclusion of cross-examination evidence can have constitutional as well as evidentiary implications. The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.'…While the military judge has broad discretion to preclude repetitive and unduly harassing interrogation, the cross-examiner is allowed to impeach and discredit the witness." *See also Everette*, 41 M.J. at 850.

[154] United States v. Abel, 469 U.S. 45, 52 (1984). "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *Id*.

For example, in *United States v. Bahr*,[155] the accused was charged with sodomy and indecent acts with his daughter, who was under sixteen. The defense sought to impeach the victim's testimony by eliciting from her admissions that she "lied to get a lot of attention"[156] and that she hated her mother. When the victim denied the latter accusation, the defense submitted extracts from her diaries in which the victim expressed hatred for her mother. The diary contained such entries as, "I hate my Mom . . . I hate her guts she's so stupid and dumb it's pathetic. She never lets me do anything . . . My mom and Dad are pests today, yesterday, my mother almost pushed me down in front of public . . . I'll get back when I'm 18 yrs. old."[157] There were numerous other entries in a similar vein, many of which were obscene.[158]

The military judge erroneously refused to admit the diary entry, under the apparent impression that the victim's alleged hatred of her mother was elicited to show general untruthfulness under Rule 608(b). However, as the Court of Military Appeals observed, such evidence is probative on the issue of bias, in that the girl's hatred of her mother was so intense that she had a motive to harm her mother's husband.[159] Under the circumstances, therefore, the extrinsic evidence of the diary was admissible under Rule 608(c) as constituting "evidence otherwise adduced."[160]

Unlike other forms of impeachment, there is no formal foundation that must be laid in order to establish bias. Of course, some foundational questions will be necessary to orient the court members and to avoid a relevancy objection. For example, in a case in which a witness cooperates in the

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[155] United States v. Bahr, 33 M.J. 228 (C.M.A. 1991).
[156] *Id*. at 230.
[157] *Id.*
[158] *Id*.
[159] *Id*. at 233.
[160] *Id*.

> [T]hese diary questions were asked to show a motive on the prosecutrix' part for falsely testifying against appellant. *See* Mil. R. Evid. 608(c). There is no extrinsic-evidence limitation on evidence offered for this purpose. This evidence was not offered as inconsistent statements by this witness (Mil. R. Evid. 613(b)) or to show lack of truthfulness by reason of prior falsehoods. *See* Mil. R. Evid. 608(b). As a result, the defense was not required to accept the prosecutrix' denial of her hatred for her mother, and circumstantial evidence of such a state of mind towards her mother could be adduced by the defense either on cross-examination of the prosecutrix or by admission of the diary entries themselves.

Id. at 233. *See also* United States v. Gonzales, 16 M.J. 423, 425 (C.M.A. 1983) ("While extrinsic evidence of a specific instance of conduct is inadmissible to attack credibility . . . such evidence may be received to show '[b]ias, prejudice, or any motive to misrepresent."); United States v. Gee, 39 M.J. 311 (C.M.A. 1994); United States v. Ray, 731 F.2d 1361 (9th Cir. 1983).

investigation against an accused in order to seek clemency in the witness's own court martial, the following illustrates a possible line of attack for the defense.

> Q. Isn't it true that your BCD was still pending or Bad Conduct Discharge was still pending at that time?
>
> A. I believe it was, yes sir.
>
> Q. Isn't it true that part of the deal with the Government was to have the BCD suspended if you cooperated with the Government? Isn't that true?
>
> A. That is true.[161]

In a situation such as this, the possible bias is established and no further questioning is needed on that point. Inexperienced counsel often vitiate an effective cross by repeated or argumentative questioning. Often the brief two or three question cross-examination is the most effective.

B. Impeachment by Showing "Deficiencies in the Elements of Competency"

Impeachment by demonstrating a witness's "deficiencies in the elements of competency" is nothing more than showing the witness has a problem with a capacity to use his or her senses.[162] In *United States v. Sojfer*, the Court of Appeals for the Armed Forces explained that "a witness' interpretation of an event depends on whether her perception is impaired. For example, the individual may be hearing-impaired or may not have been wearing corrective lenses at the time of the crime. A past or present mental condition also may impact on a person's ability to perceive."[163]

An attack on a witness's ability to observe and remember a factual situation is different from impeachment by showing a witness's bias.[164] The former attacks the witness's ability to perceive the facts related while the later attacks the witness's testimony by demonstrating the witness has an internal "screen" through which the witness interpreted the event. It is the difference between showing that the witness saw what they wanted to see based on their internal belief system; and showing that the witness could not see because the he wasn't wearing his eyeglasses.[165]

Like impeachment by showing a witness's bias, counsel may use extrinsic evidence to show the witness's inability to observe, remember and

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[161] *See* United States v. Boone, 17 M.J. 567 (A.F.C.M.R. 1983); United States v. Schnitzer, 44 M.J. 380 (C.A.A.F. 1996).
[162] United States v. Sojfer, 47 M.J. 425 (1998).
[163] *Id.* at 428.
[164] *Id.*
[165] *Id.*

recollect a fact.[166] Such extrinsic evidence may come in the form of records, such as medical or mental health records,[167] or may be testified to by a witness with relevant knowledge.[168] Although extrinsic evidence is admissible, cross-examination to impeach the witness can also be a very useful tool.

Most of the time, "deficiencies in the elements of competency" are simple to identify, all it takes is a little investigation. For example, in a hypothetical drug case the prosecution used an eyewitness who made a written statement that he was in the car when the accused, who was driving, smoked a marijuana cigarette. On direct-examination, the witness testified he saw another passenger in the car pass a marijuana cigarette to the driver. However, on cross-examination the defense counsel was able to show the witness normally wore contact lenses. Further, the defense counsel brought out that the witness could not focus on objects more than an arm's length away without his glasses or contact lenses. Finally, the defense counsel elicited that the witness had not been wearing his glasses or contacts when riding in the car. The cross-examination could have gone like this:

Q: You wear glasses?

A: Yes, but I normally wear contacts.

Q: You weren't wearing your contacts on 2 December 1997 when you rode with SSgt Smith to the Cabana Club, were you?

A: No. I took them out because I was tired.

Q: Were you wearing your glasses on 2 December 1997 when you rode with SSgt Smith to the Cabana Club?

A: No.

Q: Without your contacts or glasses, you can't see more than two feet?

A: No.

Q: When you rode with SSgt Smith, you were in the back seat?

A: Yes.

Q: The people in the front seat were more than two feet away, weren't they.

A: Yes.

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[166] *Id.*

[167] United States v. Smith, 77 F.3d 511 (D.C. App. 1996); United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986).

[168] Henderson v. Detella, 97 F.3d 942 (7th Cir. 1996). *See also* United States v. Fisher, 24 M.J. 358, 361 n. 1 (C.M.A. 1987) (refusing to consider the extent to which a witness's use of marijuana relates to the witness's ability to perceive, but distinguishing extrinsic evidence used to impeach by showing problems with perception from extrinsic evidence used to impeach by attacking truthfulness).

With this simple cross-examination, the defense counsel has demonstrated that the witness could not have seen what the witness testified he saw. Using the same hypothetical, the defense counsel could have also shown the witness could not have seen the accused smoke the marijuana cigarette. Since the witness was situated more than two feet away from the individuals in the front seat he would have been unable to see the witness take something to his mouth.

Other "deficiencies in the elements of competency" deal with the witness's ability to record and process information. For example, if a witness is intoxicated from alcohol or drug use, the witness's observations and memory are likely faulty. In *Henderson v. Detella*, the Seventh Circuit Court of Appeals, held that the

> use of narcotics can, obviously, affect the ability of a witness to perceive, to recall, and to recount the events she has observed. Whether [a witness] may have been under the influence of narcotics at the time of the offense (or at some other pertinent time) was thus an appropriate subject of inquiry and impeachment.[169]

Aside from drug or alcohol use, other circumstances may also impact a witness's ability to observe, record, and recollect information. For example, a mentally challenged witness may have demonstrable memory problems. During cross-examination, counsel should demonstrate these problems by showing the members the witness cannot remember simple matters like the witness's address or the names of relevant people.[170] As long as the cross-examination relates to a witness's cognitive abilities, impeachment questions or extrinsic evidence will be admissible. But without that connection, cross-examination into a witness's prior acts will only be viewed as an attempt to impeach the witness's character.[171]

A witness's mental illness may also impact the witness's cognitive abilities.[172] The mental disorder must, however, be relevant to the purpose of impeachment, which is to examine the witness's believability and the truth of his or her testimony. "Certain forms of mental disorder have high probative value on the issue of credibility."[173] One federal circuit court conservatively listed those types of emotional or mental defects which may impact the accuracy of testimony as including, "'the psychoses, most or all of the neuroses, defects in the structure of the nervous system, mental deficiency,

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[169] *Henderson*, 97 F.3d at 949.
[170] *See* United States v. Jones, 26 M.J. 197 (C.M.A. 1988).
[171] *Henderson*, 97 F.3d at 949.
[172] *Sojfer*, 47 M.J. at 428.
[173] United States v. Lindstrom, 698 F.2d 1154, 1160 (11th Cir. 1983).

alcoholism, drug addiction and psychopathic personality.'"[174] The court went on to explain:

> A psychotic's veracity may be impaired by lack of capacity to observe, correlate or recollect actual events. A paranoid person may interpret a reality skewed by suspicions, antipathies or fantasies. A schizophrenic may have difficulty distinguishing fact from fantasy and may have his memory distorted by delusions, hallucinations and paranoid thinking. A paranoid schizophrenic, though he may appear normal and his judgment on matters outside his delusional system may remain intact, may harbor delusions of grandeur or persecution that grossly distort his reactions to events.[175]

Military courts have also accepted the proposition that a witness's mental condition may be relevant for impeachment. In *United States v. Eshalomi*,[176] the Court of Military Appeals reversed a conviction for burglary, rape, assault with the intent to commit sodomy, and indecent assault based on a discovery error. The trial counsel had not disclosed evidence of the victim's prior mental condition which could have been used to impeach the witness's testimony. More recently in *United States v. Sojfer*,[177] the same court included a person's past or present mental condition in a listing of things that might impair a witness's interpretation of events.

Even if a witness has been treated for a mental condition in the past, impeachment evidence still must be relevant.[178] The mental condition must have somehow impacted the witness's ability to perceive and recall the events that are the subject of the testimony, or impact the witness's ability to testify truthfully and accurately.[179] In *United States v. Butt*, the First Circuit Court of Appeals determined that evidence of mental instability is relevant for impeachment "only where, during the time-frame of the events testified to, the witness exhibited a pronounced disposition to lie or hallucinate, or suffered from a severe illness, such as schizophrenia, that dramatically impaired her ability to perceive and tell the truth."[180] The Court of Appeals for the District of Columbia believed the *Butt* test was too narrow and found, "it is enough to say that we agree that evidence regarding mental illness is relevant only when it may reasonably cast doubt on the ability or willingness of a witness to tell the truth."[181] Since the purpose of impeachment is to test a witness's credibility, the more appropriate test considers whether the witness's illness or

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[174] *Id*. (quoting Michael Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 Cal.L.Rev. 648 (1960)).
[175] *Lindstrom*, 698 F.2d at 1160.
[176] United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986).
[177] *Sojfer*, 47 M.J. at 428.
[178] United States v. Phelps, 733 F.2d 1464 (11th Cir. 1984).
[179] United States v. Butt, 955 F.2d 77 (1st Cir. 1992).
[180] *Id.* at 82-83 (footnote omitted).
[181] United States v. Smith, 77 F.3d 511, 516 (D.C. Cir. 1996).

mental condition could have an effect on their observation, recollection, or description of the relevant facts.[182]

Inquiry into a witness's mental condition for the purposes of impeachment should not be confused with a witness's mental competency to testify. "Credibility is a jury question, whereas competency is a 'threshold question of law to be answered by the judge.'"[183] Even if the witness's mental condition is not so severe that the witness is incompetent to testify, evidence on how the mental condition effects the witness's ability to perceive events may be relevant for impeachment. This was recognized as early as 1950, when a Federal court stated, "[e]vidence of insanity is not merely for the judge on the preliminary question of competency, but goes to the jury to affect credibility."[184]

IV. CONCLUSION

The Sixth Amendment to the United States Constitution[185] guarantees a criminal defendant the right to be confronted with the witnesses against her.[186] The Supreme Court has held that cross-examination is essential in order to safeguard the accuracy of the fact-finding process in our adversarial system of justice.[187] It is "the principle means by which the believability of a witness and the truth of his testimony are tested."[188]

Cross-examination is both an art and a science. The art is in understanding how to best present available impeachment evidence, in relationship to the rest of your case. The science is in knowing and being able to apply the various methods of impeachment. The science of cross-examination is at times difficult because the rules on impeachment can be confusing and evidence that may be admissible under one theory may not be admissible under another. Adding to the confusion are differing rules on when extrinsic evidence may be admissible. As the Supreme Court said in *Michelson v. United States*:

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[182] Factors such as the nature of the mental disease or defect, or the severity of the mental condition will certainly have an impact on the relevance of evidence offered to impeach a witness. Other factors are the time lapse since treatment for a condition and whether a mental condition was formally diagnosed. *See* Chnapkova v. Koh, 985 F.2d 79 (2nd Cir. 1993) (holding psychiatric treatment which ocurred five years prior to testimony was relevant); *Phelps*, 733 F.2d at 1471 (holding psychiatric treatment 14 years prior to testimony was not relevant); *Butt*, 955 F.2d at 82 (citing lack of precedent supporting idea that an informal diagnosis is relevant for impeachment).

[183] *Lindstrom*, 698 F.2d at 1162 n.4 (quoting United States v. Martino, 648 F.2d 367, 384 (5th Cir. 1981), *cert. denied*, 456 U.S. 943 (1982)).

[184] United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950).

[185] U.S. CONSTITUTION, AMEND VI.

[186] Davis v. Alaska, 415 U.S. 308, 315 (1974).

[187] *Id*. at 316.

[188] *Id*.

> [M]uch of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court.[189]

This clumsy, but workable, system can be effective. The key to working this system is to keep in mind that the "goal of effective cross-examination is to impeach the credibility of opposing witnesses."[190]

[189] Michelson v. United States, 335 U.S. 469, 486 (1948).
[190] *Lindstrom*, at 1160.

"Shrinking" the Right to Everyman's Evidence: *Jaffee* in the Military[∇]

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I. INTRODUCTION

On 13 June 1996, the Supreme Court recognized a psychotherapist-patient privilege under Federal Rule of Evidence 501 (FRE 501)[1] in *Jaffee v. Redmond*[2] Utilizing its Congressionally granted power to define new privileges by interpreting "the principles of the common law . . . in the light of reason and experience,"[3] the Supreme Court, in a seven-two decision, recognized a federal privilege for confidential communications made to licensed psychotherapists in the course of diagnosis or treatment.[4]

The effect of this ruling on military practice, however, remains uncertain. Under Military Rule of Evidence 501 (MRE 501) the "principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence" are incorporated into the Military Rules "insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual."[5] There are four main positions on the applicability of the *Jaffee* decision to military practice, differing primarily on the interpretation of FRE 501, MRE 501(a)(4), and MRE 501(d). These are: (1) Jaffee does not apply since it is a civil case, and

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[∇] The term "right to everyman's evidence" derives from the maxim "that the public . . . has a right to every man's evidence" which "was a well known phrase as early as the mid-18th century. Both the Duke of Argyll and Lord Chancellor Hardwicke invoked the maxim during the May 25, 1742, debate in the House of Lords concerning a bill to grant immunity to witnesses who would give evidence against Sir Robert Walpole, first Earl of Orford. . . . The bill was defeated soundly." Jaffee v. Redmond, 116 S. Ct. 1923, n. 8 (1996) (quoting 12 T. Hansard, Parliamentary History of England 643, 675, 693, 697 (1812)).

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[1] FED. R. EVID. 501.

[2] Jaffee v. Redmond, 116 S. Ct. 1923 (1996).

[3] FED. R. EVID. 501. The "reason and experience" language of Rule 501 was taken from the Supreme Court's decision in Wolfle v. United States, 291 U.S. 7, 12 (1934) "which in turn referred to the oft-repeated observation that 'the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions'". *Jaffee*, 116 S. Ct. at 1927 (quoting Funk v. United States, 290 U.S. 270, 271 (1933).

[4] *Jaffee*, 116 S. Ct. at 1931.

[5] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 501(a)(4) (1995 ed.) [hereinafter MCM].

the plain wording of MRE 501 requires as a predicate the general recognition of the privilege in the trial of "**criminal cases**" in federal district courts; (2) *Jaffee* does not apply since MRE 501(d)[6] bars application of the privilege; (3) *Jaffee* applies to non-military personnel only; and (4) *Jaffee* applies in military courts-martial.

This article first examines *Jaffee v. Redmond*, and the history of the psychotherapist-patient privilege under federal law. It then explores whether the psychotherapist-patient privilege, recognized in *Jaffee*, applies in military courts-martial; whether it should apply as a policy matter; and what the proper scope of the privilege should be in the military environment. Finally, it concludes that *Jaffee* applies automatically in military courts-martial by operation of MRE 501(a)(4); but that the military should amend the Military Rules of Evidence to limit the psychotherapist-patient privilege to civilian personnel only.[7]

II. *JAFFEE V. REDMOND*: THE CASE

On June 27, 1991, Mary Lu Redmond, a police officer on patrol duty in an Illinois apartment complex, responded to a reported fight in progress. She was informed that there had been a stabbing. After her arrival at the complex she shot and killed Ricky Allen, Sr. Allen's estate later sued under 42 U.S.C. § 1983 claiming a deprivation of Allen's constitutional rights, and under state law for wrongful death. In testimony at trial, Officer Redmond stated that after arriving, she saw Allen chasing another man with a knife, preparing to stab him. Redmond stated she shot and killed Allen only after yelling for him to drop the knife, which he did not do. Four of Allen's brothers and sisters testified that Allen was unarmed at the time of the shooting. Soon after the shooting, Officer Redmond sought counseling with Karen Beyer, a licensed clinical social worker employed by the Village of Hoffman Estates, Redmond's employer. This counseling continued for approximately six months. During trial, plaintiffs sought to compel discovery of the contents of these counseling sessions. Both Redmond and Beyer claimed this information was privileged under state and federal law,[8] and sought to protect the

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[6] "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." MCM, *supra* note 5, MIL. R. EVID. 501(a)(4).

[7] The term "civilian personnel" or "civilian" used throughout this article is intended to mean persons not subject to the Uniform Code of Military Justice as defined by Article 2, UCMJ (Uniform Code of Military Justice), 10 U.S.C. § 802 (1988). The author recognizes that "civilians accompanying the force" are included under Article 2, UCMJ, and it is not my intention to include these categories of civilians when using the term "civilians" in this article.

[8] Petitioner's Brief at 2-3, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (No. 95-266) [hereinafter Petitioner's Brief]; Brief of *Amicus Curiae* The United States of America at 3, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (95-266) [hereinafter US *Amicus* Brief].

confidentiality of the communications between them throughout the discovery process and trial.[9]

The trial court ordered Beyer to testify and produce her notes from the counseling sessions with Redmond. The judge explained that the claimed privilege as recognized in other circuits did not include communications made to a licensed clinical social worker.[10] Although Beyer did give limited testimony "concerning Redmond's 'factual description of the events leading up to the shooting,'" she refused to turn over her counseling notes.[11] At the close of the trial, the court instructed the jury that it "was entitled to assume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates."[12] The jury found for the plaintiffs and awarded $45,000 for the federal constitutional claims and $500,000 for the state wrongful death claim. Officer Redmond and the Village of Hoffman Estates appealed.[13]

The United States Court of Appeals for the Seventh Circuit agreed with the Second and Sixth Circuits and recognized a psychotherapist-patient privilege under FRE 501.[14] In recognizing the privilege, the Court balanced the evidentiary need for the disclosure of the contents of the patient's counseling records against the patient's privacy interests.[15] Conducting this balancing, the Court found that the "balance of the competing interests tips sharply in favor of the privilege if we hope to encourage law enforcement officers who are frequently forced to experience traumatic events by the very nature of their work to seek qualified professional help."[16] The Court added this was particularly true in cases with numerous eyewitnesses that render the counseling information cumulative at best.[17] The Seventh Circuit reversed the judgment and the plaintiffs appealed. The Supreme Court granted *certiorari* because of the importance of the question and the split among the courts of appeals.[18]

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[9] Jaffee v. Redmond, 51 F.3d 1346, 1350 (7th Cir. 1995).
[10] *Id*. at 1350.
[11] *Jaffee*, 51 F.3d at 1351; US *Amicus* Brief, *supra* note 8, at 4.
[12] *Jaffee*, 51 F.3d at 1351.
[13] *Id*. at 1352.
[14] *Jaffee*, 51 F.3d at 1355. *See In re* Zuniga, 714 F.2d 632, 638 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 426 (1983); *In re* Doe, 964 F.2d 1325, 1328 (2d Cir. 1992).
[15] *Jaffee*, 51 F.3d at 1357.
[16] *Id*. at 1357.
[17] *Id*. at 1358.
[18] *Jaffee*, 116 S. Ct. at 1927. *Compare In re* Zuniga, 714 F.2d 632, 638 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 426 (1983) (recognizing privilege); *In re* Doe, 964 F.2d 1325, 1328 (2d Cir. 1992) (same); with United States v. Burtrum, 17 F.3d 1299 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 176 (1994) (declining to recognize privilege); *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989), *cert. denied sub nom*. Doe v. United States, 110 S. Ct. 265 (1989) (same); United States v. Corona, 849 F.2d 562 (11th Cir. 1988), *cert. denied* 109 S. Ct. 1542 (1989)

On review, the Supreme Court recognized the existence of a psychotherapist-patient privilege, but expressly rejected the balancing test applied by the Seventh Circuit.[19] Instead, the Court both recognized an absolute privilege and extended the privilege to cover confidential communications made to licensed clinical social workers in the course of psychotherapy.[20] The Supreme Court, however, left the determination of the contours of the privilege to future cases.[21] The expansive nature of the Supreme Court's decision can be seen in the following:

> We reject the balancing component of the privilege implemented by that court [the Seventh Circuit] and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege . . . [I]f the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[22]

III. PRIVILEGE RULES UNDER THE FRE & THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

A. Privilege rules under the FRE

To understand *Jaffee's* result one must understand both the general development of the privilege rules under the Federal Rules of Evidence,[23] and the specific background of the psychotherapist-patient privilege. In 1973, the Supreme Court forwarded to Congress the proposed Rules of Evidence drafted by its Advisory Committee.[24] These proposed rules contained thirteen detailed rules on privilege.[25] Congress held hearings on the proposed rules,

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(same); United States v. Meagher, 531 F.2d 752 (5th Cir. 1976), *cert. denied* 97 S. Ct. 146 (1976) (same).

[19] *Jaffee*, 116 S. Ct. at 1931.

[20] *Id*. at 1932.

[21] *Id*. at 1932.

[22] *Id*. at 1932 (quoting Upjohn Co. v. United States, 101 S. Ct. 677, 684 (1981).

[23] FED. R. EVID. 501.

[24] The Court did so under the power given it by Congress in 1934 to promulgate rules of evidence under The Rules Enabling Act. *See* Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under the Federal Rules of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 514 (1994).

[25] *See id*. at 514 (nine specific privileges, one general rule freezing federal privilege law, two general rules on issues such as waiver, and one on adverse comment upon a privilege); STEPHEN A. SALTZBURG & KENNETH R. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 198-260 (2d ed. 1977) [includes text of rejected rules] [hereinafter FRE MANUAL] (recognizing ten

and controversy over the privilege rules section ensued.[26] This controversy was due in part because privilege rules "have the most effect on everyday behavior outside the courtroom and promote extrinsic social values."[27]

Congress substantially revised the section on the proposed rules dealing with privilege, deleting the provisions for specified privilege rules and substituting one general rule.[28] The final rule enacted by Congress left the continued development of privilege rules to the courts:[29]

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof **shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience**. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness,

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specific privileges: (1) reports required by statute (Rule 502); (2) attorney-client (Rule 503); (3) psychotherapist-patient (Rule 504); (4) husband-wife (Rule 505); (5) clergyman-penitent (Rule 506); (6) political vote (Rule 507); (7) trade secrets (Rule 508); (8) secret of state (Rule 509(a)(2)); (9) official information (Rule 509(a)(2)); (10) identity of informer (Rule 510). "Proposed rule 501 granted recognition only to these ten privileges and those established by Act of Congress and the Constitution.").

[26] *See* Imwinkelried, *supra* note 24, at 513-523. Professor Imwinkelried has proposed two reasons for this controversy. First, controversy arose because the debate over the rules of privilege took place against the backdrop of the Watergate investigation, with President Nixon's assertion of executive privilege against Congress, and because privilege rules have the most effect on everyday behavior outside the courtroom. The majority of disagreement by bar organizations on the Advisory Committee's draft rules centered on the privilege rules. Both the House and Senate reports labeled these provisions as the most "controversial". According to Judge (then Representative) Hungate, who chaired the House hearings, "50% of the complaints in our committee related to the [article] on privileges." *See also* Federal Rules of Evidence, S. Rep. No. 1277, 93d Cong., 2d Sess. 6 (1974) reprinted in 1974 U.S.C.C.A.N. 7051. ("Many of these rules contained controversial modifications or restrictions upon common law privileges."); Kathleen L. Cerveny & Marian J. Kent, *The Psychotherapist-Patient Privilege in Federal Courts*, 59 NOTRE DAME L. REV. 791, 806 (1984) (In response to the Proposed Rules forwarded by the Supreme Court, Congress amended the Rules Enabling Act to require its approval for any amendment of the rules on privilege only. Previously any proposed rules would have taken effect automatically had Congress not acted within ninety days.).

[27] Imwinkelried, *supra* note 24, at 512-514.

[28] *See* Sen. Rep. No. 1277, 93 Cong., 2d Sess. 6 (1974) reprinted in 1974 U.S.C.C.A.N. 7051 (Much of the Congressional debate over this substituted rule centered on the decision on which rule to use in diversity cases in federal court.).

[29] *See id.*; United States v. Trammel, 445 U.S. 40, 47 (1980) (stating FRE 501 "manifests an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,' and to leave the door open to change." (quoting 120 Cong. Rec. 40891 (1974) (Statement of Rep. Hungate) H.R. Rep. No. 93-650 at 8 (1973)).

> person, government, state or political subdivision thereof shall be determined in accordance with state law.[30]

Federal courts had previously split on whether the federal courts, under FRE 501, could recognize any privilege which did not exist at common law prior to the adoption of the federal rules. The strict view holds that FRE 501 limits recognition of any privilege to those recognized at common law prior to 1975.[31] A middle view found FRE 501 "erects 'a strong presumption' against the creation of novel privileges."[32] A more expansive interpretation holds that FRE 501 left the federal courts in the same position they were prior to the adoption of the rules. Indeed, the text, context, and legislative history of FRE 501 support the view that the adoption of the rules did not change the ability of the federal courts to adopt new privileges.[33] Textually, Congress chose the words, "principles of common law" rather than the more limited term "common law rules," implying a more dynamic methodology for the courts to use in developing privilege rules.[34] Additionally, the context of the Congressional debate over the privilege rules implies a judgment that the proposed specific rules were not generous enough, and Congressional concern that passage would freeze the federal rules of privilege too narrowly.[35] Further, Congress stated that:

> [I]n approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.[36]

Since the psychotherapist-patient privilege had not been generally recognized at common law prior to the enactment of the federal rules, the resolution of this conflict over the effect of FRE 501 was critical to whether a psychotherapist-patient privilege could be recognized in federal law. An understanding of the development of the psychotherapist-patient privilege is

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[30] Act of Jan. 2, 1975, Pub. L. No. 93-495, 88 Stat. 1926 (1975), as reprinted in WIGMORE ON EVIDENCE, *supra* note 25, at n.19 (current version of FED. R. EVID. 501) (emphasis added).
[31] Imwinkelried, *supra* note 24, at 524-26 (referring to *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989)).
[32] *Id*. at 528.
[33] *See id*. at 528.
[34] *See id*. at 526-28.
[35] *See id*. at 514, 529. The proposed rules "did not include general medical privilege or privilege for confidential interspousal communications." The proposed statutory versions of the more familiar privilege were considerably narrower than their common law versions. The proposed Rule 501 would have abolished the federal courts' ability to create new privileges.
[36] Sen. Rep. No. 1277, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 7051.

illustrative of many of the issues that will face military policy makers in deciding the scope of the privilege, if any, to be recognized in military tribunals.

B. History of the Psychotherapist-Patient Privilege

"[P]rivilege is a corruption of the Latin phrase '*privata lex'*, meaning a private law applicable to a small group of persons as their special prerogative."[37] It was originally based on a judicially recognized point of honor among lawyers and other gentlemen not to reveal confidential communications.[38] Lawyers retained this ability at common law, while other professionals, most notably physicians, lost the ability to refuse to testify based on the confidential nature of their interaction with their client.[39] A testimonial privilege gives a person a right to refuse to disclose information to a court, while the broader concept of confidentiality is defined as a professional's ethical obligation not to disclose a client's confidences.[40]

The psychotherapist-patient privilege is historically tied to the more general physician-patient privilege.[41] American common law courts refused to recognize a general doctor-patient privilege.[42] In response to intense lobbying by the American Medical Association, state legislatures rapidly moved into this void, creating statutory privileges protecting the doctor-patient relationship.[43] New York granted a statutory doctor-patient testimonial privilege in 1928, thirty-nine states and the District of Columbia soon followed.[44] Over time, the physician-patient privilege became riddled with exceptions.[45] Although no state did away with the privilege altogether, most limited their recognition of a doctor-patient privilege to certain narrow

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[37] Allred v. State, 554 P.2d 411, 413 (Alaska 1976) (quoting Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 181 (1960)).
[38] Allred v. State, 554 P.2d at 413-414.
[39] *Id.*
[40] *See* Major David Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial*, 123 MIL. L. REV. 31 (1989).
[41] Because the original practitioners of psychotherapy were physicians (psychiatrists) the two privileges were originally intertwined before the two fields diverged.
[42] *See* Brian Domb, *I Shot the Sheriff, But only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J.L. & HEALTH 209, 213 (1991).
[43] Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 178 (1960). The policy underlying these legislative actions was to increase public health. The privilege was necessary to encourage patients to seek medical treatment in a social atmosphere that stigmatized the victims of "dreadful diseases."
[44] *Medical and Counseling Privileges*, 98 HARV. L. REV. 1530, 1533 (1985).
[45] *See id*., at 1539. (Exceptions, themselves defined to protect other overarching social values, increased while simultaneously the stigma associated with the seeking of health care diminished).

circumstances. Additionally, the federal courts never recognized a general doctor-patient privilege.[46]

A separate psychotherapist-patient privilege, originally arising out of the physician-patient relationship, was slow to develop, perhaps due to the fact that psychiatry did not develop until well into the twentieth century. States began to create separate statutory psychotherapist-patient privileges in the 1950s.[47] There was also some movement by the courts, in addition to legislative action in this area, to recognize a separate and distinct privilege protecting the psychotherapist-patient relationship under the common law or state or federal constitutional requirements.[48]

1. *Privilege Analysis*

Privilege rules, which deprive a court of otherwise competent evidence, are analyzed under utilitarian, privacy, and functionalist rationales.[49] The utilitarian rationale weighs the benefits to society against the costs to the judicial process from the recognition of the privilege. The privacy rationale argues that certain relationships should be protected because they protect other human values such as privacy, dignity, intimacy, anonymity, and individuality.[50] Finally the functionalist rational maintains that "privilege law, if it is to be consistent, must accord similar protections to relationships that are functionally alike."[51] In other words, functions, rather than professions, are protected.[52] The existence of a psychotherapist-patient privilege is supported by all three rationales. The Supreme Court focused primarily on the utilitarian analysis in *Jaffee*, adroitly avoided the privacy issue, and recognized the functionalist rationale by its extension of the privilege to clinical social workers.

a. *Utilitarian Rationale*—Dean Wigmore, the most notable proponent of the utilitarian analysis, used four criteria to determine when a privilege should be recognized. These criteria have been generally recognized as the test for an evidentiary privilege:

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[46] *See id*., at 1539.
[47] Domb, *supra* note 42, at n.51.
[48] *See In re* 'B', 394 A.2d 419, 425 (Pa. 1978); Allred v. State, 554 P.2d 411 (Alaska 1976); Binder v. Ruvell, Civil Docket No. 52-C-2535 (Cir. Ct., Cook Cty., Ill. June 24, 1952) [reported in 15 J.A.M.A. 1241 (1952)]; State v. Evans, 454 P.2d 976 (Ariz. 1969).
[49] *See* Jessica G. Weiner, *Comment, "And the Wisdom to Know the Difference": Confidentiality vs. Privilege in the Self-Help Setting*, 144 U. PA. L. REV. 243, 266 (1995); Hayden, *supra* note 40, at 55-60.
[50] *See* Weiner, *supra* note 49, at 268. (The "preservation of some degree of privacy in certain relationships in order to protect these values is as significant as, and perhaps more significant than, appropriate fact finding in litigation.").
[51] *Id*. at 270.
[52] *See id*. at 271.

> (1) The communication must originate in a confidence that they will not be disclosed.
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> (3) The relation must be one that in the opinion of the community ought to be sedulously fostered.
> (4) The injury that would inure to the relation by the disclosure must be greater than the benefit thereby gained for the correct disposal of litigation.[53]

"Psychotherapy is the treatment of mental or emotional disorders by verbal or other symbolic communication between patient and therapist . . . based on the theory that a patient's problems result from conflicts repressed in the unconscious which must be probed in order to treat the patient."[54] Successful therapy depends on the protection of a relationship of trust and confidence between patient and therapist and the encouragement of free disclosure—Wigmore's first criterion. "The very essence of psychotherapy is confidential personal revelations about matters which the patient is and should be normally reluctant to discuss."[55] The Advisory Committee, when forwarding Proposed FRE 504[56] to Congress, recognized the importance of confidentiality to the therapeutic process. It stated that "confidentiality is the *sine qua non* for successful psychiatric treatment."[57] Their proposed rule

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[53] *Id*. at 269; 8 J. WIGMORE, 8 EVIDENCE IN TRIALS AT COMMON LAW, s. 2285 (McNaughton rev. 1961); Hayden, *supra* note 40, at 35 (quoting CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, FEDERAL RULES OF EVIDENCE s. 5522).
[54] Domb, *supra* note 42, at 220-21.
[55] Slovenko, *supra* note 43, at 184.
[56] Proposed Rule 504 (Psychotherapist-Patient Privilege), *infra* note 93.
[57] The Advisory Committee described the need as follows:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

recognized that "true and complete communication by the patient of all his ideas and associations,"[58] depends completely on the patient's faith that his confidences will not be revealed.[59]

There is conflicting empirical data on whether the protection of an evidentiary privilege is necessary to encourage the disclosure so essential to successful therapy which would satisfy Wigmore's second criterion. Several studies have suggested that the existence, or lack, of a judicial privilege is not a factor considered by most patients when deciding whether to seek therapy.[60]

Steven A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 596, n.78 (1980) (quoting Proposed Fed. R. Evid. 504, 56 F.R.D. 180, 242 (1972) (Advis. Comm. Note) (quoting GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 45, at 92 (1960)).

[58] Slovenko, *supra* note 43, at 186. *See also* Brief of *Amicus Curiae* American Psychoanalytic Association, et. al. at 7, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (95-266):

> Psychoanalytic therapy starts from the premise that the human mind operates on both conscious and unconscious levels. The 'conscious' mind consists of those thoughts and feelings of which we are aware. The 'unconscious' encompasses those parts of our minds of which we are not aware. Psychoanalytic theory assumes that the conscious concerns and symptoms (e.g., fear, anxiety, depression) that bring a person into psychotherapy are caused, at least in part, by unconscious factors . . . . Stated simply, the central goal of psychoanalytic therapy is to help individuals become aware of and/or rework the unconscious factors that (unbeknownst to them) are shaping the way that they think, feel, act or react to a given situation . . . . Once this is done, the individual is able to use the abilities of the conscious mind—reason, understanding, intention—to deal better with the unconscious aspects of the mind that were causing the distressing symptoms, behaviors or reactions. In this way, psychoanalytic therapy uses insight to alleviate symptoms . . . . The central challenge of psychoanalytically-based psychotherapy lies in the fact that it is not easy to bring into conscious awareness that which is unconscious.

[59] *See* Slovenko, *supra* note 43, at 186.

[60] *See* Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 916, 919-20, 929 (1982).

> [The] study concluded that although withholding data from therapist is common, it has little relationship to fear of disclosure but rather to the judgment of the therapist. Seventy percent of this information had to do with sexual acts and thoughts, nine percent concerned thoughts of violence and an additional nine percent concerned financial issues. But when the therapist threatens to disclose or actually does so, communication of violent urges drops and often premature termination results.

This study was discussed in Domb, *supra* note 42, at n.130; David Nowell & Jean Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed?*, 24 PROF. PSYCH.: RES. &

Other studies and articles, however, contradict that conclusion.[61] Recent studies have shown that approximately fifteen percent of covered patients "pay for psychotherapy out of their own pockets rather than risk disclosure of treatment by filing insurance claims."[62] The social stigma associated with

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PRAC. 367 (1993); Daniel W. Shuman, Myron F. Weiner, & Gilbert Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 INT'L. J. OF LAW AND PSYCH. 393 (1987) (comparing responses from two groups, one from Ontario which had no privilege, and one from Quebec, which did have a form of the psychotherapist-patient privilege, concluding that the privilege had little effect on patients' decisions concerning therapy); Jeffrey A. Klotz, *Limiting the Psychotherapist-Patient Privilege: The Therapeutic Potential*, 27 CRIM. LAW BULL. 46 (1991) (advocating that no privilege would actually have a positive effect since the patient disclosing an intent to commit a future crime would actually be deterred from committing the crime if he knew the therapist was obligated to disclose—a somewhat fallacious argument since it assumes that a patient intending to actually commit a future crime would tell a therapist in the first place if he knew of the duty to disclose).

[61] *See* Robert G. Meyer & Steven R. Smith, *A Crisis in Group Therapy*, 32 AM. PSYCHOL. 638, 639-40 (1977) (finding that 81.8% of respondents to a questionnaire on confidentiality indicated that they would refuse to enter group therapy or would be substantially less inclined to speak freely without assurance of confidentiality); Deborah E. Willage & Robert G. Meyer, *The Effects of Varying Levels of Confidentiality on Self-Disclosure*, 2 GROUP 88, 94-95 (1978) (finding that subjects were more open in answering personality inventories when confidentiality was assured than when they thought the results of the survey might be released*); Note, Functional Overlap between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1262 (1962) [hereinafter *Functional Overlap*] (suggesting that many people are unaware of current privilege law but that a substantial number of people felt that they would be much less willing to disclose personal information in therapy if they knew that a psychotherapist was legally obligated to release information learned during a therapy session*); Note, Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 183 (1978) (noting that one quarter of therapists found that patients were reluctant to discuss violent tendencies when patients were informed of the possibility of the breach of the breach of confidence). *See also* David J. Miller & Mark H. Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 PROF. PSYCHOL.: RES. & PRAC. 15, 18 (1986) (finding that 42% of the study's subjects maintained that if they were told that the information they revealed was not kept completely confidential, they would exhibit reluctance and discretion before speaking to a therapist); Howard B. Roback et al., *Guarding Confidentiality in Clinical Groups: The Therapist's Dilemma*, 42 INT'L J. GROUP PSYCHOTHERAPY 81, 81 (1992) (indicating that therapists who had not discussed confidentiality with their patients were likely to view such discussions as having an inhibiting effect on group process). All the above sources are discussed in Weiner, *supra* note 49, at n. 120, & Steven R. Smith, *Psychotherapy and the Right of Privacy*, 49 GEO. WASH. L. REV. 1, n. 163 (1980). *See also* Michele Smith-Bell & William J. Winslade, *Privacy, Confidentiality, and Privilege in Psychotherapeutic Relationships*, 64 AMER. J. ORTHOPSYCHIAT. 180 (1994); Donald Schmid et al., *Confidentiality in Psychiatry: A Study of the Patient's View*, 34 HOSP. & COMMUNITY PSYCHIATRY 353-354 (1983) (stating that a study of 30 patients revealed that a statistically significant number of patients would be upset and less likely to share information if their confidences were released to a court); *Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L. J. 1226 (1962).

[62] Domb, *supra* note 42, at 222.

seeing a therapist remains a potent inhibiting force in some patients' decision to not seek, or delay seeking, therapy.[63] Concerns that intimate disclosures could become public can further chill the open disclosure necessary for psychotherapy to work.[64]

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition . . . . It would be too much to expect them to do if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.[65]

A study completed in 1990 concludes that two factors are relevant in determining the effect of the existence of a privilege on the decision to seek therapy or make full disclosure within therapy.[66] These are: the extent to which the law is understood by a patient; and the extent to which the law is relevant and consequential to a patient. The study concludes that privacy may matter only to some types of patients and under some types of circumstances.[67] This common sense conclusion becomes more relevant when we discuss the effect of the privilege on a sub-community like the military. One study shows that sixty percent of Air Force officers would not seek therapy because of the perceived negative effect on their career.[68] The Navy and Air Force have

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[63] *See Medical and Counseling Privilege*, *supra* note 44, at 1543.

[64] *See id*. at n.85 ("Freud described the importance of full patient disclosure in psychoanalysis in the following manner: 'We pledge him to obey the fundamental rule of analysis, which is henceforth to govern his behavior towards us. He is to tell us not only what he can say intentionally and willingly, what will give him relief like a confession, but everything else as well that his self-observation yields him, everything that comes into his head even if disagreeable for him to say it, even if it seems to him unimportant or actually nonsensical.'").

[65] Domb, *supra* note 42, at n.91 (quoting Judge Luther Alverson's speech in an address before the Connecticut Mental Health Association, in M. GUTTMACHER & H. WEINOFEN, PSYCHIATRY AND THE LAW 272 (1952)).

[66] *See* Daniel O. Tabue & Amiram Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures*, 21 PROF. PSYCH.: RES. & PRAC. 72 (1990).

[67] *See id.* at 72.

[68] *See* Harold Rosen & LTC James P.T. Corcoran, USAF, *The Attitudes of USAF Officers Toward Mental Illness: A Comparison with Mental Health Professionals*, 143 MIL. MED. 570 (1978). *See also* Debra Gordon, *Navy Tries to Demystify Mental Health, Boorda's Death Refocuses Attention on Idea That Seeking Psychiatric Help Can Hurt a Career*, VIRGINIAN-PILOT & LEDGER STAR (NORFOLK VA.) June 11, 1996, at A1 (In wake of Admiral Boorda's suicide, article discussing pervasive and enduring belief that seeking mental health treatment can derail a career); Neil A. Lewis, *Military Conducting Anti-Suicide Campaign*, THE SEATTLE TIMES, May 19, 1996, at A1 (Dr. Joseph, Assistant Secretary of Defense for Health Affairs, states that message that seeking professional mental health help is not a sign of weakness, and will not hurt career runs against "centuries-old military culture" in which strength is prized and

increased their programs to destigmatize mental health care following Admiral Boorda's suicide in May 1996.[69] It is likely that the extensive press coverage of the Supreme Court decision in *Jaffee* will remove some of the relative ignorance on the extent of any privilege which existed when the prior studies above were conducted. Firmer conclusions on the effect of the privilege on willingness to disclose may result.[70] Nevertheless, the stigma attached to mental health problems still poses an important barrier to people's willingness to get help that is only worsened if the contents of these disclosures are made public.[71] Those patients who pay for mental health care themselves rather than submit insurance claims do so out of the fear of stigma at work, or future inability to find employment.[72]

Wigmore's third criteria is satisfied if one accepts that the psychotherapist-patient relationship ought to be fostered by society. The use of mental health services is expanding. "[A] 1977 study showed that 33 percent of Americans had used psychotherapy at some time in their lives" and by 1995, "a national survey . . . indicated that nearly half of the respondents had had personal experience with a mental health professional." [73] In 1990, it was reported that over 28 percent of US adults (52 million) suffered from

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anything that could be perceived as weakness is concealed); Bruce Hilton, *Suicide Seldom a Rash Act, Experts Say*, PATRIOT LEDGER (QUINCY, MASS.), May 21, 1996, at 21 (discussing stigma of mental illness—people in positions of high public responsibility such as Admiral Mike Boorda, feel that if they suffer from a mental illness they cannot let it be known if they want to continue in those high positions—also discusses Senator Thomas Eagleton who was dropped as a vice-presidential candidate after he revealed he had once been treated for depression).

[69] *See* Debra Gordon, *Navy Tries to Demystify Mental Health Boorda's Death Refocuses Attention on Idea That Seeking Psychiatric Help Can Hurt a Career*, VIRGINIAN-PILOT & LEDGER STAR (NORFOLK VA.), June 11, 1996, at A1; Neil A. Lewis, *Military Conducting Anti-Suicide Campaign*, THE SEATTLE TIMES, May 19, 1996, at A1; Bryant Jordan, *Major Commands are Told to Target Stress*, AIR FORCE TIMES, June 10, 1996, at 17 (discussing the Air Force Chief of Staff's campaign to make it known that seeking help for mental health problems would not be seen as career ending).

[70] *See* Bruce J. Winnick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249, 258 (1996).

[71] *See* H. Carol Bernstein, *Criminal Law: The Psychotherapist-Patient Privilege Under Federal Rule of Evidence 501*, 75 J. CRIM. LAW 388, 397 (1984) ("In psychotherapy, patients often act without regard to social conventions and differently from the way they conduct themselves in daily life. Patients' fears that their unconventional actions might be disclosed are forceful deterrents against seeking treatment. Also, patients' apprehension of societal ridicule of their mental problems may cause them to avoid consultations with psychotherapists about their ailments.").

[72] *See* Domb, *supra* note 42, at 222 (Dr. Steven Sharfstein estimated that in 1981, about fifteen percent of all adults who had employer provided mental health insurance waived reimbursement in order to conceal that they received treatment. One person even quit his job because he had to hand his medical bills to the personnel manager of his company.)

[73] Lynn VanMatre, *Some Patients' Dark Thoughts Test Therapists*, CHI. TRIB. Feb. 9, 1996, at 1.

mental disorders or substance-use disorders, "ranging from mild depression to far less common antisocial personality disorders that may be associated with violence."[74] Of those 52 million Americans, only 28.5% get help.[75] There are "approximately 30,642 psychiatrists, 56,000 psychologists, and 81,000 psychiatric social workers practicing mental health counseling today."[76] "Some level of mental health is necessary to be able to form beliefs and value systems and engage in rational thought."[77] The promotion of emotional and mental health can be expected to ultimately reduce antisocial activity and acts. These are the societal goals that the protection of the confidentiality of therapy is designed to accomplish.[78]

Finally, since the right to a privilege imposes a cost on the public, Wigmore's test requires that it may be justified only by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."[79] A recognition of a psychotherapist-patient privilege will result in a loss of otherwise potentially relevant evidence. However, not all the information produced in psychotherapy is "reliable" evidence, and may actually be misleading to the court.[80] In addition, fear of judicially compelled disclosure may result in information not being produced in the first place. When weighed against the social gains discussed above, the fourth Wigmore criterion also argues for the recognition of the privilege.[81]

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[74] *See id*.

[75] *See* Winnick, *supra* note 70, at 253 (Close to nine million of those with a mental disorder develop the problem for the first time each year. Another eight million of these suffer from a relapse of a condition developed earlier.)

[76] Winnick, *supra* note 70, at 264.

[77] Smith, *supra* note 61, at 27.

[78] *See id.* at 39.

[79] *Jaffee*, 116 S. Ct. at 1928. (quoting United States v. Trammel, 445 U.S. 40, 50, 100 S. Ct. 906, 912 (1980)).

[80] *See* Cerveny & Kent, *supra* note 26, at n.27; Slovenko, *supra* note 43, at 195 ("Although absolutely necessary in treatment, data from free-association, or fantasies, or memories, are not reliable for use in court as they mostly represent the way the person experienced an event, and not how the event occurred. They are not facts. Psychic reality is not the same thing as actual reality. The psychiatrist in his records uses words having a special and rather abstruse meaning to him, such as 'Oedipus complex,' 'Electra complex,' 'castration complex,' 'narcissistic identification,' 'homosexuality' and 'incest fantasies.' Introduced in court, the record will unfairly prejudice the patient's case, as the words have a different connotation for the layman."); Ralph Slovenko, *Psychotherapist-Patient Testimonial Privilege: a Picture of Misguided Hope*, 23 CATH. U. L. REV. 643, 653 (1974) ("There may be 'truth in lending' but there is no truth in entertainment or psychotherapy. Psychotherapy is concerned with man's struggle to cope with internally or externally induced stresses. The law is concerned with the outside world, i.e., with objective facts, that which is called truth. The psychotherapist, on the other hand, is not engaged in a fact finding process . . . .")

[81] Several commentators have agreed that a psychotherapist-patient privilege is justified under Wigmore's test. *See* Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, *supra* note 43, at 179-187; Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 NW. U. L. REV. 384, 386-87 (1952); 4 GROUP FOR THE

b. ***Privacy Rationale***—The proponents of the psychotherapist-patient privilege argue that the disclosures made in psychotherapy fall within the constitutional right of privacy. These disclosures are likely to "include the most personal thought, feelings, and aspects of one's life."[82] The right to privacy has been recognized in the context of decisions involving marriage, sexuality, and abortion.[83] The decision to engage in mental health treatment, involving intimate details of a person's life, involves similar privacy concerns, and should merit similar protection.[84] "The privilege does not exist merely because of a *per se* 'right of privacy'; rather, the privilege is necessary because privacy is the prerequisite to effective treatment of the patient."[85] Some courts have agreed and used this rationale to protect psychotherapy disclosures.[86]

c. ***Functionalist Rationale***—Proponents of the psychotherapist-patient privilege argue that the law has recognized confidential communications between professionals and their clients.[87] Since psychotherapists fill similar functions, they argue these also should be protected by a privilege. These proponents also argue that the privilege should extend beyond psychiatrists and psychologists to encompass all therapists who are acting in a counseling capacity. The Supreme Court agreed in *Jaffee*, extending the privilege to cover clinical social workers as well.

2. *Psychotherapist-Patient Privilege History*

a. ***Common Law History***—No psychotherapist-patient privilege was recognized at common law prior to World War II. In 1976, the Supreme Court of Alaska recognized a common law psychotherapist-patient privilege in a criminal case.[88] There the court focused on the four Wigmore criteria and

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ADVANCEMENT OF PSYCHIATRY, REPORTS AND SYMPOSIUMS, REPORT NO. 45, 95 (1960); Weiner, *supra* note 49, at 284; Smith, *supra* note 60, at 40.

[82] Smith, *supra* note 61, at 59 (Excellent argument for the privacy rationale for the psychotherapist-patient privilege).

[83] *See* Whalen v. Roe, 429 U.S. 589, 599, 97 S. Ct. 869, 877-78 (1977); Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965); Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973); Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1952); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 97 S. Ct. 2777 (1977).

[84] *See* Smith, *supra* note 61, at 59; Weiner, *supra* note 49, at 283.

[85] Bernstein, *supra* note 71, at 400.

[86] *See* Caesar v. Mountanos, 542 F.2d 1064, 1068 n.9 (9th Cir. 1976), *cert. denied*, 430 U.S. 954, 97 S. Ct. 1598 (1977) (holding that the constitutional right to privacy protects the confidentiality of psychotherapist-patient relations); *In re* Lifshutz, 467 P.2d 557, 567-68 (Cal. 1970) (basing patient's right to preserve confidentiality of communications made to a psychotherapist on the California Evidence Code and the federal Constitution's right to privacy); *In re* "B", 394 A.2d 419, 425 (Pa. 1978) (recognizing the psychotherapist-patient privilege as rooted in Pennsylvania and Federal Constitution).

[87] *See* Weiner, *supra* note 49, at 271-72, 284-287.

[88] *See* Allred v. State, 554 P.2d at 418. The court avoided the constitutional/privacy issue because of a lack of state action in that case.

limited the privilege in two ways: the communication had to have been made to a psychiatrist or licensed psychologist, and must have been made in the course of psychotherapeutic treatment or of examinations or diagnostic interviews which might reasonably lead to psychotherapeutic treatment.[89] Several other states similarly recognized the privilege.[90] This development was halted when state legislatures began creating statutory privileges.[91]

b. ***Statutory History***—From the mid-1950s to the present, all fifty states have enacted some form of statutory psychotherapist-patient privilege. These statutory protections vary on exactly what relationships are protected, some limiting the privilege to psychiatrists, others extending the privilege to clinical psychologists, and clinical social workers. States also vary on which exceptions to the privilege apply, with some states equating the privilege to that covering attorney-clients and others severely limiting the privilege to civil cases only.[92]

As discussed above the psychotherapist-patient privilege was one of the specific proposed privileges forwarded to Congress by the Supreme Court as part of the Proposed Federal Rules of Evidence. Rule 504 limited the coverage of the privilege to specific professionals and to specific disclosures.[93]

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[89] *Id*. at 421. (limiting the privilege to specific types of disclosures made to specific individuals).

[90] Binder v. Ruvell, Civil Docket No. 52-C-2535 (Cir. Ct., Cook Cty., Ill. June 24, 1952) (reported in 15 J.A.M.A. 1241 (1952)); State v. Evans, 454 P.2d 976 (Ariz. 1969).

[91] See Major Barbara J. Zanotti and Captain Rick A. Becker, *Marching to the Beat of a Different Drummer: Is Military Law and Mental Health Out-of-Step after Jaffee v. Redmond*, 41 A.F. L. REV. 1, 7 (1997) (Commenting that *Jaffee* recognized that "once legislation is passed, the opportunity for common-law development of the issue is lost.").

[92] *See* Hayden, *supra* note 40, at appendix A; Jaffee, 116 S. Ct. at n.11-18.

[93] Proposed Rule 504 provided:

Rule 504. Psychotherapist-Patient Privilege

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including the members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

Although Congress deleted this Proposed Rule, many courts have examined it to determine whether to recognize a common law privilege on the basis of "reason and experience."[94]

c. ***Federal Cases***—The federal cases prior to *Jaffee* fell into three general categories. Several courts dismissed the existence of the psychotherapist-patient privilege based on the lack of a doctor-patient privilege at common law,[95] some refused to recognize the existence of the privilege under FRE 501,[96] and others recognized the existence of the privilege.[97] Courts in the first category refused to create privileges that were not part of the common law prior to the enactment of FRE 501, reading the words "shall be governed by the principles of common law . . ." narrowly. Courts in the remaining two categories analyzed Proposed Rule 504 and the legislative history of FRE 501 to determine that they had the authority to recognize new privileges under FRE 501. In deciding whether to recognize the privilege "in the light of reason and experience," these courts examined the existence and extent of state recognition of this privilege, the privacy interests of the patient, societal interests in encouraging mental health treatment, and

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(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of the deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority to do so is presumed in the absence of evidence to the contrary.
(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.
56 F.R.D. 183, 240-41 (1972).

[94] FED. R. EVID. 501.

[95] *See* United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983); Hancock v. Hobbs, 967 F.2d 462 (11th Cir. 1992); United States v. Corona, 849 F.2d 562, 567 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084, 109 S. Ct. 1542 (1989); United States v. Meagher, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853, 97 S. Ct. 146 (1976).

[96] *See* United States v. Burtrum, 17 F.3d 1299 (10th Cir.), *cert. denied*, 115 S. Ct. 176 (1994); *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir.), *cert. denied sub nom.* Doe v. United States, 493 U.S. 906, 110 S. Ct. 265 (1989).

[97] *See In re* Zuniga, 714 F.2d 632, 636-637 (6th Cir. 1983), *cert. denied*, 464 U.S. 983, 104 S. Ct. 426 (1983) (recognizing privilege); *In re* Doe, 964 F.2d 1325 (2d Cir. 1992) (same).

respected commentator's opinions.[98] Several courts recognized a qualified privilege requiring a case-by-case balancing.[99] The recognition of a privilege in a specific case depended on whether the evidentiary need was outweighed by the interests designed to be protected by the privilege.[100] The split in the analytical approach under FRE 501 in recognizing new privileges, and in the recognition of the privilege itself, led the Supreme Court to grant *certiorari* in *Jaffee v. Redmond.*[101]

d. *Synthesis in* Jaffee—The split in the courts of appeal resulted in the granting of *certiorari* by the Supreme Court.[102] The Court definitively resolved the question of whether federal courts had the authority under FRE 501 to recognize new privileges that had not existed at common law prior to the enactment of the Federal Rules of Evidence—they did. The Supreme Court, however, went further than the courts of appeal that had previously recognized a privilege. It recognized an absolute privilege, stating that the case-by-case balancing those courts had recognized would result in just the type of uncertainty that led to the social ills of citizens avoiding or delaying treatment or inhibiting disclosure within psychotherapy. The Court examined conflicting empirical data on the importance of the privilege to psychotherapy, and resolved the debate in a seven to two decision in favor of the privilege. The Court also went beyond previous court decisions, and the Seventh Circuit decision in *Jaffee*, by taking the functionalist approach and recognizing that the privilege also applied to clinical social workers engaged in psychotherapy. The Court recognized that social workers provide most of the mental health services to the poor and middle class.[103] Although not addressing the equal protection and privacy arguments that had been made by Redmond, *amici*, and prior legal review articles,[104] the Court did recognize the fact that the mental

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[98] *See In re* Zuniga, 714 F.2d 632 at 636-637; *In re* Doe, 964 F.2d at 1328-1329.

[99] *See In re* Zuniga, 714 F.2d at 637, 639-40 ; *In re* Doe, 964 F.2d at 1328-29; Jaffee, 51 F.3d at 1357.

[100] *Jaffee*, 51 F.3d at 1357. *See also* Trammel v. United States, 445 U.S. 40, 100 S. Ct. 906 (1980).

[101] *Jaffee*, 116 S. Ct. at 1927.

[102] *See In re* Zuniga, 714 F.2d 632 (6th Cir. 1983) (recognizing privilege); *In re* Doe, 964 F.2d 1325 (2d Cir. 1992) (same); United States v. Burtrum, 17 F.3d 1299 (10th Cir. 1994) (finding no privilege in context of criminal child sex abuse case); *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir.), *cert. denied*, 110 S. Ct. 265 (1989) (no privilege); United States v. Corona, 849 F.2d 562, 567 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1542 (1989) (holding no psychotherapist privilege in federal criminal trials); United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983) (same); United States v. Meagher, 531 F.2d 752 (5th Cir.), *cert. denied*, 97 S. Ct. 146 (1976) (same).

[103] *See Jaffee*, 116 S. Ct. at 1931. *See also* Brief of *Amicus Curiae* National Association of Social Workers, et. al. at 5-7, 116 S. Ct. 1923 (1996) (No. 95-266).

[104] *See* Smith, *supra* note 61, Richard Delgado, *Comment: Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 CAL. LAW. REV. 1050, 1061-1070 (1973); Brief of *Amicus Curiae* American Psychoanalytic Association at 25, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (95-266); Brief

health system has changed since the Advisory Committee proposed Rule 504 to Congress.[105] The Court drew the line on the privilege in *Jaffee* at licensed psychotherapists, but declined to specify the exact contours of the privilege. The Court left the determination of the scope of the privilege, its exceptions and waiver provisions, to future case-by-case definition.

The dissent disputed the necessity of the privilege to the encouragement of the putative social good to be gained.[106] It focused on the vast differences in the states' recognition of the privilege, highlighting differences in applicability and exceptions.[107] The dissent considered the actual text of Proposed Rule 504 a more suitable starting point for evaluating the privilege. At its base, the dissent balances the interests to be protected by the privilege against the costs to the truth finding process differently than the majority. The dissent was particularly disturbed by the extension of the protection of the privilege to social workers, fearing the slippery slope where all counselors would be covered by a privilege with the resulting high cost to the judicial process.

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of *Amicus Curiae* American Counseling Association at 25, 116 S. Ct. 1923 (1996) (95-266); Respondent's Brief at 34-35, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (95-266).

[105] *See Jaffee*, 116 S. Ct. at 1931, n.16.

[106] *Id.* at 1931-1941 (Scalia, J., dissenting).

[107] *Id.* at 1936-41 (Scalia, J., dissenting).

3. *Post*-Jaffee *Developments*

Since *Jaffee*, the federal district courts have begun to define the scope of the privilege, and to use *Jaffee* as the authority to recognize other confidential communications privileges.[108] In *United States v. Lowe*,[109] the court extended the privilege recognized in *Jaffee* to include confidential communications made to rape crisis counselors who were not psychiatrists, psychologists, or social workers in the context of a motion to compel discovery of these rape counseling records. In *United States v. Schwensow*,[110] the court reexamined a suppression motion in a criminal case on a claim of privilege under *Jaffee*. It recognized the applicability of the privilege but found it not to have been met in that case. The court, more interestingly described a methodology to determine the scope of the privilege by first looking to state law analogies[111] for the development of a common law of privileges when the federal rule is unsettled. The next step was to examine whether the claim for the privilege meets the justifications for the psychotherapist-patient privilege given in *Jaffee*, to include both the private and public interests. Finally, the court said to examine the nature of the relationship between the claimed psychotherapist and the patient.

In *In re Grand Jury Proceedings*,[112] the court used *Jaffee* to recognize a limited parent-child privilege in a criminal case. Finally, in *United States v. Haworth*,[113] a federal district court applied *Jaffee* to protect psychotherapy

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[108] *See* United States v. Lowe, 948 F. Supp. 97 (D.Mass. 1996) (extending the *Jaffee* privilege to cover rape crisis counseling records in criminal case); United States v. Schensow, 942 F.Supp. 402 (E.D. Wisc. 1996); *In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487 (E.D. Wash, 1996) (recognizing privilege for confidential parent-child communications in criminal context); *In re* Grand Jury Impounded, 103 F.3d 1140 (3d Cir. 1997) (declining to recognize a parent-child privilege); Greet v. Zagrocki, 1996 WL 724933 (E.D. Pa., Dec. 16, 1996) (No. CIV. A. 962300) (applying the psychotherapist-patient privilege in a section 1983 civil rights damages suit); United States v. Horton, 98 F.3d 313 (7th Cir., 1996) (remanding for determination of whether *Jaffee* would allow the use of an inmate's psychiatric records as a condition for supervised release); United States v. Haworth, 168 F.R.D. 660 (D. N.M., 1996) (applying *Jaffee* to protect psychotherapy records of key prosecution witness in criminal trial).

[109] United States v. Lowe, 948 F. Supp. 97 (D.Mass., 1996) (extending the *Jaffee* privilege to cover rape crisis counseling records—There the court found (1) that the victim had waived the privilege; and (2) that none of the information was exculpatory or material to the defense after an *in camera* review.).

[110] United States v. Schwensow, 942 F.Supp. 402 (E.D. Wisc. 1996).

[111] In this case using state law analogy for guidance on the definitions of "confidentiality" and "counselor".

[112] *In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487 (E.D. Wash, 1996) (looking to the policy rationales underlying the *Jaffee* decision). *But see In re* Grand Jury Impounded, 103 F.3d 1140 (3d Cir. 1997) (declining to recognize a parent-child privilege).

[113] United States v. Haworth, 168 F.R.D. 660 (D. N.M., 1996).

records of a key witness from compelled disclosure in a criminal trial. The court found that the defendant's Sixth Amendment confrontation rights were satisfied by allowing cross examination of the witness on the subject of his psychotherapy, but not allowing access to the records.[114] What is critical about these limited cases is the recognition of the applicability of the psychotherapist-privilege, and its extensions, to criminal cases, its interplay with the Sixth Amendment's Confrontation clause, and the resolution of the issue of the ability of federal courts to recognize new privileges under FRE 501.

IV. Does *Jaffee* Apply in Military Courts-Martial?

The *Jaffee* decision led to discussions of whether the new psychotherapist-patient privilege would apply in the military. Debate ensued both within the military justice establishment, in Congress, and in the media.[115] Shortly after the *Jaffee* decision, the military's treatment of mental

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[114] *Id.*

[115] *See* The Honorable Patricia Schroeder, *Confidentiality is Vital*, ARMY TIMES, Oct. 7, 1996, at 62 (Editorial discussing Elmendorf case and urging adoption of a psychotherapist-patient privilege in the Military Rules of Evidence for non-military patients) [hereinafter Schroeder Editorial]; The Honorable Patricia Schroeder, Press Release, Sept. 19, 1996 (same); The Honorable Patricia Schroeder, Congressperson, Letter to The Honorable William J. Perry, Secretary of Defense, Subject: Wall Street Journal Story on Elmendorf AFB Case, Sept. 11, 1996 (Discussing Elmendorf case and asking for clarification on doctor-patient confidentiality in the military) [hereinafter Schroeder Letter to SECDEF]; The Honorable Patricia Schroeder, Congressperson, Letter to The Honorable Sheila Widnall, Secretary of the Air Force, Subject: Wall Street Journal Story on Elmendorf AFB Case, Aug. 22, 1996 (Discussing Elmendorf case and requesting the Air Force revisit their policy on medical record confidentiality) [hereinafter Schroeder Letter to SECUSAF]; LTC Beth A. Unklesbay, USAF, Office of Legislative Liaison, Congressional Inquiry Division Letter to The Honorable Patricia Schroeder, Congressperson, Subject: Response to Aug. 22, 1996 Letter, Sept. 9, 1996 (Explanation that disclosure of Elmendorf records was not a matter of policy but of law); The Honorable Stephen Joseph, Assistant Secretary of Defense (Health Affairs), Memorandum to The Honorable Judith Miller, DOD General Counsel, Subject: Confidentiality of Patient Records, Sept. 9, 1996 (Urging amendment of the Military Rules of Evidence to create a privilege for non-active duty patients) [hereinafter Joseph Letter to DOD GC]; Memorandum, DOD General Counsel, to The Honorable Stephen Joseph, Under Secretary for Defense (Health Affairs), subject: Legal Privilege for Therapist-Patient Communications, (23 Sept. 1996) (Response that Joint Service Committee on Military Justice and military courts are addressing the issue); The Honorable Patricia Schroeder, Robert Dornan, Elijah Cummings, Robert Matsui, Joseph Kennedy, Lane Evans, Neil Abercrombie, and Barney Frank, Congresspersons, Letter to the Honorable William J. Perry, Secretary of Defense, Subject: Dr. Stephen Joseph's 9 Sept. 1996 Letter to DOD General Counsel, Oct. 21, 1996 (Letter urging adoption of a privilege for non-military patients which discusses effect on military dependents and readiness) [hereinafter Seven Congressperson Letter]; Memorandum, Chair Ethics Consultants to the Surgeons General, Uniformed Services University of Health Sciences, to John F. Mazzuchi, Deputy Assistant Secretary of Defense (Clinical Services), subject: Ethical

health records became the subject of intense public scrutiny,[116] centering on an Elmendorf Air Base case covered in the Wall Street Journal.[117]

This front-page report incited considerable Congressional interest, resulting in letters from Representative Patricia Schroeder to the Secretary of the Air Force and the Secretary of Defense.[118] These letters questioned the

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Considerations Regarding Privileged Communications Between Military Psychotherapists and Patients Who Are Not on Active Duty (3 Sept. 1996) (discussing ethical component of confidentiality issue for non-military patients) [hereinafter USUHS 3 Sept. 96 Memo]; Memorandum, Bryan G. Hawley, Major General, USAF, The Judge Advocate General, U.S. Air Force, HQ USAF/JA, to All Staff Judge Advocates, Chief Circuit Judges and Chief Circuit Trial and Defense Counsel, subject: Release of Medical Records in Criminal Proceedings (July 31, 1996) [hereinafter USAF TJAG July 31, 1996 Memo] (*Jaffee* is contrary to MRE 501(d) and impracticable, subordinate units will continue to have access to these records); Memorandum, Edgar R. Anderson, Jr., Lieutenant General, USAF, Surgeon General, US Air Force, HQ USAF/SG to ALMAJCOM/SG, HQ AFIA/SG, HQ AFPC/DPAM, NGB/SG, HQ AFRES/SG, HQ USAF/REM, HQ USAFA/SG, ANGRC/SG, 1100 MED SQ, HQ AFMSA/SGS, subject: Release of Medical Records in Criminal Proceedings, (July 31, 1996) (same) [hereinafter USAF SG July 31, 1996 Memo]; Gordon Livingston, *Serving Two Masters: The Ethical Dilemmas That Military Medical Students Want to Know About—But Can't*, THE WASH. POST, Dec. 22, 1996, at C3 (discussing the Elmendorf case, *Jaffee*, and conflict of military psychotherapists to care for patient and serve military master) [*hereinafter Ethical Dilemmas*]; Karen Jowers, *Joseph Asks for Ensured Patient Confidentiality*, Army Times, Sept. 23, 1996, at 30 (describing Joseph's memo to DOD General Counsel) [hereinafter *Joseph Asks*]; Karen Jowers, *AF Psychiatrist Ordered Away from Patients*, ARMY TIMES, Sept. 23, 1996, at 31 (discussing Elmendorf case) [hereinafter *AF Psychiatrist*]; Ellen Joan Pollock, *The Psychiatrist in the Middle*, WALL ST. J., Aug. 22, 1996, at A1 (discussing Elmendorf case. This article was the catalyst for much Congressional interest.) (Copies of all correspondence are on file with the author).

[116] *See* Pollock, *supra* note 115. *See also* Schroeder, *Schroeder Editorial*, *supra* note 115; Jowers, *supra* note 115; Jowers, *AF Psychiatrist*, *supra* note 115.

[117] Ellen Joan Pollock, *The Psychiatrist in the Middle*, WALL ST. J., Aug. 22, 1996, at 1 (In this case, an airman was accused of raping the daughter of a fellow Air Force member. The nineteen year old woman sought counseling from the base mental health clinic in an attempt to deal with the rape. As the airman accused of rape neared trial, his defense counsel sought production of the victim's mental health records as part of the preparation of the defense case. The victim's mother discovered this fact and sought to retrieve the records to protect her daughter. The psychiatrist in charge of the clinic was reprimanded for failing to prevent her tearing the records in half in an attempt to stop their disclosure. The young woman described the feelings of having her records disclosed: "They think there's something big in the records but there's not. That's the funny thing. There's stuff in there I haven't even told my parents. There's stuff in there I don't want to review. There's stuff I just wanted to get off my chest and never think about again. That's my life. I'm only 21. I don' t have a very long life, and what I have is there written down. All my humiliating moments, my happy moments and my sad moments. They might as well strip me naked and make me walk in front of everybody naked. I'll tell you, it would be easier.").

[118] The Honorable Patricia Schroeder, Congressperson, Letter to The Honorable William J. Perry, Secretary of Defense, Subject: Wall Street Journal Story on Elmendorf AFB Case, Sept. 11, 1996; The Honorable Patricia Schroeder, Congressperson, Letter to The Honorable Sheila Widnall, Secretary of the Air Force, Subject: Wall Street Journal Story on Elmendorf AFB Case, Aug. 22, 1996; LTC Beth A. Unklesbay, USAF, Office of Legislative Liaison,

military's protection of medical records and urged amendment of the Military Rules of Evidence to create a psychotherapist-patient privilege for non-military personnel. This furor coincided with the ongoing effort in the Department of Defense to assess *Jaffee's* impact on military practice. The Joint Committee on Military Justice (JSC) met and concluded that *Jaffee* had no effect on military practice.[119] Simultaneously, the American Psychiatric Association (APA) began a dialogue with the Department of Defense on *Jaffee's* applicability, contacting both the Office of the Under-Secretary of Defense for Health Affairs and the DOD General Counsel.[120] Interestingly, the APA conceded the military's compelling need to know the mental status of its personnel.[121]

Congressional Inquiry Division Letter to The Honorable Patricia Schroeder, Congressperson, Subject: Response to Aug. 22, 1996 Letter, Sept. 9, 1996. [On file with the author].

[119] *See* USAF TJAG July 31, 1996 Memo, *supra* note 115.

[120] *See* Letter from Melvin Sabshin, M.D. Medical Director, American Psychiatric Association, to The Honorable Stephen C. Joseph, Assistant Secretary of Defense (Health Affairs), subject: Request for Meeting to Discuss Confidentiality Limits in Military, June 20, 1996 (requesting meeting to discuss Elmendorf case and *Jaffee*); Letter from John F. Mazzuchi, Deputy Assistant Secretary of Defense (Clinical Services), subject: Response to June 20, 1996 APA Letter, July 2, 1996 (agreeing to meeting); Memorandum from Eugene Cassel, J.D., Assistant Director Government Relations, American Psychiatric Association, to Commander Nancy Bakalar, M.D., subject: July 24, 1996 Meeting, July 18, 1996 (listing items to discuss to include: current regulatory and statutory provisions on access to mental health information about military personnel and dependents, potential procedural safeguards, protection of military psychiatrists from ethical conflicts, protection of military psychiatrists from appointment as litigation consultants or expert witnesses in conflict to current or former patients, and anticipated impact of *Jaffee* on military courts); Memorandum from Eugene Cassel, J.D., Assistant Director Government Relations, American Psychiatric Association, to Commander Nancy Bakalar, M.D., subject: Rescheduled Meeting, July 23, 1996; Memorandum from Eugene Cassel, J.D., Assistant Director Government Relations, American Psychiatric Association, to Commander Nancy Bakalar, M.D., subject: Meeting Attendees, Aug. 1, 1996 (listing attendees); Letter from Melvin Sabshin, M.D., Medical Direction, American Psychiatric Association, to Colonel Thomas G. Becker, USAF, Associate Department of Defense General Counsel (Military Justice and Personnel Policy), subject: Request by the American Psychiatric Association to Amend the Military Rules of Evidence to Provide Privilege for Military Dependents, Aug. 19, 1996 (urging creation of privilege *a la Jaffee* for non-military patients, addressing morale and readiness impact on military members from lack thereof); Letter from Mr. John F. Mazzuchi, Deputy Assistant Secretary of Defense (Clinical Services), to Mr. Melvin Sabshin, M.D., Medical Director, American Psychiatric Association, subject: Meeting of Jul. 31, 1996 & referral to Joint Service Committee on Military Justice, Aug. 23, 1996; Letter from Colonel Thomas G. Becker, Associate Deputy General Counsel, Department of Defense, to Mr. Melvin Sabshin, M.D., Medical Director, American Psychiatric Association, subject: Response to Request for Privilege, Sept. 16, 1996 (stating will raise issue with Joint Service Committee and DOD General Counsel, explaining discovery process under MREs, and stating applicability of Jaffee is matter for resolution by military courts.) (On file with the author).

[121] *See* Joseph Letter to DOD GC, *supra* note 115.

Within DOD, Mr. Stephen C. Joseph, the Under-Secretary of Defense for Health Affairs, weighed in on the issue and urged amendment of the Military Rules of Evidence to create a privilege for non-active duty patients. DOD's official response to all queries was that the issue was under consideration by the JSC and that *Jaffee's* applicability would be determined on a case-by-case basis by the military courts.[122]

Congressional interest continued. Representative Schroeder issued a press release on the issue and wrote a editorial that appeared in the *Army Times*.[123] She was joined by seven other Congressional Representatives in urging the Department of Defense to amend the Military Rules of Evidence to recognize a privilege for non-active duty personnel.[124] In response to Congressional threats to legislate on this issue, DOD has prepared draft legislation directing the President to issue a Military Rule of Evidence implementing the privilege.[125] On May 6, 1997, the Department of Defense published a notice of proposed amendments to the UCMJ.[126] These proposed amendments included a proposed psychotherapist-patient privilege. The Department of Defense received substantial input on the proposed rule, but further divisions arose among the Services about the proper extent and exceptions to the privilege. The proposed rule is currently under substantial revision.

However, pending changes in the Military Rules of Evidence, military trial courts will be forced to address whether *Jaffee* applies in military courts-martial. As discussed above, there are four main positions on the applicability of the *Jaffee* decision on military practice, differing primarily on the interpretation of FRE 501, MRE 501(a)(4), and MRE 501(d). These are: (1) *Jaffee* does not apply since it is a civil case, and the plain wording of MRE 501

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[122] Letter from Colonel Thomas G. Becker, Associate Deputy General Counsel, Department of Defense, to Mr Melvin Sabshin, M.D., Medical Director, American Psychiatric Association, subject: Response to Request for Privilege, Sept. 16, 1996; LTC Beth A. Unklesbay, USAF, Office of Legislative Liaison, Congressional Inquiry Division Letter to The Honorable Patricia Schroeder, Congressperson, Subject: Response to Aug. 22, 1996 Letter, Sept. 9, 1996; The Honorable Stephen Joseph, Assistant Secretary of Defense (Health Affairs), Memorandum to The Honorable Judith Miller, DOD General Counsel, Subject: Confidentiality of Patient Records, Sept. 9, 1996 [hereinafter Joseph Letter to DOD GC]; Memorandum, DOD General Counsel, to The Honorable Stephen Joseph, Under Secretary for Defense (Health Affairs), subject: Legal Privilege for Therapist-Patient Communications, 23 Sept. 1996. (On file with the author).

[123] *See* The Honorable Patricia Schroeder, *Confidentiality is Vital*, ARMY TIMES, Oct. 7, 1996, at 62; The Honorable Patricia Schroeder, Press Release, Sept. 19, 1996.

[124] *See* Seven Congressperson Letter, *supra* note 115 (Urging that the Military Rules of Evidence be amended to create a psychotherapist-patient privilege for non-active duty patients).

[125] Telephone interview with Colonel Charles Trant, *infra* note 198, and accompanying text.

[126] Joint Service Committee on Military Justice, Notice of Proposed Amendments, 62 FR 24640-01 (text of the proposed rule is included at appendix C).

requires as a predicate the general recognition of the privilege in the trial of "criminal cases" in Federal district courts; (2) *Jaffee* does not apply since MRE 501(d)[127] bars application of the privilege; (3) *Jaffee* applies to non-military personnel only because MRE 501(d) bars recognition of the privilege for military personnel only; and (4) *Jaffee* applies in military courts-martial. The interaction of MRE 501(a)(4) and MRE 501(d), which controls the military's recognition of the "new" federal psychotherapist-patient privilege, remains as the central issue in the debate over *Jaffee's* applicability. The resolution of this issue will have implications for the military justice system, administrative separation and disciplinary procedures, and the protection of mental health records and information.[128]

1. *Underlying Environment.*

a.*. *Pre-Jaffee Status of the Privilege under the Military Rules of Evidence—Prior to *Jaffee* the issue of a psychotherapist-patient privilege in military courts-martial seemed fairly clear cut since no privilege existed in federal law. The two cases which addressed the issue did so in a cursory manner,[129] concluding with little to no analysis, that "[t]here is no physician-patient privilege or psychotherapist-patient privilege in federal law, including military law."[130] The Supreme Court's decision in *Jaffee* reopened this closed door.

b. ***Status of the Military Rules of Evidence***—The Military Rules of Evidence are part of the Manual for Courts-Martial (the Manual or MCM),[131] and are promulgated by the President in accordance with the authority granted him in article 36 of the Uniform Code of Military Justice (UCMJ).[132] The

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[127] "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." MCM, *supra*, note 5, MIL. R. EVID. 501(d).

[128] Again because privilege rules necessarily impact on the confidentiality of information, any decision on the psychotherapist-patient privilege in military courts-martial will impact on administrative proceedings.

[129] *See* United States v. Mansfield, 38 M.J. 415 (C.M.A. 1993), *cert. denied* 114 S. Ct. 1610 (1994); United States v. Brown, 38 M.J. 696 (A.F.C.M.R. 1993), *review denied* 40 M.J. 287 (C.M.A. 1994). *See also* Zanotti & Becker, *supra* note 91, at 15-32 (presenting good discussion of all preceding cases addressing this issue to include Art. 31b and attorney-client privilege cases).

[130] United States v. Mansfield, 38 M.J. 415, 418 (C.M.A. 1993). *See* United States v. Brown, 38 M.J. 696 (A.F.C.M.R. 1993) (citing Mansfield simply for the quoted proposition).

[131] MCM, *supra* note 5.

[132] 10 U.S.C. § 836, UCMJ art. 36 (1983), ("Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of

Rules of Evidence and the Manual are binding while the drafters discussion, included in appendix 22 of the Manual, is not.[133] The drafters analysis, however, can be analogized to a legislative history, and can be used to interpret terms within the rules. MRE 102 also gives general rules of construction for the Military Rules of Evidence.[134] Whenever possible the UCMJ and the

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criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.").

[133] *See* United States v. Fisher, 37 M.J. 812 (N.M.C.M.R. 1993) (R.C.M.s are binding, they are issued by the President IAW the authority in Article 36, UCMJ, but the Discussion accompanying each Rule is not binding); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (3d ed. 1992) (hereinafter MILITARY PRACTICE); STEPHEN A. SALTZBURG, ET. AL., MILITARY RULES OF EVIDENCE MANUAL, 7 (3d ed. 1991) (hereinafter MRE MANUAL). *See also* S. Rep. 96-197, 96th Cong., 1st Sess. 1979, 1979 U.S.C.C.A.N. 1818 (Legislative history clarifying Congressional intent in passing Article 36, UCMJ.

> The Proposal neither changes nor expands the existing power under which the President promulgates the Manual for Courts-Martial. The language of the present Article 36 may be traced to Article 38 of the Articles of War of August 29, 1916, Chapter 418, sec. 1342, 39 Stat. 656, which provided: 'The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: provided, that nothing contrary to or inconsistent with these Articles shall be so prescribed: Provided further, that all rules made in pursuance of this Article shall be laid before Congress annually.' This provision has remained virtually unchanged in pertinent part through successive amendments of the Articles of War and incorporation into Article 36 of the Uniform Code of Military Justice. It has provided the statutory authority for coverage of pretrial and post-trial procedures in every edition of the Manual for Courts-Martial issued by the President since 1928. The fair and efficient operation of the military justice system is dependent upon the authoritative legal guidance provided to members of the armed forces by the Manual for Courts-Martial. Enactment of the proposed legislation will reaffirm the power exercised by the President for more than fifty years to prescribe a comprehensive and effective Manual for Courts-Martial.

[134] MCM, *supra* note 5, MIL. R. EVID. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."). *See also* SALTZBURG, ET. AL., MRE MANUAL, *supra* note 133, at 12. MRE 102 lists six goals: "securing fairness in the administration of justice; eliminating unjustifiable delay; eliminating unjustifiable expense; promoting the growth and development of the law of evidence; enhancing the truth finding process; and justly determining the guilt or innocence of the accused." MRE 102 will provide limited aid in resolving the psychotherapist-patient issue since arguments can be made for both positions from MRE 102. The recognition of the applicability of Jaffee promotes the growth and development of the law. Conversely recognizing any new privilege does not enhance the truth finding process.

Manual for Courts-Martial should be construed to avoid any potential conflict.[135]

In defining the scope of the Military Rules of Evidence, the drafters in MRE 101 authorized the use, as secondary sources, of "the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, . . . if not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual."[136] Thus even the drafters envisioned a close connection between federal and military practice.[137] The drafters' analysis of MRE 101 recognizes that a significant policy consideration in adopting the Federal Rules of Evidence was to ensure, where possible, common evidentiary law.[138] Thus decisions by Article III courts in interpreting rules common to both the federal and military systems "should be considered very persuasive, . . . [but] not binding."[139] The drafters' analysis also states that "to the extent that a Military Rule of Evidence reflects an express modification of a Federal Rules of Evidence or a federal evidentiary procedure, the President has determined that the unmodified Federal Rule or procedure is, within the meaning of Article 36(a), either not 'practicable' or is 'contrary to or inconsistent with' the Uniform Code of Military Justice."[140] However, this guidance is of limited

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[135] *See* United States v. Lucas, 1 C.M.R. 19, 22 (C.M.A. 1951) ("We can and do hold that the act of Congress (the Code) and the act of the Executive (the Manual) are on the same level and that the ordinary rules of statutory construction apply. In the event that the general rule is that statutes dealing with the same subject should, if possible, be so construed that effect is given to every provision of each."); United States v. LaGrange, 3 C.M.R. 76 (C.M.A. 1952) (stating regulations and statutes are to be construed with reference to their manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat that object, they should receive the former construction). Thus, Presidential intent for Manual provisions is akin to Congressional intent for Code provisions. If there is a conflict between the Manual and the Code the Code prevails. *See* United States v. Greer, 13 C.M.R. 132 (C.M.A. 1953).

[136] MCM, *supra* note 5, MIL. R. EVID. 101(b)(1).

[137] This view continued so long as military practitioners viewed changes in the Federal Rules of Evidence as supporting the dual goals of the military justice system—the fair administration of justice and the preservation of good order and discipline. The creation and adoption of FED. R. EVID. 413 & 414 (Evidence of Similar Crimes in Sexual Assault Cases, and Evidence of Similar Crimes in Child Molestation Cases) caused military practitioners to question whether continued close ties between the civilian and military systems was still desirable. The JSC is now examining a proposal to extend the 180 days waiting period under MIL R. EVID. 1102 before amendments to the Federal rules apply to the Military Rules to one and one and one-half years allowing the military more time to examine new rules and take action to avoid their automatic implementation if necessary.).

[138] MCM, *supra* note 5, MIL. R. EVID. 101 analysis, app. 22, at A22-2 (1995 ed.).

[139] *Id.*

[140] *Id.* It goes on to say, "[c]onsequently, to the extent to which the Military Rules do not dispose of an issue, the Article III Federal practice when practicable and not inconsistent or contrary to the Military Rules shall be applied. In determining whether there is a rule of evidence 'generally recognized,' it is anticipated that ordinary legal research shall be involved

assistance in analyzing MRE 501 since it both modifies and expressly adopts the approach taken by the Federal Rules.

The drafters of the privilege rules under the Military Rules of Evidence were aware of the debate that occurred over the passage of the privilege section of the Federal Rules.[141] Rather than adopt a system similar to that adopted by Congress which left the development of the rules of privilege to the courts, the drafters felt that more specific guidance was necessary for military courts-martial.[142] The drafters combined the flexible approach taken by the Federal Rules with the specific privileges listed in the 1968 Manual.[143] Thus, the general rule on privileges, MRE 501, which incorporates the "principles of common law" generally recognized by federal courts, was combined with the specific privileges listed in MRE 502 through MRE 509.[144]

2. The Dispositive Issue: MRE 501(a)(4) & 501(d)

MRE 501(a) limits the claim of privilege to those privileges required by or provided for in the Constitution, an Act of Congress applicable to trial by courts-martial, the Military Rules of Evidence or the Manual, or:

> The **principles of common law** generally recognized in the trial of **criminal** cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence **insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual**.[145]

MRE 501(a)(4) directly incorporates the term "principles of common law" as it exists in FRE 501. There are two major limitations on this incorporation. First is the requirement that the "principle of common law" must be generally recognized in criminal cases in United States District Courts. Second, the application of these principles must be practicable, and "not contrary to or

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with primary emphasis being placed upon the published decisions of the three levels of the Article III courts."

[141] MCM, *supra* note 5, MIL. R. EVID. 501 analysis, app. 22, at A36-37 (1995 ed.).

[142] MCM, *supra* note 5, MIL. R. EVID. 501 analysis, app. 22, at A36-37 (1995 ed.).

[143] *Id*.

[144] MCM, *supra* note 5, MIL. R. EVID. 502 Lawyer-client privilege; MIL. R. EVID. 503 Communication to a Clergy; MIL. R. EVID. 504 Husband-wife privilege; MIL. R. EVID. 505 Classified Information; MIL. R. EVID. 506 Government Information other than classified information; MIL. R. EVID. 507 Identity of informant; MIL. R. EVID. 508 Political vote; MIL. R. EVID. 509 Deliberations of courts and juries.

[145] MCM, *supra* note 5, MIL. R. EVID. 501 (emphasis added).

inconsistent with the code, these rules, or this Manual."[146] The four positions interpreting *Jaffee v. Redmond* revolve around these two limitations.

3. Interpretations:

a. *First Interpretation*—The first interpretation of the *Jaffee* decision, based on MRE 501(a)(4), is that it does not apply to military courts-martial since *Jaffee* was a civil case. MRE 501(a)(4) requires general recognition in **criminal** cases. The Supreme Court deliberately left the definition of the scope of the privilege to development on a case-by-case basis,[147] and did not explicitly recognize its applicability to criminal trials. Nevertheless, a narrow definition of the scope of the privilege, limiting it to non-criminal cases is unlikely.[148] Although the issue of a psychotherapist-patient privilege was decided in a civil context, the Supreme Court expansively adopted an absolute privilege. The Court explicitly rejected the Seventh Circuit's recognition of a qualified privilege which required a balancing of the evidentiary need against the social benefits gained by the application of the privilege.[149] The wording of the Court's decision implies an expectation that it would apply in the criminal context:

> We reject the balancing component of the privilege implemented by that court [the Seventh Circuit] and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege . . . . If the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all . . . .[150]

This broad wording rejected the qualified privilege advocated by Officer Redmond and adopted by the Seventh Circuit in the case below as not sufficiently protective.[151] In addition, the Court's failure to include a criminal case exception, after its in-depth analysis of all fifty States' statutory

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[146] *Id*.
[147] *See Jaffee*, 116 S. Ct. at 1932.
[148] FED. R. EVID. 101 & 1101 states that the Federal Rules of Evidence apply in courts of the United States, including both civil actions and proceedings and criminal cases and proceedings; and that rules of privilege apply at all stages of all proceedings. *See* STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 9-11, 563-579 (5th Ed. 1990).
[149] *See Jaffee*, 116 S. Ct. at 1931.
[150] *Id*. at 1932.
[151] *See Jaffee*, 116 S. Ct. at 1932; *Jaffee*, 51 F.3d at 1357; Respondent's Brief at 7-8, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (No. 95-266).

privileges, some of which explicitly exempt criminal proceedings, certainly indicates a disinclination to do so. Further, in the months since *Jaffee* was decided, three federal district court decisions have applied *Jaffee* in a criminal context,[152] with one of the courts recognizing that the privilege would apply even against a Confrontation Clause challenge.[153] The Supreme Court's high profile seven-two decision recognizing the psychotherapist-patient privilege "under the principles of common law . . . in light of reason and experience,"[154] when combined with subsequent federal district court actions, strongly argues against this narrow first interpretation of *Jaffee's* effect on military practice.

b. ***Practicality & Automatic Incorporation?***—The proviso in MRE 501(a)(4) that the application of the principles of common law be practicable, also does not seem to effectively limit the application of the psychotherapist-patient privilege in the military system. No guidance has been given on what is considered "practicable," but no evidence exists that the military mental health or legal system is not capable of practically applying such a privilege.[155] Military mental health practice is substantially similar to civilian practice.[156] Administrative changes would be required in military regulations governing mental health care records,[157] but none of these would rise to the level of impracticability.[158] Some analysts feel that *Jaffee* does not apply to military

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[152] *See* United States v. Lowe, 948 F. Supp. 97, 1996 WL 713070 (D.Mass. 1996) (extending *Jaffee* to rape-counselor-victim privilege, recognized yet waived here, Confrontation Clause issue not addressed); United States v. Schwensow, 942 F. Supp. 402 (1996) (dealing with motion for reconsideration of suppression motion of defendant's asserted psychotherapy admissions. Admissions not made to psychotherapists for purpose of obtaining counseling services); United States v. Haworth, 168 F.R.D. 660 (1996) (finding psychotherapy records are privileged under *Jaffee v. Redmond*. Sixth Amendment confrontation rights are satisfied by allowing cross examination of witness about therapy, access to records is prohibited).

[153] *See* United States v. Haworth, 168 F.R.D. 660 (1996).

[154] FED. R. EVID. 501.

[155] *See* Zanotti & Becker, *supra* note 91, at 15.

[156] *See id*. at 63, n.454 ("In general, military mental health care is similar to that provided in the civilian sector. All of the same issues seen in small practices to large medical centers have their counterpart in the military. Where military practice differs from its civilian counterpart is in relation to administrative military duties and the special challenges combat and combat related pressures create." Examples of administrative duties are: "performing mental status exams for administrative separations, investigations into suspected suicides of military members, psychiatric evaluations as part of security clearance assessments, and clinical review of positive urine drug screens.").

[157] DEP'T OF THE ARMY REG. 40-66, MEDICAL RECORD ADMINISTRATION, (July 20, 1992) (medical records are not privileged) [hereinafter AR 40-66], DEP'T OF THE ARMY REG. 40-68, MEDICAL SERVICES — QUALITY ASSURANCE ADMINISTRATION, (20 Dec. 1989) (IO3, 30 Jun. 1995) [hereinafter AR 40-68].

[158] *See* Zanotti & Becker, *supra* note 91, at n.224 (The authors argue that claims of impracticability reduce down to bare policy arguments, since the drafters recognized "that Fed. R. Evid. 501, without any specificity, was itself 'impracticable' for the military").

courts-martial automatically, requiring instead some "enabling legislation"[159] by the President or Congress through the rules or code amendment process.[160] The text of MRE 501, however, argues strongly against this view. That rule was drafted to allow both a specific set of privilege rules for use by military courts-martial while simultaneously allowing some flexibility by automatically incorporating the changes generally recognized in federal district court criminal cases.[161]

c. ***Second & Third Interpretations***—The second and third interpretations of the applicability of *Jaffee* to military practice depend on the effect of MRE 501(d) which states: "[n]otwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity."[162] The crucial issue is the interpretation of this provision and of MRE 501(a)(4) which prohibits the incorporation of any privilege rule recognized under FRE 501 "insofar as the application of such principles in trials by court-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual."[163] In simpler terms, is a psychotherapist-patient privilege contrary to or inconsistent with MRE 501(d)? If so, *Jaffee* does not apply. If not, MRE 501(a)(4) automatically incorporates the privilege. If the privilege is only partially inconsistent with MRE 501(d), then the privilege applies **insofar** as it is consistent.

The second interpretation answers this question simply. Yes, MRE 501(d) completely bars the incorporation of the psychotherapist-patient privilege recognized in *Jaffee*, because this privilege is a subset of the broader physician-patient privilege. When interpreted by reference to the policy expressed in the drafters' analysis, MRE 501(d) prevents "the application of a doctor-patient privilege."[164] In the Rule, the drafters used the wording, "on the

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[159] The term "enabling legislation" is used broadly here to cover both the President's rule making authority under Article 36, UCMJ and Congress' legislative amendment of the UCMJ.

[160] Telephone interview with LTC Linda Webster, U.S. Army Trial Judiciary (Feb. 14, 1996). The JSC is unanimous that some sort of Manual provision is required to incorporate a Jaffee privilege. The author disagrees since the text of MRE 501(a)(4) is clear and unambiguous in requiring no additional action by the President. *See also* Zanotti & Becker, *supra* note 91, at 32-37 (discussing military cases predating *Jaffee* which directly incorporated privilege exceptions recognized in federal common law into military practice under MRE 501(a)(4) and concluding that they can be automatically incorporated).

[161] MCM, *supra* note 5, MIL. R. EVID. 501; MIL. R. EVID. 501(a)(4); MIL. R. EVID. 501 analysis, app. 22 at A36-37 (1995 ed.). *See generally* SALTZBURG, ET. AL., MRE MANUAL, *supra* note 133, at 538 (3d ed. 1991) (noting it is an open question of whether military courts can recognize new common law privileges or must wait for federal courts to do so and incorporate through MIL. R. EVID. 501(a)(4). Further noting drafters compromised to allow some dynamism, and enough clarity for non-practitioners to use MCM.).

[162] MCM, *supra* note 5, MIL. R. EVID. 501(d).

[163] *Id*.

[164] MCM, *supra* note 5, MIL. R. EVID. 501(d) analysis, app. 22, at A22-37 (1995 ed.).

basis it was acquired by a medical officer or civilian physician in a professional capacity" to bar any medical privilege since "[s]uch a privilege was considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel."[165] The interpretation of the term "medical officer" is necessary to define the effect of MRE 501(d). A broad interpretation that includes any military health care provider supports the policy expressed in the drafters' analysis.[166] However, such a broad interpretation is troublesome since (1) the same rule bars only information acquired by civilian physicians creating an illogical split between mental health care given in the military and civilian systems; and (2) since the term "medical officer" traditionally includes only physicians in the military.[167]

The drafters' analysis goes on to emphasize the "strong anti-medical privilege position,"[168] of the military privilege rules by stating that the military will look to the law of the forum in evaluating privilege claims.[169] The drafters' analysis directly contemplates compelling testimony from civilian physicians providing care to military patients despite state privilege protections.[170] Unfortunately, the differentiation between military "medical officers" and "civilian physicians" in MRE 501(d) weakens the argument that "medical officer" be interpreted broadly since such an interpretation causes an absurd result: (1) barring the privilege as applied to any military health care provider but not any civilian health care provider; and (2) barring the application of the privilege recognized in *Jaffee* for civilian psychiatrists, but not for psychologists or clinical social workers. The deliberate inclusion and discussion of compelling testimony from civilian physicians despite state privilege law implies an intent that all such evidence be treated equally in military courts-martial.

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[165] *Id*.

[166] Telephone interview with Fred Lederer, Professor of Law, William & Mary Law School (Feb. 25, 1997) (MRE 501(d) was intended to bar any medical privilege that would interfere with the commander's ability to ensure the health or fitness for duty of their soldiers, sailors, airmen, and marines. Specific scenarios involving mentally disturbed individuals were discussed in the Joint Service Committee on Military Justice.) Then Major Fredric Lederer, U.S. Army, of the Evidence Working Group of the Joint Service Committee on Military Justice primarily prepared the original Analysis of the Military Rules of Evidence. MCM, *supra* note 5, MIL. R. EVID. 501(d) analysis, app. 22, at A1 (1995 ed.).

[167] *See* DEP'T OF THE ARMY PAM. 600-4, ARMY MEDICAL DEPARTMENT OFFICER PROFESSIONAL DEVELOPMENT AND UTILIZATION, Paras. 2-4c & 8-2d (May 1977) (Army Medical Corps includes only physicians. Psychologists and Social Work Officers are members of the Medical Service Corps.).

[168] STEPHEN A. SALTZBURG, ET. AL., MILITARY RULES OF EVIDENCE MANUAL, 535-43 (3d ed. 1991).

[169] *Id*. at 537; United States v. Johnson, 47 C.M.R. 406 (C.M.A. 1973).

[170] MCM, *supra* note 5, Mil. R. Evid. 501(d) analysis, app. 22, at A36-37.

The second view is supported by the fact that the drafters were aware of Proposed Rule 504[171] when they formulated the specific privileges included in MRE 502 through MRE 509. They did not include a specific privilege rule covering the psychotherapist-patient relationship. Instead, the drafters specifically included MRE 501(d) to bar or preclude any privilege that would interfere with the military's duty to ensure the health, both physical and mental, of their personnel.[172] This interpretation ignores the text of MRE 501(d) and focuses on the expressed intent behind the rule to bar **any** psychotherapist-patient privilege, as applied to both military personnel and civilians.

The third interpretation sees MRE 501(d) as barring only a psychotherapist-patient privilege as applied to military personnel. The third interpretation also requires MRE 501(d)'s interpretation using the drafters' analysis comment on the armed forces' interest in ensuring the health and fitness for duty of personnel. The critical difference here, however, is that no such need or interest exists for non-military personnel.

Since many Military Rules of Evidence are identical to their equivalent Federal Rules of Evidence, interpretation of a Military Rule of Evidence that differs from the Federal Rule must include an evaluation of the deliberate difference.[173] Section V, the privilege section of the Military Rules, attempts to both delineate specific rules yet simultaneously allow dynamic change by directly incorporating changes occurring under FRE 501. MRE 501(d)

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[171] Proposed Rule 504 applied to "persons authorized to practice medicine in any state or nation . . . or a person licensed as a psychologist under the laws of any state or nation, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction." Proposed Rule 504, *supra* note 93.

[172] Telephone interview with Fred Lederer, Professor of Law, William & Mary Law School (Feb. 25, 1997) (The inclusion of MRE 501(d) was intended to bar any medical privilege that would interfere with the commander's ability to ensure the fitness for duty of their soldiers, sailors, airmen, and marines. The rule was intended to bar a doctor-patient privilege or medical privilege of any kind. Specific scenarios involving mentally disturbed individuals were discussed in the committee. However, there was no contemplation of any social worker privilege at that time. The primary focus was on barring application of any such privilege for military members, no specific discussion of victim's records was held. Additionally, the committee did include specific protections in the drafting of MRE 412, which was more protective than the federal rule at that time. The issue of the confidentiality limits was seen as outside the purview of the rule since no privilege was written into the military rules, although necessarily interrelated as a practical matter. These confidentiality limits were considered to be a service matter to be addressed by regulation. The intent of the words in MRE 501(d) were intended to bar a privilege on any medical matter. The drafters' intent was to ensure that the commanders' need to know the mental status of their personnel—to avoid the "madman in the missile silo scenario"—was protected by the Military Rules of Evidence.) Whether they do so is the subject of this paper. *See also* discussion *infra* note 217 and accompanying text for discussion of the "madman in the missile silo" type scenario exemplifying why the military needs to have access to its personnel's mental health information.

[173] *See* SALTZBURG, ET. AL., MRE MANUAL, *supra* note 133, at 7.

attempted to ensure that military courts-martial would never accept a privilege recognized under FRE 501 which interfered with the military's responsibility to ensure the health and fitness for duty of its personnel. Accepting the third interpretation both recognizes the difference in MRE 501(d),[174] and the overall policy of incorporating changes in the federal rules of privilege under the principles of common law.[175] Additionally, the environment in which military courts-martial operate has changed since the Military Rules of Evidence were drafted.[176]

Neither the text, purpose, nor interpretation of MRE 501(d), in light of that purpose, bars the application of a psychotherapist-patient privilege for civilians. MRE 501(a)(4) incorporates the principles of common law **"insofar as the application is not contrary to or inconsistent with** the code, these rules, or the MCM." Privileges recognized under FRE 501 apply in military courts-martial "insofar" as their application does not conflict with the code, rules, or MCM. Thus a partial incorporation of the privilege into military courts-martial can be supported by MRE 501(a)(4)'s use of the term "insofar." The text of MRE 501(d), even expansively interpreted using the drafters' analysis, does not bar the application of the privilege for civilians.[177] The application of the *Jaffee* psychotherapist-patient privilege for civilians is not contrary to or inconsistent with the code, the rules, specifically MRE 501(d), or the MCM. Therefore, the third interpretation sees *Jaffee* as supporting the recognition of the privilege to the extent it protects non-military patients' confidential communications to a psychotherapist.

d. ***The Fourth Interpretation***—Finally, the fourth interpretation sees MRE 501(d) as having no effect on the incorporation of the psychotherapist-patient privilege recognized in *Jaffee*. The text of MRE 501(d), barring the

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[174] The military's need to know the health and fitness for duty of its personnel.

[175] *See* SALTZBURG, ET. AL., MRE MANUAL, *supra* note 133, at 7 (In addition, some military courts have been reversed for failure to consider persuasive federal authority that would have had a direct effect on the issue at hand when interpreting Military Rules of Evidence). *See e.g.* United States v. Moore, 34 C.M.R. 415 (C.M.A. 1964); United States v. Clemons, 16 M.J. 44 (C.M.A. 1983) (noting failure to consider federal authority which had a bearing on the interpretation of a Military Rule of Evidence).

[176] At the time of the drafting of the Military Rules of Evidence, the more stringent requirements of pleading and proving service-connection limited the number of situations where the military tried typical criminal cases involving off-duty conduct and civilian victims. *See* Parker v. Levy, 417 U.S. 733 (1974); Relford v. Commandant, 401 U.S. 355, 367-368 (1971). *United States v. Solorio* expanded and simplified military practice. *See* 483 U.S. 435 (1987). The Supreme Court was more willing to recognize a wider subject matter jurisdiction for military courts-martial because of its perception of the system's fairness and protection of individual rights. MRE 501(d) and the drafters' analysis were written against this pre-*Solorio* background. Limiting the effect of MRE 501(d) to barring the application of the privilege only for military members supports both the intent of the drafters, however inartfully drafted, and the changes in military practice and society since *Solorio*.

[177] The term "civilians" here is not intended to include personnel included in art. 2, UCMJ. S*upra* note 7.

application of any privilege "on the basis that it was acquired by a medical officer or civilian physician in a professional capacity" is clear. Only evidence privileged on the MRE 501(d) specified basis is barred. The privilege recognized in *Jaffee* is not based on the fact that the information was acquired by a physician. It is a separate and distinct privilege from the doctor-patient privilege, and is not subsumed in that privilege. The fact that some psychotherapists are also physicians is coincidental. Thus MRE 501(d) does not dispose of the issue.[178] The Supreme Court emphasized the distinctions between the two privileges in *Jaffee* by focusing on psychotherapy's dependence of confidentiality-its "*sine qua non.*" The Supreme Court highlighted the fact that the need for confidentiality is significantly different in the psychotherapist-patient relationship than in the doctor-patient relationship.[179] A noted treatise on military law has echoed this finding in discussing MRE 501(d), stating that "it is unclear whether a narrow psychotherapist-patient privilege, rather than a broader doctor-patient privilege is barred by this subdivision.[180] We would think that it would not be barred in light of the extraordinary need for confidentiality between psychotherapist and patient that is as important in military as in civilian life."[181]

The Supreme Court's actions in *Jaffee* show its recognition of the separate basis for the psychotherapist-patient privilege. The Court, in recognizing the privilege, went well beyond the parameters envisioned in Proposed Rule 504 which covered only physicians and psychologists engaged in the treatment of mental illness. In *Jaffee*, the Court extended the privilege to cover clinical social workers engaged in psychotherapy, based largely on a functional analysis as discussed earlier in this paper.[182] The Supreme Court's extension of the privilege highlights its view of the psychotherapist-patient privilege as separate and distinct from the traditional doctor-patient privilege.

The drafters themselves recognized that a privilege arising from a basis other than the doctor-patient basis would not be barred by MRE 501(d), even if the communication is made to a physician. In the Analysis they state, "[t]he privilege expressed in Rule 302 and its conforming Manual change in para. 121, is not a doctor-patient privilege and is not affected by Rule 501(d)."[183] The text of MRE 501(d) is clear: "information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." Information protected by the psychotherapist-patient privilege is not privileged **on that basis**. If a statute's

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[178] *See* United States v. McConnell, 20 M.J. 577 (N.M.C.M.R. 1985) (stating it is only where the military rules do not dispose of an issue that the Article III federal practice when practicable and not inconsistent or contrary to the military rules shall be applied).
[179] *Jaffee*, 116 S. Ct. at 1928.
[180] Referring to MRE 501(d).
[181] *See* SALTZBURG, ET. AL., MRE MANUAL, *supra* note 133, at 537.
[182] *See Jaffee*, 116 S. Ct. at 1931, n.16; *supra* note 87 and accompanying text.
[183] MCM, *supra* note 5, MIL. R. EVID. 501, analysis, app. 22, at A36-37 (1995 ed.).

meaning is clear, then courts do not resort to the legislative history in interpreting the law.[184] The same maxim would apply to the text of the Rules in the Manual for Courts-Martial,[185] barring reference to the drafters' Analysis if the text of the rule is clear. Additionally, the drafters' Analysis is not binding.[186]

The drafters were aware of the existence of Proposed Rule 504 when they combined "the flexible approach taken by Congress" under FRE 501 with the adoption of specific privileges to guide military practitioners. That rule[187] included non-physicians in the coverage of the privilege. Numerous state statutory privileges also extended the privilege to non-physicians. More importantly, psychologists have been involved in mental health care with patients in the military since the mid-1950s.[188] The technical meaning of the term "medical officer" in the military includes only physicians.[189] The drafters were aware of these mental health care realities, but chose wording in MRE 501(d) that barred only privileges based on status as physicians.

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[184] *See* United States v. Teal, 34 C.M.R. 890, 892-893 (A.F.B.R. 1964) (holding there is no room for statutory interpretation through reference to extrinsic materials where the text of the statute carries within itself a plain, unambiguous meaning, constructional changing of a statute is resorted to only when there is persuasive basis for concluding that the literal text does not conform to the legislative intent); United States v. Ware, 1 M.J. 282 (C.M.A. 1976) (explaining plain and unambiguous statute is to be applied, not interpreted, and where no ambiguity is apparent there is no reason to resort to the rules of statutory construction. To the extent that a Manual for Courts-Martial provision is irreconcilably in conflict with the Uniform Code of Military Justice, it must yield to the statute). *See also* Levy v. Killon, 286 F. Supp 593 (D.C. Kan. 1968), *aff'd*, 415 F.2d 1263 (recognizing MCM has the force of statutory law).

[185] The Military Rules of Evidence were originally enacted by President Carter in 1980 by Executive Order No. 12,198, 45 Fed. Reg. 16,832 (1980). Since then the Manual, including the Rules, has been amended, mostly recently by Executive Order No. 12,960, signed by President Clinton on 12 May 1995.

[186] *See* United States v. Fisher, 37 M.J. 812 (N.M.C.M.R. 1993), *aff'd*, 40 M.J. 293 (C.M.A. 1994) (stating the supplementary materials in the MCM, which include the Discussion, Analysis, and appendices, do not constitute a rule, do not represent the views of the Department of Defense or the military departments, and do not create rights or responsibilities that are binding on any person, party, or entity. Therefore they are not a part of the Rules and do not constitute a mandate by the President under his UCMJ rule-making authority).

[187] Proposed Rule 504, *supra* note 93.

[188] Telephone interview with Colonel Dennis Grill, Psychology Consultant to the U.S. Army Surgeon General (Feb. 4, 1997) (Walter Reed's psychology training program was accredited in 1958. Training commenced prior to that date.).

[189] DEP'T OF THE ARMY PAM. 600-4, ARMY MEDICAL DEPARTMENT OFFICER PROFESSIONAL DEVELOPMENT AND UTILIZATION, (May 1977) (Para. 2-4c: Army Medical Corps includes only physicians. Para. 8-2d: Psychologists and Social Work Officers are members of the Medical Service Corps.).

Finally, the text of MRE 501(d) itself makes its attempted limitation on MRE 501(a)(4) irrelevant.[190] The rule begins, "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis . . . ." [191] However, information which is protected by the *Jaffee* psychotherapist-patient privilege is "otherwise privileged" by the operation of MRE 501(a)(4) rendering the remainder of MRE 501(d) irrelevant. Since no ambiguity exists in the text of the rule, MRE 501(d), however interpreted, has no effect on the incorporation of the *Jaffee* privilege under MRE 501(a)(4). A strict interpretation of the text of MRE 501(d), leads to the conclusion that the psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee*, and incorporated into military law by MRE 501(a)(4), is not contrary to or inconsistent with the code, the rules, or the Manual.

4. *Conclusion*

Of the four interpretations above, the final two are the most supportable under the law, and legislative history of the UCMJ, and MCM. The third interpretation recognizing the privilege for non-military personnel is the most supportable when the drafters' intent for MRE 501(d)—barring any privilege that would interfere with the commander's ability to ensure the fitness for duty of his soldiers—is included in the analysis. However, this interpretation requires ignoring the text of MRE 501(d). In my opinion an unbiased reading of *Jaffee* recognizes that the Supreme Court clearly viewed the psychotherapist-patient privilege as separate and distinct from the physician-patient privilege. Thus, MRE 501(d), however interpreted, does not prevent the immediate incorporation of the psychotherapist-patient privilege under MRE 501(a)(4). Further there is no ambiguity in the text of MRE 501(d); it does not apply by its own terms.[192] Military courts will initially determine which of the four interpretations of *Jaffee* discussed above will apply in courts-martial. Several military courts-martial have addressed the issue. None so far have explicitly recognized the applicability of *Jaffee* and based the exclusion

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[190] Telephone interview with Colonel Thomas G. Becker, USAF, Associate Deputy General Counsel (Military Justice and Personnel Policy), Department of Defense (Mar. 11, 1997) (clearer language was available to bar any medical privilege but was not used by the drafters).

[191] MCM, *supra* note 5, MIL. R. EVID. 501(d).

[192] No interpretation is required or permitted if no ambiguity exists. *See* United States v. Teal, 34 C.M.R. 890, 892-893 (1964) (explaining there is no room for statutory interpretation through reference to extrinsic materials where the text of the statute carries within itself a plain, unambiguous meaning, constructional changing of a statute is resorted to only when there is persuasive basis for concluding that the literal text does not conform to the legislative intent); United States v. Ware, 1 M.J. 282 (1976) (holding plain and unambiguous statute is to be applied, not interpreted, and where no ambiguity is apparent there is no reason to resort to the rules of statutory construction.).

of evidence solely on that basis.[193] The Air Force Judge Advocate General and Surgeon General circulated a memorandum to its field agencies and the judiciary stating that the "application of *Jaffee* to the military is impractical."[194] The discussion of at least three intellectually supportable positions on the applicability of *Jaffee* to military courts-martial, the Air Force opinion, and military courts' actions to date demonstrate that widely divergent positions on *Jaffee's* effect exist. The uncertainty generated by these varied positions will only worsen with time.

In July 1997, the Army Court of Criminal Appeals evaluated the claim of a psychotherapist-patient privilege.[195] The Court in that opinion analyzed the privilege using the approach outlined in the fourth interpretation above, and declined to explicitly recognize the privilege for the accused solely because the Court found the accused had waived the privilege by not objecting at trial. However, in *dicta*, the Court clearly signaled its intention to recognize the privilege, even for active-duty soldiers, in future cases. [196]

Ultimately, the President and Congress, the two powers entrusted with the regulation of the armed forces by the Constitution, will have to determine what *Jaffee's* effect will be. This decision will be made in the midst of public debate and controversy among the armed forces.[197] Congressional legislation on this issue is likely.[198] In an attempt to head off Congressional action, the Joint Service Committee on Military Justice (JSC) met on 13 and 28 March

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[193] Telephone interview with Colonel Kenneth D. Pangburn, Military Judge, Office of the Circuit Judge, Second Judicial Circuit, Fort Stewart Georgia (Feb. 4, 1997) [discussing United States v. Jeffers (HQ Ft. Stewart, July 1996) (acquittal). Admissions by accused were excluded based on combination of effects of Jaffee v. Redmond and Article 31 concerns]; Telephone interview with Lieutenant Colonel Linda Webster, U.S. Army Trial Judiciary (Feb. 14, 1997) (Of cases that raised psychotherapist-patient privilege issue, one dealt with admissions by the accused and by close family members of the accused in counseling with non-military counselors. Lieutenant Colonel Webster determined that Jaffee was not immediately applicable to the military in the first case, and deferred ruling on the applicability of Jaffee in the second.)

[194] USAF TJAG July 31, 1996 Memo & USAF SG July 31, 1996 Memo, *supra* note 115. *But see* Zanotti & Becker, *supra* note 91 (a claim of impracticability is essentially a policy argument not based on the text or interpretation of the rules).

[195] United States v. Demmings, 46 M.J. 877 (Army Ct. Crim. App. 1997).

[196] *Id.* at 883.

[197] Deep divisions exist among the military services on the psychotherapist-patient privilege and the issue of the effect of the *Jaffee* decision with the Navy taking a strong position against the privilege. *Infra* note 198.

[198] Telephone Interview with Colonel Charles Trant, Chief, Criminal Law Division, Office of the Assistant Judge Advocate General for Military Law and Operations (Mar. 14, 1997) (Two Congressional staffers on the Senate Armed Services Committee have threatened to legislate in this area. In response DOD may forward draft legislation which attempts to limit any legislation to directing the President to adopt a Military Rule of Evidence implementing a psychotherapist-patient privilege by a date certain. The short time constraints arise from the fact that the Senate Armed Services Committee is currently reviewing the 1998 DOD Authorization Act.) *See also* Seven Congressperson Letter, *supra* note 118.

1997 to finalize a draft Military Rule of Evidence implementing the psychotherapist-patient privilege,[199] which was published in the Federal Register on 6 May 1997 for public comment.[200]

[199] *Id*. (In these meetings the JSC reviewed both the substance and procedural aspects of the proposed rule. The procedural aspects of the rule includes the mechanism by which the military judge will access and review alleged privilege information. The proposed rule was completed, and presented to the DOD General Counsel in the JSC's annual review. On 6 May 1997 the proposed rule was published in the Federal Register for a ninety day public comment period. The proposed rule creates a privilege for civilians but not for active duty military. Much of the debate centered over whether the rule would cover some of the other categories of personnel subject to the code such as retirees, reservists, and personnel accompanying the force. There are generous exceptions for military necessity, for information relating to future crimes, mandatory reporting under federal and state law and military regulation which would cover the child sex abuse situation. There was a difference of opinion between the DOD and Navy representatives reflecting a basic disagreement over the purpose of the rule. DOD wanted to include exceptions that recognize the necessary interrelation of the privilege rule and the ethical limits of confidentiality. The Navy, however, wanted to limit the scope of the rule to address only those situations relevant to courts-martial. DOD hopes the public comment period, following publication of the proposed rule, will generate valuable input from experts, to include the medical community. The text of the proposed rule is included at appendix C and will be discussed later in this paper).

[200] Joint Service Committee on Military Justice, Notice of Proposed Amendments, 62 FR 24640-01.

V. SHOULD IT APPLY? POLICY CONSIDERATIONS

1. Background

The Constitution entrusts the power to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces to Congress,[201] and names the President as the Commander-in-Chief.[202] As part of this authority, Congress has authorized the President to promulgate rules for courts-martial,[203] to specifically include the Manual for Courts-Martial.[204]

However, Congress did not give this rule making power without guidance. Article 36, UCMJ directs the President to, "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."[205] Congress, thus wanted to keep the military system closely tied to the federal system, separated only when required by the unique circumstances of the military. Senator Sam Nunn has characterized Congress' intent, when exercising its Constitutional mandate, as a careful balancing of the rights of individual servicemembers and the needs of the armed forces.[206] For him, Congress has played a leading role in enhancing the rights of servicemembers.[207]

One way military member's rights are protected is through limitations on the use of mental health information. Current military regulations, however, limit protection of military mental health records to that provided by the Privacy Act, allowing access by agency officials with an official need to know.[208] Those agency officials include commanders, law enforcement agents

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[201] U.S. CONST. art. I, sec. 8, cl. 14.
[202] U.S. CONST. art. II, sec. 2, cl. 1.
[203] UCMJ art. 36, 10 U.S.C. § 836 (1983).
[204] *See* S. Rep. 98-197, 96th Cong., 1st Sess. 1979, reprinted in 1979 U.S.C.C.A.N. 1818 (Article 36 intended to authorize President to promulgate Manual for Courts-Martial.).
[205] UCMJ art. 36, 10 U.S.C. § 836 (1983).
[206] The Honorable Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 566 (1994).
[207] *Id*. at 565 (Senator Nunn lists as examples: enacting the UCMJ, establishing an independent civilian tribunal, the U.S. Court of Military Appeals to review court-martial cases, authorizing the appeal of specified military justice cases directly to the Supreme Court, enhanced procedural rights in the promotion process, expanding opportunity for wearing religious apparel while in uniform, and providing protection for military whistleblowers). The U.S. Court of Military Appeals was later renamed The United States Court of Appeals for the Armed Forces. 10 U.S.C. § 924 as amended by Act of Oct. 5, 1994, Pub. L. 103-337, 108 Stat. 2831, 2832 (1994).
[208] *See* AR 40-66 & AR 40-68, *supra* note 157; DEP'T OF THE NAVY, INS. 6150.1, HEALTH CARE TREATMENT RECORDS (25 Feb. 1987) [hereinafter NAVMEDCOMINST 6300.4]; DEP'T

conducting investigations, and defense counsel under appropriate discovery procedures under the MCM.[209] In certain cases, Congress has taken specific steps to protect misuse of the military mental health system by commanders for improper purposes. This legislation, as applied by DOD,[210] has imposed significant procedural safeguards for military members ordered to undergo command directed mental health evaluations.

In addition to enhancing protections for military members against misuse of mental health information, Congress has acted to protect crime victims' rights.[211]In recent years, Congress has taken significant legislative steps to ensure that crime victims are treated with fairness and respect for the victim's dignity and privacy. [212] The Department of Defense has implemented victims' rights programs in accordance with this Congressional policy and direction.[213] Typical scenarios experienced by military courts-martial involve demands for victim's psychotherapy records as part of pre-trial discovery by the defense. These victims' experience with this process will implicate the Congressional mandate that victims have the "right to be treated with fairness and with respect for [their] . . . dignity and privacy."[214]

The judiciary is also enhancing victims' rights. Federal district courts are applying a psychotherapist-patient privilege in criminal trials, and are evaluating claims by both defendants and victims to the protections afforded by the psychotherapist-patient privilege. These courts are also extending the *Jaffee* decision to recognize parent-child and rape counselor-patient privileges.

The federal judiciary will also have to address the issue of *Jaffee's* applicability when called upon to support military subpoenas for psychotherapy records and warrants of attachment. A practical issue exists in how the military will enforce its attempts to compel testimony from non-military mental health care professionals. Article 46, UCMJ authorizes

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OF THE AIR FORCE INS. 41-210, PATIENT ADMINISTRATION FUNCTIONS (26 Jul. 1994) [hereinafter AFI 41-210].

[209] *See* MCM, *supra* note 5, R.C.M. 701 (1995 ed.).

[210] *See* Pub. L. 101-510, "National Defense Authorization Act for Fiscal Year 1991" (NDAA FY 91) (Nov. 5, 1990); Pub. L. 101-484, NDAA for FY 93 (Oct. 23, 1992); DEP'T OF DEF. DIR. 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES (Sept. 14, 1993). *See also* Zanotti & Becker, *supra* note 92, at 47-48 (discussing these whistleblower protections).

[211] *See* United States v. Lowe, 948 F. Supp. 97 (D.Mass. 1996) (extending *Jaffee* privilege to cover rape crisis counseling records); *In Re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 402 (E.D. Wash. 1996) (recognizing privilege for confidential parent-child communications in criminal context).

[212] *See* 42 U.S.C. § 10601, § 10681 (1995); 18 U.S.C. § 1512-1514 (1984).

[213] *See* DEP'T OF DEF., DIR. 1030.1, VICTIM AND WITNESS ASSISTANCE (Nov. 23, 1994) [hereinafter DOD Dir. 1030.1]; DEP'T OF DEF., INS. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES, (Dec. 23, 1994); DEP'T OF THE ARMY REG. 27-10 MILITARY JUSTICE (June 24, 1996).

[214] 42 U.S.C.A. § 10606(b)(2) (1995).

process to compel the appearance of witnesses and the production of other evidence similar to that which courts of the United States having criminal jurisdiction may lawfully issue. Article 47, UCMJ makes refusal to appear or produce subpoenaed evidence a criminal offense and authorizes trial in a United States district court.[215] Although the law of the particular forum in which the case is litigated determines the applicability of the privilege, military courts-martial would be required to have its service enforced, and have persons refusing to testify or produce evidence prosecuted, in federal district courts which do recognize the psychotherapist-patient privilege. Alternatively Article 46, UCMJ authorizes the issuance of a warrant of attachment taking the witness into custody by a U.S. marshal or military officer.[216] Beyond the obvious public relations sensitivities, a person so taken into custody could bring suit to enjoin such an action or commence a habeus corpus proceeding to secure his release from military custody. Federal district courts would be forced to examine the effect of *Jaffee* on military practice in either of these two circumstances. In doing so, they will interpret the interaction of MRE 501(a)(4) and MRE 501(d). The outcome is far from clear—there are at least four different interpretations of *Jaffee's* effect as discussed above. These courts are unlikely to be receptive to military claims that no privilege exists for both military and civilian personnel.

2. Confidentiality and the Military's Need to Know

The importance of confidentiality to successful mental health care treatment, recognized by the Supreme Court, also exists within the military community. However, the countervailing need for the military to know the mental status of its personnel changes the utilitarian analysis of the privilege. The mission of the military necessarily involves the use of dangerous equipment, access to weapons and classified information, control of nuclear weapons, and life-and-death reliance on the stability of other service members.[217] The rationale described under the drafters' analysis to MRE

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[215] UCMJ art. 47, 10 U.S.C. §. 847 (1983) as amended by Act of Feb. 10, 1996, Pub. L. 104-106, 110 Stat. 461 (1996).

[216] *See* Major Calvin M. Lederer, *Warrant of Attachment—Forcible Compelling the Attendance of Witnesses*, 98 MIL. L. REV. 1 (1982). Now this offense can be tried as a misdemeanor or a felony. UCMJ art. 47, 10 U.S.C. § 847 (1983) as amended by Act of Feb. 10, 1996, Pub. L. 104-106, 110 Stat. 461 (1996).

[217] The most obvious include aircraft, tanks, and self-propelled artillery. In one well publicized case in late 1980, an 8th Infantry Division soldier in Mannheim Germany stole a fully uploaded M-60 tank and went on a rampage after being rejected by his long-time girlfriend. His intent was to take the tank to her home in Mannheim and kill her. After being blocked on the Neckar River Bridge by the German Polizei, he drove the tank off the bridge and died. Telephone Conversation with LTC Cliff Dickman, Member of 3d Brigade, 8th Infantry Division at the time (Feb. 25, 1997). *See also Editorial/Opinion: A Rapid Response*, NEWS & OBSERVER (RALEIGH, NC), June 3, 1996, at A10 (SGT William Kreutzer, who

501(d), ensuring the health and fitness for duty of military members, applies equally to their mental health. The utilitarian approach weighs the benefits to society from recognizing the privilege against the costs to society. In the military, the costs to society must include not only the costs to the judicial process, but also the dangers posed by mentally disturbed individuals performing military missions.

The lack of confidentiality of mental health care treatment has resulted in military members delaying or avoiding treatment[218] and in the underdiagnosis of mental illness.[219] The military culture stigmatizes mental illness.[220] Military members feel that seeking help will adversely affect their careers, particularly if the member is on flight status or has a sensitive security clearance.[221] A leader may avoid seeking help for mental illness in fear that "his troops will view him as 'weak' and lose confidence in his leadership."[222] Fears that mental illness can result in discharge, loss of security clearance, loss of flying status, and loss of promotion opportunity in a sub-culture where strength is valued over all else result in military members avoiding treatment.[223] Ninety-five percent of suicides are tied to mental illness.[224]

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opened fire on a stadium full of comrades at Fort Bragg, NC suffered from mental problems and sought help prior to the shooting); Interview with Major John Einwechter, Government Counsel in United States v. Kreutzer, (Mar. 14, 1997) (SGT Kreutzer made homicidal threats against members of his unit as early as eighteen months prior to the shooting while deployed in the Sinai. He was seen by a social worker who returned him to duty. SGT Kreutzer also received counseling from Division Mental Health for the month and one-half prior to the shooting). *See* earlier reference to "madman in the missile silo scenario," *supra* note 156.

[218] LCDR Taylor L. Porter & LT W. Brad Johnson, *Psychiatric Stigma in the Military*, 159 MIL. MED. 602 (1994).

[219] *See* CPT Anderson B. Rowan, *Demographic, Clinical, and Military Factors Related to Military Mental Health Referral Patterns*, 161 MIL. MED. 324 (1996); Regina Pedigo Galvin, *Even Soldiers Get the Blues, But Issues of Stigma, Confidentiality Keep Those in Need from Getting Help*, ARMY TIMES, July 29, 1996, 12, 13.

[220] David L. Kutz, *Military Psychiatry: A Cross-Cultural Perspective*, 161 MIL. MED. 78 (1996); Neil A. Lewis, *Military Conducting Anti-Suicide Campaign*, THE SEATTLE TIMES, May 19, 1996, at A1 (Dr. Stephen Joseph states that the major thrust of the campaign has been to emphasize that seeking help for mental illness is not a sign of weakness . . . a message that he acknowledged run counter to a centuries-old military culture in which strength is prized and anything that could be perceived as weakness is concealed); Debra Gordon, *Navy Tries to Demystify Mental Health, Boorda's Death Refocuses Attention on Idea that Seeking Psychiatric Help Can Hurt a Career*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk Va.), June 11, 1996, at A1 (discussing Admiral Boorda's suicide and military attitudes toward seeking psychiatric care, effect of lack of confidentiality on willingness to seek care, and ethical conflicts of military psychotherapists); Bruce Hilton, *Suicide Seldom a Rash Act, Experts Say*, PATRIOT-LEDGER (QUINCY, MASS.), May 21, 1996, at 21 (mental illness link to suicide and Admiral Boorda's stresses).

[221] *See* Kutz, *supra* note 220, at 80.

[222] *Id*. at 79.

[223] *See* Porter & Johnson, *supra* note 218; Harold Rosen and LTC James P.T. Corcoran, *The Attitudes of USAF Officers Toward Mental Illness: A Comparison with Mental Health*

Although the military suicide rates are roughly commensurate with rates in the civilian sector, the military must proactively encourage members to seek mental health care to combat the "centuries old military culture in which strength is prized and anything that could be perceived as weakness is concealed."[225] Many consider this culture essential to the combat success of our military forces. This cost of military members avoiding or delaying treatment,[226] however, must be weighed against the need of the military to know the mental status of its members and be able to accomplish its mission of defending the nation.

The Supreme Court has recognized the military as "a specialized community governed by a separate discipline from that of the civilian."[227] Their jurisprudence has been "characterized by the highest degree of deference to the role of Congress and respect for the judgment of the armed forces in the delicate task of balancing the interests of national security and the rights of military personnel."[228] A decision by the military that this balancing requires access to the mental health care information of military personnel would also likely be judged with this judicial deference.[229]

However the need for access to military members' records is dramatically different from the military's need to know the mental status of family members or other civilian patients. The cost to the military judicial process caused by recognizing a psychotherapist-patient privilege for civilians would be the similar to that experienced by federal district courts under *Jaffee*. Additional social costs are caused by the forced production of these sensitive records in the military. The most likely scenario where this issue would arise in a military court-martial would be where a family member was the victim of a crime allegedly committed by a military member, most typically sexual

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Professionals, 143 MIL. MED. 570 (1978) (Although line officers in USAF had a more negative view of psychiatric patients than mental health care providers, the line officers' opinions were "relatively liberal, and "approximated those of college educated civilians."); Zanotti & Becker, *supra* note 91, at 66 (discussing Admiral Boorda's suicide and the Air Force campaign against suicide and the perception that seeking counseling would have negative career impacts).

[224] Sue Goetinch & Tom Siegfried, *Mentally Ill Fight Disease and Stereotypes*, THE DALLAS MORNING NEWS, Apr. 28, 1996, at 1A.

[225] Neil A. Lewis, *Military Conducting Anti-Suicide Campaign*, *supra* note 220 (discussing military culture prizing strength and concealing weakness, and suicide statistics in the military).

[226] Of military personnel delaying or avoiding treatment.

[227] Orloff v. Willoughby, 345 U.S. 83, 94 (1953). *See also* Parker v. Levy, 417 U.S. 733, 743 (1974).

[228] Nunn, *supra* note 206, at 557.

[229] *See* Orloff v. Willoughby, 345 U.S. 83, 94 (1952) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."). *See also* Zanotti & Becker, *supra* note 91, at 76.

assault or child abuse. Military members' morale would be affected by the trauma experienced by their family members when sensitive mental health treatment information is turned over to the defense counsel as part of the discovery process.[230] This additional social cost further supports the recognition of the psychotherapist-patient privilege for civilian patients.

The *Jaffee* decision directly implicates Article 36, UCMJ since federal courts now recognize a psychotherapist-patient privilege. Article 36 embodies an explicit Congressional policy that military practice follow as closely as possible practice in federal district court. Recent Congressional action enhancing the crime victims' protections support the recognition of the privilege for civilian patients.

Recent Congressional contacts with the Department of Defense urging the amendment of the Military Rules of Evidence echo the current Under-Secretary of Defense for Health Affairs' position that there is no imperative need to have access to non-military patients' mental health records. In addition, the President, although not explicitly addressing this issue, has also been supportive of initiatives protecting victims of crime.[231] If the Department of Defense fails to take action to amend the Rules of Evidence to recognize these policy declarations it is likely that either Congressional or Presidential action will be forthcoming to amend the Rules without military input.[232] Awaiting judicial determination of the validity and scope of the privilege will

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[230] Telephone interview with Dr. Richard Epstein, Chair of the American Psychiatric Association Ethics Committee, (Feb. 4, 1997). *See* Letter from Melvin Sabshin, M.D., Medical Direction, American Psychiatric Association, to Colonel Thomas G. Becker, USAF, Associate Department of Defense General Counsel (Military Justice and Personnel Policy), subject: Request by the American Psychiatric Association to Amend the Military Rules of Evidence to Provide Privilege for Military Dependents, Aug. 19, 1996 (urging creation of privilege *a la Jaffee* for non-military patients, addressing morale and readiness impact on military members from lack thereof).

[231] *See Clinton Urges Amendment on Victim's Rights*, BOSTON GLOBE, June 26, 1996, at 6; J. Scott Orr, *Fight is Rally Cry for Rights of Victims*, STAR-LEDGER (NEWARK, NJ), June 26 1996, at 001; Martin Kasindorf, *Clinton Pushes for Victims' Rights*, NEWSDAY, June 26, 1996, at A16.

[232] *See* Schroeder Editorial; Patricia Schroeder, Press Release; Schroeder Letter to SECDEF; Schroeder Letter to SECUSAF; LTC Beth A. Unklesbay, USAF, Office of Legislative Liaison, Congressional Inquiry Division Letter to The Honorable Patricia Schroeder, Congressperson, Subject: Response to Aug. 22, 1996 Letter, Sept. 9, 1996; Joseph Letter to DOD GC; Memorandum, DOD General Counsel, to The Honorable Stephen Joseph, Under Secretary for Defense (Health Affairs), subject: Legal Privilege for Therapist-Patient Communications, (23 Sept. 1996); Seven Congressperson Letter; Livingston, *Ethical Dilemmas*, *supra* note 115 (parentheticals same) (On file with the author). *See also* Zanotti & Becker, *supra* note 91, at n.349 (recognizing that: "Legislation could be somewhat deferential by directing the military departments to develop a confidentiality provision compatible with the military's mission, or not at all deferential, as would be the case if it passed legislation, applicable in trials by courts-martial, creating a psychotherapist-patient privilege.").

be a luxury the military is unlikely to enjoy.[233] An internal redrafting of the Military Rules of Evidence to adopt this privilege for civilian patients is more likely to result in a rule that the military can live with.[234] A possible Military Rule of Evidence providing a privilege for civilian patients is proposed below.

[233]The military can choose to take no action pending judicial determination of the extent of the privilege. However, it is unlikely that Congress will wait for that determination. *See* Zanotti & Becker, *supra* note 91, at n.349. The resolution of the issue by judicial means is likely to be slow. Few military courts are recognizing the psychotherapist-patient privilege for either accuseds or victims. At least one military service has officially stated that the application of *Jaffee* in the military is impractical. Cases resulting in acquittals will not be appealed, and with the relatively stringent rules on government appeals, an interlocutory appeal is unlikely. The continuing media attention, and the lobbying by the American Psychiatric and Psychological Associations, will spur Congress into taking some action, if the military takes none. Congress has indicated interest in legislating in this area. *See* sources cited *supra* note 120 (On file with author); Gordon Livingston, *Serving Two Masters: The Ethical Dilemmas That Military Medical Students Want to Know About—But Can't*, THE WASH. POST, Dec. 22, 1996, at C3; Karen Jowers, *Joseph Asks for Ensured Patient Confidentiality*, ARMY TIMES, Sept. 23, 1996, at 30; Karen Jowers, *AF Psychiatrist Ordered Away from Patients*, ARMY TIMES, Sept. 23, 1996, at 31; Ellen Joan Pollock, *The Psychiatrist in the Middle*, THE WALL ST. J., Aug. 22, 1996, at A1.

[234] It is the author's opinion that recognition of the privilege for civilians is appropriate. However the military's mission mandates command access to psychotherapy information for military personnel. An explicit amendment to the Military Rules of Evidence is the best course to clarify this issue, however, implementation of a regulatory privilege is another option. Regulatory Privilege: Prior to *Jaffee*, a regulatory privilege similar to that extended to alcohol and drug rehabilitation records was proposed. *See* Hayden, *supra* note 40, at 90-91. Although this type of regulatory privilege might operate to protect accuseds' records by preventing the government from introducing this evidence, it is unlikely that it would protect victims' records from Sixth Amendment based discovery demands. Since the most troublesome cases arise in that context and excite emotional reactions by the victims, Congress, and the media, this alternative would not prove to be a long-term solution.

3. Incorporating Jaffee

An explicit Military Rule of Evidence recognizing the psychotherapist-patient privilege for civilian patients is the best approach in resolving the issues created by the *Jaffee* decision. This approach allows the military to craft a rule that addresses its specific needs. An explicit rule recognizing this privilege as part of the MCM would operate to foreclose additional expansion of the privilege by federal courts in the future since changes would likely be "contrary to or inconsistent with the MCM" if a specific rule existed. It would also conclusively resolve the open question of whether military personnel have a privilege.[235] The draft MRE 513 at appendix A is one attempt to balance the needs of the patient with the needs of the military through the definitions of a "civilian patient," "confidential communication," and "psychotherapist."

This rule defines a civilian patient as one not subject to the UCMJ at **both** the time the confidential communication was made and at the time of the trial by courts-martial. This definition would allow the military to have access to the records of reservists and other persons accompanying the force who would be subject to the Code even if the confidential communication was made as a civilian.[236] It excludes retirees so long as the retiree is not the accused. The military's need to ensure the mental health of its members is protected by this rule since personnel subject to the Code would not have a privilege.

The definition of "confidential communication" requires that the communication not be intended for disclosure to third persons. Disclosure to third persons present to further the interests of the patient, reasonably necessary for the transmission of the communication, and to those participating in the treatment of the patient under the direction of the psychotherapist would be allowed under the umbrella of the psychotherapist-patient privilege. Thus disclosures to clerks assisting the psychotherapist by taking an intake history, members of the patients' family or fellow group therapy members participating in the treatment of the patient under the direction of the psychotherapist would

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[235] The fourth interpretation, which the author feels is the most supportable, clearly recognizes the privilege for military personnel. However, the author's personal opinion is that military personnel cannot have a privilege since it would interfere with commanders' responsibilities to know the mental status of their personnel.

[236] Failure to require that the patient not be subject to the Code at both the time the confidence is made and at the time of the trial is necessary if the command is to have knowledge of the mental health status of reservists. Otherwise a reservist may never be involved in psychotherapy during his drill periods (inactive duty training) or his two-week annual training (active duty training), but may be regularly seeing a psychotherapist during the intervening time. Failure to exclude reserve forces from the definition of civilian patient would result in commanders not having access to mental status information for their reserve soldiers. With the increased involvement of reserve forces in any significant military mission both in the US and abroad, the need of the command to know the mental status of reserve soldiers is of equal importance to that of the active component.

not make the communication non-confidential. This is similar to the attorney-client privilege extending to cover representatives of the attorney necessary for the provision of legal advice, and would include enlisted medical specialists acting under the supervision of the psychotherapist.

Finally, the definition of the "psychotherapist" would limit covered disclosures to those made to a doctor (to include a psychiatrist), psychologist, or clinical social worker when actually engaged in the diagnosis or treatment of a mental or emotional condition, including drug or alcohol addiction. Thus only those professionals, and only those communications made in the course of treatment or diagnosis, would be covered by the privilege.

Exceptions that would be relevant in trials by court-martial are rare if the privilege exists only for civilian patients.[237] Military courts-martial are purely criminal in nature, thus exceptions designed to operate in civil or commitment proceedings are not relevant. The first exception in the proposed rule would cover those cases involving a breach of duty between the patient and psychotherapist covering dereliction of duty or other criminal charges against the psychotherapist involving their care of a patient. The second exception would allow disclosure in cases involving information involving likely serious bodily harm or death or significant impairment of national security, allowing disclosure in courts-martial in those few cases where this would be relevant and parallels the ethical confidentiality exception. Third, no privilege would bar disclosure of any reporting required by state or federal law, or military regulation, such as for suspected child abuse or neglect, spouse abuse, or elder abuse. Finally, no privilege would exist where the accused was charged with crimes against his or her spouse or either's child, covering the vast bulk of spouse and child abuse cases where the victim recants. Some of these exceptions involve situations that would be rare in courts-martial but which recognize, and parallel, the effect of the privilege rule on the psychotherapists' confidentiality rules.[238]

The proposed rule includes a procedure to obtain information under the discovery process, mandating the military judge's *in camera* inspection of the records or information to determine if the privilege exists. [239] The party

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[237] MCM, *supra* note 5, MIL. R. EVID. 101, analysis, app. 22, at A1-2 (1995 ed.) (Military Rules of Evidence do not apply to military commissions, tribunals, etc., unless expressly made to do so by competent authority.).

[238] Some parallelism between the confidentiality rule and the privilege rule of evidence is desirable since the privilege rule necessarily involves effects in society.

[239] I deliberately did not include an explicit exception for when information is constitutionally required. This is due to my view that the privilege, outside of the enumerated exceptions, should be roughly akin to the attorney-client privilege. One of the primary purposes of this rule is to protect confidences of victims and to encourage them to obtain psychotherapy to help deal with the emotional toll of the crime. If a disclosure is actually "constitutionally required," then the addition of such an exception would not assist the military judge in making this tough decision. *See* SALTZBURG, ET. AL., *supra* note 133, at 522 (The authors state in reference to

seeking the information must notify the alleged civilian patient, allowing him to assert the privilege. Finally, the psychotherapist-patient privilege would be subject to the same waiver rules as other privilege provisions. MRE 510 describes voluntary waiver in the military practice. An amendment of MRE 510 may be necessary to clarify that a witness may testify concerning a privileged matter in response to cross examination by a defense attorney or accused acting *pro se* (required by the Sixth Amendment confrontation clause) without waiving the protections of the privilege for the records or the psychotherapist's testimony. A provision stipulating that a victim's testifying on the emotional impact of a crime on himself does not waive the privilege may also be appropriate.

Faced with Sixth Amendment challenges to the privilege, military courts-martial would be limited to conducting *in camera* inspections of the records or testimony to determine only if they were covered by the privilege. If so, compelled disclosure would be prohibited.[240]

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the "constitutionally required" exception to MRE 412 that "Any limitation on a constitutional right would be disregarded whether or not such a Rule existed." The MRE 412 protection, is even less strong when compared to a constitutional claim since it is a mere rule of evidence, and not a common law privilege.).

[240]The success of a claim of privilege against a Sixth Amendment Confrontation Clause challenge would depend on the view of the scope of the privilege. If viewed as akin to the attorney-client privilege, as many States have adopted, the assertion of privilege would probably be successful even if the requested information contained exculpatory information. A detailed discussion of this question is beyond the scope of this paper but it raises interesting issues since DOD must deal with accused's claims for this information under R.C.M. 701a(6)/*Brady* material, even though protected by the psychotherapist-patient privilege. The Supreme Court has condoned this procedure (judge's *in camera* inspection of material to determine applicability of privilege) when analyzing Sixth Amendment claims in the context of attorney-client and other privileges. *See* Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974); Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S. Ct. 989, 1003 (1987); United States v. Wilson, 798 F.2d 509, 514 (1st Cir. 1986) (reviewing documents protected under the attorney-client privilege to determine if any were exculpatory); United States v. Cuthbertson, 630 F.2d 139, 148 (3d Cir. 1980), *cert. denied*, 499 U.S. 1126 (1981) (permitting *in camera* review of statements of a government witness despite qualified journalistic privilege because of the unavailability from another source.) These cases are discussed in United States v. Lowe, 948 F. Supp. 97 (D.Mass. 1996). The defense would still be allowed to cross examine the civilian witness on the content of the psychotherapy, but would not have access to either the records or the psychotherapist in order to conduct the cross-examination. *See* Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974); Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S. Ct. 989, 1003 (1987). *See also* SALTZBURG & MARTIN, *supra* note 148, at 427-28 (discussing United States v. Brown, 634 F.2d 819 (5th Cir. 1981), United States v. Zoln, 109 S. Ct. 2619 (1989), and Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982). These courts evaluated situations where a privilege or rule of evidence must give way to a defendant's Sixth Amendment rights. The Supreme Court approved an *in camera* inspection only after a threshold showing of a factual basis adequate to support a good faith belief by a reasonable person that an *in camera* review of the materials may reveal evidence to establish the claim that the exception to the privilege applies. The decision whether to conduct a review is within the sound discretion of the court. The *Brown* court required, in the context of a claim of

Several alternate privilege rules could be drafted and supported in the military.[241] Alternate forms of the rule could distinguish on the basis of the status of the person making the confidential communication, denying the privilege to any accused while recognizing it for all other persons. The protection of the privilege would then be dependent on whether the individual is accused of a crime. Any of the proposed exceptions to the proposed rule could be deleted based on policy considerations. Alternatively, the privilege rule could differentiate on the type of information disclosed by providing an exception to allow disclosure of exculpating information. Further, the military privilege rule could provide a qualified privilege of the type recognized by the Seventh Circuit in *Jaffee*, which requires "an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests."[242]

Any workable military privilege rule must, however, recognize the imperative need of the military to ensure its personnel's health and fitness for duty. The proposed MRE 513 has the advantage of following the Supreme Court's *Jaffee* decision as closely as possible, with changes based solely on the special nature of the military society and mission.[243] The proposed MRE 513 recognizes a broad privilege for civilian patients as implied by the expansive language in the Supreme Court's *Jaffee* decision. It encourages the frank disclosure so necessary for effective psychotherapy, while retaining the military's power to supervise and control its personnel. Its major weakness is the lack of protection for military victims. The cost of the loss of this information to the military judicial system if such a privilege were recognized, is not outweighed by the privacy interests of military victims. Military authorities will have access to military victims' mental health information to ensure their health and fitness for duty. Imposing an additional cost on the truthseeking process of the courts when the information is already not confidential is not supportable under the utilitarian analysis of privileges

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marital privilege, a showing that the inability to introduce the testimony or evidence covered by a privilege substantially deprived the defendant of the ability to test the truth of a witness' testimony. Otherwise there was no infringement of the defendant's Sixth Amendment confrontation rights. These cases support the *in camera* inspection procedure to determine if the privilege applies.)

[241] Telephone interview with LTC Linda Webster, U.S. Army Trial Judiciary (Feb. 14, 1997) (discussing possible alternatives); Zanotti & Becker, *supra* note 91, at 76-81 (The authors propose a rule creating a privilege for both military and civilian patients, with exceptions for national security information, child abuse, sanity boards, future crime or fraud, and when used as an element of a defense. They also include a procedure for determining if the information is privileged.); Telephone interview with COL Charles Trant, *supra* note 199 (discussing the present draft rule 513 being prepared by the JSC for presentation to the DOD General Counsel and for publication in the Federal Register for public comment).

[242] *Jaffee*, 51 F.3d at 1357.

[243] *See* Parker v. Levy, 417 U.S. 733 (1974); Orloff v. Willoughby, 345 U.S. 83 (1953); Nunn, *supra* note 206.

advanced by Dean Wigmore because of the military's need and ability to access this information. Further the privacy interests of military personnel are subject to different intrusions than those of civilians in a variety of situations.[244] The military's decision to provide differing protections for its personnel is the type of decision normally deferred to by the courts.[245]

4. Joint Service Committee Draft MRE 513

The Joint Service Committee published their draft MRE 513 for public comment on 6 May 1997.[246] This draft rule is included at appendix C. The primary differences between its proposed rule and the rule proposed above are in the definition of the term "patient," in the types of professionals covered, and in the exceptions delineated in the rule.

The JSC proposed rule focuses solely on the patient's status at the time the disclosure is made. It excludes active component members; cadets and midshipmen; members of the reserve component while on inactive duty training; persons in custody of the armed forces serving a sentence imposed by court-martial; members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces; prisoners of war in custody of the armed forces; and in times of war, persons serving with or accompanying an armed force in the field. Focus on the status at the time the disclosure is made prevents military authorities from having access to relevant data on the mental status of reservists and other persons accompanying the force who would be subject to the UCMJ. With today's increasing utilization of the reserve component in most contingency operations, such an exclusion is arguably dangerous if one accepts the basic premise of the commander's need to know the mental status of his or her personnel.

Under the JSC proposed MRE 513, covered professionals are limited to psychiatrists or psychologists. Within the military health care system the privilege applies only to those professionals having credentials to provide professional services as a psychologist or psychiatrist. Licensed clinical social workers or other psychotherapists are excluded from the coverage of the privilege. A portion of the mental health counseling in military health care facilities is done by social workers. Under this rule, confidences made to these personnel would not be privileged. Further, this proposed rule differs in coverage from the privilege recognized in federal courts, and from the

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[244] Differing reasonableness determinations of expectations of privacy under the Fourth Amendment are common in military and federal case law.

[245] *See* Parker v. Levy, 417 U.S. 733 (1974); Orloff v. Willoughby, 345 U.S. 83 (1953); Nunn, *supra* note 206.

[246] Joint Service Committee on Military Justice, Notice of Proposed Amendments, 62 FR 24640-01.

Supreme Court's holding in *Jaffee.* This difference would create the exact same enforcement difficulties existing currently.

Although many of the proposed exceptions are similar to those in the rule proposed above, the "military necessity" exception is very broad, making the application of the privilege uncertain. Mere necessity extinguishes the privilege. Additionally, the circumstances in which "military necessity" would defeat the privilege—"to ensure the safety and security of military personnel, military dependents, military property, classified information or the accomplishment of a military mission" —are so encompassing that almost no privilege would survive. No requirement of seriousness is required of the threat to the safety or security of the listed categories before the privilege is extinguished. Certainly a privilege strong enough to defeat an accused's Sixth Amendment claims for victim's records and information is not created by this proposed rule.

Again, although the exceptions in the proposed rule above are similar, they are more narrowly cast, requiring serious bodily harm or death or significant impairment of national security rather than necessity. These more narrow exceptions make it more likely that the privilege would survive a Sixth Amendment challenge. A rule encompassing broader exclusions of covered personnel and covered professionals, coupled with narrower exceptions would make a better overall rule—one that would provide a greater degree of protection to victims.

Finally, the procedure envisioned by the rule contemplates an evidentiary hearing rather than an *in camera* review by the military judge. Although the proposed JSC rule permits a closed hearing, such a closure is not mandated by the rule, leaving the privacy interests of the patient subject to the discretion of the military judge and to the requirement for the counsel for either party to request such a closure. The patient claiming the privilege is not included among those who can request a closed hearing.

5. Confidentiality Requirements

Since military courts-martial are purely criminal, the evidentiary rule would have to be accompanied by ethical rules for military psychotherapists that would address exceptions to the general rule of confidentiality. Currently there are no guidelines for DOD psychotherapists establishing when confidential information must, may, or may not be disclosed.[247] These rules

[247] Telephone interview with Dr. Gregory Lande, Forensics Psychiatry Consultant to the U.S. Army Surgeon General (Mar. 14, 1997) (There are no regulations or directives governing the ethical duties of military psychiatric personnel to protect the confidentiality of mental health information. The only protections are: the protections for sanity boards IAW R.C.M. 706, UCMJ; the ADAPCP limited use policy IAW ch. 6, DEP'T OF THE ARMY REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, (Oct. 21, 1988) & change

could be issued in the form of a Department of Defense Directive and specific service regulations similar to the Army regulation which controls the conduct of Army attorneys.[248] These rules would address exceptions that would not be applicable or relevant in a military courts-martial, but which might occur in civil, administrative, or commitment proceedings. One example might be an exception to the confidentiality requirement when the patient sues for malpractice. Some proposed exceptions are listed at appendix B. These limitations on confidentiality could be included in the disclosure to patients mandated by current ethical rules,[249] and because of their similarity to restrictions in civilian practice might help alleviate the perceived conflict of interest on the part of military psychotherapists.[250] The proposed clarifications of the psychotherapist's ethical duties at appendix B would exist as exceptions to their ethical duty of confidentiality, and should be included in military psychotherapists' ethical rules.

Additionally, current military regulatory protections on mental health records would have to be changed to provide the necessary protection for non-military mental health records.[251] These changes must specifically include the

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(Sept. 17, 1995), and protections for FACMT information IAW ch. 6 & para. 3-8, DEP'T OF THE ARMY REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM, (Sept. 1, 1995). .

[248] DEP'T OF THE ARMY REG. 27-26, RULES FOR PROFESSIONAL CONDUCT FOR LAWYERS, (May 1, 1992). A DOD Directive would be a better approach allowing a single set of rules to apply to all military health care providers. With the advent of Tricare and the increased assignment and training of military medical personnel to medical centers, patients should be able to expect that the same set of rules governs the confidentiality of their mental health records regardless of whether they are seen by an Army, Navy, or Air Force psychotherapist.

[249] *See Jaffee*, 116 S. Ct. at n.12 (At the outset of their relationship, the ethical therapist must disclose to the patient "the relevant limits on confidentiality." *See* American Psychological Association, Ethical Principles of Psychologists and Code of Conduct, Standard 5.01, 9 Dec. 1992). *See also* National Federation of Societies for Clinical Social Work, Code of Ethics V(a) (May 1988); American Counseling Association, Code of Ethics and Standards of Practice A.3.a (effective July 1995).

[250] *See* Livingston, *supra* note 115; Pollock, *supra* note 115; Jowers, *AF Psychiatrist*, *supra* note 115. These confidentiality rules show the necessary interrelationship between the confidentiality and privilege rules.

[251] Presently the Privacy Act protects these health records, but allows access by agency officials with an official need to know, to include law enforcement investigations. *See* the Privacy Act, 5 U.S.C. § 552a(b); DEP'T OF THE ARMY REG. 340-21, THE ARMY PRIVACY PROGRAM (July 5, 1985) [hereinafter AR 340-21]; AR 40-66. Military medical centers, hospitals, and clinics, would have to segregate and provide additional protections to these mental health records. Some segregation already exists, but an explicit Military Rule of Evidence recognizing the privilege for civilian patients, coupled with a regulation governing other ethical exceptions to the confidentiality obligation, would provide firm guidance for military health care providers. These regulations would have to address the specific issues of joint or group therapy and the protection of those sessions, and whether that protection is destroyed if a military member is a participant as a patient. This may necessitate separate group therapy sessions for military and non-military members.

requirement for a military judge's written order prior to turning over non-military mental health records under seal.

An explicit Military Rule of Evidence and Psychotherapist Ethics regulation would provide guidance to military mental health care providers, and could provide a basis to assess the duty owed by these providers to their patients and to the military. Both are necessary components in providing high quality mental health care to patients while still ensuring the fair administration of military justice.

VII. CONCLUSION: NOW WHAT?

The Supreme Court's decision in *Jaffee v. Redmond* complicated military practice by raising the issue of the applicability of a psychotherapist-patient privilege. Congress, the media, professional mental health associations, the Department of Defense, and various trial courts are addressing this issue on a case-by-case basis. At least four interpretations of the effect of *Jaffee* on the Military Rules of Evidence exist. In the midst of all this uncertainty patients seeking care in military facilities, and counsel dealing with them, do so in ignorance of the extent or existence of any privilege protecting their confidential communications. Military psychotherapists are similarly ignorant. However, the opportunity still exists for the military to shape the effects of *Jaffee v. Redmond* on military courts-martial practice and the UCMJ.[252]

Amendment of the Military Rules of Evidence to recognize a psychotherapist-patient privilege for civilian patients is the best method to resolve the controversy, provide protection to civilian patients, and preserve the military's need to ensure the physical and mental health of their personnel. Failure to take decisive action will result in congressional action mandating a privilege which may be broader than the military can live with.[253] The privilege rule proposed above simultaneously recognizes an expansive privilege for civilian patients while retaining the military's ability to ensure the health and fitness for duty of its personnel.

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[252] Failure to take decisive action may result in Congressional amendment of the UCMJ which would be incorporated by the operation of MRE 501(a)(2). *See supra* note 198.

[253] *See* Zanotti & Becker, *supra* note 91, at n.349 (recognizing that: "Legislation could be somewhat deferential by directing the military departments to develop a confidentiality provision compatible with the military's mission, or not at all deferential, as would be the case if it passed legislation, applicable in trials by courts-martial, creating a psychotherapist-patient privilege.").

APPENDIX A—Proposed Military Rule of Evidence 513

Rule 513. Psychotherapist-Patient Privilege

(a) General rule of privilege. A civilian patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug and alcohol addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(b) Definitions. As used in this rule:

(1) A "civilian patient" is a person who: (1) is not subject to the Uniform Code of Military Justice (UCMJ) as defined by Article 2, UCMJ and Rule for Courts-Martial 202, at both the time the confidential communication is made and at the time of the trial by court-martial, excluding retired members of a regular component of the armed forces who are entitled to pay unless such person is the accused; and (2) consults or is examined by a psychotherapist.

(2) A "psychotherapist" is: (A) a person authorized to practice medicine in any state, territory of the United States, the District of Columbia, or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug and alcohol addiction; or (B) a person licensed or certified as a psychologist under the laws of any state, territory of the United States, the District of Columbia, or nation, while similarly engaged; or (C) a person licensed or certified as a clinical social worker under the laws of any state, territory of the United States, the District of Columbia, or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the civilian patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the civilian patient, or the guardian or conservator of the civilian patient. The psychotherapist who received the communication may claim the privilege but only on behalf of the civilian patient. His authority to do so is presumed in absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule under the following circumstances:

(1) Breach of duty by psychotherapist or civilian patient. As to a communication relevant to an issue of breach of duty by the psychotherapist to the civilian patient or to the military or by the civilian patient to the psychotherapist.

(2) Information involving likely serious bodily harm or death, or significant impairment of national security. As to communications clearly containing information that the psychotherapist reasonably believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(3) Mandatory Reporting Requirements. As to a communication which would require the psychotherapist to report suspected offenses to the appropriate authorities under applicable state or federal law, or military regulations.

(4) Spousal or child victim: In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse or child of either.

(e) Procedures to determine production or admissibility or allegedly privileged information:

(1) A party intending to seek production of information under R.C.M. 701, or offer evidence under subdivision (a) must—

(A) file a written motion at least 14 days before trial specifically describing the allegedly privileged information that the party reasonably believes exists, the location of the information, the identity of the custodian, and factual information sufficient to establish a good faith belief that the privilege does not apply, and stating the purpose for which it is sought unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged civilian patient or, when appropriate, the alleged civilian patient's guardian or conservator.

(2) Before ordering the release of information under R.C.M. 701, or admitting evidence the court must first conduct an *in camera* inspection of the records or information and afford the alleged civilian patient a right to attend and be heard. The purpose of the *in camera* inspection is to determine whether the psychotherapist-patient privilege under this rule applies. The motion, related papers, and the record of the *in camera* inspection must be sealed and remain under seal until the court orders otherwise.

Drafters' Analysis: Nothing in this rule should be seen as affecting the privilege expressed in Military Rule of Evidence 301 or 302. Nothing in this rule should be seen as affecting the judicial interpretation of Military Rule of Evidence 305 as applied to health care professionals. The *in camera* inspection of allegedly privileged information is designed to allow the military judge to determine whether the privilege applies. The custodian of the information shall provide the allegedly privileged information to the court under seal upon receipt of a the military judge's order ordering its production.

Sources for this proposed rule include the Proposed Fed. R. Evid. 504, *supra*, note 93; MCM, *supra* note 5, MIL. R. EVID. 502 & 504; and various state statutes.

APPENDIX B—PROPOSED PSYCHOTHERAPIST ETHICAL RULES ON CONFIDENTIALITY

A psychotherapist shall not reveal information relating to the diagnosis or treatment of a civilian patient unless the patient consents after consultation, except for disclosures that are impliedly authorized in order to carry out the diagnosis or treatment, and except as stated in the below exceptions:

(a) Proceeding for hospitalization. There is no confidentiality under these rules for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(b) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not confidential under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(c) Condition an element of claim or defense. There is no confidentiality under these rules as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense. This exception does not include a crime victim's claim of emotional distress caused by the commission of the crime.

(d) The existence of a psychotherapist-patient privilege shall not be grounds for failure to report suspected child abuse or neglect to the appropriate authorities when required under applicable state or federal law, or military regulation.

(e) Validity of a document such as a will or power of attorney of a patient. There will be no confidentiality as to communications relevant to the validity of a patient's will, power of attorney, or other equivalent document where the mental competency of a deceased or incapacitated patient is at issue.

(f) Breach of duty by psychotherapist or civilian patient. There is no confidentiality as to a communication relevant to an issue of breach of duty by the psychotherapist to the civilian patient or by the civilian patient to the psychotherapist.

(g) Information involving likely serious bodily harm or death, or significant impairment of national security. There is no confidentiality as to communications containing information that the psychotherapist reasonably believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system, and the psychotherapist must disclose this information.

(h) Licensing, Privileging, or other Professional Disciplinary Proceedings. There is no confidentiality as to communications relevant to an administrative or judicial proceeding commenced by a present or former Department of Defense health care provider concerning the termination, suspension, or limitation or clinical privileges of such health care provider, and the psychotherapist must disclose this information..

(i) Required by State or Federal Law: There is no confidentiality where disclosure is required by state or federal law.

APPENDIX C—JOINT SERVICE COMMITTEE ON MILITARY JUSTICE PROPOSED MRE 513

Rule 513. Psychotherapist-Patient Privilege

(a) General rule of privilege. A patient, as that term is defined in this rule, has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by the patient to a psychotherapist or an assistant to a psychotherapist, as those terms are defined in this rule, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist, but the term does not include a person who, at the time of such consultation, examination or interview, is subject to the Uniform Code of Military Justice under Article 2(a)(1), (2), (3), (7), (8), (9), or (10).

(2) A "psychotherapist" is a psychiatrist or psychologist who is licensed or certified in any state, territory, the District of Columbia or Puerto Rico to perform professional services as such and, if such person is a member of, employed by, or serving under contract with the armed forces, who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such qualifications.

(3) An "assistant to a psychotherapist" is a person employed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for the transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychiatrist, psychologist, or assistant to the same, or patient records that pertain to communications by a patient to a psychiatrist, psychologist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) Who may claim the privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. The psychotherapist or assistant to a psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist or assistant to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule under the following circumstances:

(1) Death of patient. The patient is dead;

(2) Crime or fraud. If the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist were sought

or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(3) Spouse abuse or child abuse or neglect. When the communication is evidence of spouse abuse, or child abuse or neglect;

(4) Mandatory reports. When a federal law, state law, or military regulation imposes a duty to report information contained in a communication;

(5) Patient is dangerous to self or others. When a psychotherapist or assistant to a psychotherapist has a reasonable belief that a patient's mental or emotional condition makes the patient a danger to any person, including the patient, or to the property of another person;

(6) Military necessity. When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission.

(e) Procedure to determine admissibility of patient records or communications:

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practicable, notify the patient or the patient's guardian or representative of the filing of the motion and of the opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communications, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient will be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings will not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) If the military judge determines on the basis of the hearing described in subparagraph (2) of this subdivision that the evidence that the party seeks to acquire, offer, or exclude is privileged, irrelevant, or otherwise inadmissible, no further proceedings will be conducted on the issue and the military judge shall not order the production or admission of the evidence.

(4) If the military judge is unable to determine whether the evidence is privileged or relevant, the military judge shall examine the evidence or a proffer thereof *in camera*.

(A) If the military judge determines on the basis of the *in camera* examination that the evidence is privileged, irrelevant, or otherwise inadmissible, the military judge shall not order the production or admission of the evidence.

(B) If the military judge determines that the evidence is relevant and not privileged, such evidence, or pertinent portions thereof, shall be produced and/or admitted in the trial to the extent specified by the military judge.

(5) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

The analysis to Mil. R. Evid. 501 is amended by adding:

199_ Amendment: The amendment of Mil. R. Evid 501(d), and the related creation of Mil. R. Evid. 513, clarify the state of military law after the Supreme Court decision in *Jaffee v. Redmond*, ___ U.S. ___ [116 S. Ct. 1923, 135 L.Ed. 2d. 337] (1996). *Jaffee* interpreted Fed. R. Evid. 501, which refers federal courts to state law to determine the extent of privileges in civil proceedings. Although Mil. R. Evid. 501(d), as it existed at the time of the *Jaffee* decision, precluded application of such a privilege in courts-martial, Rule 501(d) was amended to prevent misapplication of a privilege. The language of Mil R. Evid 513 is based in part on Proposed Fed. R. Evid. (not enacted) 504 and state rules of evidence. Mil. R. Evid. 513 was created to establish a limited psychotherapist-patient privilege for civilians not subject to the UCMJ and military retirees. In keeping with the practice of American military law since its inception, there is still no doctor-patient or psychotherapist- patient privilege for members of the Armed Forces.

The analysis to Mil. R. Evid. 513 is created as follows:

199_ Amendment: Mil. R. Evid. 513 was created to establish a limited psychotherapist-patient privilege for civilians not subject to the UCMJ and military retirees. In keeping with the practice of American military law since its inception, there is still no doctor-patient or psychotherapist-patient privilege for members of the Armed Forces. Rule 513, and the related amendment to Mil. R. Evid 501(d), clarify the state of military law after the Supreme Court decision in *Jaffee v. Redmond*, U.S. ___ [116 S. Ct. 1923, 135 L.Ed. 2d. 337] (1996). *Jaffee* interpreted Fed. R. Evid. 501, which refers federal courts to state law to determine the extent of privileges in civil proceedings. Although Mil. R. Evid. 501(d), as it existed at the time of the *Jaffee* decision, precluded application of such a privilege in courts-martial, Rule 501(d) was amended to prevent misapplication of a privilege. The language of Mil R. Evid 513 is based in part on Proposed Fed. R. Evid. (not enacted) 504 and state rules of evidence.

Defending the "Indefensible": A Primer to Defending Allegations of Child Abuse

MAJOR BETH A. TOWNSEND, USAF*

Perhaps the most valuable result of all education is the ability to make yourself do the thing you have to do when it ought to be done, whether you like it or not; it is the first lesson that ought to be learned; and however early a man's training begins, it is probably the last lesson that he learns thoroughly.
-Thomas Huxley

I. INTRODUCTION

At some point in a tour as a defense counsel, many Air Force attorneys will encounter a client accused of abusing a child, either physically or sexually. These same defense counsel may field questions or remarks from their peers, family and friends, questioning how they could defend such clients. It goes without saying that any abuse of a child is deplorable and that these cases evoke a great deal of strong emotional responses. Defending a case involving allegations of child abuse not only challenges a defense counsel as an advocate, but also tests the ability of a defense counsel to defend a case in spite of personal feelings regarding the case or the accused. While many counsel will encounter these cases, it is not often that they will have sufficient experience to overcome the steep learning curve involved in mounting a successful defense. The purpose of this article is to provide the "nuts and bolts" for the novice in defending allegations of child abuse. It is designed to take the defense counsel from the initial meeting with the client through the sentencing phase of trial. While not all encompassing, it hopefully provides a basic framework with which to begin preparing a defense of such allegations as well as strategies to consider when reviewing the client's options and various approaches to trial. This article takes the defense counsel through a case beginning with pretrial matters such as initial advice for the client, discovery issues, expert assistance, and the Article 32 hearing. The trial section includes guidance regarding motion practice, voir dire, cross-examination of the child, dealing with expert testimony and closing argument.

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The article concludes with a brief review of sentencing strategies and tips on preparing a client for a guilty plea inquiry.

II. PRETRIAL MATTERS

A. First Contact

Once a client enters the defense counsel's office and informs him that he[1] is accused of abusing a child, one of the first things that the defense counsel should do is determine what, if any, statements the client has made to any third party regarding the allegations. At the outset of representation, it is better to wait to ask the client for information regarding the allegations. While the defense counsel is required to ask the client what he knows about the allegations,[2] before those conversations takes place, the attorney can save time and energy by determining the specific allegations and gathering all the information the government has. A prudent defense counsel will wait until later in the process to have these discussions with the accused. This will assist the counsel in asking the relevant and necessary questions.

B. Pretrial Statements

Barring some extraordinary circumstances, the defense counsel should advise the client to remain silent and to refrain from any conversations with any third party about the allegations. This is especially important if the client has not made any previous statements. At this time, the defense counsel should inform the client of the various agencies that will contact him simply as a result of the allegations that have been made. These agencies include the Office of Special Investigation (OSI), Family Advocacy, Mental Health, and various civilian agencies like child protective services. He should inform the client that while he may be required to attend various appointments with these

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[1] The author uses the male vernacular because it has been the author's experience that the majority of the accuseds are men. However, the principles are the same for women who are also so accused.

[2] Standard 4-3.2(a) and (b), Air Force Standards for Criminal Justice, The Judge Advocate General (TJAG) Policy No. 26 (6 January 1995). The standard states:

> (a) As soon as practicable the defense counsel should seek to determine all relevant facts known to the accused. In so doing, counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.
> (b) It is unprofessional conduct for the defense counsel to instruct the client or to intimate to the client any way that the client should not be candid In revealing facts so as to afford the defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

agencies (other than OSI), anything he says, can and will be used against him, often without Article 31 rights advisement.[3]

C. Statements to Mental Health Providers

The client should be advised that statements made voluntarily to mental health providers may be introduced against him.[4] The Air Force has provided limited confidentiality to members through the Limited Privilege Suicide Prevention Program.[5] However, this limited privilege applies only after the commander has offered non-judicial punishment or the preferral of charges[6] and only if a mental health provider[7] determines the members to be a suicide risk. Once the risk of suicide is no longer present, the privilege ceases to apply.[8] There appears to be a move in the appellate courts to recognize a

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[3] In United States v. Dudley, 42 M.J. 528, 531 (N.M.Ct.Crim.App. 1995) statements by the accused to a psychiatrist were held to be admissible without an Article 31 rights advisement despite the psychiatrist's knowledge that the accused was under investigation.

> We believe that although the case at bar involves a closer question . . . due to [doctor] superior military status, the location of the interview aboard ship, [the doctor's] close friendship with [NCIS agent], and the fact that the appellant did not seek out the doctor for treatment. Nevertheless, we find that the inquiry did not merge with the law enforcement investigation because it was conducted solely for diagnostic and psychiatric care purposes. [The doctor] was not acting as the alter ego of the NCIS. . . . Moreover, [his] testimony concerning the need for progression in mental health patients to overcome the denial stage convinces us that his question "Well, did you do it?" was motivated for non-law enforcement reasons and to help the appellant psychiatrically through what must have been a difficult period.

Id. at 531. *See also* United States v. Rios, 45 M.J. 558 (A.F.Ct.Crim.App. 1997) (holding statement made to civilian child protective services worker was admissible because civilian was not subject to UCMJ, not required to give Article 31 rights advisement and not working in connection with military); United States v. Bowerman, 39 M.J. 219, 221 (C.M.A. 1994) (stating military physician who suspected abuse not required to give Article 31 rights when questioning accused regarding injuries) ("Even if [doctor] thought that child abuse was a "distinct possibility," her questioning of appellant "to ascertain the facts for protective measures and curative purposes" did not violate Article 31." (cites omitted)); United States v. Pittman, 36 M.J. 404 (C.M.A. 1993) (explaining statement by accused to supervisor who was escorting accused home were admissible and were not the product of an interrogation or a request for a statement within the meaning of Article 31).

[4] *See* United States v. Raymond, 38 M.J. 136 (C.M.A. 1993) (holding statements made by the accused who voluntarily sought the services of a psychiatrist were admissible, psychiatrist not required to give Article 31 rights advisement because not acting as an investigator and had no intent of turning over statements).

[5] Air Force Instruction [hereinafter AFI] 44-109, Mental Health and Military Law (1 Mar 97).

[6] *Id.*, para 3.2.

[7] *Id.*, para 3.4.

[8] *Id.*, para 3.4.

psychotherapist-patient privilege;[9] however, until that happens, the client is better served to remain silent. Unless the client has already confessed to the OSI or child protective services, or has a strong desire to plead guilty, it may be best for him to refuse to answer questions with regard to the allegations when dealing with any outside agency. The defense counsel should recognize the investigation and legal process could be a long and stressful ordeal for the client. One of the best sources to refer him to for assistance is the Air Force chaplaincy. Chaplains are the only Air Force members, other than the defense counsel, who can provide a recognized privilege[10] as well as invaluable support for the client. However, before sending the client to see the chaplain, the defense counsel should establish the limits of the privilege.[11]

D. Pretext Phone Calls

The defense counsel should also advise the client against discussing the allegations with the accusers. One investigative tool used by the OSI is a pretext phone call. Essentially the OSI will have the victim call the client and attempt to obtain incriminating statements from the accused in the course of a taped phone call. Statements obtained in such a manner are generally admissible against the client[12] and can be very damaging, especially if he has not yet made any statements.

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[9] *See* United States v. Demmings, 46 M.J. 877 (Army Ct.Crim.App. 1997) (citing Jaffee v. Redmond, 58 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)), (stating psychotherapist-patient privilege could apply to courts-martial, however defense waived the issue by failing to object to applicable statements at trial).

[10] MANUAL FOR COURTS-MARTIAL, United States (1995 ed.) [hereinafter MCM] Military Rules of Evidence [hereinafter Mil. R. Evid.] 503.

[11] *See* United States v. Napolean, 44 M.J. 537, 543 (A.F.Ct.Crim.App. 1996), *aff'd.*, 46 M.J. 279 (1997). Here the court held the privilege did not exist between the accused and a lay minister. "Its foundation contains three elements: (1) the communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual advisor; and (3) the communication must be intended to be confidential." *See also* United States v. Coleman, 26 M.J. 407 (C.M.A. 1988) (holding accused's statements to father-in-law who was also a minister that he had taken liberties with his daughter were not privileged because they were not made for purposes of his religion, but rather to obtain emotional support from his father-in-law).

[12] *See* United States v. Rios, 45 M.J. 558, 564 (A.F.Ct.Crim.App. 1997). The court found that accused's statements during a pretext phone call were admissible and minors can consent to taped phone conversations. "Investigators monitoring a telephone conversation involving a suspect, with the consent of one of the parties, where the party acts as an agent for the AFOSI, is a 'routine and permissible undercover technique.'" quoting U.S. v. Parillo, 31 M.J. 886 (C.M.A. 1992). Additionally, with the growth of electronic mail use, clients should be advised not to discuss matters with anyone by e-mail, in electronic chat rooms, etc. This is particularly true if a client uses a government, business, or city/state library computer since use of such systems usually include "prior consent" by the user for monitoring and interception by law enforcement officials. *See* Jarrod J. White, *E-Mail @ Work.Com: Employer Monitoring of Employee E-Mail,* 48 ALA. L. REV. 1079, 1083-1084 (1997).

E. Strategies When The Client Has Provided A Confession

If the client has made a confession, it will be helpful to ask him at the first meeting exactly what the confession contained and the circumstances surrounding the taking of the confession in order to determine the voluntariness of the statement. Issues to be investigated include whether the interrogation contained discussions regarding civilian prosecution, as well as military action, either by the military law enforcement agents[13] or by social workers.[14] It is important to do the legwork and research ahead of time, as any challenge to the voluntariness of the confession before the members must first

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[13] *See* United States v. Bubonics, 45 M.J. 93 (1996) (stating threat of civilian prosecution combined with good cop/bad cop interrogation technique overcame free will of sailor with two years active duty service and no experience with military justice system).

[14] *See* United States v. Murray, 45 M.J. 554 (N.M.Ct.Crim.App. 1996) (holding statement does not become involuntary because interrogator discussed possible loss of unborn child or jailing of spouse as possible adverse consequences facing accused for allegations of child abuse); The court held in United States v. Moreno, 36 M.J. 107 (C.M.A. 1992) (Sullivan, Chief Judge, dissenting) that statements of accused were not involuntary when state social worker discussed options and possible adverse consequences if accused did not cooperate with state authorities.

> Admittedly, appellant was faced with a choice. On the one hand, he was offered the opportunity of enlisting the aid and support of the Texas Department of Human Services [DHS] in trying to keep his family together, in helping himself to overcome his personal problem, and in siding with him in the event of a criminal prosecution. On the other hand, as he well knew, by cooperating with DHS he risked the possibility that his statements would be discovered by prosecutorial forces and used against him at a trial. If he did not cooperate with DHS, however, the risk of losing his children was presumably increased and the risk of criminal prosecution remained-without the benefit of significant DHS influence. It is something of a dilemma to be sure, but it was a dilemma of his own causing. When people abuse children in this society, two distinct processes are triggered. One is the criminal process, which focuses on the proper way to deal with the perpetrator. The other is the child protective process, which focuses on the best interests of the child-victim. In appellant's case, both of these processes were well set in motion by the information initially reported to the authorities. Each of these processes is going to play itself out, one way or another, whether appellant wanted it and whether he took affirmative steps to affect the processes. In effect [DHS] merely apprised appellant where he stood in the great flow of things and obviously in the best of faith, she offered him a very plausible scenario that might improve his personal and family prospects.

Id. at 112. However, according to Chief Judge Sullivan: "Substantial constitutional error occurred in this case. (cites omitted) Appellant's incriminating admissions were made in response to direct questioning by [DHS employee]. This deliberate elicitation of incriminating statements occurred after his Sixth Amendment right to counsel had attached and without a proper waiver of that right." (cites omitted).

be made on motion to the military judge.[15] The defense counsel may also face a situation where the client has confessed but subsequently recants. While the initial response to the recantation may be skepticism by the defense counsel, there is a developing body of research that addresses situations in which innocent people confess to crimes they didn't commit.[16] This research may be helpful in explaining either to the judge or members why the confession is unreliable.[17]

If the client has confessed and there is no issue regarding voluntariness, the defense counsel should begin to evaluate all options available to the client. These include resignation or administrative discharge in lieu of court-martial, and pretrial agreement negotiations. When it appears that the facts will not be disputed in the case, clients should begin therapy, voluntarily, as soon as practicable. Every effort must be made at the earliest date to determine the extent and content of the defense's sentencing case.[18] Any and all actions that the client can take that can be introduced in extenuation and mitigation should be identified, coordinated and undertaken. A client who can demonstrate that he is truly remorseful, has spared the child from going through any public questioning, and who has taken steps to learn to deal with his problem, will only assist himself when it comes to sentencing. This may also help to mend fences within the family and lead to legitimate support from the family at the time of trial.

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[15] Mil. R. Evid. 304(a) & (d)(2)(A). MCM, *supra* note 10. Mil. R.Evid. 304(d)(2)(A) provides

> Motions to suppress or objections under this rule or M.R.E. 302 or 305 to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

[16] *See generally* Richard J. Ofshe and Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions,* 16 STUDIES IN LAW, POLITICS AND SOCIETY, 189 (1997).

[17] Presentation of this evidence will generally require the services of an expert witness with familiarity of the subject and research in this area.

[18] This includes deciding whether to waive the Article 32 hearing, submitting a resignation in lieu of court-martial, production of witnesses to testify on behalf of the accused, and establishing the potential of expert testimony regarding the client's progress in therapy.

F. Proof Analysis

Once the charges are preferred, one of the first steps the defense counsel should take is to prepare a detailed proof analysis. If prepared in a format that is workable for the defense counsel, the proof analysis will assist him in all phases of the trial. While preparing for the Article 32 hearing, it may help focus the line of attack. A proof analysis can also assist the defense counsel in identifying the proper discovery to request, assessing the weaknesses in the government case, finding any drafting errors he can exploit, or even providing a tool that can later be used to format the closing argument. The value of a thorough and complete proof analysis will become apparent as he uses it to prepare throughout every facet of the case.

G. Discovery Issues

Discovery issues in child abuse cases can be complex and proper discovery can produce voluminous amounts of records. The defense counsel should take advantage of the military's liberal discovery standard.[19] To facilitate collection of all appropriate discovery, the defense counsel should use a well-conceived and thorough discovery request. A canned discovery request may be insufficient. It may even result in untimely requests and ultimately in not receiving discovery. The request should, to the best of counsel's ability, articulate a basis for the requested records.[20] Records that should be requested routinely include, but are not limited to:

1. All records from child protective services, to include any other records concerning the particular child making the allegations, as well as other children living in the same household;[21]

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[19] MCM, *supra* note 10, Part II, Rules for Courts-Martial [hereinafter R.C.M.] 701(e) states "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence." *See* United States v. Hart, 29 M.J. 407 (C.M.A. 1990)(explaining discovery available to accused in courts-martial is broader than the discovery provided most civilian defendants). For a good introduction to the discovery process, see LeEllen Coacher, *Discovery in Courts-Martial*, 39 A. F. L. Rev. 103 (1996).

[20] In *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987), the defense counsel described medical records and relevancy sufficiently despite not knowing the exact contents. "The Military Rules of Evidence establish 'a low threshold of relevance'. . . ." (citation omitted). *But see* United States v. Briggs, 46 M.J. 699, 702 (A.F.Ct.Crim.App. 1996) (holding military judge did not err by denying defense motion to compel production of rape victim's medical records) ("A general description of the material sought or a conclusory argument as to their materiality is insufficient.").

[21] Records of previous allegations of abuse may provide fertile areas for defense to explore in defending the case by providing other sources of alleged abuse or injuries. For admissibility requirements of such evidence *see* United States v. Woolheater, 40 M.J. 170, 173 (C.M.A.

2. All records from Family Advocacy concerning this child and family, as well as records concerning the client;
3. All records from Mental Health concerning this child and family as well as the client;
4. All records kept by any mental health provider, social workers, therapists, counselors, nurses, or doctors, who have seen the child;[22]
5. Medical records of the child and any other children in the family.
6. School records;
7. Videotape interviews, whether by OSI agents or civilian agencies;
8. Notes made by interviewers or observers of an interview of the child;
9. Notice of all previous statements made by the victim or any witness;[23]

1994). In *Woolheater* a conviction was reversed for failure to allow the defense to present evidence that another person had motive, knowledge and opportunity to commit the crime. "The right to present defense evidence tending to rebut an element of proof such as the identity of the perpetrator is a fundamental Constitutional right." In *United States v. Gray*, 40 M.J. 70 (C.M.A. 1994), a conviction was reversed because the military judge improperly excluded evidence of possible sexual conduct involving the victim and another child.

> A child-victim's sexual activity with someone other than an accused may be relevant to show that the alleged victim had knowledge beyond her tender years before the alleged encounter with the accused. . . .By excluding the evidence, the military judge deprived appellant of evidence which could have made his otherwise incredible explanation believable.

Id. at 80. *But see* United States v. Shaffer, 46 M.J. 94 (1997); United States v. Gober, 43 M.J. 52 (1995).

[22] Reece, 25 M.J. at 95 (C.M.A. 1987)

> At trial, defense counsel established that, as there were no eyewitnesses to the alleged offenses, the credibility of the two girls would be a key issue in the case. He argued that Miss D's history of alcohol and drug treatment was relevant to her ability to perceive and remember events, especially as she had admitted that she had consumed alcohol before each of the alleged incidents. With respect to Miss B, he argued that her counseling records would contain evidence of her behavioral problems. He made as specific a showing of relevance as possible, given that he was denied all access to the documents. Some forms of emotional or mental defects have been held to 'have high probative value on the issue of credibility . . . . [A] conservative list of such defects would have to include . . . most or all of the neuroses, . . . alcoholism, drug addiction, and psychopathic personality'" (citations omitted).

[23] *See* United States v. Romeno, 46 M.J. 269 (1997) (case reversed for failure of the prosecutor to provide discovery of exculpatory statements made by main witness against accused).

10. Notice of all previous statements made by the accused; and,
11. A copy of any photographs taken of the injuries.

One of the easiest ways for the defense counsel to determine the appropriate records to request is to construct a timeline regarding the chronology of the disclosure. The timeline will assist him in determining whether he has requested the right discovery, or what records exist and what agency has them. For instance, if a child reports to a school official that she has been abused by her neighbor, the child is probably then interviewed by her teacher, the school psychologist or guidance counselor, the civilian law enforcement agent and the child protective services worker assigned to the case. In such a case, the defense counsel should request a copy of the records, notes and reports generated by all of these witnesses. He should begin the timeline with the initial disclosure, continuing through trial, annotating each agency and person that had contact with the child and the statements made by the child. This will also assist the defense counsel in ensuring he has received all records that are created during this process up through the time of trial.

When the defense counsel receives the various records, it is important he review them thoroughly. For example, it is important to determine if the child is on any medication that may affect his or her ability to perceive and recall. For instance, the medical records may indicate that the child has been diagnosed with Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD). Children who have been diagnosed with those disorders may have then been prescribed Ritalin or some other drug to deal with this problem. The defense counsel should carefully review the pharmacology of any medication and the interactions of any medications given to the child before, during or after the time the child disclosed the alleged offenses.[24] The medical records may also indicate that the child has been seen for a medical condition that is relevant to the allegations. For instance, if the child had been diagnosed with a sexually transmitted disease such as chlamydia that predates the allegations (assuming the accused did not have access to the child during this time), the defense counsel now has evidence that the child may have been abused by someone else.[25] If the initial examination of the victim produced evidence of physical findings such as hymeneal tears, notches, or clefts, there is research that indicates the presence of these findings

[24] A good source for this type of information is The Physicians' Desk Reference. PHYSICIANS' DESK REFERENCE (51st ed. 1997). Additionally, most health care providers have access to on-line services which catalogue published articles relating to the particular drugs being researched. These services are also usually available at larger military medical facilities and local libraries.

[25] *See* Jan Bays and David Chadwick, *Medical Diagnosis of the Sexually Abused Child*, 17 CHILD ABUSE & NEGLECT 91, 99 (1993). "Transmission of sexually transmitted diseases outside the perinatal area by nonsexual means is a rare occurrence."

in nonabused girls.[26] A review of the medical records may show these findings were annotated at a time that predates the allegations. Conversely, the lack of physical evidence can be inconsistent with the child's allegations and the type of injuries one would expect, depending on the timing of the disclosure.[27] Family advocacy or mental health records may indicate a long-standing problem with the child that would also explain the allegations or provide a motive for the child to fabricate. The defense counsel should also check the parents' medical records for any of the child's records that may have been misfiled.

H. Expert Assistance

It is difficult to imagine a child abuse case, whether it involves physical or sexual abuse, where the defense would not be aided by the assistance of an expert.[28] An expert can provide assistance in a number of ways. As stated in *United States v. Turner*, [29]

> To assure that indigent defendants will not be at a disadvantage in trials where expert testimony is central to the outcome, the Supreme Court has ruled that a defendant must be furnished expert assistance in preparing his defense. . . . An expert may be of assistance to the defense in two ways. The first is as a witness to testify at trial. . . . An expert also may be of assistance to the defense as a consultant to advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made. [30]

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[26] *See generally* John McCann, MD, et al., *Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study*, PEDIATRICS, Volume 86, No. 3, at 428 (3 September 1990); *see also* Bays and Chadwick, *supra* note 25, at 92, 94-97.

[27] Bays and Chadwick, *supra* note 25, at 103-107.

[28] *See* United States v. Tornowski, 29 M.J. 578 (A.F.C.M.R. 1989)

> There is little question that child sexual abuse cases often present a fertile, indeed, a necessary, area for expert assistance (cites omitted). Particularly when . . . the prosecution utilizes the assistance of experts, the defense can make a valid and plausible argument for expert assistance of its own to aid in properly evaluating the factual issues and providing adequate legal representation for an accused. . . . From our review of the record, the defense team in this case articulated a number of areas in which a child psychologist might have provided valuable insights and guidance. For instance, certain information suggested that the seven year old victim might have possessed an unusual degree of sexual awareness for a child of tender years. Might this have caused her to make sexual allegations against the appellant that another child of the same age could not have fabricated? *Id.* at 580.

[29] United States v. Turner, 28 M.J. 487 (C.M.A. 1989) (citations omitted).

[30] *Id*. at 488.

In a case involving physical allegations, the defense counsel should have a dedicated defense expert review the evidence. This expert can assist the defense with cross-examination of the government's expert, provide alternative explanations for the physical findings, and may assist in ensuring the government expert's testimony is accurate. The expert can also provide assistance in evaluating the evidence to determine whether the parental-discipline defense is available. In cases involving parental-discipline, the defense must show three things: the appropriate person administered the discipline or force, for a proper purpose, with a reasonable amount of force.[31] Experts can provide assistance in determining whether the facts of the case, and those disclosed by the client, will satisfy the test and how best to present the case. They may also be required to provide expert testimony on these issues.

I. Expert Consultant

A good rule of thumb for the defense counsel is to request that the expert be appointed as a consultant so that he and the expert will have the benefit of the attorney-client privilege.[32] In *Turner*[33], the court articulated how the defense counsel can benefit from the privilege given to expert consultants.

> In performing this function [as a consultant], the expert often will receive confidential communications from the accused and his counsel; and he may have occasion to learn about the tactics the defense plans to employ. If the expert consultant were free to disclose such information to the prosecutor prior to trial, the defense counsel would be placed at a great disadvantage;

[31] *See* United States v. Brown, 26 M.J. 148, 150 (C.M.A. 1988); United States v. Robertson, 36 M.J. 190, 191 (C.M.A. 1992). Both cases adopted the test for the parental discipline defense given in the MODEL PENAL CODE, Section 3.08(1) (1985).

> The use of force upon or toward the person of another is justified if: (1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and: (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. . . .

[32] *See* Mil. R. Evid. 502, *supra* note 10; United States v. Turner, 28 M.J. 487 (C.M.A. 1989); United States v. Gordon, 27 M.J. 331, 332 (C.M.A. 1989); and United States v. Toledo, 25 M.J. 270, 275 (C.M.A. 1987). *See also* Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A. F. L. Rev. 143 (1996).

[33] United States v. Turner, 28 M.J. 487 (C.M.A. 1989).

> and, indeed, he might hesitate to consult with the expert. The result would be impairment of the accused's right to counsel, because his attorney would be inhibited in the performance of his duties and unable fully to utilize the assistance contemplated by *Ake*.[34]

The defense counsel should be aware that in order to obtain the benefit of the attorney-client privilege, the consultant must be either employed by the accused to assist him or be appointed to provide such assistance.[35] According to Mil. R. Evid. 502, "representative" is specifically defined as ". . . a person employed by or assigned to assist a lawyer in providing professional legal services."[36] In *United States v. Toledo*,[37] the defense counsel asked a clinical psychologist to examine his client "off the record." The psychologist was later called as a government witness to testify as to his opinion regarding the accused's character for truthfulness. The defense objected and asserted a privilege. The Court of Military Appeals held no privilege existed because the defense had not used the proper procedure for making the psychologist a representative of the lawyer.

> Had the defense procured medical assistance for the preparation of its defense at its own expense, we would have held that communications between appellant and that expert were within the attorney-client relationship, at least unless a mental-responsibility defense was presented. . . By the same token, a servicemember has no right simply to help himself to government experts and bring them into the attorney-client relationship, bypassing the proper appointing authorities.[38]

J. Making an Adequate Request for Assistance

As with the discovery request, the request for expert assistance must be specific regarding the issues that require expert assistance. In *United States v. Garries*,[39] the Court of Military Appeals held that "When an accused applies for the employment of an expert, he must demonstrate the necessity for the services."[40] The court further held that it would be inappropriate for the military judge to hold an *ex parte* hearing in order to protect disclosure of defense theories when requesting expert assistance. "Use of an *ex parte* hearing to obtain expert services would rarely be appropriate in the military context because funding must be provided by the convening authority and such a procedure would deprive the Government of the opportunity to consider and

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[34] *Id.* at 488, 489. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).
[35] Mil. R. Evid. 502, *supra* note 10.
[36] Mil. R. Evid. 502(b)(3), *supra* note 10.
[37] United States v. Toledo, 25 M.J. 270 (C.M.A. 1987).
[38] *Id.* at 276.
[39] United States v. Garries, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985, 107 S. Ct. 575, 93 L. Ed. 2d 578 (1986).
[40] *Id.* at 291.

arrange alternatives for the requested expert services."[41] In *United States v. Tornoswski*,[42] the Air Force Court of Military Review addressed the difficulty in articulating a need for expert assistance. Citing *Moore v. Kemp*,[43] the Court stated:

> We recognize that the defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with detailed analysis of the assistance an appointed expert might provide. We do believe, however, that the defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to defense's case.[44]

In *United States v. Gonzalez*,[45] the Court of Military Appeals established a three-prong test the defense must meet in order to show necessity for expert assistance. "There are three aspects of showing necessity. First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop."[46] Thus, to the best of his ability, the defense counsel must establish in the request the necessity of expert assistance. Additionally, the defense is not entitled to a specific expert.[47] However, this does not suggest that it is permissible for the government to provide the defense with an expert who is

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[41] *Id.* at 291. In *United States v. Kaspers*, 47 M.J. 176, 180 (1997), the appellant asked for an *ex parte* hearing to protect attorney client privileged information which formed the basis of the expert request. The Court explained that:

> Here, we examine our own rule, which requires disclosure by the defense if it desires government funding. See R.C.M. 703(d). Using our rule, the judge did not abuse his wide discretion in denying the *ex parte* hearing because appellant did not establish "unusual circumstances" [cite omitted]. . . . We realize that, while our rule may burden the defense to make a choice between justifying necessary expert assistance and disclosing valuable trial strategy, the defense is not without a remedy. The military judge has broad discretion to protect the rights of the military accused.

[42] United States v. Tornowski, 29 M.J. 578 (A.F.C.M.R. 1989).
[43] Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.1987).
[44] United States v. Tornowski, 29 M.J. 578, 580 (A.F.C.M.R. 1989).
[45] United States v. Gonzalez, 39 M.J. 459 (C.M.A. 1994).
[46] *Id.* at 461, citing United States v. Allen, 31 M.J. 572, 623 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).
[47] United States v. Ingham, 42 M.J. 218, 226 (1995). "[A]ppellant's right, upon a minimal showing of need, is to expert assistance (cites omitted). He does not have a right to compel the Government to purchase for him any particular expert or any particular opinion." *See also* United States v. Garries, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985, 107 S. Ct. 575, 93 L. Ed. 2d 578 (1986); United States v. Tharpe, 38 M.J. 8, 14 (C.M.A. 1993).

less qualified than the government expert[48] or one who is unqualified to provide competent assistance to the defense.[49]

When the defense counsel requests any expert, it is always helpful if he has done the legwork for the government to find a qualified expert to recommend to the convening authority. The defense counsel should avoid any potential conflict issues by recommending someone other than a member assigned to the same medical group as the government expert. He should discover the qualifications of the government expert witness and use those as a minimum for the defense requested expert.[50]

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[48] United States v. Burnette, 29 M.J. 473, 475-76 (C.M.A. 1990) (holding the government is required to provide competent expert and simply providing access to government expert may not be sufficient) (citations omitted).

> All that is required is that competent assistance be made available. . . . In retrospect it is clear that [the government expert] would not have been an adequate substitute for such independent assistance. . . . [The government expert] was presenting incriminating evidence against appellant on behalf of the prosecution. If there remained a genuine question regarding the test procedures and conclusions, it would hardly be fair to expect the defense to extract its ammunition from one of the very witnesses whose conclusions it was attacking.

[49] *See* United States v. Robinson, 43 M.J. 501, 505 (A.F.Ct.Crim.App. 1995) (explaining it was not error to deny defense motion for civilian expert who had more experience in treatment of sex offenders than initial defense approved expert). ("[A]n accused is not entitled to have the government pay for the best expert witness available since the government may always provide an adequate substitute. R.C.M. 703(d). Of course, a government-selected expert is not an 'adequate substitute' when that expert and the defense requested one hold divergent scientific views."); United States v. Van Horn, 26 M.J. 434, 438 (C.M.A. 1988) (citations omitted) (reversing based on military judge's denial of defense requested expert and erroneous finding that government expert was an adequate substitute).

> We have no doubt that [the government expert] was an expert in his field. However, the fact remains that [the defense expert], also an expert, had no connection with the challenged laboratory and had examined its reports which were used by the prosecution. More importantly, he had a contrary opinion concerning reliability of the test procedures used, results reached, and conclusions based thereon. In short, his testimony favored the defense and could not reasonably be considered cumulative of [the government expert] or replaceable by his testimony. . . . To deny the defense a meaningful opportunity to present its evidence, which challenged the Government's scientific proof, its reliability, and its interpretation, denied appellant a fair trial.

[50] Often, the government will use the physician that initially examined the child. This physician may be one with limited experience in the child abuse arena. Finding a physician with more experience and better credentials will impress the members should the defense expert testify. It may also have the effect of educating the government expert regarding the

It is important to remain diligent in defense efforts to obtain expert assistance. The defense counsel should receive a written response to the request. A motion to compel the production of an expert should follow any denial of the request.[51] If the defense counsel believes the proposed expert is not competent to provide adequate assistance, he should begin to address the problem by thoroughly interviewing the proposed expert. Often the trial counsel may not provide the proposed expert adequate information regarding what the defense counsel requires and expects from the expert. Once the defense counsel explains this to the expert, the expert can then tell him whether he believes he has the appropriate qualifications. Before filing a motion to compel, it may be useful for the defense counsel to attempt to work with trial counsel to find another qualified expert.

In the event the defense believes the proposed expert is inadequate and if the government refuses to approve another expert, the defense must then show that the expert is not qualified. In *United States v. Ndanyi*,[52] the Court of Military Appeals held that the defense did not make an adequate showing that the experts the government offered to provide were inadequate. "[A]bsent a showing by appellant at trial that his case was unusual, i.e., the proffered scientific experts . . . were unqualified, incompetent, partial, or unavailable, his motion for government-funded expert assistance was properly denied."[53]

The defense counsel should include in his request an appropriate number of days of preparation time with his expert prior to trial. He should also seek to have the consultant present throughout the trial, including sentencing, if the government intends to put on expert testimony. The pretrial preparation with the expert should include a records review prior to the expert's arrival at trial, as well as several days to assist in interviewing the relevant witnesses prior to trial. The relevant witnesses include the government expert witness, the alleged victim, and those witnesses who had initial contact with the child upon disclosure. Generally, the expert does not need to be present for the interview of all the witnesses, provided the defense counsel gives the expert a good summary of the peripheral witnesses.

K. Potential Issues Requiring Expert Assistance

Issues that arise in a case of sexual abuse allegations that may require the assistance of a psychologist/psychiatrist, preferably one with forensic experience,[54] include:

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current state of research in the relevant subject area which should keep the government expert from exceeding limits of his/her expert opinion.

[51] R.C.M. 906(b)(7), *supra* note 19.

[52] United States v. Ndanyi, 45 M.J. 315 (1996).

[53] *Id.* at 320. *See also* Van Horn, 26 M.J. at 468.

[54] A forensic psychologist/psychiatrist has experience dealing with legal issues as they relate to the field of psychology, may have previously testified as an expert witness, and should have

a. delayed reporting by the victim;
b. evaluation of cognitive abilities, development of the child, memory capacity;[55]
c. analysis of statements by the child for age appropriate vocabulary and whether the child displays age appropriate behavior;[56]
d. effects of family problems including significance of a pending divorce and custody battle;
e. whether the child is susceptible to suggestion or influence by authority figures; [57]
f. whether the statements have been tainted by contact with investigators, therapists, doctors, or prosecutors;[58]

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experience in analyzing evidence in a criminal trial for issues related to his field of expertise. Employing an expert with forensic experience may reduce the amount of preparation time as well as increase the use of the expert given this specialized knowledge.

[55] In United States v. Sojfer, 47 M.J. 425, 427-28 (1998) (citations and footnotes omitted) the court discussed admissibility of evidence related to a witness' competency in terms of an ability to perceive a situation.

> There are similarities between bias and capacity to observe, remember and recollect. Both are grounds for impeachment, and both may be proven by extrinsic evidence. However, before the proponent may introduce evidence under either theory, he or she must lay a foundation that establishes the legal and logical relevance of the impeaching. How a witness "views" an event, in terms of her five senses, depends on her background, including family life, education and day-to-day experiences. Witnesses "behave according to what [they] bring to the occasion, and what each of [them] brings to the occasion is more or less unique. In that sense, each witness has a bias. Additionally a witness's interpretation of an event depends on whether her perception is impaired. For example, the individual may be hearing-impaired or may not have been wearing corrective lenses at the time of the crime. A past or present mental condition also may impact on a person's ability to perceive.

This language could also be used to support a motion to compel discovery of certain mental health and medical records.

[56] For a discussion on a suggested approach for assessing the validity of statements regarding sexual abuse, *see* David R. Raskin and Phillip W. Esplin, *Statement Validity Assessment: Interview Procedures and Content Analysis of Children's Statements of Sexual Abuse*, 13 BEHAVIORAL ASSESSMENT 265 (1991). Concerned over increased questioning of the reliability of assessment procedures for examining abuse, the American Academy of Child and Adolescent Psychiatry (AACAP) issued recommended guidelines in 1988. *See* AACAP, *Guidelines for the Clinical EVALUATION OF CHILD AND ADOLESCENT SEXUAL ABUSE*, 25 J. Am. Acad. Child & Adolescent Psychiatry 655 (1988).

[57] *See generally*, THE SUGGESTABILITY OF CHILDREN'S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY (John Doris ed., American Psychological Association 1991).

[58] For a discussion regarding the possible effects of repeated or leading questions or multiple interviews, see John B. Meyers, et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 27 PACIFIC L.J. 1, 12, 25 (1996).

g. forensic evaluation of the allegations of abuse;[59]
h. occurrence of fabrication of allegations by children;[60]
i. evaluation of any diagnosis for personality disorders, adjustment disorders, or psychological problems which might indicate an inability to accurately perceive, recall or report;
j. effect of use of anatomically correct dolls by government expert or initial interviewer;[61] and
k. assistance in preparation of how to interview and prepare cross-examination of the child witness.

L. Expert Contact with the Accused – Setting The Boundaries

Once the defense counsel has an expert consultant, he must decide how much contact the expert should have with the client. This may depend in large part on how the defense counsel plans to use his expert. Factors the defense counsel should consider include whether the expert consultant will testify during the trial. If so, the defense counsel should be aware of the limits of what the consultant must disclose. In *United States v. Turner*,[62] trial counsel interviewed the defense expert prior to trial. The Court of Military Appeals held this was error because the defense expert had not been declared as an expert witness prior to trial. In footnote 3, the Court noted the safeguards the defense would have even if they had declared him an expert witness at some point in the trial.

> If the defense counsel also planned to use [defense expert] as a witness, trial counsel could properly have interviewed him as to the matters about which he could testify. However, in that event, the expert witness should have been advised carefully that he could not reveal any discussions with the accused or with the defense counsel, or impart information to trial counsel which was not already available to him. Moreover, the defense counsel could properly have insisted on being present during the interview of his own expert witness in order to assure that trial counsel did not stray into forbidden territory.[63]

In *United States v. Mansfield*,[64] the Court of Military Appeals specifically held that

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[59] *See generally*, William Bernet, M.D., *Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36:3 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY, 423 (March 1997).
[60] *See generally*, DR. STEVEN CECI & DR. MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 30-33 (1995).
[61] For a review of the pros and cons of the use of anatomically correct dolls in child interviews, see generally CECI AND BRUCK, *supra* note 60, at 161.
[62] United States v. Turner, 28 M.J. 487 (C.M.A. 1989).
[63] *Id.* at 489 n.3.
[64] United States v. Mansfield, 38 M.J. 415 (C.M.A. 1993).

> [W]hen such experts are called as a witness on behalf of an accused and the witness has relied upon statements of the accused in formulating an opinion, the attorney-client privilege terminates with respect to those matters placed in issue by the expert's testimony. Further, any expert who offers a testimonial opinion is subject, at the request of the party-opponent "to disclose the underlying facts or data on cross-examination."[65]

Thus, examination of the accused and presentation of evidence on the issue is another factor to be considered. If the expert does examine the accused, as articulated in the request for expert assistance, the defense counsel should know the limits of what the expert must disclose if he later testifies. An alternative to using the expert consultant to examine the accused would simply be to request a sanity board.[66] If the defense counsel has done this, and/or intends to contest the findings of the sanity board to put forward a lack of mental responsibility defense, he must be aware of the exposure of the client's statements when the expert testifies.

M. Article 32 Strategies

The defense counsel should prepare extensively for the Article 32 hearing. The Article 32 hearing is often where the defense counsel lays the groundwork for cross-examination at trial of the alleged victim. This cannot be properly done unless the defense counsel has done his homework first. The hearing will also give him a chance to evaluate how well the child testifies. This will help him to determine his strategy at trial and whether the defense counsel should litigate or pursue other options either to avoid trial, or obtain a favorable pretrial agreement for his client.

When preparing for the hearing, a good source of information may be the primary caregiver. The defense counsel is looking for indications the child has a problem distinguishing between fantasy and reality, has an overactive imagination, tells lies as a way to get attention, is melodramatic or histrionic, has ADD/ADHD, is physically active and always has bruises, or is difficult to control. Presenting the testimony at the Article 32 that calls into question the reliability of the allegations may result in the government taking a second look at whether the case should be referred to trial. It may also put the defense counsel in a position to obtain an alternative disposition for the client. While the "conventional wisdom" may be to play his cards close to the vest, the astute defense counsel will not overlook any opportunities to keep his client out of the courtroom. If the child has serious problems, like lying or distinguishing between fantasy and reality, or if other plausible explanations for injuries exist, bringing these problems to the attention of the prosecution

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[65] *Id.* at 418.
[66] R.C.M. 706.

early on may strengthen the defense position with regard to alternative disposition.

The Article 32 hearing also provides the defense counsel an opportunity to interview the child in person. When interviewing the child, he should avoid suggesting answers to the child or contributing to the taint of the child's testimony by asking leading questions.[67] He should use the interview to gather as much background information as he can about the child and her history with the client, before and after disclosure. The defense counsel should inquire whether the child keeps a journal, diary, or has written anything about the incidents, either before or after the allegations. The child's writings may contain information that is invaluable to the defense.[68]

If the victim is going to testify, the defense counsel should request a verbatim transcript. While there is always the concern that the victim may be unavailable at trial, having a witness declared unavailable is a high standard.[69] A verbatim record is important for the defense counsel because it will help him to develop the inconsistencies in the child's testimony, as well as get the child committed to areas he hopes to use as impeachment at trial. The Investigating Officer (IO) may not recognize the value of areas the defense counsel is examining the witness about and may not incorporate the information into a summary. Because the IO is not obligated to prepare a summary[70] there is essentially no relief for a defense counsel when this occurs.[71] Thus, a

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[67] Even the military courts have recognized the difficulty in interviewing child witnesses. In United States v. Dunlap, 39 M.J. 835, 839 n.6 (A.C.M.R. 1994), the Army Court of Military Review set aside the conviction because of the improper admission of the child's hearsay statements which were the product of a suggestive puppet show dealing with child abuse. The court noted

> This case points up a very important aspect of developing child abuse cases- the need for a trained professional. If a school or other organization is going to use a puppet show or other device to surface cases of abuse, then it had better also have personnel specifically trained in dealing with child abuse problems to do the follow-up counseling.

[68] If the child indicates that they have such writings, it may be prudent for the defense counsel to call the trial counsel and ask that an adult, other than the parents, accompany the child to pick up the diary. This will avoid destruction of the writings by the child or a misguided parent or social worker.

[69] M.R.E. 804(a) *supra* note 10, and R.C.M. 703(b)(3) *supra* note 19.

[70] R.C.M. 405(j)(2)(B), *supra* note 19. *See also* Discussion to R.C.M. 405(h)(1)(A) at Part II, page 38, which suggests that the IO prepare a summary of the testimony and have the witness swear to it again. However, the analysis acknowledges that the IO is not required to do this to complete the report.

[71] *But see* Discussion to R.C.M. 405(h)(1)(A) at Part II, page 38, *supra* note 19, which indicates that any notes or recordings of the testimony should be preserved until the end of the trial. These recordings should then be available to the defense and could be used to impeach the witness with the prior inconsistent statement.

verbatim transcript would best ensure that the lines of questioning pursued by the defense counsel are preserved for trial.

If the IO determines that the child is unavailable for the hearing, the defense counsel should make sure the IO has performed the correct analysis. In *United States v. Marrie*,[72] the Air Force Court of Military Review held that R.C.M. 405(g)(1)(A)[73] does not establish a *per se* rule of unavailability if the witness is located more than 100 miles from the site of the hearing.[74] The IO is required to perform a balancing test that weighs the necessity of the witness's testimony against the expense and trouble in producing the witness.[75] In order to preserve the right of personal attendance at an Article 32 hearing the defense counsel must move to take the witness's testimony by deposition.[76] Often, the child is in the local area, but doesn't want to testify. While the IO cannot compel the witness to attend the hearing, the defense counsel should not agree to a finding of unavailability unless the government has taken sufficient steps to procure the testimony.[77] If the child is legitimately unavailable, or the client has already decided to enter a plea and attempt to negotiate a pretrial agreement with the convening authority, the defense counsel should consider waiving the Article 32 hearing. There is nothing for him to gain by going through the motions of an Article 32. Waiving the hearing may be good extenuation and mitigation at trial if the defense can argue the client waived the hearing in an effort to ease the burden of the ordeal on the child. If the child testifies at the hearing, the defense counsel should object to the child adopting any prior statements as part of the Article 32 testimony[78] unless the statements are inconsistent and consideration by the IO will favor the defense.

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[72] United States v. Marrie, 39 M.J. 993 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 35 (1995).

[73] *See supra* note 19. The rule provides

> Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is "reasonably available" when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. A witness who is unavailable under Mil. R. of Evid. 804 (a)(1-6) is not "reasonably available."

[74] *Marrie*, *supra* note 72, at 997.

[75] R.C.M. 405(g)(1(A), *supra* note 19.

[76] United States v. Simoy, 46 M.J. 592, 608 (A.F.Ct.Crim.App. 1996).

[77] *See* Discussion to R.C.M. 405(g)(2)(B), *supra* note 19, at Part II, page 36.

[78] *See* United States v. Oritz, 33 M.J. 549 (A.C.M.R. 1991) and United States v. Rudolph, 35 M.J. 622 (A.C.M.R. 1992). This is especially important if there are legitimate concerns about the availability of the child at trial.

Matters that should be presented by the defense at the Article 32 hearing include any and all "atta-boy" papers that the client may have. This is especially important in a "close" case. Generally, the client should not testify at the Article 32 hearing. The risk of committing the client to testimony that is sworn and available to the government, months prior to trial, allows the government to work on discrediting the client. It also provides the trial counsel with a rare opportunity to actually prepare a cross-examination of the accused based on this prior statement. If he wants to make a statement, the rules provide for an unsworn statement[79] and it may not be a bad idea to have the client make a generalized statement denying any wrongdoing.

The responsibilities of the defense counsel do not end after the report is served on the accused. He must file his objections in a timely manner[80] or the issues are considered waived.[81] The defense counsel should ensure that they have carefully read the report, reviewed the summary of testimony, and filed any written objections in a timely fashion.

III. TRIAL

A. Motions To Compel

Motion practice in a case involving child abuse allegations may be complex and require the defense counsel to determine which motions he intends to file well in advance of the trial. Assuming witness and discovery requests are made in a timely manner,[82] the defense counsel should file a motion to compel as soon as he has notice from the prosecution that the government will not turn over certain documents, produce an expert or other witnesses.[83]

In *United States v. Reece*,[84] the Court of Military Appeals held that the military judge abused his discretion by failing, at a minimum, to review the requested records *in camera*. The Court based its ruling on its finding that "Military law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts."[85]

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[79] R.C.M. 405(f)(12), *supra* note 19.
[80] R.C.M.405(j)(4), *supra* note 19.
[81] *See* United States v. Argo, 46 M.J. 454 (1997) (holding where defense did not raise issue of nondisclosure of impeachment evidence of a government witness in objections to the Article 32 report within 5 days, was waived for the issue at trial).
[82] R.C.M. 703(c)(2)(C), *supra* note 19.
[83] R.C.M. 905(b)(4), 906(b)(7), and 914, *supra* note 19.
[84] United States v. Reece, 25 M.J. 93 (C.M.A. 1987).
[85] *Id.* at 94, quoting United States v. Mougenel, 6 M.J. 589, 591 (A.F.C.M.R. 1978), *pet denied*, 6 M.J. 194 (1979).

The Court went on to further hold that "The Military Rules of Evidence establish 'a low threshold of relevance' . . . ."[86]

In *United States v. Tangpuz*,[87] the Court of Military Appeals articulated several factors to be considered when determining whether to produce a witness requested by the defense.

> The Court has never fashioned an inelastic rule to determine whether an accused is entitled to the personal attendance of a witness. It has, however, identified some relevant factors, such as: the issues involved in the case and the importance of the requested witness as to those issues; whether the witness is desired on the merits or the sentencing portion of the trial; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories or previous testimony. . . . If adverse to the accused, the ruling is subject to review and reversal if there has been an abuse of discretion.[88]

The Court went on to state that all parties should recognize the need for the accused to have equal access to witnesses and the use of compulsory power. Citing *United States v. Manos,* [89] the court stated

> We are, however, concerned with impressing on all concerned the undoubted right of the accused to secure the attendance of witnesses in his own behalf; the need for seriously considering the request; and taking necessary measures to comply therewith if such can be done without manifest injury to the service. That is what we meant in *Sweeney*,[90] in speaking of weighing the relative responsibility of the parties against the equities of the situation.[91]

Failure to request witnesses or experts in a timely fashion may result in loss of these witnesses.[92] Filing the motion early may help to resolve these issues prior to the trial and avoid undue delay. If not, the defense counsel may face the prospect of a delay in the proceedings because the documents in question may be difficult to obtain quickly, witnesses become unavailable, and experts make other commitments.

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[86] *Id.* at 95 (citations omitted).
[87] United States v. Tangpuz, 5 M.J. 426 (C.M.A. 1978).
[88] *Id.* at 429.
[89] United States v. Manos, 17 U.S.C.M.A. 10, 15, 37 C.M.R. 274, 279 (1967).
[90] United States v. Sweeney, 14 U.S.C.M.A. 599, 605, 34 C.M.R. 379, 385 (1964) (holding accused prejudiced when the military judge denied motion to compel two character witnesses who would have testified on the merits).
[91] 5 M.J. at 430, citing United States v. Manos, 17 U.S.C.M.A. at 15, 37 C.M.R. at 279.
[92] *See* United States v. Brown, 28 M.J. 644 (A.C.M.R. 1989). "Although timeliness is not *per se* grounds for denying a request for a witness, timeliness of a defense request for a witness may be considered." *Id.* at 647.

B. Motions for a New Article 32 Hearing

One motion for the defense counsel to consider is a motion for a new Article 32 hearing.[93] This will be important if the child witness was not produced at the hearing and the basis for finding him/her unavailable is insufficient.[94] Another issue may be that the IO improperly considered statements or alternatives to evidence over defense objection.[95] The defense counsel should, however, pay special attention to the axiom, "be careful what you ask for, you just may get it." He should carefully weigh the benefit of another hearing with consideration as to how well his client is holding up in the process. If an extended delay will result in further deterioration of the client, the benefits may be outweighed by the risks.

C. Motions in Limine – Residual Hearsay Issues

In cases dealing with child abuse allegations, the prosecution may seek to introduce hearsay statements of the victim. Motions in limine may prevent the prosecution from doing this and allow the defense counsel to try his case. One of the more common avenues that the prosecution attempts to take in admitting out of court statements is M.R.E. 803(24).[96] The standard for

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[93] R.C.M. 905(b)(1) and 906(b)(3), *supra* note 19.

[94] *See* United States v. Marrie, 39 M.J. 993 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 35 (1995).

[95] While the author's research found no cases directly on point, a due process argument could be made based on R.C.M. 405(g)(4)(A), *supra* note 19. *See also* United States v. Pazdernik, 22 M.J. 690 (A.F.C.M.R. 1986) (stating purpose of the Article 32 hearing is to insure the accused receives a thorough and impartial investigation); United States v. Bramel, 29 M.J. 958 (A.C.M.R.) (stating primary purpose of Article 32 investigation is to obtain impartial recommendation of the charges); and United States v. Chestnut, 2 M.J. 84, 85 n.4 (C.M.A. 1976). ("[T]his court once again must emphasize that an accused is entitled to the enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial.").

[96] M.R.E. 803, *supra* note 10, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

admissibility of statements under the residual hearsay rules is the United States Supreme Court decision in *Idaho v. Wright*.[97] In *Wright*, The Supreme Court held that a statement offered under the residual hearsay exception should only be admitted "if it bears adequate 'indicia of reliability.'"[98] This requirement can only be met "by a showing of particularized guarantees of trustworthiness."[99] To determine whether these guarantees exist, the court must look at "the totality of circumstances . . . [t]he only relevant circumstances, however are 'those that surround the making of the statement and that render the declarant particularly worthy of belief.'"[100]

In *United States v. Kelley*,[101] the Court of Appeals for the Armed Forces[102] addressed the issue of admissibility of statements offered under the residual hearsay exception. "The residual-hearsay rule sets out three requirements for admissibility: (1) materiality, (2) necessity, and (3) reliability."[103] The Court went on to state that the exception should be rarely used, but that in cases involving child abuse allegations, the necessity prong is more liberally construed. The Court explained that:

> Federal courts have recognized that "one such exceptional circumstance generally exists when a child abuse victim relates to an adult the details of the abusive events." The more liberal approach in child abuse cases extends to the "necessity" requirement. Even though residual hearsay may be "somewhat cumulative, it may be important in evaluating other evidence and arriving at the truth so that the 'more probative' requirement can not be interpreted with cast iron rigidity."[104]

Under this standard, it appears that the best line of attack for the defense counsel will be the reliability prong of the test. If the statement is made to a law enforcement agent, the defense counsel can attack the reliability of the statement based on this fact.[105] In *United States v. Hines*,[106] the Court of Military Appeals addressed the issue of reliability of statements of

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[97] Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d. 638 (1990).
[98] *Id.* 497 U.S. at 814-15, 110 S. Ct. at 3141.
[99] *Id*. 497 U.S. at 815, 110 S. Ct. at 3142.
[100] United States v. Clark, 35 M.J. 98, 106 (C.M.A. 1992) citing Idaho v. Wright, 497 U.S. at 819, 110 S. Ct. at 3142.
[101] United States v. Kelley, 45 M.J. 275 (1996).
[102] Formerly the Court of Military Appeals.
[103] 45 M.J. at 280.
[104] *Id*. (citations omitted).
[105] *See generally* United States v. Cordero, 22 M.J. 216 (C.M.A. 1986); United States v. Murphy, 30 M.J. 1040 (A.C.M.R. 1990) (citing cases holding that statements made to law enforcement agents are inherently suspect); and United States v. Quarles, 25 M.J. 761 (N.M.C.M.R. 1987) (explaining admission of hearsay statements error because they were unreliable).
[106] United States v. Hines, 23 M.J. 125 (C.M.A. 1986).

unavailable witnesses made to law enforcement agents and whether the statements would satisfy the Confrontation Clause.

> Our concern . . . is whether *ex parte* statements to law enforcement officers are obtained with such a degree of bipartisanship that an accused cannot reasonably contend that the purposes of cross-examination have not been served? . . . Since [the agent's] questioning is proffered as a replacement for cross-examination, was it equivalent to cross-examination? In other words, was [the agent] as zealous at uncovering the weaknesses in the prosecution's case . . . as defense counsel would have been? Was he intent on exploring all possibilities of reasonable doubt as to guilt, or was he, in effect, content with making out a *prima facie* case? On this record we think that the investigative process was not equivalent to the judicial process, and we would not ordinarily expect it to be. Hence we do not believe that [the agent's] examination of the declarants by itself comported with the substance of the constitutional protection.[107]

D. Motions in Limine – Uncharged Misconduct

In light of M.R.E.s 413[108] and 414,[109] it may be difficult for the defense counsel to limit uncharged misconduct of sexual assaults by his client. As his first line of attack, the defense counsel should consider challenging the constitutionality of these rules of evidence. If this fails, he should ask the judge to perform an M.R.E. 403[110] balancing test. Of course, if the government intends to offer this evidence, make sure they have complied with the notice requirements. If the military judge allows the evidence to be

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[107] *Id*. at 137 (cites omitted).

[108] Mil. R. Evid. 413, *supra* note 10, allows the prosecution, in the case of sexual assault, to present evidence of any other sexual assault committed by the accused for any relevant purpose. The prosecution must provide notice of its intent at least 15 days prior to trial date. (The Air Force has proposed an amendment to the current rules, changing the notice requirement to 5 days. It is expected this change will be approved and implemented in the near future.)

[109] Mil. R. Evid. 414, *supra* note 10, allows the prosecution, in a case of child sexual molestation, to present evidence of any other sexual assault on a child for any relevant purpose. The prosecution must provide notice of its intent at least 15 days prior to trial date. (The Air Force has proposed an amendment to the current rules, changing the notice requirement to 5 days. It is expected this change will be approved and implemented in the near future.) For a good overview of the new rules, see Stephen R. Henley, *Caveat Criminale: The Impact of the New Military Rules of Evidence in Sexual Offense and Child Molestation Cases*, THE ARMY LAWYER, 82 (Mar 1996).

[110] The rule states "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See also* United States v. Hughes, __ M.J. __, ACM 32359 1998 CCA LEXIS 227 (AFCCA 1998) (holding that in cases of evidence offered under Mil. R. Evid. 414, a judge must still find the evidence to be relevant under Mil. R. Evid. 401 and must perform the balancing test under Mil. R. Evid. 403.

introduced, the defense counsel should seek a limiting instruction regarding how the members can use the evidence.[111]

In dealing with uncharged misconduct unrelated to sexual assaults, the defense counsel should move to limit the government's use of the evidence. In determining whether uncharged misconduct is admissible, the courts have established a three-prong test. First, the quality of the evidence must be assessed for its ability to prove the extrinsic offenses; second, is the evidence relevant to prove something other than a predisposition to commit crimes; third, regardless of the findings relating to the first two prongs, a balancing test must be performed under M.R.E. 403.[112] In *United States v. Franklin*,[113] the Court of Military Appeals addressed the issue of whether uncharged misconduct offered to prove intent was properly admitted. The Court recognized the inherent difficulty in distinguishing "between the intent to do an act and the predisposition to do it."[114] In *United States v. Gamble*,[115] the Court of Military Appeals reversed a conviction of rape because the military judge had erroneously admitted uncharged misconduct. The issue in the case was consent of the victim. The prosecution offered evidence of another assault as evidence of intent, plan, preparation and absence of mistake. The Court, quoting from the Military Rules of Evidence Manual,[116] stated:

> It is common for the prosecution to use short-hand expressions like modus operandi, common plan or scheme, etc., to account for an offer of evidence of other acts. A trial judge must be certain to make the prosecution state exactly what issue it is trying to prove in order to see whether the evidence is probative, how probative it is, and whether it should be admitted in light of the other evidence in the case and the ever present danger of prejudice.[117]

While the advent of the new rules of military evidence relating to uncharged misconduct in these kinds of cases may make it more difficult to keep the evidence from the members, the defense counsel should still make every effort and use every avenue to prevent it.

E. Dealing with Statements Offered under Medical Diagnosis Exception

Another avenue prosecutors will commonly use to have out of court statements of the child admitted is the medical diagnosis exception to M.R.E.

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[111] Mil. R. Evid. 105, *supra* note 10.
[112] *See generally* United States v. Loving, 41 M.J. 213 (1994); United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989); United States v. Mirandes-Gonzalez, 26 M.J. 411 (C.M.A. 1989); and United States v. White, 23 M.J. 84 (C.M.A. 1986).
[113] United States v. Franklin, 35 M.J. 311 (C.M.A. 1992).
[114] *Id.* at 316.
[115] United States v. Gamble, 27 M.J. 298 (C.M.A. 1988).
[116] S. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL, at 361 (2d ed. 1986).
[117] 27 M.J. at 304.

803.[118] Statements offered under this exception must meet two requirements. First the person making the statement must have "some expectation of promoting his well-being and thus an incentive to be truthful. Second, the statement must be made by a declarant for the purpose of medical diagnosis and treatment."[119] In *United States v. Siroky*,[120] the Court of Appeals for the Armed Forces affirmed the Air Force Court of Criminal Appeals finding that a child's testimony did not meet the test for admissibility. The Court found that there was insufficient evidence in the record to indicate that the 2 1/2-year-old child had an expectation of treatment when she visited the psychotherapist.

The defense counsel should be alert to situations in which the statements being offered were taken in conjunction with investigations rather than treatment. In *United States v. Faciane*,[121] the Court of Military Appeals reversed a conviction of indecent acts because statements by the alleged victim were improperly admitted under the medical diagnosis exception. The Court found that there was insufficient evidence to meet the second prong of the test when the child was interviewed by a child protective services worker at the hospital.

> Although the child may have associated a hospital with treatment and may have known that she was in a hospital when she talked to Mrs. Thorton, there is no evidence indicating that the child knew that her conversation "with a lady" in playroom surroundings was in any way related to medical diagnosis or treatment. Mrs. Thorton testified that she did not present herself as a doctor or do anything medical. There is no evidence that Mrs. Thorton was dressed or otherwise identified as a medical professional. The interview took place in a room filled with toys. There is nothing suggesting that the child made the statements with the expectation that if she would be truthful, she would be helped.[122]

The Court of Military Appeals set out five foundational requirements that may provide additional grounds for the defense to attack admissibility of

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[118] Mil. R. Evid. 803(4), *supra* note 10, provides

> (4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

[119] United States v. Armstrong, 36 M.J. 311, 313 (C.M.A. 1993). *See also* United States v. Quigley, 35 M.J. 345, 346-47 (C.M.A. 1992).

[120] United States v. Siroky, 42 M.J. 707 (A.F.Ct.Crim.App. 1996), *aff'd*., 44 M.J. 394 (1996).

[121] United States v. Faciane, 40 M.J. 399 (C.M.A. 1994).

[122] *Id.* at 403. See also *United States v. Dunlap*, 39 M.J. 835 (A.C.M.R. 1994) (holding it error to admit statements under M.R.E. 803(4) as there was no evidence that witness recognized that person making statement to could provide treatment, or that witness expected to receive treatment).

these statement in *United States v. Quigley*.[123] In *Quigley*, the Court found that:

> [T]he foundational facts required by M.R.E. 803(4) are that a statement (1) was made; (2) near the pivotal time of the events; (3) to an individual who could render medical diagnosis or treatment; (4) by an individual who had an expectation of receiving treatment from the recipient of the statement; and (5) refers to the person's mental and emotional condition.[124]

The defense counsel should also be familiar with who was present at the interview and the circumstances surrounding the taking of the statements. In *United States v. Armstrong*,[125] the court reversed a conviction for sodomy that was based on statements made to trial counsel in the presence of a psychologist. The Court found that the statements did not fit the exception because they were made to the trial counsel for purposes of preparing for trial. The Court recognized that the relationship between the witness and the psychologist who was present during the interview was for an appropriate purpose and the therapeutic value of all the statements made to the psychologist. "However, even untrue statements contribute to the psychologist's understanding of his or her patient's problems; thus the mere fact that a patient made a statement to a psychologist does not necessarily make the statement admissible under this rule."[126] In *United States v. Henry*,[127] the Army Court of Criminal Appeals[128] held that statements of the alleged victim were not made for medical diagnosis "but rather the statements were made for the purpose of facilitating the collection of evidence relevant to the criminal investigation of her rape allegation."[129] In *Henry* the investigators had arranged for the examination after they interviewed the witness. The witness testified that she did not request the examination and her understanding of the reason for the exam was to determine if she had been raped.[130]

Cases involving child abuse can raise difficult evidentiary issues. The defense counsel must be vigilant and aggressive to ensure the government operates within, and the courts properly apply, the evidentiary rules. Recently in *United States v. Knox*,[131] the Navy-Marine Corps Court of Criminal Appeals[132] reversed a conviction of rape and forcible sodomy with a child

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[123] *Quigley*, 35 M.J. at 346-347.
[124] *Id.*
[125] United States v. Armstrong, 36 M.J. 311 (C.M.A. 1993).
[126] *Id.* at 314.
[127] United States v. Henry, 42 M.J. 593 (Army Ct.Crim.App. 1995).
[128] Formerly the Army Court of Military Review.
[129] 52 M.J. at 597-98.
[130] *Id*. at 596.
[131] United States v. Knox, 46 M.J. 688 (N.M.Ct.Crim.App. 1997).
[132] Formerly the Navy Marine Court of Military Review.

under age 16 in part because of the improper admission of hearsay testimony. At the conclusion of the opinion the Court cautioned trial practitioners about circumvention of the military rules of evidence in the name of justice.

> Optimally, every person who criminally abuses a child, physically or sexually, would be caught, convicted, and punished appropriately for the offense. As a result, the certainty of detection, conviction, and punishment would act as a strong deterrent, protecting children from such abuse. But the rules of evidence have been developed painstakingly over centuries to ensure, to the extent it is humanly possible, the reliability of convictions. The rules of evidence cannot be overlooked, set aside, or circumvented in the zeal to prosecute any crime, no matter how heinous. In a court of law the ends never justify the means. It is our responsibility to overturn the results of well-meaning efforts to use manners of proof which do not meet the standards of admissibility established by the rules of evidence regardless of the nature of the offense. As recently stated by the U.S. Supreme Court: "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eye witness. But 'this Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases.'"[133]

F. Developing a Theme and Theory

Developing a theme and theory for the case is critical to defense counsel in cases involving allegations of abuse. As may often be the case in dealing with child abuse allegations, "The case . . .[is] . . . in essence, the damning accusation of a sympathetic victim cloaked in the presumptive innocence of tender years."[134] Defense counsel need to overcome this presumption by providing the members with a plausible explanation, other than the accused's guilt, to explain the allegations or convince the members the testimony is unreliable. In *United States v. Woolheater*,[135] the Court of Military Appeals discussed theme and theory in defense cases and held that the military judge improperly limited the defense from introducing evidence that would have indicated someone else was responsible for the charged offense. The Court explained how and why the defense develops a case theory and discussed how the defense counsel, in *Woolheater*, attempted to establish the evidence to support the case theory.

> In setting up a defense strategy for a case, counsel adopts a coherent theme and theory under which to present the case. The theme and theory usually take into consideration the strengths and weaknesses of the evidence that is both favorable and unfavorable to the accused. The defense theory of the

[133] *Id.* at 696, citing Tome v. United States, 513 U.S. 150, 165-67, 115 S. Ct. 696, 705, 130 L. Ed. 2d 574 (1995).
[134] United States v. Buenaventura, 40 M.J. 519, 528 (A.C.M.R. 1994) (Hostler, concurring in part, dissenting in part).
[135] United States v. Woolheater, 40 M.J. 170 (C.M.A. 1994).

> case can be most helpful in explaining the weaknesses so as to be consistent with all or most of the evidence presented. In this case, the defense counsel was persistent in the defense theory that Shaner committed the arson. The defense also recognized that the most unfavorable and damaging evidence to appellant was his voluntary and detailed confession describing many of the particulars surrounding the cause of the fire. The defense attempted to negate or lessen the impact of appellant's confession by introducing psychiatric evidence of a plausible explanation for the confession. Dr. Parker presented evidence explaining appellant's reaction to stressful situations such as a series of NIS interrogations. . . . Attacking the reliability of the confession was the first prong of a two-pronged defense strategy. Even though the confession was detailed, voluntary, and properly before the finders of fact, the members were still free to determine the reliability of that confession. . . . The second prong was to present plausible evidence that another individual, Shaner, had the motive, knowledge, and opportunity to commit the crime.[136]

As *Woolheater*[137] shows, it is crucial that the defense theory and theme are clear. Thus the defense counsel must start to explain the theory of the case to the members at the earliest possible time.

When developing a theme and theory the defense counsel may want to consider other possibilities besides the oft-used "the child is lying."[138] For instance, the defense counsel may be able to argue that the allegations are a cry for attention because the parents were so caught up in their own problems that they have ignored this child for months. This may be more plausible if the parents are having serious marital problems. Or, the defense counsel may show the jury that the child has a history of problems distinguishing between dreams and reality or is on some type of medication that produces bizarre dreams which the child has confused with reality. From the beginning of the trial, the defense counsel must show that he has a plausible theory, that the evidence will support his theory, and that the theory raises reasonable doubt regarding the allegations.

G. Voir Dire/Challenging Members

While voir dire can be difficult to handle effectively, if done correctly, it can be the "beginning of a beautiful friendship"[139] between the defense counsel and the jury. The purpose of voir dire is to "obtain information for the

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[136] *Id*. at 173-74.
[137] *Id*.
[138] In many instances the child may not so much be lying but rather is being pushed into a story by a parent with their own agenda. This type of false accusation case happens quite often in bitter divorce proceedings. *See* Thomas M. Horner & Melvin J. Guyer, *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: I. Predictable Rates of Diagnostic Error in Relation to Various Clinical Decisionmaking Srategies*, 25 FAM. L. Q. 217, 219-220 (1991).
[139] Humphrey Bogart, CASABLANCA (Metro-Goldwyn-Mayer 1942).

intelligent exercise of challenges."[140] R.C.M. 912 establishes fourteen separate grounds for challenge against a military member.[141] "Military judges must follow the liberal-grant mandate in ruling on challenges for cause."[142] In *United States v. Daulton*,[143] a case involving indecent acts with a child, the Court of Appeals for the Armed Forces reversed a conviction in part because the military judge abused his discretion when he denied a challenge for cause against a court member whose sister and mother had been sexually abused. The Court did not rule that members are *per se* disqualified because they, or someone close to them, has been a victim of a similar crime, unless they have been victims of similar violent or traumatic crimes.[144] Instead, the Court's decision was based on implied bias. "Implied bias exists when most people in the same position would be prejudiced. Implied bias is not viewed through the

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[140] Discussion to R.C.M. 912(d), *supra* note 19.

[141] R.C.M. 912(f), *supra* note 19, provides

> (f) *Challenges and removal for cause.*
> (1) *Grounds.* A member shall be excused for cause whenever it appears that the member:
> (A) Is not competent to serve as a member under Article 25(a), (b), or (c);
> (B) Has not been properly detailed as a member of the court-martial;
> (C) Is an accuser as to any offense charged;
> (D) Will be a witness in the court-martial;
> (E) Has acted as counsel for any party as to any offense charged;
> (F) Has been an investigating officer as to any offense charged;
> (G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;
> (H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;
> (I) Has forwarded charges in the case with a personal recommendation as to disposition;
> (J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;
> (K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;
> (L) Is in arrest or confinement;
> (M) Has informed or expressed a definite opinion as to the guilt or innocence of the accused as to the offense charged;
> (N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

[142] *See generally* United States v. White, 36 M.J. 284, 287 (C.M.A. 1993); United States v. Daulton, 45 M.J. 212, 217 (1996).

[143] 45 M.J. at 218.

[144] *Id.* at 217. *See also* United States v. Smart, 21 M.J. 15 (C.M.A. 1985) (stating military judge abused his discretion when he failed to grant challenge against a victim of multiple armed robberies in a case of robbery).

eyes of the military judge or the court members, but through the eyes of the public."[145] Interestingly, the Court held that the judge did not abuse his discretion when he denied a challenge against a medical doctor with some experience dealing with child abuse.[146]

The defense counsel should listen carefully to the members' responses. He should also pay attention to the body language and nonverbal cues members may be giving. While the member may be answering the questions in an acceptable manner, his body language may indicate a complete dislike for the subject or the accused, which may evidence an inelasticity for findings or sentencing. This must be explored completely in individual voir dire, which should enable the defense counsel to establish a sufficient basis for a challenge for cause.[147]

Voir dire will requires the defense counsel to pay careful attention to each question asked. One area to consider further questioning may be whether any member knows someone who is a victim or accused of any type of sexual misconduct or assault. Another area the defense counsel may want to address in voir dire concerns members' attitudes regarding whether children lie about these types of allegations. The attorney should ask whether members will consider that children may often be easily influenced and incorporate into the own memory information that they get from the therapists, law enforcement agents, parents, or trial counsel who question them about the incidents.[148] Selecting a fair and impartial panel is crucial, and a defense counsel must be vigilant in his efforts to ensure he has ferreted out any members who should be challenged.[149]

H. Opening Statement

In a case involving child abuse, opening statements are critical to the defense. It is easy to imagine the trial counsel's opening statement as it will most likely include a grisly description of the testimony that the trial counsel hopes the child will provide. This type of opening statement can be very effective, dramatic and the members may agree early on that the accused is

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[145] *See* 45 M.J. at 217.

[146] *Id.*.

[147] To preserve the issue on appeal, the defense counsel must clearly describe the body language that concerned him, as well as when the member exhibited the body language. For instance "While answering that she could consider all available forms of punishment, MSgt Doe crossed her arms in front of herself and visibly sat back in her chair. Additionally she was shaking her head no, while saying yes."

[148] *See* CECI AND BRUCK, *supra* note 60, at 107.

[149] *See also* United States v. Mosqueda, 43 M.J. 491 (1996) (holding member should have been excused after he consulted a physician about child abuse after trial had begun); United States v. Kelley, 40 M.J. 515 (A.C.M.R. 1994) (stating member whose family member had been raped should have been excused because incident left him angry and resentful).

really a monster sitting at the table with the defense counsel. It is therefore important that the defense counsel diffuse the statement from the beginning. Whatever theory the defense counsel has to explain why the allegations are untrue, he should lay it out for the members and advise them what evidence to look for in support of this theory. This does not mean that the defense counsel should make promises that he can't keep. It is important to review the anticipated evidence to ascertain what he realistically expects the members to hear in order to properly frame the opening statement.

I. Cross-Examination of the Victim

As with all cross-examinations, the only way to do a truly effective job is to prepare, prepare, prepare. Child witnesses present unique issues to the defense counsel, both during the interview process and in cross-examination.[150] To prepare the cross-examination, the defense counsel should know each and every statement that the child has made, to whom and when, so that he can take full advantage of prior inconsistent statements.[151] Constructing a timeline may also be an effective organizational tool when preparing cross-examination.[152] Another useful approach is to do a small chart containing all of the previous statements made by child that the defense counsel can keep at the desk. [153] The defense counsel could break the statements into the different allegations. As the child testifies on direct, he should then write down the statements that are inconsistent with earlier statements. Pointing out the inconsistencies may be more difficult with the child because they can easily become confused and simply may not remember making previous statements. The defense counsel should work with the military judge and trial counsel to determine the best way to present inconsistent statements to the members. If the inconsistent statements are contained in a videotaped interview, this may be easier to do as the statements

[150] *See generally* John B. Meyers, et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 27 PACIFIC L.J. 1, 12, 25 (1996).

[151] For a discussion on the use of prior inconsistent statements *see generally* Earl F. Martin, III, *Prior Inconsistent Statements and the Military Rules of Evidence*, 39 A.F. LAW REV. 207 (1996).

[152] *See* LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES, 137 (1993). Pozner explains cross-examination preparation by using sequence of events charts.

[153] *Id.* at 155. Pozner discusses cross-examination preparation by using witness statement charts.

can be played for the child in court.[154] The important thing is that the defense counsel shows the members the relevant inconsistencies.

The defense counsel should determine the approach he intends to take in cross-examination. For older children, such as teenagers, he may be able to treat them as he would an adult witness. To the extent that he can, the defense counsel should examine a preteen child as he would an adult except that he simplifies his vocabulary. Trial counsel will most likely present the child in a manner that emphasizes the youth and innocence of the child.[155] The defense counsel should therefore talk to the child like an adult to the extent possible while keeping the examination as emotionless as possible. If the defense counsel becomes visibly agitated or angry, the child may feel threatened and shut down. Or the defense counsel may upset the members and they may shut down. Either way, the defense counsel loses. The defense counsel should be firm in the questioning but not argumentative. The defense counsel will have hard questions to ask but should do it in a manner that does not antagonize the child, members or military judge.

Cross-examination of a child can be both challenging and intimidating to the defense counsel. Children are unpredictable witnesses and there is a danger that the defense counsel may actually bolster the child's credibility during cross-examination. The defense counsel must be disciplined and prepared. It does not have to be a long examination, nor does it have to be an aggressive one. Like air power, the key to a good cross-examination of a child is flexibility. The defense counsel should remember to ask only the questions that he needs for the closing argument. Once defense counsel obtains the information he needs, end the examination. It is rare that the defense counsel will destroy the credibility of a child through cross-examination. That will come from the other evidence the defense counsel has that supports why the allegations are unreliable.

J. Confrontation Issues

In child abuse cases, the defense counsel may be presented with situations where the government seeks to have the child testify behind a barrier, by closed circuit television, or in some other manner that prevents the child from actually "facing" the accused. The starting point for the defense counsel is whether the government can establish the necessary prerequisites.

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[154] Introduction of a videotape may also be beneficial to the defense if there is a question of suggestion. *See* United States v. Casteel, 45 M.J. 379 (1996) (allowing defense counsel to play videotape and cross-examined investigator about leading questions used in the interview).

[155] Recent studies have shown a child's age has the greatest impact on both credibility and conviction. Younger children, especially those around nine years old, are viewed by jurors as being more credible than older children, teenagers and adults. *See* Jessica Libergott Hamblen & Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abuse Children Testifying as Victim-Witnesses*, 21 LAW & PSYCHOL. REV. 139, 145-154 (1997).

> [T]he confrontation Clause [is] satisfied in cases involving child victims where: (1) there [is] a case-specific finding that testimony by the child in the presence of the defendant would cause the child to suffer serious emotional distress such that the child could not reasonably communicate; (2) the impact on the child [is] more than *de minimis*; (3) the child testifie[s] via one-way closed-circuit television, enabling the judge, jury, and the defendant to observe the child's demeanor during testimony; and (4) the child [is] subject to full cross-examination.[156]

In the two recent cases of *United States v. Longstreath*[157] and *United States v. Daulton,*[158] the Court of Appeals for the Armed Forces declined to find that the Comprehensive Crime Control Act of 1990[159] applied to trials by courts-martial. The Act authorizes federal courts to order two-way closed-circuit television in cases involving child-abuse. This suggests that the Court is unwilling to establish a "bright line" rule regarding how this situation can be handled during a court-martial. When this issue arises at trial, the defense counsel should familiarize himself with the current state of the law in order to handle the situation appropriately at trial, as well as create a record for appeal.[160]

K. Expert Witness Testimony

Equally challenging to the defense counsel in these kinds of cases is handling cross-examination of the government expert witnesses, as well as the decision regarding whether he will put on expert testimony. "Use of expert testimony in these child sexual abuse cases is another 'legal thicket' for the expert testimony is extremely complex and often novel."[161] The permissible scope of expert testimony in child sexual abuse cases was defined in *United States v. Birdsall.*[162] Citing a case from the Eighth Circuit,[163] the Court of Appeals for the Armed Forces had this to say regarding the parameters of expert testimony.

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[156] United States v. Longstreath, 45 M.J. 366, 372 (1996) citing Maryland v. Craig, 497 U.S. 836, 856-57, 110 S. Ct. 3157, 3169-70, 111 L. Ed. 2d. 666 (1990).
[157] *Id.*at 366.
[158] United States v. Daulton, 45 M.J. 212 (1996).
[159] Comprehensive Crime Control Act of 1990 § 225, 18 U.S.C. § 3509 (1990).
[160] *See* U.S. v. Daulton, 45 M.J. 212, 219 (1996) (holding Confrontation Clause was violated by requiring accused to leave the courtroom during the testimony and watch on closed-circuit television); United States v. Williams, 37 M.J. 289 (C.M.A. 1993) (allowing child to testify from a chair in the center of the courtroom where accused could see her profile); United States v. Thompson, 31 M.J. 168 (C.M.A. 1990) (stating Confrontation Clause not violated by allowing boys to testify with their backs to accused, facing military judge and counsel).
[161] United States v. Banks, 36 M.J. 150, 160 (C.M.A. 1992).
[162] United States v. Birdsall, 47 M.J. 404 (1998).
[163] United States v. Whitted, 11 F.3d 782, 785 (8th Cir. 1993).

> In the context of a child sexual abuse case, a qualified expert can inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits. A doctor who examines the victim may repeat the victim's statements identifying the abuser as a family member if the victim was properly motivated to ensure the statements' trustworthiness. A doctor can also summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse. Because jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse, however, a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury or admissible.[164]

The Court reversed Birdsall's conviction because a doctor and a psychologist testified for the government that in their opinion the children had been sexually abused.

> Normally expert testimony that a victim's conduct or statements are consistent with sexual abuse or consistent with the complaints of sexually abused children is admissible and can corroborate an alleged victim in a significant way. Nevertheless, to say as a matter of expert opinion that sexual abuse occurred and a particular person did it crosses the line of proper medical testimony and imparts an undeserved scientific stamp of approval on the credibility of the victims in this case. Here the inadmissible testimony came from two doctors, magnifying its impact on the members in an extremely close case.[165]

Additionally, profile evidence is inadmissible. The leading case in this area is *United States v. Banks.*[166] The Court of Military Appeals held that it was reversible error to allow expert testimony that the accused's family fit the profile of a family experiencing the dynamics of sexual abuse within the family.[167] As these cases illustrate, the defense counsel must be well aware of the parameters of expert testimony in order to prevent experts from providing impermissible evidence.[168]

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[164] *See* 47 M.J. at 409 (citations omitted).
[165] *Id.* at 410 (citations omitted).
[166] United States v. Banks, 36 M.J. 150 (C.M.A. 1992).
[167] *Id.* at 163.
[168] *See also* United States v. Dollente, 45 M.J. 234 (1996) (reversing for allowing expert to testify as a human lie detector); United States v. Cacy, 43 M.J. 214 (1995) (stating expert went too far when testified that she explained necessity of telling truth to child in order to determine if further treatment was necessary, then recommended further treatment, which were really euphemism for truthfulness of child); and United States v. King, 35 M.J. 337, 342 (C.M.A. 1992) (finding it error to permit expert to testify that 5 year old children lack the ability to fabricate allegations because of lack of sophistication) ("This type of testimony illustrates how dangerous it is for judges to receive uncritically just anything an expert wants to say. The evaluation of expert testimony does not end with a recitation of academic degrees. Everything the expert says has to be relevant, reliable, and helpful to the factfinder.").

Cross-examination of an expert witness can be daunting, but with some background work and assistance of the consultant, it can be extremely productive to a defense counsel. One source of information the defense counsel should attempt to obtain is copies of previous testimony by the government expert. This information previews the expert's testimony and helps the defense counsel to prepare a solid cross-examination. Additionally, it may assist the defense counsel to find areas the expert can testify about that are helpful to the defense. The defense counsel then can minimize anything damaging said by the expert on direct, while obtaining information helpful to the defense (without having to call his own expert).

The decision whether the defense expert will testify may depend in large part on the strength of the government's case. The decision should be based on discussions with the expert regarding what the expert can testify about that is helpful to the defense case. Such discussions should include the issues the expert will have to concede that could harm the defense. Defense counsel should also be sensitive to the limits of the expert testimony it seeks to introduce. However, the appellate courts have noted that "[J]udges should 'view liberally the question of whether the expert's testimony may assist the trier of fact.' And, 'if anything, in marginal cases, due process might make the road a tad wider on the defense's side than on the Government's.'"[169] In *United States v. Dollente*,[170] the Court of Appeals for the Armed Forces held the military judge erred when he refused to allow the defense to present expert testimony that the alleged victim suffered from Post Traumatic Stress Disorder that could have been caused by other things present in the victim's life other than a sexual assault. This evidence directly contradicted the government's expert opinion that there was no other explanation for the victim's mental state but the trauma of a sexual assault. [171]

L. Closing Argument

Closing argument is an opportunity for the defense counsel to weave together all the evidence in the case that supports the defense theory of why his client is not guilty of the offense. While heaven may belong to the meek, courtrooms belong to the bold. The defense counsel should make no apologies for defending his client zealously. Nor should he be afraid to make the hard call, i.e., arguing the child is lying or is unable to accurately perceive and recall. The defense counsel cannot overemphasize the government's burden of proof despite the evidence that cuts against the reliability of the allegations. These may include evidence of motivation of the child or spouse to fabricate,

[169] United States v. Garcia, 40 M.J. 533, 536 (A.F.C.M.R. 1994) (citations omitted), *aff'd*, 44 M.J. 27 (1996).
[170] United States v. Dollente, 45 M.J. 234 (1996).
[171] *Id*. at 238.

external influences which may have affected the child's memory, prior inconsistent statements, basic improbabilities of the story, and the client's good record.

The defense counsel may want to consider consulting the expert concerning the content of the closing argument. The expert may have more objectivity with regard to the strengths and weaknesses of the defense theory. The expert may be able to find any faults in the logic or presentation. The expert may also be helpful in assisting the defense counsel in framing his argument relating to the expert testimony.

M. Guilty Pleas

Getting the client through a *Care*[172] inquiry in cases involving child abuse can be difficult. It requires a great deal of preparation and practice with the client.[173] In cases involving child sexual abuse, the most difficult part of the inquiry may be convincing the client to admit that his conduct was "with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both."[174] Obviously, the defense counsel cannot advise the client to plead guilty if he is in fact not guilty. And if the client cannot bring himself to admit this particular element, then he still cannot plead guilty. However, once the defense counsel explains the elements to the client, the defense counsel can help the client provide the relevant information that satisfies the requirements of a guilty plea inquiry.

N. Sentencing

Sentencing is one of the most important, and difficult, portions of any defense case. In a litigated case, sentencing is even more difficult because the defense counsel does not have the arguments he would have had in a guilty plea. However, it is important even in litigated cases to provide perspective to the members. The defense counsel can potentially argue the good military record of the client, the impact of a severe sentence on the family and the member's ability to support them, the devastating effect of a punitive discharge, or the need to help the family recover from the accused's misconduct.

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[172] United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

[173] The defense counsel should consider such things as giving the accused a copy of the proof analysis to familiarize the client with the elements the military judge will talk with him about. The defense counsel may also ask the client to write out a statement explaining the offense. The client could use this as a basis for telling the judge in his own words why he is guilty of the charged offense.

[174] MCM, *supra* note 10, Uniform Code of Military Justice, Part IV paragraph 87, Article 134, Indecent Acts or Liberties With a Child.

Evidence presented in sentencing by the prosecutor may include victim impact testimony or expert testimony. The defense counsel must be alert to any overreaching by the witnesses in these areas because failure to object waives the issue (absent plain error).[175] He must also be alert to improper argument by the government. For instance, he should object to any inappropriate government argument regarding the accused's lack of remorse, especially if the case is litigated. The basis for the objection is that the accused may chose to assert his rights and not testify.[176]

Even in the most egregious cases of long-term abuse or multiple victims, there are points for the defense counsel to argue in sentencing. If supported by the facts, the defense counsel can argue the value of the guilty plea, the therapeutic needs of the client, any efforts the client has undertaken before trial to deal with the problem, the client's background, the need to provide the client with a motive to get better, the impact on the family if the sentence is unduly severe, or the family's desire to reunite. While all may seem lost at this point in the trial, the defense counsel must redouble his efforts to obtain the best possible punishment outcome for his client.

IV. CONCLUSION

"In many respects, child abuse litigation is a new frontier with a plethora of cases in all jurisdictions addressing provocative issues."[177] Defending a case involving any kind of child abuse, may be personally and professionally one of the most challenging that the defense counsel will face. The defense counsel must remain detached from his own feelings about the case. It is important for him to remember that he is often the only person in the client's world who is offering any kind of support or encouragement for the future. Regardless of the defense counsel's personal views, the client should never feel that the defense counsel also considers him unworthy of human existence because of the allegations, or his confession to such allegations. An accused has every right to expect and demand that his defense counsel will provide the same kind of zealous representation for his case he would provide in any other case. Harper Lee, in her novel, *To Kill A Mockingbird*,[178] touched

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[175] *See generally* United States v. Williams, 41 M.J. 134 (C.M.A.) (holding expert can testify as to future dangerousness as it relates to relevant rehabilitative potential); United States v. Prevatte, 40 M.J. 396 (C.M.A. 1994) (explaining it is not plain error for government experts to recommend confinement as part of sentence).

[176] *But see* United States v. Toro, 37 M.J. 313, 318 (C.M.A. 1993) ("It is proper for the prosecutor to comment on appellant's refusal to admit guilt after the accused has either testified or has made an unsworn statement and had either expressed no remorse or his expressions of remorse can be arguably construed as shallow, artificial, or contrived." (citations omitted)).

[177] *See* United States v. Banks, 36 M.J. 150, 160 (C.M.A. 1992).

[178] HARPER LEE, TO KILL A MOCKINGBIRD (1960).

on the need for meaningful representation even in controversial cases. Although Ms. Lee was talking about racism, her thoughts about defending an unpopular client in an unpopular case are equally applicable to the issues the defense counsel will face in cases involving child abuse.

> "Do all lawyers defend n-Negroes, Atticus?"
>
> "Of course they do, Scout."
>
> "Then why did Cecil say you defend niggers? He made it sound like you were runnin' a still."
>
> Atticus sighed. "I'm simply defending a Negro – his name's Tom Robinson. He lives in that settlement beyond the town dump. He's a member of Calpurnia's church, and Cal knows his family well. She says they're clean living folks. Scout, you aren't old enough to understand some things yet, but there's been some high talk around town to the effect that I shouldn't do much about defending this man." . . .
>
> "If you shouldn't be defendin' him, then why are you doin' it?"
>
> "For a number of reasons," said Atticus. "The main one is, if I didn't I couldn't hold up my head in town, I couldn't represent this county in the legislature, I couldn't even tell you or Jem not to do something again."
>
> "You mean if you didn't defend that man, Jem and me wouldn't have to mind you any more?"
>
> "That's about right."
>
> "Why?"
>
> "Because I could never ask you to mind me again. Scout, simply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally. This one's mine, I guess."[179]

[179] *Id*. at 83-84.

Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity

CAPTAIN JOHN A. CARR, USAF*

> The United States government should not engage in foreign wars for the purpose of protecting access to crude oil, and if soldiers are asked to participate in such a war they should refuse to fight. Women should never be permitted in a combat zone, but maybe homosexual men should not be discharged. President Clinton's handling of Bosnia proves that he is incompetent to lead the military; he's a draft-dodger anyway. Someone should tell Congress that it ought to give airmen a pay raise instead of wasting money on-base beautification projects.[1]

If a civilian read aloud the preceding statement in Lafayette Park, the government would almost undoubtedly be without the authority to sanction him. But what if the speaker was a civilian shouting outside the gates of Andrews Air Force Base? The Chief-of-Staff of the Air Force addressing a banquet hall full of military personnel? An airman speaking to fellow airmen in his dormitory? A lieutenant in a letter to the editor of the *Air Force Times*? Does the Uniform Code of Military Justice (UCMJ) prohibit these statements or does the military member have a First Amendment free speech right? When should a commander be advised to initiate actions against a member and what type of sanction should be imposed?

The First Amendment's freedom of speech clause[2] has long posed unique challenges to the military community. Active duty military members

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[1] This statement is a compilation of comments made by military personnel either in the cases discussed within this article or overheard by the author during the last eight years. It is provided to facilitate the following discussion and in no way represents the views or opinions of the author.

[2] The First Amendment provides that "Congress shall make no law. . . abridging the freedom of speech. . . " U.S. CONST. amend I.

are subject to the Uniform Code of Military Justice[3] that limits not only conduct, but also certain forms of speech. It seems obvious that First Amendment protections will be applied to military personnel in a different manner, but the more perplexing challenge is to define the exact boundary of that protection; if, in fact, any boundary actually exists.

The most intense period of the military free speech debate was sparked by the United States involvement in the Vietnam War. With the initiation of the draft, thousands of unwilling and educated conscripts were "shocked by military practices that had never been seriously questioned."[4] Not wholly by coincidence, this turmoil occurred as the Supreme Court was articulating the fundamental principles underlying First Amendment doctrine. However, the Supreme Court and the military courts of review refused to apply this new line of precedent to the military community, reasoning that the unique nature of the military as a "separate community" necessitated a different application of First Amendment principles.

As the furor over the Vietnam War subsided, scholars attempted to refine earlier examinations[5] of the "separate community" rationale.[6] While many authors questioned the wisdom of granting the military a near *carte blanche* to define what constitutes a "clear and present danger" to military order and discipline, the courts consistently deferred to the military's exercise of delegated authority. The lull in the storm during the Reagan military build-up of the early 1980's[7] was interrupted by the Supreme Court's decision in *Goldman v. Weinberger*[8] and recent academic examinations have focused

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[3] MANUAL FOR COURTS-MARTIAL, United States (1995 ed.) [hereinafter MCM], Rule for Courts-Martial 202 [hereinafter R.C.M.], (outlining limitations on personal jurisdiction); R.C.M. 203, (outlining limitations on subject-matter jurisdiction); *See also* Solorio v. United States, 483 U.S. 435, 436 (1987) (explaining jurisdiction in courts-martial depends solely on the accused's status as a person subject to the UCMJ and not on the "service-connection" of the offense).

[4] Donald N. Zillman and Edward J. Inwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396, 397 (1976) [hereinafter Zillman and Imwinkelried II].

[5] *See, e.g.*, Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962); Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187 (1957).

[6] *See, e.g.*, Zillman and Imwinkelried II, supra note 4; Donald N. Zillman, *Free Speech and Military Command*, 1977 UTAH L. REV. 423 (1977); Donald N. Zillman and Edward J. Inwinkelried, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42 (1975) [hereinafter Zillman and Imwinkelried I]; Edward F. Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325 (1971).

[7] A notable addition to the debate concerning the separate community rationale during this time period is James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984).

[8] Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that military is not required by the Free Exercise Clause of the First Amendment to provide exception to uniform dress regulations for wearing of yarmulke). *See generally* First Lieutenant Dwight H. Sullivan, *The Congressional Response to* Goldman v. Weinberger, 121 MIL. L. REV. 125 (1988); *Military*

almost exclusively on the First Amendment vulnerability of the so-called "Don't Ask, Don't Tell" policy.[9]

The Department of Defense has changed dramatically since the Vietnam War. The all-volunteer force has replaced the draft. With the democratization of the former Soviet Union and the stand-down of U.S. nuclear forces, military personnel are currently assigned to peacekeeping missions across the globe. Additionally, while courts continue to distill the free speech rights of government employees,[10] federal civil servants,[11] and

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Ban on Yarmulkes, 100 HARV. L. REV. 163, 172 (1986) (concluding that the Court's refusal in the case to "establish guidelines for government action when that action impinges upon constitutionally protected interests . . . sends a legitimating message to military officials prone to suppress the individuality of service personnel and leaves unanswered the question of when, if ever, the Court is prepared to defend the liberties of Americans who serve their country in the armed forces"); Lt. Richard G. Vinet, USNR, Comment and Note, Goldman v. Weinberger: *Judicial Deference to Military Judgment in Matters of Religious Accommodation of Servicemembers*, 36 NAVAL L. REV. 257 (1986); Felice Wechsler, Comment, Goldman v. Weinberger: *Circumscribing the First Amendment Rights of Military Personnel*, 30 ARIZ. L. REV. 349 (1988) (expressing belief that the decision is the "latest in a long line of Supreme Court cases giving virtually unlimited deference to military decisionmaking where the constitutional rights of service people conflict with claimed military necessity."). *See also* 10 U.S.C. § 774 (West 1998) providing that military members may wear items of religious apparel except when the Secretary of the individual service determines that "wearing of the item would interfere with the performance of the member's military duties;" or when the Secretary determines by regulation that "the item of apparel is not neat and conservative."

[9] *See* Department of Defense Directive 1304.26, Qualification Standards for Enlistment, Appointment, and Induction (Dec. 21 1993); DOD Directive 1332.14, Enlisted Administrative Separations (Dec. 21, 1993); DOD Directive 1332.30, Separation of Regular and Reserve Commissioned Officers (Mar. 14, 1997); 32 C.F.R. § 41, App. A (1992), (codified at 10 U.S.C. § 654 (1994)). For First Amendment examinations of the Directives, see generally Daniel S. Alter, *Confronting The Queer And Present Danger: How To Use The First Amendment When Dealing With Issues Of Sexual Orientation Speech And Military Service*, 22-SUM HUM. RTS. 22 (1995); Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, And Legal Perspectives*, 131 MIL. L. REV. 55 (1991); Walter J. Krygowski, Comment, *Homosexuality And The Military Mission: The Failure Of The "Don't Ask, Don't Tell" Policy*, 20 U. DAYTON L. REV. 875 (1995); David A. Schlueter, *Gays And Lesbians In The Military: A Rationally Based Solution To A Legal Rubik's Cube*, 29 WAKE FOREST L. REV. 393 (1994); Scott W. Wachs, *Slamming The Closet Door Shut:* Able, Thomasson *And The Reality Of "Don't Ask, Don't Tell"*, 41 N.Y.L. SCH. L. REV. 309 (1996); Kenneth Williams, *Gays In The Military: The Legal Issues*, 28 U.S.F. L. REV. 919 (1994).

[10] *See e.g.*, Vojvodich v. Lopez, 48 F.3d 879 (5th Cir. 1995), *cert. denied*, 516 U.S. 861 (1995); Horton v. Taylor, 767 F.2d 471 (8th Cir. 1985), *aff'd*, 817 F.2d 476 (8th Cir. 1987); Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

[11] *See, e.g.*, Mings v. Department of Justice, 813 F.2d 384 (5th Cir. 1987); Johnson v. Department of Justice, 65 M.S.P.B. 46 (1994) (stating racially derogatory comments about co-worker made in the presence of other agency personnel while on duty did not relate to matter of public concern), *appeal dismissed*, 48 F.3d 1236 (Fed. Cir. 1995) (unpublished disposition); Means v. Department of Labor, 60 M.S.P.B. 108 (1993) (explaining disruptive, insubordinate, and disrespectful conduct and speech relating to workload and performance standards were not related to matter of public concern); Jackson v. Small Business Admin., 40 M.S.P.B. 137 (1989); Sigman v. Department of the Air Force, 37 M.S.P.B. 352 (1988) (holding speech that

independent contractors,[12] the government is privatizing thousands of positions formally held by uniformed personnel.[13] In the end, however, the military's mission remains the protection of the national security interests of the United States through the use of force. Given these dramatic transformations and the continued development of First Amendment doctrine, this article has two purposes.

Part I of the article examines the courts' resolution of free speech challenges to UCMJ prosecutions and administrative actions. First, the arguments supporting judicial deference to government authorities are introduced. Judicial deference has been justified on the grounds that the Constitution entrusts the regulation of the military to the Legislative and Executive branches. Additionally, courts have noted the lack of judicial competence to review the impact of a particular threat to the unique mission of the military community. Second, the cases in which free speech challenges have been made to either UCMJ prosecutions or administrative actions are profiled. For the purposes of this discussion, the restrictions on the speech of military personnel are divided into three categories. The first category consists of the specific Articles of the Uniform Code of Military Justice. The second level includes the regulations promulgated by the Department of Defense and the Air Force. The lawful orders of specific commanders comprise the third set of restrictions.

An examination of the applicable case law in each category illustrates that courts continue to exhibit substantial deference to the judgment of military commanders concerning the threat to military interest posed by certain types of speech. When the free speech challenges of military personnel are reviewed under traditional First Amendment doctrine—a rare occurrence—the courts have found that the restrictions are permissible because the military's interests are substantial and unrelated to the suppression of free expression. It appears, therefore, that the military may impose restrictions on the speech of military personnel whenever the speech poses a significant threat to discipline, morale, esprit de corps, or civilian supremacy. While this formulation may seem severe when contrasted to civilian protections, Congress and the President have established official channels to permit servicemembers to voice dissent without the fear of retaliation. Additionally, the Department of Defense and the Air

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addresses internal agency complaints but not issues of concern to the community do not relate to matters of public concern), *aff'd*, 868 F.2d 1278 (Fed. Cir. 1989) (unpublished disposition); Barnes v. Department of the Army, 22 M.S.P.B. 243 (1984); Curry v. Department of the Navy, 13 M.S.P.B. 327 (1982).

[12] In *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), the Supreme Court, per Justice O'Connor, held that the First Amendment protects independent contractors from government termination or prevention of automatic renewal of at-will contracts in retaliation for contractor's speech, and such claims will be evaluated under the balancing test outlined in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

[13] The federal government's guidelines for privatization are outlined in OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-76 (Aug. 4, 1983).

Force have enacted regulations that protect certain types of speech. The lack of successful free speech challenges to personnel actions is a testament to the responsible use of this discretion by military commanders.

Part II of the article reexamines the arguments both for and against affording military personnel greater free speech protections. The evaluations of these arguments serve not only to support the judiciary's continued treatment of the military as a separate community, but also to provide legal advisors relevant factors to consider when making recommendations to commanders. Additionally, a commander's ability to protect the military's interests from the threats posed by the speech of civilians and government employees is canvassed.

Finally, arguments are presented to refute the suggestions that courts should adopt either the traditional civilian First Amendment doctrine or, at least during peacetime, the protections afforded government employees and federal civil servants. Courts should not adopt either standard because of the intrusive nature of the inquiry and the need for the military to impose criminal sanctions in certain circumstances. To the extent that the protections differ, however, legal advisors should recommend as a general rule that military members be afforded the same First Amendment protections provided government employees. Criminal sanctions should be sought in situations when a substantial breakdown in military custom is likely or the threat to military interests is greater than would be posed by a similarly situated government employee.

I. REGULATION OF SPEECH IN THE MILITARY

When confronted with Constitutional challenges to military regulations or criminal prosecutions, courts have displayed a substantial amount of deference to government authorities for two related reasons. The first reason is the responsibility imposed by the Constitution on the Legislative and Executive branches to administer the military.[14] The second is the concept of the military as a "separate community." The separate community rationale is

[14] *See, e.g.,* Solorio v. United States, 483 U.S. 435, 447 (1987) ("Decisions of this Court . . . have also emphasized that Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."); Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("Nor can it be denied that the imposing number of cases from this Court [previously cited] suggest that judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."); ("The responsibility for determining how best our Armed Forces shall attend to [fighting or being ready to fight wars] rests with Congress, see U.S. CONST., Art. I, § 8, cls. 12-14, and with the President. See U.S. CONST. Art. II, § 2, cl. 1.") *Id.* at 71 (quoting Schlesinger v. Ballard, 419 U.S. 498, 510 (1975)).

based upon the unique military mission,[15] the critical importance of obedience and subordination,[16] and the complimentary development of military custom.[17] Based upon one or more of these characteristics, courts confronted with free speech issues in the military context typically refuse to apply the free speech protections afforded civilians or other government employees, preferring to defer to the military's judgment of the potential disruptive effect of the speech in question.

This judicial deference has both supporters and critics. Former Senator Sam Nunn has written that the "Supreme Court's jurisprudence in the field of military law has been characterized by the highest degree of deference to the role of Congress and respect for the judgment of the armed forces in the delicate task of balancing the interests of national security and the rights of military personnel."[18] Others disagree, choosing to depict the Supreme Court's treatment of the First Amendment in the military context as "the area of most extreme judicial abdication."[19] It has been noted, however, that "the judiciary has become more sensitized to violations of individual rights and the

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[15] *See, e.g.,* United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972) ("In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. . . . The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself.").

[16] *See, e.g.,* Brown v. Glines, 444 U.S. 348, 354 (1980) ("To ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'") (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)); Parker v. Levy, 417 U.S. 733, 758 (1974) ("[T]he different character of the military community and of the military mission," based upon the "fundamental necessity for obedience" and "necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

[17] *See, e.g.,* Parker v. Levy, 417 U.S. 733, 744 (1974) (In order to "maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'") (quoting Martin v. Mott, 25 U.S. (12 Wheat.) 19, 35, 6 L.Ed. 537 (1827)).

[18] Hon. Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, JANUARY 1995 ARMY LAW. 27 (1995).

[19] C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other Special "Contexts"*, 56 U. CIN. L. REV. 779, 799 (1988). Prof. Dienes comments that:

> Justice Rehnquist's opinion for the Court in [Goldman v. Weinberger, 475 U.S. 503 (1986)] reflects two characteristics common to most judicial treatment of the first amendment claims in the military context. First, there is an insensitivity, or perhaps more exactly, a lack of attention to and concern with the burden on the litigant's first amendment rights. Second, there is a strong deference to the special needs of the military's separate society and an unwillingness to review the military's judgment on the importance of the interests served by the regulation and the need for the restriction to satisfy that interest.

Id. at 808 (footnote omitted).

perils of unchecked discretion."[20] Recently, in fact, a number of judges have taken exception to the military's exercise of discretion, citing either outright abuse[21] or selective enforcement.[22]

Both courts and commentators have justified the judicial deference to the military on the grounds that the Constitution vests the primary responsibility for respecting the rights of servicemembers with the Legislative and Executive branches. The Constitution gives Congress the power to "raise and support Armies,"[23] "provide and maintain a Navy,"[24] and "make Rules for the Government and Regulation of the land and naval Forces."[25] The President is designated as the "Commander in Chief of the Army and Navy of the United States."[26] Given this division of responsibility, it has been argued that the two branches have safeguarded the rights of service personnel while protecting the readiness of the military. Senator Nunn explains that:

> [A] system of military and criminal and administrative law that carefully balances the rights of individual service members and the changing needs of the armed forces . . . has demonstrated considerable flexibility to meet the needs of the armed forces without undermining the fundamental needs of morale, good order, and discipline. The principles of judicial review developed by the Supreme Court recognizes the fact that over the years Congress has acted responsibly in addressing the constitutional rights of military personnel.[27]

Others have challenged the courts' reliance on Congress and the President to protect the rights of military personnel. Although acknowledging the role played by the two co-equal branches of government, Prof. Thomas Dienes concludes that this role "does not deny the power and duty of the courts to protect the constitutional rights of military personnel."[28] He argues that the "military and its courts do have special expertise regarding military needs, but

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[20] Zillman and Imwinkelried II, *supra* note 4, at 400.

[21] Rigdon v. Perry, 962 F.Supp. 150, 165 (D.D.C. 1997) ("What we have here is the government's attempt to override the Constitution and the laws of the land") (granting motion for summary judgment and preliminary injunction based on First Amendment freedom of speech and religion against military's attempt to prevent chaplain from urging congregation to contact Congress on pending legislation).

[22] Holmes v. California Army National Guard, 124 F.3d 1126, 1139 (9th Cir. 1997) (Reinhardt, J., dissenting) ("From General Eisenhower on, up and down the ranks, even to Commander-in-Chief, there are many who would have had to forfeit their positions had the military's code of sexual conduct been strictly and honestly enforced.").

[23] U.S. CONST. art. I, § 8, cl. 12.

[24] U.S. CONST. art. I, § 8, cl. 13.

[25] U.S. CONST. art. I, § 8, cl. 14.

[26] U.S. CONST. art. II, § 2, cl. 1.

[27] Nunn, *supra* note 18, at 33. *See also* Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) ("The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.").

[28] Dienes, *supra* note 19, at 822.

the civilian courts have a special competence and constitutional obligations in protecting constitutional freedoms against government abuse."[29]

Underlying the judiciary's cautious excursions into the realm of military command are fears that courts lack the competence to contradict the judgment of military experts. Chief Justice Earl Warren has explained that the Supreme Court's deference to military determinations is based upon the "strong historical" tradition supporting "the military establishment's broad power to deal with its own personnel."[30] According to Warren, the "most obvious reason" for this deference is that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[31] The Supreme Court has alluded to the judiciary's lack of expertise to review prosecutions based upon military custom. In *Parker v. Levy*, it cited lower court opinions which held that the applications of military custom are best determined by military officers who are "more competent judges than the courts of common law."[32] Additionally, in the oft-quoted opinion of *Orloff v. Willoughby*, the Court expressly adopted a hands-off approach to the military, stating:

> But judges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[33]

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[29] *Id.* *Cf.* Goldman v. Weinberger, 475 U.S. 503, 513-14 (1986) (Brennan, J., dissenting) ("The Court's response to Goldman's request [for exception to Air Force uniform regulations to wear yarmulke] is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity.").

[30] Warren, *supra* note 5, at 187.

[31] *Id.*

[32] Parker v. Levy, 417 U.S. 733, 748 (1974) (quoting Smith v. Whitney, 165 U.S. 553, 562 (1897)). *See infra* notes 72-73 and accompanying text.

[33] Orloff. V. Willoughby, 345 U.S. 83, 93-94 (1953). In Orloff, the defendant was lawfully inducted into the service but was denied a commission and assignment to the Medical Corps because he refused to supply certain information on the loyalty certificate. *Id.* at 89. He petitioned "the courts, by habeas corpus, to discharge him because he has not been assigned to the specialized duties nor given the commissioned rank to which he claims to be entitled by the circumstances of his induction." *Id.* at 84. The Supreme Court held that while Orloff could not be punished for refusing to furnish the information, the President was under no obligation to commission him as an officer—a position of honor and trust—if he did. *Id.* at 91. The Court also held that since Orloff was lawfully inducted into the service, he did not have *habeas corpus* to obtain judicial review of the military's assignment decision. *See also* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("In the context of the present case, when evaluating whether the military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.").

While one may wonder how the Army could intervene in judicial matters absent a siege of the Court, the opinion unmistakably endorses a deferential attitude toward the military community based upon its unique and "legitimate" needs.

When deciding constitutional or statutory issues in the military context, the Supreme Court has emphasized the special characteristics of the military community as a separate society. For example, the Court reviewed the nature of and justifications for these characteristics in *Parker v. Levy*.[34] The Court stressed that it "has long recognized that the military is, by necessity, a specialized society separate from civilian society."[35] This specialization is necessitated by the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[36] The Court noted that "the military has, again by necessity, developed laws and traditions of its own during its long history."[37] Quoting from previous opinions, it also reiterated that the army "is not a deliberate body"[38] and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[39] Furthermore, in order to "maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'"[40]

Whatever the significance of the separate community rationale, it has not been seriously argued that the unique characteristics of the military community negate entirely the free speech protections of the First Amendment. In fact, neither the Supreme Court nor the military courts of review have implied that the First Amendment is inapplicable to members of the armed forces. In *Goldman v. Weinberger*, the Court pointed out that the special demands of "military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment."[41] Chief Justice Earl Warren has written that the Supreme Court recognizes the "proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[42] Additionally, the Court of Military Appeals has stated that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[43]

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[34] Parker v. Levy, 417 U.S. 733 (1974). *See infra* notes 65-95 and accompanying text.
[35] *Id.* at 743.
[36] *Id.* (quoting United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).
[37] *Id.*
[38] *Id.* at 744 (quoting In re Grimley, 137 U.S. 147, 153 (1890)).
[39] *Id.* (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion)).
[40] *Id.* (quoting Martin v. Mott, 25 U.S. (12 Wheat.) 19, 35, 6 L.Ed. 537 (1827)).
[41] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).
[42] Warren, *supra* note 5, at 188.
[43] United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

A few protections contained in the Bill of Rights are expressly made inapplicable to military personnel by the very wording of the Amendments. For example, the Fifth Amendment's Grand Jury provision contains an exception for "cases arising in the land or naval forces."[44] Additionally, "a court-martial has never been subject to the jury-trial demands of Article III of the Constitution."[45] Other provisions of the Bill of Rights, while applicable to the military, are interpreted differently in the military context. For example, the Court of Appeals for the Armed Forces (CAAF) has invoked the separate society rationale to qualify the Fourth Amendment's search and seizure protection.[46] The question, therefore, is not *whether* free speech protections are available to military personnel, but *to what extent*.

The search for an answer to this question commonly begins with an examination of the original intent of the Framers. One scholar concludes that the persuasive scholarship indicates the Founding Fathers "envisioned a limited, if not non-existent, role for the first amendment in the armed services."[47] Senator Nunn has commented that "[d]ifferences in constitutional rights between the armed forces and civilian society have existed from the days of the Revolutionary War, through the formation of the Constitution, to the present."[48] However, others have argued that reliance on history is misplaced and that the Founding Fathers favored the militia to a standing army precisely because of the restraints on civil liberties in the military environment.[49]

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[44] *See, e.g.*, United States v. Curtis, 44 M.J. 106, 130 (C.A.A.F. 1996) ("The defense argues that the language [of the Fifth Amendment], 'when in actual service in time of War or public danger' limits the military exclusion. This argument was long ago rejected by the Supreme Court, which said 'that the words, ... 'when in actual service in time of war or public danger'... apply to the militia only.'" (quoting Johnson v. Sayre, 158 U.S. 109, 115 (1895)) *rev'd on other grounds per curiam*, 46 M.J. 129 (C.M.A. 1997).

[45] United States v. Gray, 37 M.J. 751, 755 (A.C.M.R. 1993) (citing Ex Parte Quirin, 317 U.S. 1 (1942); Ex parte Milligan, 71 U.S. (4 Wall) 2 (1866); United States v. McClain, 22 M.J. 124 (C.M.A. 1986)).

[46] United States v. McCarthy, 38 M.J. 398, 402 (C.M.A. 1993) ("This Court has observed, 'Since the military is, by necessity, a specialized society separate from civilian society, . . . it is foreseeable that reasonable expectations of privacy within the military society will differ from those in the civilian society.'" (quoting United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981)). In the military setting, a commander who issues a search authorization does not have to be a judicial officer, the warrant does not have to be in writing or supported by oath or affirmation, and general inspections may be ordered without probable cause and without the specificity required for a typical warrant. *See e.g.*, United States v. Lopez, 35 M.J. 35, 45 (C.M.A. 1992) (Cox, J., concurring).

[47] Zillman, *supra* note 6, at 429 (citing L. LEVY, LEGACY OF SUPPRESSION, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (Torch Book ed. 1963); Weiner, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 266 (1958)).

[48] Nunn, *supra* note 18, at 32.

[49] Stephanie A. Levin, *The Deference that is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1023-61 (1990). Professor Levin examines the historical opposition to a standing army preceding and surrounding the ratification of the Constitution. She argues that the Founding Fathers did not envision or anticipate today's enormous military establishment, and instead preferred to rely upon a citizen militia that would

Justice Stewart stated his belief that the dramatic transformations in the size and function of the military justify a departure from earlier holdings.[50] Even Chief Justice Warren acknowledged that the size of the military build-up during Vietnam and the broad reach of the draft caused many to question the "wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts."[51]

The justifications for judicial deference to military authorities when servicemembers bring constitutional challenges to criminal and administrative prohibitions continue to be debated. A review of the available case law indicates, however, that courts regard the military as constituting a separate community that necessitates a distinct application of First Amendment principles and protections. Consequently, although military members have brought free speech challenges in a variety of circumstances, they are rarely, if ever, successful.

The military may limit the speech of a military member through the application of three levels of restrictions. The first level is contained in the punitive articles of the Uniform Code of Military Justice (hereinafter UCMJ), codified at 10 U.S.C. §§ 880-934. The second level consists of the regulations of the Department of Defense and the individual services. The third level includes the lawful general orders of military commanders. These orders may take the form of base-wide restrictions or may be directed at the conduct or speech of an individual soldier.

The courts' evaluations of the speech restrictions imposed at each of these three levels highlight a number of fundamental tensions that exist when First Amendment challenges are made. How much free speech protection should be afforded a military member? Does it matter that the conversation occurred in a private setting or off-base? That the conversations involved the discussion of political issues rather than military issues, or addressed policy decisions still pending or orders that have already been delivered? With these questions structuring the following discussion, the free speech challenges to the military restrictions will be examined in detail.

A. Legislative Restrictions

The punitive articles of the UCMJ contain a series of provisions that may restrict the service member's speech. A large number of the articles have never been considered to intrude upon the First Amendment even as applied to

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retain connections to civilian life and civil liberties. Consequently, she concludes that it "is inappropriate to judge this 'standing army' and a temporary army with the same yardstick of military necessity." *Id.* at 1058.

[50] *See infra* notes 89-90 and accompanying text.

[51] Warren, *supra* note 5, at 188.

the civilian community.[52] In these instances, such as extortion and perjury, the crime involves speech in the most literal sense. The speech is not, however, deemed to be within the coverage of the First Amendment because it has "nothing to do with what the concept of free speech is all about."[53] Additionally, provisions such as Article 116's sanction for breach of the peace[54] and Article 117's sanction for provoking speech or gestures[55] closely parallel categories of speech that are unprotected in the civilian sector. Even Article 100's subordinate compelling surrender and Articles 89 and 91's disrespect and insubordinate conduct prohibitions do not seem to raise serious free speech challenges given the compelling government interests at stake in each case.

Four articles, however, have prompted either serious judicial review or academic scrutiny. Article 134 prohibits all disorders to the prejudice of good order and discipline, conduct of a nature to bring discredit upon the armed services and crimes and offenses not capital. Article 133 proscribes conduct unbecoming an officer and a gentleman. Article 92 makes punishable violations of lawful general orders or regulations, specific lawful orders and dereliction of duty. Finally, Article 88 prohibits a servicemember from using contemptuous words against certain government officials. Each Article has been upheld against facial First Amendment challenges. Additionally, convictions under the Articles have been affirmed even when the

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[52] *See, e.g.,* UCMJ, Article 81—Conspiracy, Article 82—Solicitation, Article 83—Fraudulent enlistment, appointment, or separation, Article 104—Aiding the Enemy. *See e.g.*, United States v. Bayes, 22 C.M.R. 487 (A.B.R. 1956), *review denied*, 23 C.M.R. 421 (C.M.A. 1957); United States v. Batchelor, 19 C.M.R. 452 (A.B.R. 1955), *aff'd*, 22 C.M.R. 144 (C.M.A. 1956)), Article 107—False official statement, Article 123—Forgery, Article 127—Extortion, Article 128—Assault, Article 131—Perjury, Article 132—Frauds against the United States, Article 132—(False Swearing), Article 134—(Perjury: subornation of), Article 134—(Requesting commission of offense), Article 134—(Soliciting another to commit an offense), Article 134—(Threat or hoax:bomb), Article 134—(Threat, communicating).

[53] Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 274 (1981). In this article, Prof. Schauer presents an excellent discussion of the distinction between the coverage and protection of the First Amendment. *See also* Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983).

[54] UCMJ, Article 116—Riot or breach of the peace provides: "Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct." *Cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (explaining advocacy must be directed to incite imminent lawless action and be likely to produce such action).

[55] UCMJ, Article 117—Provoking speeches or gestures provides: "Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct." The accompanying explanation states that the "provoking" and "reproachful" words are those "which a reasonable person would expect to induce a breach of the peace under the circumstances." MCM, *supra* note 3, Part IV, ¶ 42(c)(1). *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding fighting words which by their very utterance inflict injury or tend to incite an immediate breach of the peace are unprotected by the First Amendment). *See also* United States v. Johnson, 45 C.M.R. 53 (C.M.A. 1972).

servicemember's speech occurred off-base and during a private conversation. These underlying circumstances are relevant only to the determination of whether the speech met the elements of the offense, and not whether the speech is protected by the First Amendment.

1. Article 134—General Article

The general article is separated into three clauses.[56] The first includes "all disorders and neglects to the prejudice of good order and discipline in the armed forces."[57] This clause implies an internal focus on the conduct's effect on the actual efficiency of the military. The second clause includes "all conduct of a nature to bring discredit upon the armed forces."[58] Conduct and speech is punishable under this clause that "has a tendency to bring the service into disrepute or which tends to lower it in public esteem."[59] Finally, the article imposes sanctions for "crimes and offenses not capital."[60] Under certain circumstances, violations of federal law and that state law made applicable by the Federal Assimilative Crimes Act[61] are proscribed by this clause.[62]

The Manual for Courts-Martial also provides a list of specifications that can be charged under the general article. The two most pertinent to this discussion are disloyal statements[63] and indecent language.[64] Typically, disloyal statements involve either political or moral objections to governmental actions or policies. Conversely, indecent language almost always involves personal, if not private, communications. Before reviewing the First Amendment implications of these specifications, the Supreme Court's treatment of the general article will be detailed.

The Supreme Court upheld Article 134 against both vagueness and overbreadth challenges in *Parker v. Levy*.[65] In doing so, the Court relied extensively on the separate community rationale and the special responsibilities vested in Congress and the President by the Constitution. Because an understanding of the Court's approach and reasoning is necessary

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[56] Article 134, UCMJ, MCM, *supra* note 3, Part IV, ¶ 60. *See generally* James K. Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 HASTINGS L.J. 259 (1971).
[57] MCM, *supra* note 3, Part IV, ¶ 60(a).
[58] *Id.*
[59] *Id.* ¶ 60(c)(3).
[60] *Id.* ¶ 60(a).
[61] 18 U.S.C. § 13.
[62] MCM, *supra* note 3, Part IV, ¶ 60(c)(4).
[63] *Id.* ¶ 72.
[64] *Id.* ¶ 89.
[65] Parker v. Levy, 417 U.S. 733 (1974). *See generally* Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839 (1994).

to the discussion contained in Part II, the opinion will be examined in some detail.

Parker was commissioned as a Captain in the Army and was assigned as Chief of the Dermatological Service at Fort Jackson, South Carolina.[66] In the execution of his duties at the hospital, Parker made a number of statements to enlisted personnel concerning the U.S. involvement in Vietnam.[67] He was convicted by a court-martial of violating Article 90, 133, and 134, and was sentenced to dismissal, total forfeiture, and three years at hard labor. Although the Third Circuit found that Parker's conduct fell within the conduct proscribed by Article 133 and 134, it nevertheless reversed his conviction.[68] The court reasoned that the Articles were void for vagueness.[69]

The Supreme Court, per Justice Rehnquist, reinstated Parker's conviction.[70] After recounting the special characteristics of the military community,[71] the Court reviewed the early history and understanding of Article 134, which pre-dated the Constitution. It then noted lower court precedent concluding that questions involving the application of military customs were best determined by military officers who are "more competent judges than the courts of common law."[72] In fact, the Court cited the Court of Claims reasoning that cases involving Article 134 determinations were "not measurable by our innate sense of right or wrong, of honor or dishonor, but must be gauged by an actual knowledge and experience of military life, its usage and duties."[73]

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[66] *Id.* at 736.

[67] The record described the following statement as representative:

> The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murders of women and children.

Id. at 736-37.

[68] Parker v. Levy, 478 F.2d 772 (3rd Cir. 1973), *rev'd*, 417 U.S. 733 (1974).

[69] Parker, 417 U.S. at 741-42.

[70] Justice Douglas, Stewart, and Brennan dissented. Justice Marshall did not participate. *Id.* at 735.

[71] *See supra* notes 34-40 and accompanying text.

[72] Parker, 417 U.S. at 748 (quoting Swaim v. United States, 165 U.S. 553 (1897) (quoting Smith v. Whitney, 116 U.S. 178 (1886))).

[73] *Id.* at 748-49 (quoting Swaim v. United States, 28 Ct.Cl. 173, 228 (1893)).

The Court restated the characteristics that distinguish the military community and governing UCMJ from civilian society and civilian law.[74] It emphasized the "different purposes of the two communities" and stated that while military members "enjoy many of the same rights" as civilians, they do not have "the same autonomy" since their "function is to carry out the policies made by . . . civilian superiors."[75] Finally, the Court noted that because of the "broader sweep of the Uniform Code" the military takes affirmative steps to make personnel aware of the UCMJ's contents.[76]

Turning to Parker's vagueness challenge, the Court found that the CAAF and other military authorities had construed the article "in such a manner as to at least partially narrow its otherwise broad scope."[77] The Court explained that "[f]or the reasons which differentiate society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter."[78] This reasoning lead the Court to hold that "the proper standard of review for a vagueness challenge to the articles of the [UCMJ] is the standard which applied to criminal statutes regulating economic affairs,"[79] namely that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness."[80] Applying this standard to the facts of the case, the Court concluded that Parker "could have had no reasonable doubt that his public statements urging Negro enlisted men not to go to Vietnam if ordered to do so" violated Article 134.[81]

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[74] *Id.* at 750-51.
[75] *Id.* at 751.
[76] *Id.* The Court cited Article 137, 10 U.S.C. § 937, which requires that the Code's provisions be "carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter" and that a complete text of the UCMJ and subsequent regulations be "made available to any person on active duty, upon his request, for his personal examination." *Id*. at 751-52.
[77] *Id.* at 752. The effect of this interpretation was to supply "considerable specificity by way of examples of the conduct which they cover," which had been further supplemented by "less formalized custom and usage." *Id.* at 754.
[78] *Id.* at 756.
[79] *Id.* at 756-57.
[80] *Id.* at 756.
[81] *Id.* at 757.

The Court similarly dispensed of Parker's overbreadth challenge.[82] Acknowledging that it typically permits attacks "'on overly broad statutes with no requirement that the person making the attack demonstrate that his conduct could not be regulated by a statute drawn with the requisite narrow specificity,'" the Court held that this type of attack was not available to military personnel.[83] Instead, the "different character of the military community and of the military mission," based upon the "fundamental necessity for obedience" and "necessity for imposition of discipline, may render permissible within the military that would be constitutionally impermissible outside it."[84] The Court quoted at length from the "sensibly expounded" reasoning of the CAAF in *United States v. Priest*:

> In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it is both directed at inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.[85]

Acknowledging that its civilian precedent involved noncriminal sanctions while the UCMJ imposed a wide range of criminal and administrative punishments, the Court nevertheless decided that the "'weighty countervailing policies'" which permit the extension of standing" for overbreadth challenges in civilian society "must be accorded a good deal less weight in the military context."[86] The Court found, therefore, that Article 134 could be applied to "a

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[82] Overbreadth doctrine has been described alternatively as either providing the accused with standing to assert a third-parties interests or requiring that the accused be sanctioned by a constitutionally valid rule of law. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867 (1991); Henry P. Monaghan, *Overbreadth*, 1981 SUP.CT.REV. 1 (1981), *edited and reproduced in* THE FIRST AMENDMENT: A READER 276 (John H. Garvey and Frederick Schauer eds., 2d ed. 1996). Under the latter description, the Court is concerned with the "fit" of the law with the stated governmental interests that it seeks to advance. It has been observed, therefore, that "the Court has reached interchangeably to 'overbreadth' and 'least restrictive alternative' challenges both inside and outside the First Amendment context." Consequently, if the Court is unconcerned with the precise fit of the law, as it is when conducting mere rationality review, then "statutory 'overbreadth' is not a meaningful objection as a matter of substantive constitutional doctrine." quoting Monaghan, at 37-39.

[83] Parker, 417 U.S. at 758 (quoting Gooding v. Wilson, 405 U.S. 518, 520-521 (1972)).

[84] *Id.*

[85] *Id.* at 758-59 (quoting 45 C.M.R. 338, 344 (C.M.A. 1972) (citing Brandenburg v. Ohio, 395 U.S. 444 (1969); United States v. Gray, 42 C.M.R. 255 (1970))).

[86] *Id.* at 760 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973)).

wide range of conduct" without infringing on the First Amendment.[87] As applied to the facts of the case, Parker's conduct was simply "unprotected under the most expansive notions of the First Amendment."[88]

Three points from Justice Stewart's dissent deserve special attention for the purposes of this discussion. First, Justice Stewart felt that the transformations of the modern military justified a departure from the Court's precedent. He admitted that beginning in 1858, the Court upheld the predecessors to Article 133 and 134 against constitutional attack. At that time the standing army and navy numbered in the hundreds and the small professional cadre perhaps understood the conduct that was prohibited by the Articles. "But times have surely changed."[89] Given the induction of millions of men through the procedures of the draft who receive only a brief explanation of the UCMJ, Stewart felt that the soldiers should not be subject to the uncertainties of the Articles "simply because these provisions did not offend the sensibilities of the federal judiciary in wholly different period of our history."[90]

Second, Stewart concluded that the military's argument that the vagueness of the Articles was necessary to "maintain high standards of conduct" lacked merit.[91] Instead, he concluded that the "vague laws, with their serious capacity for arbitrary and discriminatory enforcement, can in the end only hamper the military's objectives of high morale and esprit de corps."[92] In a footnote, he cited with approval the suggestion of General Kenneth J. Hodson, former Judge Advocate General of the Army and Chief Judge of the Army Court of Military Review, that Article 134 should be replaced with specific sets of orders outlawing particular conduct.[93] Violations of these orders could then be prosecuted as a failure to obey a lawful order under Article 92.

Finally, Justice Stewart thought that the military's resort to either criminal or administrative remedies was significant. He explained that he did not "for one moment denigrate" the importance of commissioned officers being men of honor or that military necessity required that "servicemen generally must be orderly and dutiful."[94] Therefore, the military must make character evaluations of its personnel for the purposes of promotion, retention, duty assignment, and internal discipline. Stewart recognized, however, that the UCMJ operated as a criminal statute, and he could not "believe that such

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[87] *Id.*
[88] *Id.* at 761 (Stewart J., dissenting).
[89] *Id.* at 781 (Stewart, J., dissenting).
[90] *Id.* at 783 (Stewart, J., dissenting).
[91] *Id.* at 787 (Stewart, J., dissenting).
[92] *Id.* at 788 (Stewart, J., dissenting).
[93] *Id.* at 789 n.42 (Stewart, J., dissenting).
[94] *Id.* at 789 (Stewart, J., dissenting).

meaningless statutes as these can be used to send men to prison under a Constitution that guarantees due process of law."[95]

To summarize, the Supreme Court held in *Parker* that a military member might succeed in making a vagueness challenge only if he could not have known that his conduct was within the purview of the statute. Second, the civilian overbreadth doctrine designed to provide incentives for legislatures to narrowly tailor restrictions impacting protected speech is practicably inapplicable in the military context. Given the vagueness of the articles, courts are able to discern a "wide range" of restricted conduct that does not infringe upon the First Amendment, so the statute's overbreadth is not substantial. The Court also affirmed that the clear and present danger test applies in the military context and displayed a substantial amount of deference to the military's professional judgment as to whether the test was met. Finally, in finding that the statement was outside the protection of the First Amendment, the Court implicitly concluded that Parker's speech was disloyal to the United States and that the imposition of criminal sanctions was permissible. These principles will guide much of the First Amendment law that follows.

Three weeks after *Parker*, the Supreme Court handed down *Secretary of the Navy v. Avrech*.[96] Avrech was convicted of violating Article 80, which punishes attempts to commit other UCMJ offenses.[97] The underlying offense was publishing statements disloyal to the United States "with design to promote disloyalty and disaffection among the troops" in violation of both clause 1 and 2 of Article 134.[98] The Court of Appeals had reversed Avrech's conviction, holding that Article 134 was unconstitutionally vague.[99] Relying on *Parker*, the Supreme Court summarily reinstated his conviction.[100]

Remembering his own World War I military experience, Justice Douglas submitted a strongly worded dissent that echoes many of the arguments against restricting the speech of military personnel.[101] After detailing the exact statement that Avrech typed,[102] Douglas recounted that his

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[95] *Id.* (Stewart, J., dissenting).
[96] Secretary of the Navy v. Avrech, 418 U.S. 676 (1974) (per curiam).
[97] *Id.* at 676.
[98] *Id.* at 676-77.
[99] *Id.* at 677 (citing 477 F.2d 1237 (1973)).
[100] *Id.* at 678.
[101] *Id.* at 678 (Douglas, J., dissenting).
[102] Avrech typed out the following, somewhat ironic statement and planned to have it copied and distributed. Instead, it was given to a superior officer.

> It seems to me that the South Vietnamese people could do a little for the defense of their country. Why should we go out and fight their battles while they sit at home and complain about communist aggression. What are we, cannon fodder or human beings? . . . The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. . . .We have peace talks with North Vietnam and the V.C. That's fine and dandy except how

fellow soldiers "lambast[ed] General 'Black Jack' Pershing who was distant, remote, and mythical."[103] He understood that what they said "would have offended our military superiors," but since he was free to write Congress "we saw no reason why we could not talk it out among ourselves."[104] Douglas emphasized that Avrech was not setting up a "rendezvous for all who wanted to go AWOL," but instead "was attempting to speak with his comrades about the oppressive nature of the war they were fighting."[105] At best, Douglas felt that the statements might have prompted a letter to family or member of Congress. Finding the statements innocuous, Douglas expressed his sharp disapproval of the military attitude towards free speech in the ranks:

> I think full dedication to the spirit of the First Amendment is the real solvent of the dangers and tensions of the day. That philosophy may be hostile to many military minds. But it is time the Nation made clear that the military is not a system apart but lives under a Constitution that allows discussion of the great issues of the day, not merely the trivial ones—subject to limitations as to time, place, or occasion but never as to control.[106]

Douglas's dissent raises four objections to the Court's resolution of the general article prosecutions. First, he believes that Avrech's statement was not a clear and present danger to good order and discipline. Second, he appears to observe that a certain amount of dissent is both natural and beneficial to the morale of the troops. Third, Douglas recognizes that certain limits exist on the military's authority to control the speech of its personnel. Whether the right to communicate with Congress is based upon the Constitution or statute, an outlet exists for the channeling of concerns and complaints. Finally, however, Douglas seems to conclude that the official means of expression should not be exclusive, and that if a member can write to Congress, then less formal channels should be open as well.

While *Parker* and *Avrech* are the most significant Supreme Court treatments of disloyal statements under Article 134,[107] the leading case from

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> many men died in Vietnam the week they argued over the shape of the table? *. . . Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial?* We must strive for peace and if not peace than a complete U.S. withdrawal. We've been sitting ducks for too long. . . .

Id. at 679 (Douglas, J., dissenting) (emphasis added).
[103] *Id.* at 680 (Douglas, J., dissenting).
[104] *Id.* (Douglas, J., dissenting).
[105] *Id.* (Douglas, J., dissenting).
[106] *Id.* (Douglas, J., dissenting).
[107] Although the Article was enacted after Parker and Priest, the explanation accompanying Article 134—Disloyal Statements currently provides:

> Examples include praising the enemy, attacking the war aims of the United States, or denouncing our form of government with intent to promote

the CAAF is *United States v. Priest.*[108] The court upheld Priest's conviction for disloyal statements under the predecessor to Article 134. The court concluded that the publication of 800 to 1,000 pamphlets calling for the violent overthrow of the government, taken in its entirety, was disloyal to the government; that Priest intended to promote disloyalty and disaffection among servicemen; and that the conduct was prejudicial to good order and discipline.

The case is significant in a number of respects. The CAAF specifically held that the "imminent lawless action" test outlined in *Brandenburg v. Ohio*[109] did not apply in the military context. Citing the different nature of the military mission and community, the court concluded that:

> [T]he danger resulting from the erosion of military morale and discipline is too great to require that discipline must have already been impaired before a prosecution for uttering statements can be sustained. As we have said before, the right of free speech in the armed services is not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country.[110]

Instead, the court endorsed Justice Holmes's assertion in *Schenck v. United States*:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[111]

Consequently, it was not necessary for the government to show a materialized effect on the military resulting from Priest's statements. Instead, the inquiry is "whether the gravity of the effect of accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction."[112]

> disloyalty or disaffection among members of the armed services. A declaration of personal belief can amount to a disloyal statement if it disavows allegiance owed to the United States by the declarant. The disloyalty involved for this offense must be to the United States as a political entity and not merely to a department or other agency that is part of its administration.

MCM, *supra* note 3, Part IV, ¶ 72(c).

[108] United States v. Priest, 45 C.M.R. 338 (C.M.A. 1972). *See also* United States v. Harvey, 42 C.M.R. 141 (C.M.A. 1970); United States v. Gray, 42 C.M.R. 255 (C.M.A. 1970); United States v. Amick, 40 C.M.R. 720 (A.B.R. 1969).

[109] Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

[110] Priest, 45 C.M.R. at 344.

[111] *Id.* at 344 (quoting 249 U.S. 47, 52 (1919)).

[112] *Id.* at 344-45.

Having articulated this standard, the court concluded that the facts supported Priest's conviction. Although the court realized that the military personnel's level of education was extremely high, it still reasoned that "not all of them have the maturity of judgment to resist propaganda."[113] In this case, "[o]ne possible harm from the statements is the effect on others if the impression becomes widespread that revolution, smashing the state, murdering policemen, and assassination of public officials are acceptable conduct."[114]

The lesson to be taken from the court's reasoning is that even a seemingly remote threat to good order and discipline will be sufficient in most instances to justify a criminal conviction. The court attached great weight to the fact that Priest advocated the violent overthrow of the government instead of exercising the right of every citizen to petition the government for redress or to elect candidates who espouse his views.[115] The court also understood that it was "highly desirable" for military members to "have a good understanding of national issues," and noted that this is not a case of "political discussion between members of armed forces in the privacy of their rooms or at an enlisted men's or officers' club."[116] In the end, however, the court stated that "the primary function of a military organization is to execute orders, not to debate the wisdom of decisions that the Constitution entrusts to the legislative and judicial branches of the Government and to the Commander in Chief."[117]

While the number of prosecutions for disloyal statements decreased sharply after Vietnam, the military courts have recently seen a substantial increase in the number of indecent language specifications under Article 134.[118] The CAAF has consistently declined First Amendment challenges to the prosecutions, finding that "indecent" is synonymous with "obscene," and such language is not afforded constitutional protection.[119] Furthermore, the CAAF has explained that "whether language is indecent depends on a number of factors, including but not limited to 'fluctuating community standards of morals and manners, the personal relationship existing between a given speaker and his auditor, motive, intent and the probable effect of the

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[113] *Id.* at 345.
[114] *Id.*
[115] *Id.* at 342.
[116] *Id.* at 345-46.
[117] *Id.* at 345.
[118] Article 134—Indecent language provides: "Indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral senses, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts." MCM, *supra* note 3, Part IV, ¶ 89.
[119] United States v. Moore, 38 M.J. 490, 492 (C.M.A. 1994) (citing United States v. French, 31 M.J. 57, 59 (C.M.A. 1990)).

communication."[120] Language is indecent if it "is calculated to corrupt morals or excite libidinous thoughts."[121]

As review of the reported cases indicates, criminal sanctions can be imposed under Article 134 even for the content of "private" speech. Courts have affirmed convictions for the interstate transportation of child pornography, charged under the "crimes and offenses not capital" provision of Clause 3 of Article 134.[122] The courts have also determined that private communication between adults is unprotected, especially if hostile and degrading.[123] Openly sexual comments that rise to the level of indecent communication can be charged under Article 134,[124] although comments that create a hostile work environment can be charged in certain circumstances under Article 92 or 93. When the conduct involves children, the courts have been even more reluctant to entertain First Amendment challenges, relying on "the Supreme Court's conclusion in [*New York v. Ferber*[125]] that the right to communicate to young children may be restricted."[126]

In addition to imposing criminal sanctions for "private" conversations, a charge under Clause 1 or 2 of Article 134 can also be applied to conduct that occurs off-base. The off-base nature of the speech is relevant to the extent that it indicates whether the act was actually prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. The Army Court of Military Review (ACMR) found that this showing was not met in the

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[120] United States v. Hullett, 40 M.J. 189, 191 (C.M.A. 1994) (quoting United States v. Linyear, 3 M.J. 1027, 1030 (N.C.M.R. 1977), *petition denied*, 5 M.J. 269 (C.M.A. 1978)).

[121] Hullett, 40 M.J. at 191 (quoting Linyear, 3 M.J. at 1030).

[122] *See. e.g.,* United States v. Pullen, 41 M.J. 886, 887 (A.F.C.C.A. 1995) (finding that 18 U.S.C. § 2252(a)(4)(A) has scienter requirement and therefore rejecting First Amendment challenge to conviction on one specific specification of knowing possession of 3 or more items depicting minors engaged in sexually explicit conduct, in violation of statute, imported into Article 134 through its "crimes and offenses not capital" clause), *petition denied*, 43 M.J. 166 (C.A.A.F. 1995); United States v. Olinger, 41 M.J. 615 (N.M.C.M.R. 1994).

[123] *See, e.g.,* United States v. Caver, 41 M.J. 556, 561 (N.M.C.C.A. 1994) ("[C]onsidering the factors set forth in the record, including the context of the utterance, the intent and effect of the communication, and applying community standards," accused use of the term "bitch" was indecent), *petition denied*, 43 M.J. 151 (C.A.A.F. 1995).

[124] *See, e.g.,* United States v. Gill, 40 M.J. 835, 837 (A.F.C.M.R. 1994) (rejecting accused's assertions that conviction violated his First Amendment right to freedom of speech because the writings were private communications between consenting adults and holding that it was sufficient that the language was indecent on its face and was prejudicial to good order and discipline, as clearly established by the testimony of the two victims), *petition denied*, 42 M.J. 100 (C.A.A.F. 1995); United States v. Durham, 1990 WL 199847 *1 (A.F.C.M.R. 1990) (per curiam) (rejecting summarily appellant's argument that his indecent language specifications violate his First Amendment right to free speech), *petition denied*, 32 M.J. 470 (C.M.A. 1991).

[125] 458 U.S. 747 (1982) (upholding state prohibition on distribution of child pornography based on government interest in preventing the sexual exploitation of children).

[126] United States v. Orben, 28 M.J. 172, 175 (C.M.A. 1989) (holding that under the circumstances, display of non-pornographic or obscene pictures to minor constituted taking indecent liberties when accompanied by behavior and language demonstrating intent to arouse his own sexual passions, those of the child, or both), *cert. denied*, 493 U.S. 854 (1989).

particularly interesting case of *United States v. Hadlick.*[127] Hadlick was convicted under Article 134 after he spit on the American flag while in a drunken stupor at a police station. The CAAF remanded the case to the ACMR with instructions to consider whether Hadlick's conduct was expressive speech and protected in light of *Texas v. Johnson.*[128] The ACMR held that Hadlick spit on the flag "for no particular reason" and therefore had no claim to First Amendment protection.[129] However, the court set aside the conviction, concluding that "we have no information that the act was observed by anyone in the armed forces, was in fact a deliberate act of desecration or was likely to be considered by anyone to be a deliberate act of desecration or service discrediting."[130]

The issue presented in the case did not go unnoticed.[131] If, unlike Hadlick, a military member burns a flag for expressive purposes during an off-base demonstration, can the military impose a criminal sanction under the UCMJ without offending the First Amendment? One commentator has concluded that "[l]ittle question exists that a flag burner in the ranks will undermine the effectiveness of response to command."[132] Flag burning strikes at "the very heart of good order and discipline" and would subject the flag burner to abuse from the members in his command.[133] A breach of the peace may result, and "any trust" in the flag-burner's "ability and desire to defend his fellow soldiers—let alone his country—in combat would be questionable."[134]

Although the government failed to prove that Hadlick's off-base conduct violated Article 134, this showing was made in *United States v. Stone.*[135] Stone was convicted under Clause 2 (conduct discrediting the service) for giving a false account of his military actions in Iraq during Operation Desert Shield/Desert Storm to a high school assembly. Appearing in uniform and donning a green beret that he was not authorized to wear, Stone described to the students how he had parachuted from 50,000 feet into Baghdad prior to the beginning of the air war.[136] He also claimed to have been

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[127] United States v. Hadlick, CM 8900080 (A.C.M.R. 30 Nov. 1989) (unpublished opinion), *aff'd*, 33 M.J. 163 (C.M.A. 1991).

[128] Texas v. Johnson, 491 U.S. 397 (1989) (striking Texas statute making it a crime to desecrate the American flag).

[129] Hadlick, slip op. at 3.

[130] Hadlick, slip op. at 4.

[131] *See generally* Jonathan F. Potter, *Flag Burning: An Offense Under the Uniform Code of Military Justice?*, NOVEMBER 1990 ARMY LAW. 21 (1990); Gregory A. Gross, Note, *Flag Desecration in the Army*, APRIL 1990 ARMY LAW. 25 (1990).

[132] Potter, *supra* note 131, at 26.

[133] *Id.*

[134] *Id.*

[135] United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993) *aff'd*, 40 M.J. 420 (C.M.A. 1994).

[136] *Id.* at 561. Stone also told the students that as the leader of the four-man Green Beret team, he wore a computerized "glove" worth $1.2 million that tied into "Star Wars" satellites, would warn him of approaching enemy forces and direct him to helicopter landing zones. *Id.* at 561 n.3. The local newspaper covered the assembly. The newspaper publisher, the brother of then

in Iraq in December, 1990, and told the students "that they may be in jeopardy because terrorists intent on retaliation may be watching his activities."[137]

The Army Court of Military Review (ACMR) rejected Stone's contention that the speech could not have discredited the military because he delivered it while on leave and spoke only for himself.[138] Instead, it found that Stone had acted in an official capacity by making the speech regarding his military activities while in uniform and in public.[139] Because the presentation was false but not disloyal, the court examined the surrounding circumstances to determine if it was service-discrediting. Stone claimed that the speech could not have discredited the service because the audience warmly received it.[140] The court found, however, that the government had provided ample evidence to the contrary.[141] Affirming the ACMR's decision, the CAAF summarily stated that the "First Amendment does not protect false statements about military operations made by a soldier in uniform to a public audience of high school students during wartime."[142]

The question left unresolved by the opinion is whether Stone would be subject to prosecution if his story were true. The court simply noted that such a case would raise First Amendment concerns.[143] Imagine that Stone had described a true account of a massacre by U.S. military personnel that he witnessed first-hand. After hearing the presentation, the audience had diminished confidence in the integrity of military personnel. Why would this speech not discredit the military? Could it be that Stone must first report the incident through approved channels, such as a filing an Inspector General complaint or sending a letter to Congress?[144] Does he have to wait for a

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Vice-President Dan Quayle, proudly forwarded a copy of the story to the Vice President's office, which then forwarded it to the Pentagon. *Id.* at 562.

[137] *Id.*

[138] *Id.* at 562.

[139] *Id.*

[140] *Id.* at 564.

[141] *Id.* at 565. The government presented evidence at trial that, once the falsity of the presentation was exposed, the audience had diminished confidence in the integrity of military personnel. Evidence was also produced indicating that special operations personnel believed that the story, although completely false, might endanger members during the ground war. Finally, a public affairs officer for the Special Forces issued an apology to the high school principal and suggested methods to dispel the anxiety caused resulting from the terrorism remarks. *Id.* at 562.

[142] United States v. Stone, 40 M.J. 420, 424-25 (C.M.A. 1994).

[143] Stone, 37 M.J. at 564.

[144] Although he did not witness the events in Vietnam on March 16, 1968, Ronald Ridenhour heard first-hand accounts from fellow soldiers. After his discharge and return to the states, he initiated the investigation into what would become known as the "My Lai Massacre" with a letter to the Department of the Army, the Department of Defense, and numerous government officials and members of Congress. He ended the letter with the following statement

> I have considered sending this to newspapers, magazines, and broadcasting companies, but I somehow feel that investigation and action by the Congress

response before he tells the story to the public?

It could be argued that Clause 2 is intended to reach only false speech that discredits the military, but this is not clear from the plain language of the Article. Even if this interpretation were correct, it would place great weight on the truth/falsity determination. For example, what if Stone had told the students it was his opinion that "President Clinton's handling of Bosnia proves that he is incompetent to lead the military; he's a draft-dodger anyway?" If reasonable people could disagree about the validity of this opinion, then is the speech within the reach of Clause 2? Does the First Amendment protect Stone from prosecution?

A second point from the ACMR's opinion deserves consideration. The court found that Stone acted in his official capacity because he delivered the discussion of his military activities while in uniform and in a public forum. It is not clear why these facts are relevant to the determination that his presentation was discrediting to the service. First, Stone's presence in a public forum increased the likelihood that the speech would discredit the military. At least in the civilian context, however, categorizing a facility as a "public forum" under First Amendment doctrine significantly limits the government's ability to regulate speech.[145] Second, even if Stone was out of uniform, the audience no doubt understood that he was speaking about his personal experiences in the military. If he had already been discharged from the military, then he would not be subject to prosecution under the UCMJ. Furthermore, even if he was not speaking about his military activities, so long as the audience knew he was in the service the presentation could still be discrediting to the service. For example, imagine that he had given a presentation out of uniform and off-base on the legalization of child pornography and the audience knew he was an airman from the local base. Is this within the reach of Clause 2? Is it protected by the First Amendment?

The most recent First Amendment challenge to an Article 134 conviction was brought in *United States v. Brown*.[146] Brown was a member of a unit of the Louisiana National Guard that was mobilized during the Gulf War. A number of his fellow airmen became discontent when his unit was deployed to Fort Hood, Texas. After meetings with the commanding officer failed to alleviate their concerns, Brown and others arranged for charter buses to transport them back to Louisiana. Brown was charged and convicted with violating 10 U.S.C. § 976, incorporated by Clause 3 of Article 134, which

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> of the United States is the appropriate procedure, and as a conscientious citizen I have no desire to further besmirch the image of the American serviceman in the eyes of the world. I feel this action, while probably it would promote attention, would not bring about the constructive actions that the direct actions of the Congress of the United States would.

RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 23-28 (1971).

[145] *See infra* notes 325-26 and accompanying text.

[146] United States v. Brown, 45 M.J. 389 (C.A.A.F. 1996).

prohibits *inter alia* the organization of military members for strike, march, or demonstration against the government.[147] Brown claimed that the statute was vague and overly broad and interfered with his First Amendment freedom of speech.

Delivering the CAAF's opinion,[148] Judge Crawford reviewed the Supreme Court precedent that recognizes the military as a "separate community" and concluded that Brown could have little doubt that "organizing *battalion-wide* meetings to discuss living conditions, long hours, and inadequate time off, then arranging for transportation home would be improper."[149] In fact, she reasoned that there would be no question that the allegation would meet the vagueness requirement had the government charged Brown under Clause 1 or 2 of Article 134. Turning to the specific First Amendment issue, Judge Crawford developed a checklist to guide the analysis. Military personnel have "a right to voice their views so long as it does not impact on discipline, morale, esprit de corps, and civilian supremacy."[150] After reviewing both the legal precedent and scholarly articles that outline the critical importance of each factor to the military community, she concluded that Brown's speech was unprotected by the First Amendment. Although it does not appear to have been necessary for the Court's holding, Judge Crawford made special note of the many alternative outlets that Brown may have pursued with his complaint, to include the chain of command under Article 138, an Inspector General complaint, and communication with members of Congress.[151]

2. Article 133—Conduct unbecoming an officer and gentleman

> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.[152]

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[147] *Id.* at 392-393.

[148] Chief Judge Cox concurred in the result, but did not "view this as a First Amendment case." *Id*. at 399. Although he found it "highly unusual" that the government relied on a federal statute outside of the UCMJ, he still concluded that "it is quite clear that the appellant's conduct was prejudicial to good order and discipline in the military and punishable as such." *Id.* at 399-400. Judge Gierke concurred in part and in the judgment, affirming the conviction on the basis of Clause 1 of Article 134 instead of Clause 3. Judge Sullivan dissented, finding that the underlying conduct did not constitute "union" activity under the federal statute. *Id*. at 401-02.

[149] *Id.* at 394.

[150] *Id.* at 396.

[151] *Id.* at 398.

[152] Article 133, UCMJ, MCM, *supra* note 3, Part IV, ¶ 59(a). For an excellent discussion of the historical development and rationale supporting Article 133 and 134, UCMJ, see Maj. Keithe E. Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 A.F. L. REV. 124 (1970). Maj. Nelson explains that "the elimination of the mandatory dismissal punishment and the resultant change of wording in the Manual for Courts-Martial have operated to increase the vagueness surrounding [Article 133]." *Id.* at 138-39.

In *Parker v. Levy*, the Supreme Court upheld Article 133 against vagueness and overbreadth challenges using the same line of reasoning that it found convincing for Article 134. The Court found that the specific needs of the military community permitted restrictions that would not be applicable to the civilian populace.[153] Additionally, the Court noted that the military courts of review had narrowed the broad language of the article. The underlying conduct must have "double significance and effect."[154] As Winthrop explained, "[t]hough it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such a circumstance as to bring dishonor or disrepute upon the military profession."[155] The explanation accompanying the article provides further guidance, stating that not every officer "is or can be expected to meet unrealistically high moral standards."[156] There is a limit of tolerance, however, "based on customs of the service and military necessity below which the personal standards of [the officer] cannot fall without seriously compromising the person's standing as an [officer] or the person's character as a gentleman."[157]

First Amendment challenges to Article 133 prosecutions have been made in three types of cases. The first implicates the "Don't Ask, Don't Tell" policy. In essence, the member's statement that "I am a homosexual" is treated as an admission. The admission is then used as evidence to discharge the member based upon the engagement in prohibited conduct.[158] Because it has received ample consideration elsewhere, the constitutional implications of the policy will not be discussed here.[159]

The second type of case involves an officer's solicitation of another to violate a federal statute. Criminal solicitation is typically considered outside the coverage of the First Amendment and is, therefore, unprotected. In *United States v. Bilby*,[160] the accused solicited another to violate the federal statute prohibiting the interstate transportation of child pornography.[161] The CAAF held that "[i]t is not necessary, under Article 133, that the conduct of the officer, itself, otherwise be a crime" and concluded that "it is unbecoming for

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[153] Parker v. Levy, 417 U.S. 733, 753-54 (1974).
[154] *Id.* at 754 (quoting United States v. Howe, 37 C.M.R. 429, 441-442 (1967) (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 711-12 (2d. ed. 1920)).
[155] *Id.* (quoting *Id.*).
[156] MCM, *supra* note 3, Part IV, ¶ 59(c)(2).
[157] *Id.*
[158] *See, e.g.*, Holmes v. California Army National Guard, 124 F.3d 1126, 1136-37 (9th Cir. 1997).
[159] For a list of articles that address the constitutionality of the "Don't Ask, Don't Tell" policy, see note 9.
[160] United States v. Bilby, 39 M.J. 467 (C.M.A. 1994), *cert. denied*, 513 U.S. 1077 (1995).
[161] 18 U.S.C. § 2252.

an officer to solicit someone to violate a Federal statute—period."[162]

The third type of case involves an officer's private use of sexually explicit language. In most instances, civilians who engage in this type of speech are protected from prosecution,[163] so long as the speech is not obscene[164] or does not involve children.[165] In *United States v. Hartwig*,[166] a captain serving during the Gulf War received a letter from a 14-year old schoolgirl. Although it was unclear whether he knew the exact age of the girl,[167] Hartwig responded with a letter that contained strong sexual overtones and a request for the girl to send a nude picture of herself to him.[168] On appeal, Hartwig challenged his conviction on First Amendment grounds, claiming that the private letters were protected. The CAAF held that "[w]hen an alleged violation of Article 133 is based on an officer's private speech, the test is whether the officer's speech poses a 'clear and present danger' that the speech will, 'in dishonoring or disgracing the officer personally, seriously compromise[ ] the person's standing as an officer.'"[169] The court found, therefore, that "the private nature of his letter neither clothes it with First Amendment protection nor excludes it from the ambit of Article 133."[170] As the court explained, the Supreme Court over a century ago "upheld the constitutional authority of Congress to prohibit private or unofficial conduct by an officer which 'compromised' the person's standing as an officer 'and brought scandal or reproach upon the service.'"[171]

The CAAF disposed of a similar First Amendment challenge in *United States v. Moore*.[172] Moore was convicted under Article 133 for the

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[162] Bilby, 39 M.J. 470.

[163] *See, e.g.*, Sable Communications v. F.C.C., 492 U.S. 115 (1989) (striking unanimously a statute that prohibited indecent interstate "dial-a-porn" telephone calls while upholding ban on obscene services).

[164] The now familiar three-part test for obscenity was outlined by the Court in Miller v. California, 413 U.S. 15 (1973), *reh'g denied*, 414 U.S. 881 (1973).

[165] In Sable, 492 U.S. at 126, the Court noted that "there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." The Court concluded, however, that the statute was not narrowly tailored to serve that interest. *Id.* at 126. *See also* New York v. Ferber, 458 U.S. 747 (1982) (upholding state prohibition on distribution of child pornography based on government interest in preventing the sexual exploitation of children).

[166] United States v. Hartwig, 39 M.J. 125 (C.M.A. 1994).

[167] *Id.* at 126-27.

[168] *Id.* at 127.

[169] *Id.* at 128 (quoting MCM, *supra* note 3, Part IV, ¶ 59(c)(2)). *See also* United States v. Modesto, 39 M.J. 1055, 1061 (A.C.M.R. 1994) ("Assuming without deciding that cross-dressing in a public place has First Amendment implications, we have no doubt that the conduct presented a 'clear and present' danger' that the conduct, 'in dishonoring or disgracing the officer personally, [would] seriously compromise[ ] the person's standing as an officer." (quoting MCM, *supra* note 3, Part IV, ¶ 59(c)(2))), *aff'd*, 43 M.J. 315 (C.A.A.F. 1995).

[170] *Id.* at 128.

[171] *Id.* at 128-29 (quoting Smith v. Whitney, 116 U.S. 167, 185 (1886)).

[172] United States v. Moore, 38 M.J. 490 (C.M.A. 1994).

communication of indecent language, which the court described as "not simply amorous banter between two long-time lovers; rather it was demeaning vulgarity interwoven with threats and demands for money and sex."[173] The court explained that the "conduct of an officer may be unbecoming even when it is in private," and his actions "were clearly unbecoming an honorable, decent, and moral man."[174] Furthermore, "any 'reasonable military officer' would recognize that fact," and his "statements were of a kind to bring discredit upon himself and raise serious questions regarding his leadership ability."[175]

3. Article 92--Failure to obey order or regulation

> Any person subject to this chapter who – (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.[176]

While Article 92 may be applied to a wide-range of speech, convictions have recently been challenged on First Amendment grounds in three particular circumstances: flag desecration, "hostile environment" sexual harassment, and possession of a drug recipe. Although rejected in all three cases, the mere fact that free speech challenges were argued illustrates the growing tendency of the accuseds to resort to First Amendment defenses.

In 1991, the ACMR rejected a free speech challenge to an Article 92 conviction in *United States v. Wilson*.[177] Wilson was a disenchanted military policeman on flag-detail. After expressing his disgust of the Army and the United States, he blew his nose on the American flag.[178] The accused was charged with dereliction of duty in that he "willfully failed to ensure that the United States flag was treated with proper respect by blowing his nose on the flag when it was his duty as military policeman on flag call to safeguard and protect the flag."[179] The duty was based upon military custom, which was proven by reference to Army field manual, and knowledge of the custom was established by the testimony of his first sergeant.[180]

The military judge determined that soldier's actions were expressive conduct "entitled to protection unless government has greater countervailing

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[173] *Id.* at 492 (quoting Army Court of Military Review's unpub. op. at 3-4).
[174] *Id.* at 493 (internal quotation marks omitted).
[175] *Id.* (quoting United States v. Frazier, 34 M.J. 194 (C.M.A. 1992)).
[176] Article 92, UCMJ, MCM, *supra* note 3, Part IV, ¶ 16(a).
[177] United States v. Wilson, 33 M.J. 797 (A.C.M.R. 1991).
[178] *Id.* at 798.
[179] *Id.*
[180] *Id*. at 798 n.1.

interest in suppressing the particular speech."[181] The ACMR recounted the "separate community" rationale, stating that the "essence of military service 'is the subordination of desires and interests of the individual to the needs of the service.'"[182] However, since it determined that Wilson's conduct was expressive speech and the governmental regulation only incidentally related to the suppression of free speech, the ACMR proceeded to evaluate the government regulation based upon the test outlined in *United States v. O'Brien*.[183] Given the long precedent establishing the unique nature of the military community, it is somewhat surprising that the ACMR did not apply the clear and present danger test in this instance. In fact, this is the only reported case in which a military court of review has utilized the *O'Brien* test.

As defined by the ACMR, the *O'Brien* test asks four questions. Is the regulation within the constitutional power of the government? Does it further an important or substantial government interest? Is the governmental interest unrelated to the suppression of free expression? Is the incidental restriction on alleged First Amendment freedoms no greater than necessary to further that interest?[184]

Applying the *O'Brien* test, the court found that Article 92 "is a legitimate regulatory measure because the government may regulate the conduct of soldiers."[185] Second, Article 92 "furthers an important and substantial government interest in promoting an effective military force."[186] Third, the purpose of Article 92, "in proscribing failures to perform military duty is, on its face, unrelated to the suppression of free speech."[187] "Finally, the incidental restriction of alleged First Amendment freedoms is no greater than is essential to further the government interest in promoting the disciplined performance of military duties."[188] Consequently, Wilson's expressive conduct was unprotected.

Aside from the fact that it was applied in this situation, the *O'Brien* test's application presents an interesting dilemma for future accuseds wishing to challenge an Article 92 conviction. In short, it is nearly impossible. Because the ACMR chose to evaluate the government's interests in suppressing free expression and the incidental effect of the restriction in

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[181] *Id.* at 798. The military judge also found that if the accused in this case were a civilian and purchased his own flag, the conduct would be protected under Texas v. Johnson, 491 U.S. 397 (1989). Additionally, if the soldier was off duty and out of uniform and procured his own flag, "arguably then that expression of a position might be protected, that issue has yet to be decided." *Id.*

[182] *Id.* at 799 (internal quotation marks omitted) (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (citing Orloff v. Willoughby, 345 U.S. 83, 92 (1953))).

[183] *Id.* at 799-800 (citing 391 U.S. 367 (1968), *reh'g denied* 393 U.S. 900 (1968)).

[184] *Id.* at 800.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

general terms, the analysis is applicable to any challenge to an Article 92 conviction.

It could be argued, however, that the *O'Brien* test should be applied to the underlying duty and not the general article. Wilson's duty was to show the proper respect to the flag as a member of the flag-raising detail. Initially, it could be argued that the government's restriction is not incidental to the suppression of speech, and therefore, the *O'Brien* test should not apply. Alternatively, applying the *O'Brien* test, it could be argued that the government's interest in showing the proper respect for the flag is not unrelated to the suppression of free expression. Even applying a more specific definition of the underlying duty, Wilson's challenge would likely fail because his conduct involved government property and he was assigned as a military policeman. However, a different fact scenario might lend itself to this type of argument.

First Amendment challenges were also made to an Article 92 conviction involving seven specifications of sexual harassment in *United States v. Daniel*.[189] The accused argued that the underlying Navy Regulation's prohibition of "hostile environment" sexual harassment was facially void for vagueness because of its chilling effect on speech. The court reversed the conviction on other grounds, finding that the regulation was not punitive and therefore could not serve as the basis for an Article 92 conviction. However, in light of the recent Supreme Court's treatment of similar challenges to Title VII,[190] future challenges are likely to be unsuccessful.

Finally, a conviction under Article 92 was challenged on free speech grounds in *United States v. McDavid*.[191] McDavid was charged and convicted, *inter alia*, of violating an Air Force regulation by possessing a handwritten drug "recipe" with criminal intent to produce a controlled substance.[192] On appeal, he argued that "punishing someone for possessing a document that they

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[189] United States v. Daniel, 42 M.J. 802, 804-06 (N.M.C.C.A. 1995) (Secretary of the Navy Instruction 5300.26A, Department of the Navy Policy on Sexual Harassment (Aug. 2, 1989) was not a punitive regulation but merely a policy statement and, therefore, could not serve as basis for Article 92, UCMJ offense), *petition denied*, 43 M.J. 429 (C.A.A.F. 1995). For examinations of sexual harassment prosecutions in the military, see Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1 (1993); Mary C. Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082 (1987).

[190] Interpreting Title VII, the Supreme Court has held that if the work environment could reasonably be perceived to be hostile or abusive no showing of psychological injury was necessary. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). Although free speech issues were briefed by both parties, the Court's opinion did not even reference the First Amendment. *See* Richard H. Fallon, Jr., *Sexual Harassment, Content-Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1 (1994).

[191] United States v. McDavid, 37 M.J. 861 (A.F.C.M.R. 1993), *petition denied*, 39 M.J. 405 (C.M.A. 1994).

[192] *Id.* at 862.

wrote themselves has profound constitutional implications."[193] The Air Force Court of Criminal Appeals reiterated that the prosecution was for possessing a drug recipe *with criminal intent*, and not merely the "dissemination of ideas or the expression of views." The court concluded that it had "no First Amendment concerns about a specification which alleges as criminal the act of possessing a recipe for concocting an illegal controlled substance, together with some of the chemical components of the controlled substance."[194]

4. Article 88—Contempt toward officials

> Any commissioned officer who uses contemptuous words against the President, the Vice-President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.[195]

According to the clear language of Article 88, only "contemptuous" words against the listed officials are prohibited. Furthermore, the explanation accompanying the Article states that "[n]either 'Congress' nor 'legislature' includes members individually."[196] The discussion also indicates that it is "immaterial whether the words are used against the official in an official or private capacity."[197] However, so long as the words are "not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged as a violation of the article."[198] Finally, "[t]he truth or falsity of the contemptuous statement is immaterial."[199]

The prohibition contained in Article 88 is not only content-based, it is also view-point based. Under the civilian protections of the First Amendment, the government is forbidden to discriminate among speakers based upon the speaker's viewpoint. Even in a nonpublic-forum such as a military base, the government may impose restrictions upon civilian speech only if the restriction is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[200] Civilians are, therefore, protected from prosecution for uttering words that are "contemptuous" against public officials. For example, in *Watts v. United States*, the Supreme Court reversed the conviction of a teenager who stated during a protest rally "If they ever

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[193] *Id.* at 863.
[194] *Id.* at 863-64.
[195] MCM, *supra* note 3, Part IV, ¶ 12(a).
[196] *Id.* ¶ 12(c).
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] Perry Educ. Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 46 (1983).

make me carry a rifle, the first man I want to get in my sights is L.B.J."[201] Watts was convicted under a federal statute that prohibited any person from knowing and willfully making a threat against the life of the President.[202] Although the statute was valid on its face, the Court explained that "[w]hat is a threat must be distinguished from what is constitutionally protected speech."[203] Taken in context and "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[204] the only offense Watts committed was to engage in "a kind of very crude offensive method of stating a political opposition to the President."[205]

The most recent court-martial conviction under Article 88 involved 2nd Lt. Henry Howe's off-duty participation in a sidewalk demonstration to protest the Vietnam War.[206] During the fall of 1965, Howe carried a sign that read "LET'S HAVE MORE THAN A 'CHOICE' BETWEEN PETTY, IGNORANT, FACISTS [sic] IN 1968" and "END JOHNSON'S FACIST [sic] AGRESSION [sic] IN VIETNAM."[207] While he was not in uniform, the record indicates that the protest march prompted extensive media coverage and approximately 2000 people were present.[208] Military policemen, on hand to assist civilian police with any military personnel that might become involved in the demonstration, recognized Howe and several others.[209]

Howe was convicted by a general court-martial of violating Article 88 and 133, and ultimately received a sentenced of dismissal, total forfeitures, and one-year confinement.[210] On appeal, the CAAF rejected Howe's assertion that Article 88 violated his First Amendment rights. The court noted the restrictions contained in the provision are older than the Constitution itself, appearing in the Article of War adopted by the Continental Congress in 1775.[211] After detailing the subsequent congressional endorsement of the article, the court concluded that the reenactments "constituted a contemporary construction of the Constitution and is entitled to the greatest respect."[212] While highlighting that the protections afforded by the First Amendment are not absolute, the court emphasized that the evil the article seeks to avoid is "the impairment of discipline and the promotion of insubordination by an officer of

[201] Watts v. United States, 394 U.S. 705, 706 (1969) (per curiam).
[202] *Id*. at 705-06, (citing 18 U.S.C. § 871(a)).
[203] *Id.* at 707.
[204] *Id.* at 708 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).
[205] *Id.* (internal quotation marks omitted).
[206] United States v. Howe, 37 C.M.R. 429 (C.M.A. 1967).
[207] *Id.* at 433.
[208] *Id.* at 432.
[209] *Id.* at 432-33.
[210] *Id.* at 431.
[211] *Id.* at 434.
[212] *Id.* at 438.

the military service."[213] The court noted that given the hundreds of thousands of troops fighting in Vietnam and the thousands of draftees, it "seems to require no argument" that Howe's conduct constituted a clear and present danger to discipline within the armed forces.[214] The conclusion that Article 88 "does not violate the First Amendment is clear."[215]

Apart from the actual finding that Article 88 is facially valid, the court's holding is significant in at least three respects. First, the court relied heavily upon the fact that the restrictions proscribed in the article pre-dated the First Amendment. The consequent reenactment of the Article by Congress led the court to conclude that this prohibition was acceptable. It has been argued, however, that this reasoning is inapplicable to the current military community because the Founding Fathers had never envisioned a large peacetime standing army.[216] Second, the court placed great emphasis on the "separate community" theory and the importance of civilian control of the military to survival of our democratic government.[217] Third, the ease by which the court found that Howe's expressive conduct represented a clear and present danger to military discipline is notable.

This article has not gone without criticism.[218] It has been argued that Article 88 "precludes military officers from engaging in open and vigorous debate about officials and their policies,"[219] and "must have a chilling effect on anyone subject to its strictures and aware of its prohibition."[220] Arguably, however, the actual threat to free speech posed by Article 88 is small.

Consider the remarks of Maj. Gen. Harold N. Campbell, a 32-year veteran who reportedly called President Clinton a "dope-smoking," "skirt-chasing," "draft-dodging" Commander-in-Chief during a speech in the Netherlands in the summer of 1993.[221] An Air Force inquiry ensued and reportedly concluded that Gen. Campbell had violated Article 88.[222] Soon thereafter, Air Force Chief of Staff Gen. Merrill McPeak announced at a Department of Defense briefing that Gen. Campbell was given a written

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[213] *Id.* at 437.
[214] *Id.* at 437-38.
[215] *Id.* at 438.
[216] *See generally* Levin, *supra* note 49.
[217] Howe, 37 C.M.R. at 439 (quoting Warren, *supra* note 4).
[218] *See generally* Richard W. Aldrich, Comment, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 UCLA L. REV. 1189 (1986); John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697 (1968).
[219] Aldrich, *supra* note 218, at 1195.
[220] *Id.* at 1206.
[221] Eric Schmitt, *General to Be Disciplined for Disparaging President*, N.Y. TIMES, June 16, 1993, at A20, *available in* LEXIS, Nexis Library, ARCNWS File.
[222] *Pentagon Fines, Reprimands And Retires General Who Ridiculed Clinton*, UPI, June 18, 1993, *available in* LEXIS, Nexis Library, ARCNWS File.

reprimand under Article 15 and had requested to retire.[223] Regardless of one's voting preferences or the popularity of an opinion with others,[224] it seems clear that Gen. Campbell's remarks were inappropriate. Amounting to a personal attack on the President, the comments were not aimed at a pending national issue or policy. The incident did add to the impression held by many that the military did not hold the highest opinion of the President, but whether the "open and vigorous" public debate benefited from this additional information is at least questionable. As President Clinton reportedly responded, "for a general officer to say that about the commander-in-chief—if that happened—is a very bad thing."[225]

C. Department of Defense Regulations and Air Force Instructions

The Department of Defense and the individual services have promulgated a variety of regulations that restrict the speech activities of its members.[226] If the regulation is punitive, violations may be charged under Article 92, UCMJ.[227] A number of punitive Air Force Instructions (hereinafter AFI or AFIs) raise possible free speech issues, such as the Internet restrictions contained in AFI 33-129[228] and the unprofessional relationship prohibitions outlined in AFI 36-2909.[229] Of particular interest for the purpose of this inquiry, however, are the restrictions on political speech.

The restrictions on the political activities of Air Force personnel are contained in Department of Defense (hereinafter DOD) Directive 1344.10[230]

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[223] Gen. Merrill McPeak, Defense Department Briefing, June 18, 1993, *available in* LEXIS, Nexis Library, ARCNWS File.

[224] *See* Bruce Smith, *Memo to the Navy: Ask the JAG*, 42-Dec. FED. LAW. 18 (1995) (emphasizing that the Naval Institute's *Proceedings* essay critical of DOD policies on personnel and social issues that provoked outrage in Washington D.C. illustrates that "even political commentary that enjoys widespread support among the ranks can still constitute a violation of the law or good judgment.").

[225] Charles Aldinger, *General Ridiculed Clinton, Official Says*, Reuters North American Wire, June 15, 1993, *available in* LEXIS, Nexis Library, ARCNWS File.

[226] The two regulations implementing the "Don't Ask, Don't Tell" policy have evoked the most controversy in recent years. *See supra* note 9.

[227] *See, e.g.*, United States v. Daniel, 42 M.J. 802 (N.M.C.C.A. 1995) (finding that Naval instruction governing sexual harassment was not punitive and could not serve as basis for charge of violating lawful general order or regulation under Article 92, UCMJ), *review denied*, 43 M.J. 429 (C.A.A.F. 1995).

[228] AFI 33-129, Transmission of Information via the Internet, ¶ 6.1.3 (Jan. 1, 1997) (prohibiting, *inter alia*, the storage or transmission of obscene or offensive language or material on government computer system). *See supra* notes 118-21 and accompanying text for a discussion of the UCMJ's definition of indecency.

[229] AFI 36-2909, Professional and Unprofessional Relationships, ¶ 5 (May 1, 1996).

[230] DOD Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty (June 15, 1990).

and AFI 51-902.[231] The AFI prohibits a host of partisan political activity, to include the use of "official authority or influence to interfere with an election, to affect its course or outcome, to solicit votes for a particular candidate or issue, or to require or solicit political contributions from others."[232] On the other hand, members can vote, attend political meetings and rallies as a spectator out of uniform, and express personal views on non-partisan, public issues in a letter to the editor of a newspaper.[233] It would appear, therefore, that a lieutenant would be permitted to submit the statement at the beginning of this article as a letter to the editor of the *Air Force Times*. Additionally, the military permits personnel to place a "political sticker on the member's private vehicle, or wear a political button when not in uniform and not on duty."[234]

While service members are generally permitted to engage in the conduct outlined in the two regulations, commanders have also been provided guidance on the handling of political protest and dissent. These responsibilities are contained in DOD Directive 1325.6[235] and AFI 51-903.[236] The AFI provides that "commanders must preserve the service member's right of expression, to the maximum extent possible, consistent with good order, discipline, and national security."[237] Commanders, however, "have the inherent authority and responsibility to take action to ensure the mission is performed and to maintain good order and discipline."[238] Consequently, an Air Force member may not "distribute or post any printed or written material" other than official publications "within any Air Force installation without permission of the installation commander or that commander's designee."[239]

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[231] AFI 51-902, Political Activities by Members of the US Air Force (Jan. 1, 1996) (punitive regulation in its entirety); *See also* Major General Bryan G. Hawley, TJAG Policy Number 10, Political Activities by Air Force Military Personnel (1998 Revision).

[232] AFI 51-902, *supra* note 231, ¶ 3.1.

[233] *See id.* ¶ 4. For a discussion of service regulations prohibiting military personnel from appearing at certain functions in uniform, see United States v. Locks, 40 C.M.R. 1022, 1023 (A.F.B.R. 1969) ("The Air Force designs and furnishes the uniform according to its own criteria; the First Amendment does not forbid the Air Force from determining the uniform's use according to its own criteria."), *petition denied*, 40 C.M.R. 327 (C.M.A. 1969); United States v. Toomey, 39 C.M.R. 969, 973 (A.F.B.R. 1968) (rejecting free speech challenge to Article 92 charge for violating Air Force uniform regulation and finding that "there can be no doubt that the wearing of the uniform while participating in a demonstration protesting the Selective Service Act and its implementation . . . is highly injurious to the reputation of the military service.).

[234] *Id.* ¶ 4.8.

[235] DOD Directive 1325.6, Guideline for Handling Dissident and Protest Activities Among Members of the Armed Forces (Oct. 1, 1996).

[236] AFI 51-903, Dissident and Protest Activities (Feb. 1, 1998) (superceding AFI 51-903 (Mar. 4, 1994) (originally covered by Air Force Regulation 35-15 (Dec. 7, 1987))). Paragraphs 2, 5, 5.1, 7, 7.2 are punitive.

[237] *Id. at* ¶ 1.1.

[238] *Id. at* ¶ 1.

[239] *Id. at* ¶ 2.

The regulations serve two related purposes. The first is to avert clear and present dangers to military order and discipline as described in the preceding court opinions. The second purpose is to maintain a politically disinterested military that remains safely under the control of civilian superiors. The balance between the free speech rights of military personnel and the military's interest in good order and discipline and mission effectiveness can be a particularly challenging task.

In *Brown v. Glines*,[240] the Supreme Court denied a facial challenge to military regulations that required military personnel and civilians to gain prior command approval before circulating certain material. Two Air Force regulations were at issue in the case. The first regulation, Air Force Regulation (hereinafter AFR) 35-1(9) prohibited the public solicitation or collection of petitions by a military member in uniform, by a military member in a foreign country,[241] or by any person within an Air Force facility without command permission.[242] The second regulation, AFR 35-15(3) prohibited military personnel from distributing or posting any unofficial material within an Air Force facility without command permission.[243] Since the regulations applied to all petitions and unofficial material, the restrictions were content-neutral. Like the ACMR in *United States v. Wilson*,[244] the Supreme Court essentially applied the *O'Brien* test to the regulations. The Court concluded that the regulations were permissible under the First Amendment because they advanced a substantial government interest unrelated to the suppression of free

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[240] Brown v. Glines, 444 U.S. 348 (1980). The Court also held that the regulations did not violate 10 U.S.C. § 1034, which it interpreted as protecting the ability of an individual military member to contact members of Congress. *Id.* at 358.

[241] The Supreme Court upheld similar Navy and Marine Corps regulations on overseas solicitation in Secretary of the Navy v. Huff, 444 U.S. 453 (1980). *See also* Brown v. Allen, 444 U.S. 1063 (1980), *vacating* 583 F.2d 438 (9th Cir. 1978).

[242] Air Force Reg. 35-1(9) (1971) provided: "Right to petition. Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander." Brown, 444 U.S. at 349-50 n.1.

[243] Air Force Reg. 35-15(3)(a) (1970) provided: "(1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander or his designee . . . ;(2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances. (3) . . . ; (4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials. (5) In general, installation commanders should encourage and promote the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues." *Id.* at 350-51 n.2.

[244] *See supra* notes 177-88 and accompanying text.

expression and restricted speech no more than was reasonably necessary to protect that interest.

Glines was a reserve captain on active duty at Travis Air Force base. He drafted a petition to several members of Congress and the Secretary of Defense complaining about the Air Force grooming standards.[245] While on temporary duty at Anderson AFB, Guam, he had the petition circulated without obtaining prior approval of the base commander. When his commander was notified of the incident, Glines was assigned to the standby reserves.[246]

While recounting the special characteristics and attributes of the military as a separate society, the Court found that the regulations "protect a substantial Government interest unrelated to the suppression of free speech."[247] That interest was the avoidance of a "clear danger to the loyalty, discipline, or morale of the troops on the base under his command."[248] The Court repeated selective quotes from its precedent that explain the "separate community" rationale. For example, "[t]o ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'"[249] Significantly, the Court also noted that the location or combat status of the base was immaterial. The restrictions necessary for military readiness and discipline "are as justified on a regular base in the United States, as on a training base, or a combat-ready installation in the Pacific."[250] Regardless of where the base is located, airmen "may be transferred to combat duty or called to deal with a civil disorder or natural disaster."[251]

After finding that the regulations advanced a substantial government interest, the Court also concluded that "the Air Force regulations restrict

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[245] The petition to the Secretary of Defense read:

> Dear Secretary of Defense:
> We, the undersigned, all American citizens serving in the Armed Services of our nation, request your assistance in changing the grooming standards of the United States Air Force.
> We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.
> We are similarly petitioning Senator Cranston, Senator Tunney, Senator Jackson, and Congressman Moss in the hope of our elected or appointed officials will help correct this problem.

See Glines, 444 U.S. at 351 n.3 (quoting Glines v. Wade, 586 F.2d 675, 677 n.1 (9th Cir. 1978).
[246] *Id.* at 351.
[247] *Id.* at 354.
[248] *Id.* at 353 (quoting Greer v. Spock, 424 U.S. 828, 840 (1976)).
[249] *Id.* at 354 (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)).
[250] *Id.* at 356 n.14 (citations omitted).
[251] *Id.*

speech no more than is reasonably necessary."[252] The regulations "prevent commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline, or morale."[253] The additional limitations contained in the regulations convinced the Court the commander's censorship authority was sufficiently limited. Finally, the Court reasoned that the prior approval requirement was necessary because if the commander did not have the opportunity to review the material, then he "could not avert possible disruption among his troops."[254] In an important footnote, the Court conceded that commanders could "apply these regulations 'irrationally, invidiously, or arbitrarily,' thus giving rise to legitimate claims under the First Amendment."[255] Since Glines never requested permission to circulate his petition, the question was not before the Court.

It is unclear how the Court determined that the substantial government interests advanced by the regulations were unrelated to the suppression of free expression. It is indisputable that the military has a substantial interest in protecting loyalty, discipline, or morale. The regulations in question, however, advance that interest by requiring members to obtain prior approval for certain forms of speech from the base commander. It may be argued that the military is concerned, in general, with preventing disruptions to good order and discipline. The implications of this argument, however, are far reaching because it would appear that the purpose of *every* military restriction and regulation is to prevent disruptions to loyalty, discipline or morale. If this observation is correct, then the First Amendment rights of military personnel can be reduced to a simple statement: Members have the right to speak so long as the speech does not pose a clear threat to the good order and discipline of the military.

D. Specific Command Orders

There are few cases in which First Amendment challenges have been made to a commander's specific order. Of course, this may be a result of either a lack of specific orders being issued or a lack of specific orders being challenged. The most pertinent free speech challenge to a specific order dealt with a bumper sticker on a civilian employee's vehicle.

In *Ethredge v. Hail*,[256] the commander of Robins Air Force base issued an administrative order barring "bumper stickers or other similar paraphernalia" that "embarrass or disparage the Commander in Chief."[257] Ethredge, a civilian employee who had worked at the base for over twenty-five

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[252] *Id.* at 355.
[253] *Id.* at 355.
[254] *Id.* at 356.
[255] *Id.* at 357 n.15 (internal quotations omitted).
[256] Ethredge v. Hail, 56 F.3d 1324 (11th Cir. 1995).
[257] *Id.* at 1325.

years, refused to remove a bumper sticker from his truck that read "HELL WITH CLINTON AND RUSSIAN AID" claiming that it was protected speech under the First Amendment.[258] The Eleventh Circuit denied his challenge, finding that Robins Air Force Base was a non-public forum, permitting officials to impose speech regulations so long as it "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[259]

The court reasoned that the order was not viewpoint-based because it did not prohibit criticism of the President. Other vehicles on-base had bumper stickers that read "Bill Clinton has what it takes to take what you have" and "Defeat Clinton in '96."[260] Additionally, the court found that the order in no way limited the application of the restriction to opponents of the President. Since it merely prohibited bumper stickers that embarrass or disparage the President, it also applied to supporters of the President.[261]

Having decided that the order was viewpoint neutral, the court also found that it was reasonable. A commander is not required to "demonstrate actual harm before implementing a regulation restricting speech."[262] The commander merely needed to demonstrate a "clear danger to military order and morale."[263] Since the installation commanders submitted affidavits that they believed the sign would "undermine military order, discipline, and responsiveness" and anonymous phone callers had threatened to break the window out of Ethredge's truck, this standard was met.[264] As the court concluded, "[w]e must give great deference to the judgment of these officials."[265]

This case raises two points of interest. First, despite the court's conclusion to the contrary, the order is undoubtedly both content and viewpoint based. It discriminates based upon content because it applies only to signs that reference the President.[266] It discriminates based upon viewpoint

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[258] *Id.* at 1325-26.
[259] *Id.* at 1327 (quoting Perry Educ. Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 46, (1983)).
[260] *Id.* at 1327 n.2.
[261] *Id.* at 1327.
[262] *Id.* at 1328 (citing Greer v. Spock, 424 U.S. 828, 840 (1976)).
[263] *Id.*
[264] *Id.*
[265] *Id.* (citing Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986)).
[266] It could be argued that the sign did not have to reference the President, but instead had to only address a topic that embarrassed or disparaged him. Under this reasoning, the content or subject of the sign would be irrelevant and the restriction would be aimed at the effect of the sign on the President. While this interpretation raises vagueness problems, it also highlights a potential weakness in the wording of the order. While a third party might be able to judge whether a sign disparaged the President, it is less clear that a third party could determine whether the sign embarrassed him. Even when confronted with Gen. Campbell's remarks, see *supra* notes 221-25, President Clinton reportedly responded "For me, personally, I didn't care. . . . People say whatever they want about me personally." Schmitt, *supra* note 221. "He

because it applies to comments that are "disparaging or embarrassing" but not to comments that praise the President or merely state vague disapproval. Viewpoint discrimination in this instance is not determined by looking at the underlying political party or even motivation of the speaker.

Perhaps the more interesting aspect of the decision, however, is the threat to military order and discipline posed by the message. Callers had threatened to break the windows out of Ethredge's truck. This type of behavior is illegal. Unlike Parker's disloyal statements during Vietnam, Ethredge was certainly not advocating for the occurrence of this lawless action. Instead, his "speech" was likely to incite lawless action to his detriment. It could be argued that the real threat to "good order and discipline" arose from the inability of co-workers to resist the urge to destroy property, not from Ethredge's bumper sticker. Although ordinarily reluctant to give a crowd a "heckler's veto" to silence the speaker,[267] courts have not applied this line of civilian precedent to the military because of the government's compelling interest in maintaining good order and discipline.

In conclusion, federal courts have typically displayed a substantial degree of restraint in adjudicating the First Amendment claims of military personnel. This deference is justified because the Constitution places the primary responsibility for regulating the military—and balancing the military interests and free speech rights of servicemembers—in the Legislative and Executive branches. Additionally, a lower degree of free speech protection is necessary to safeguard the military's ability to fulfill its unique mission and role in society.

A review of the available case law indicates that the military may impose speech restrictions whenever necessary to protect its significant interests. Sanctions may be imposed, therefore, even when the speech occurs off-base and during an otherwise private conversation. Courts rarely review free speech challenges under the traditional civilian precedent and often defer outright to the judgment of military authorities. In other cases, courts have either resurrected the "clear and present danger" test or upheld military prohibitions under the *O'Brien* test after finding that the substantial government interest is unrelated to the suppression of free expression. Consequently, it appears that the servicemember's primary means of dissent are limited to those official channels established and protected by Congress and the President.

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doesn't know me from Adam so, you know, he's just repeating something he's heard." Aldinger, *supra* note 225. It might be suggested, therefore, that an order of this nature use a standard that is easily interpreted and applied by third parties, perhaps even the "contemptuous words" prohibition contained in Article 88, UCMJ.

[267] *See*, e.g., Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 134-35 (1992) ("Speech cannot be financially burdened, anymore than it can be punished or banned, simply because it might offend a hostile mob.") (citing Gooding v. Wilson, 405 U.S. 518 (1972); Terminiello v. Chicago, 337 U.S. 1 (1949)).

II. FIRST AMENDMENT DOCTRINE AND THE PROTECTION OF MILITARY INTERESTS

The proper scope of First Amendment protection for the speech of military personnel continues to be the source of intense debate. Critics have called for the courts to review the free speech challenges of military personnel according to either the traditional civilian First Amendment doctrine or, at least during peacetime, the protections afforded government employees and federal civil servants. These arguments must be considered in light of the dramatic transformations that the military has experienced during the last decade. Perhaps the most pertinent changes include the decreased number of military personnel, the increased level of education of the force structure, and the growing proportion of federal civil servants and independent contractors. Furthermore, the traditional focus on nuclear missions has been replaced with short-notice deployments and peacekeeping operations. Despite these seemingly critical modifications, the military mission remains the protection of the nation's interests through the application of force.

Consequently, the following examination has three primary objectives. The first objective is to review the arguments both for and against granting military personnel greater free speech protections. These arguments are presented to defend the judiciary's continued deference to military authorities as well as to provide legal advisors with pertinent factors to consider when providing guidance to commanders. The second objective is to describe how the current legal framework protects military interests from the threats posed by civilians and government employees. This discussion indicates that commanders possess substantial discretion to exclude civilians from the base and discharge federal employees based upon their speech without transgressing the First Amendment.

Finally, it is argued that, although this discretion appears adequate to protect the military's interest, courts should not apply the free speech standards of civilians and government employees to military personnel because of the intrusive nature of the inquiry and the military's need to impose criminal sanctions in certain circumstances. This section concludes, however, that legal advisors should recommend, as a general rule, that military members be afforded the same First Amendment protections provided government employees, to the extent that the protections differ. Criminal sanctions should be sought in situations when a substantial breakdown in military custom is likely or the threat to military interests is greater than would be posed by a similarly situated government employee.

A. Arguments Against Greater Free Speech Protections

Two arguments are typically advanced to justify the current restrictions on service members' speech activities. The first argument focuses on the

threat to good order and discipline that certain speech activities pose to the effective accomplishment of the military mission. The second involves the maintenance of the proper relationship between the military and the civilian leaders of the country. The unique mission and characteristics of the military community underlie both arguments. Furthermore, the need to protect these military interests explain and justify the special free speech restrictions imposed upon military personnel.

1. Threats to Good Order, Discipline, and Morale

The first argument supporting the unique free speech restrictions in the military context centers on the threats to good order, discipline, and morale posed by dissenting voices within the ranks.[268] The military fulfills a unique purpose and mission. It must be prepared to immediately defend national interests anywhere in the world. It has been entrusted with a vast array of weapons systems and technologies, capable of destroying not only towns and countries, but human civilization as we know it. This awesome responsibility distinguishes military personnel from other civilian paramilitary officers such as the police and prison guards.

The Supreme Court has acknowledged the special relationship between the military and the service member, describing induction not merely as a job but a change in "status."[269] Senator Nunn explains that once a person changes her status from civilian to military, either voluntarily or involuntarily, "that person's duties, assignments, living conditions, privacy, and grooming standards are all governed by military necessity, not personal choice."[270] Military necessity requires that a high-level of training and unit readiness be maintained at all times, because a crisis may erupt at any time.[271]

It has been recognized, therefore, that the unique military mission and responsibilities underlying the separate community rationale necessitate a different application of First Amendment principles than those applied to other civilians or other government employees. The military policies "must reflect the very realistic possibility that the soldier who is behind a comfortable desk today might be in a hostile and physically challenging field environment on very short notice."[272] In *Brown v. Glines*, the Supreme Court specifically noted that "[l]oyalty, morale, and discipline are essential attributes of all military service."[273] The Court further recognized that military personnel "may be transferred to combat duty or called to deal with civil disorder or

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[268] Zillman and Imwinkelried II, *supra* note 4, at 405.
[269] Solorio v. United States, 483 U.S. 435, 439 (1987).
[270] Nunn, *supra* note 18, at 28.
[271] Vagts, *supra* note 5, at 189.
[272] Nunn, *supra* note 18, at 31.
[273] Brown v. Glines, 444 U.S. 348, 356-57 n.14 (1980). *See supra* note 240-55 and accompanying text.

natural disaster" regardless of where they are assigned.[274] As Professor Detlev Vagts explains, the military member must "sacrifice some of the liberties which he is called upon to protect—no revolutionary regime has ever found it possible to grant true democracy to an Army."[275]

It seems rather obvious that the rogue military member who refuses to deploy to the Gulf because he disagrees with official policy should be criminally sanctioned. However, it has been noted that "[d]espite the delegation of ample congressional power to control disobedient and disruptive *conduct*, the military argues that it also needs protection against disobedient and disruptive *words*."[276] Civilians are generally provided significant protection under the First Amendment for their use and choice of words in order to maintain an "uninhibited, robust, and wide-open" public debate that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[277] Content based restrictions are permissible only when necessary to advance a compelling state interest. As a general rule, civilian advocacy can only be restricted if it is intended to incite imminent lawless action and not if it merely poses a threat to incite lawless action at some indefinite time in the future.[278]

As the discussion in Part I illustrates, the military's mission has prompted a substantial deviation from the free speech protection afforded civilians. As the CAAF explained in *United States v. Priest*, the military standard for illegal advocacy continues to be the clear and present danger test, requiring that a commander conclude that the speech will cause some level of harm to the unit even if that harm has not materialized.[279] Consequently, although the "heckler's veto" may not be used to silence a speaker in the civilian setting, "constitutional decisions requiring authorities to control the angry crowd rather than the unpopular speaker are not precedents for the military."[280]

The military is not required to control the angry crowd because of the critical importance of unit cohesion to the accomplishment of the mission.[281] Senator Nunn has quoted a number of high-level military commanders who

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[274] *Id.*

[275] Vagts, *supra* note 5, at 189.

[276] Zillman, *supra* note 6, at 434 (footnote omitted).

[277] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[278] *See. e.g.*, Hess v. Indiana, 414 U.S. 105, 107-08 (1973) (per curiam) (concluding that demonstrator's comment to law enforcement officer police that "We'll take the f***king street later [or again]" amounted, at worst, only to advocacy of illegal action at some indefinite future time).

[279] United States v. Priest, 45 C.M.R. 338 (C.M.A. 1972).

[280] Zillman and Imwinkelried II, *supra* note 4, at 405; Zillman, *supra* note 6, at 442 ("Courts have shown little concern with the civilian principle that the troublemakers and not the peaceful speakers should be controlled.").

[281] Many who critique the "Don't Ask/Don't Tell" policy challenge the reasonableness of the crowd being angry in the first place. *See supra* note 9.

have testified before Congress on the importance of this characteristic to combat capability. General H. Norman Schwarzkopf has explained that "in my forty years of Army service in three different wars, I have become convinced that [unit cohesion] is the single most important factor in a unit's ability to succeed on the battlefield."[282] While serving as Chairman of the Joints Chiefs of Staff, General Colin Powell argued:

> [W]e create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies. We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.[283]

The commander is ultimately responsible for the maintenance of good order and discipline within the unit. Consequently, when unit cohesion is threatened, she can order Ethredge to take the bumper sticker off his truck[284] instead of forcing the military community to tolerate this disruptive voice.

While the military organization does occupy a unique role, many have questioned the court's application of different First Amendment standards to the entire military community. "First, many servicemen pursue careers little different from and no more strenuous or dangerous than numerous civilian pursuits."[285] As the military privatizes thousands of positions formally occupied by uniformed personnel, the rationale supporting different standards for non-combat positions has been questioned. Second, it has been argued that "in the era of the all-volunteer force, as the armed services seek to induce talented, educated, upward mobile youths to choose a military career, exclusive reliance on 'duty, honor, country' has waned."[286] A different type of military is emerging based on a model that is "more democratic, personalistic, occupation-oriented, [and] managerial."[287]

The changing attributes of military service have prompted many scholars to question the wholesale exclusion of military personnel from the free speech protections afforded civilians.[288] It has been argued that courts should begin the analysis by assuming that civilian precedent applies, and insist "that the Government articulate and substantiate the specific military interest which allegedly precludes the application of the particular civilian

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[282] Nunn, *supra* note 18, at 29 (quoting S. REP. NO. 112, 103d Cong., 1st Sess. 274-75 (testimony of General General H. Norman Schwarzkopf, United States Army (Ret.), before the Senate Armed Services Committee, May 11, 1993)).
[283] *Id.* (quoting testimony of General Colin L. Powell, United States Army, Chairman of the Joint Chiefs of Staff, before the Senate Armed Services Committee, July 20, 1993).
[284] *See supra* notes 256-65 and accompanying text.
[285] Zillman and Imwinkelried II, *supra* note 4, at 403.
[286] Dienes, *supra* note 19, at 825.
[287] *Id.* at 824.
[288] Zillman and Imwinkelried II, *supra* note 4, at 436.

legal standard in question."[289] These commentators take exception to the generalized abstract military concerns that are typically advanced by the military. Instead, Professor Dienes argues that the mere "[r]ecitation of the vital interest of the military the *might* be at stake in a particular case, and that *might* justify the burden imposed on the individual, is simply an inadequate basis for forcing the surrender of first amendment rights."[290] Given the shear size of the military establishment, "[a] government which boasts that it is a government of, for, and by the people—all the people—cannot reduce millions of men to second class citizens."[291]

In addition to arguments concerning the need for a wholesale exclusion of all uniformed personnel from civilian free speech protections, it has also been noted that not all dissenting speech is detrimental to the military. It is conceivable that dissenting speech may, in certain circumstances, actually be supportive of military effectiveness by uncovering inefficiency and error.[292] It would appear, however, that the military has provided adequate channels for a member to voice such concern. For example, personnel may air grievances through the chain-of-command by Article 138 and may initiate an Inspector General complaint or individually communicate with members of Congress in an unofficial capacity without fear of retaliation.[293] While one Air Force officer has recently alleged retaliation,[294] there appears to be a host of available channels for reporting any number of perceived problems to the appropriate authorities.

2. Proper Relationship Between Military and Civilian Leaders

The second rationale supporting restrictions on the speech activities of military personnel addresses the threat to the civilian control of the military

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[289] *Id.*

[290] Dienes, *supra* note 19, at 825. Compare Justice Marshall's concern that "the Court has taken its second step in a single day toward establishing a doctrine under which any military regulation can evade searching constitutional scrutiny simply because of the military's belief—however unsupportable it may be—that the regulation is appropriate." Greer v. Spock, 424 U.S. 828, 872-73 (1976) (Marshall, J., dissenting) (referring to Middendorf v. Henry, 425 U.S. 25 (1976) (right to counsel inapplicable to summary court-martial proceedings)).

[291] Vagts, *supra* note 5, at 190.

[292] Zillman, *supra* note 6, at 435-39.

[293] *See infra* note 321-23 and accompanying text. *Cf.* Banks v. Ball, 705 F.Supp. 282 (E.D. Virginia, 1989) (concluding that Naval Reservist's interests in communicating on matter of public concern with Congress on official stationery without authorization in violation of Article 1149 of Navy Regulations was outweighed by military's national security interest in uniformity, esprit de corps and efficiency under the *Pickering* test, and that Article 1149 was a proper time, place, and manner regulation) *aff'd sub nom.* Banks v. Garrett, 901 F.2d 1084 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 821 (1990), *reh'g denied*, 498 U.S. 993 (1990).

[294] William Matthews, *Whistle-blower faces discipline, Air Force officer alleges retaliation*, AIR FORCE TIMES, Sep. 22, 1997, at 10.

that dissent may create.[295] The civilian leaders of the military, both elected and appointed, can be threatened by the vocalized dissent of both high-ranking officials and the involvement of military personnel in partisan political causes.[296] The threats posed to the civilian leadership by the military range from the seizure of power by military coup to the refusal to obey orders. These civilian leaders, "who bear the ultimate responsibility, need protection from irresponsible abuse by their subordinates."[297] Consequently, this rationale is closely related to the maintenance of good order and discipline.

There are two possible threats to civilian control of the military posed by the speech of military members. The first threat comes from personnel who voice disagreement with the official policies of the civilian leaders. It seems unquestionable that a commander of troops preparing to deploy should not be permitted to question the wisdom of the decision. The second threat comes from unauthorized statements of military personnel that may be interpreted as the official voice of the service. The harm from this type of statement can be felt both domestically and internationally, because it can "form the 'germ of truth' from which vast and meretricious propaganda claims of American war-mongering can be cultivated."[298]

The challenge is to define the proper role for the military leader or soldier who disagrees with a given political decision. Once again, the question is not whether the military member should obey the directive; he must. The question is whether he should be permitted to voice disagreement with the policy. It has been argued that allowing military personnel to voice dissent in the public arena "may promote the proper relationship among the military, its civilian leadership, and the people" and "help bring to the public both facts and opinions that might otherwise go unreported."[299]

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[295] Zillman, *supra* note 6, at 443-44; Zillman and Imwinkelried II, *supra* note 4, at 405-06; Vagts, *supra* note 5, at 188.

[296] Justice Brennan has argued that the fear of military involvement in political activities is acerbated by the isolation of the military from the diverse dialogue of the civilian community. As he explained:

> [W]here the interests and purpose of an organization are peculiarly affected by national affairs, it becomes highly susceptible to politicization. For this reason, it is precisely the nature of the military organization to tend toward that end. That tendency is only facilitated by action that serves to isolate the organization's members from the opportunity for exposure to the moderating influence of other ideas, particularly where, as with the military, the organization's activities pervade the lives of its members. For this reason, any unnecessary isolation only erodes neutrality and invites the danger that neutrality seeks to avoid.

Greer v. Spock, 424 U.S. 828, 868-69 (1976) (Brennan, J., dissenting) (footnote omitted).

[297] Vagts, *supra* note 5, at 188.

[298] *Id.* at 189.

[299] Zillman, *supra* note 6, at 436.

It has even been suggested that the airing of grievances by military members actually may be beneficial to civilian control. By exposing issues to the attention of the public, "a dissenting officer who is ready to make it known that the armed forces are not as unified on the position as the might appear to be" may be the greatest asset to civilian control.[300] In fact, it has been argued that the "most dangerous military may be the one with the 'isolated—garrison' mentality, totally removed from civilian concerns, but susceptible to rebellion in times of discontent."[301]

B. Arguments For Greater Free Speech Protections

Three basic arguments are advanced in support of greater free speech protections for military personnel. First, it is argued that respect for the personal autonomy and individual development of the member may actually serve the military's interest in good order and discipline. Second, it is reasoned that avenues for free expression may act as a safety valve for internal dissent, permitting individuals to vent frustration while continuing to effectively perform their tasks. Finally, it is contended that the voicing of dissent and displeasure provides both the public and the military with valuable information on the military's internal conditions and prevailing attitudes. While each of the three are related to some extent, it is critical to distinguish between the dissenting voice that benefits the services without jeopardizing the mission, and that which undermines the good order and discipline of a unit.

1. Personal Autonomy and Intellectual Development

Perhaps the most basic argument in favor of providing substantial free speech protections to military personnel involves respect for the member's personal autonomy and intellectual self-awareness. By permitting the individual to speak freely and debate the validity of a wide range of topics, the military encourages the development of both the communication and intellectual skills necessary for effective leadership.[302] Especially in an environment that emphasizes conformity and uniformity, free expression has the capacity to remind the member of her own uniqueness and self-worth.[303] Additionally, the member is afforded the opportunity to participate in the free exchange of ideas and information, reaching his own conclusions and ultimately strengthening his dedication to the organization's core values, rules, and regulations. As one scholar has observed, "it is difficult to believe that the

[300] *Id.* at 446.
[301] *Id.* at 445.
[302] Zillman, *supra* note 6, at 433.
[303] *Id.*

interests of the military are served by inhibiting the development of those skills and capacities required for full participation in any society."[304]

While it seems difficult to object to the benefits that such intellectual freedom bring, the process poses at least two threats to the military. The first threat is the potential disturbance caused by the debate itself. While it may be appropriate and useful to debate a military policy still under consideration, once a decision is made and a course of action initiated, continued discussion may pose a threat to the obedience and discipline that is vital to the military mission. As the CAAF succinctly stated in *Priest*, "the primary function of a military organization is to execute orders, not to debate the wisdom of decisions that the Constitution entrusts to the legislative and judicial branches of the Government and to the Commander in Chief."[305]

The second threat that "open and vigorous debate" poses to the military community is that the individual member may conclude that the policy of the organization is flawed. However, the mere conclusion that the policy is incorrect does not pose a significant threat to the military unless the allegiance and loyalty of the member in actually performing his duties is compromised. Certainly, military personnel are not expected to agree wholeheartedly with every policy or order that is issued. They are expected, however, to wholeheartedly implement the policy or order to the best of their ability and without reservation.

Commentators have noted a number of other factors that weigh in favor of providing the individual member with greater free speech protections. The first is that participation in the military is not always voluntary, and membership is not always a lifetime status. Consequently, if personnel "are not free to develop those attributes of human personality and human dignity we seek to foster in our society, the society itself may suffer harm."[306] Additionally, the suppression of speech can foster low morale and narrow thinking, actually hampering the attainment of the good order and discipline that the restrictions were meant to achieve.[307] Finally, at least one scholar has argued for a form of *quid pro quo*, explaining that "[i]t is neither logical nor sound policy to encourage officers to foster public relations by presenting the viewpoint of the military departments in speeches, articles, and books, but at

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[304] Dienes, *supra* note 19, at 816-17.

[305] United States v. Priest, 45 C.M.R. 338, 345 (C.M.A. 1972). *See supra* notes 108-17 and accompanying text. *See also* Persons For Free Speech at SAC v. United States Air Force, 675 F.2d 1010, 1017 (8th Cir. 1982) ("Civilians, our President and Congress make the 'ideological' decisions for the military. Where the military stands today may be an ideological controversy and even more so where the military will be tomorrow. But the debate on such controversies is for civilian forums not military bases.") (finding that government did not intend to create public forum during open house at Offutt Air Force Base), *cert. denied*, 459 U.S. 1092 (1982).

[306] Dienes, *supra* note 19, at 817.

[307] Zillman, *supra* note 6, at 433.

the same time to discourage them from expressing any unstereotyped views of their own."[308]

The personal autonomy concerns may be illusory, at least to the extent that military personnel are content with or acclimated to the restrictions that are now in place. Even if this speculation is true, the level of restriction should be cause for reflection. While the size of the military has dramatically decreased following the Gulf War, the limitations on free speech may influence the type of individual that is now volunteering for military service. Severe speech limitations are likely to narrow the intellectual diversity of incoming recruits. Permitting a degree of freedom of expression could encourage "needed men to remain in the service, while it would be hard to make service attractive to men who regarded themselves as objects of oppression."[309] This suggestion in no way denigrates the capabilities or performance of the current force structure, but serves only as a reminder that the restrictions are not without costs and may become an issue if a Vietnam War size mobilization is again necessary.

2. Safety Valve for Discontent

In the highly centralized and bureaucratic military community, griping and complaining permits the "expression of grievances and perceived wrongs which, if left unexpressed, might fester and grow."[310] As Justice Douglas noted in *Avrech*, it is common for a soldier to complain about the conditions he is forced to endure.[311] A commander may, in fact, find a complete lack of unrest more troublesome than a small degree of dissent. As one commentator has reasoned, "[i]f the American temperament is considered, it seems dangerous to prevent accumulated military discontent from being discharged through the virtually harmless channels of griping to friends or writing letters to the editors of service or civilian papers or to families at home."[312] Once the

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[308] Vagts, *supra* note 5, at 191.
[309] *Id.* at 190.
[310] Dienes, *supra* note 19, at 818.
[311] *See supra* notes 101-06 and accompanying text.
[312] Vagts, *supra* note 5, at 190. As the Army Court of Criminal Appeals has stated:

> That military personnel complain is not a classified matter. Complaining is indulged in by enlisted men and officers of all grades and ranks. Complaints can be registered on any topic and frequently are. 'Bitching,' to use the vernacular, may be expressed in gutter talk or in well articulated phrases and has been developed into a fine art. Nevertheless it sometimes serves a useful purpose. It provides an outlet for pent-up emotions, therapy for frustrations and a palliative for rebuffs and rejections. A noticeable failure to complain in a military organization is considered by some commanders as an indication of approaching morale problems.

United States v. Wolfson, 36 C.M.R. 722, 728 (A.B.R. 1966).

military member has voiced his complaints to members either outside or inside the chain of command, he may feel renewed enthusiasm for the task at hand.[313]

Of course, military personnel who complain to family and friends pose little to no threat to the military establishment. The more significant question involves the proper reaction to discussions with other airmen, letters to the editor, bumper stickers, and common workplace gripe sessions. While the potential for the oppressive stifling of speech may be present under the current discretion given military commanders, the threat does not appear to have materialized. With the possible exception of Parker and Avrech's disloyal statements during Vietnam,[314] one is hard-pressed to find a prosecution in Part I that would be objectionable on these grounds. As emphasized in the next section, Parker and Avrech's convictions occurred during the conscription of the Vietnam War when military custom was not likely to control the proper expression of dissent. Consequently, criminal prosecutions instead of administrative discharges or re-assignments were justified for the purposes of deterrence.

3. Free Flow of Information to the Public and the Military Authorities

Allowing military members to speak freely has the potential to assist either the military or the political leaders of the country to make more informed decisions. Within the military, the voicing of dissent concerning official policies and programs may have a beneficial impact on the efficiency of the service.[315] However, if the matter concerns official military matters, then the concerns or suggestion can be voiced through formalized channels.

Between the military and the society at large, the voicing of grievances might provide the appropriate decision-makers with information that would be otherwise unavailable. This form of unrestricted speech might result in more reasonable and sound policies.[316] As Professor Vagts has observed, "preventing unofficial opinions from competing in the military marketplace of ideas, [grants] a dangerous monopoly to official dogma that may shelter a stagnation and inefficiency we can ill afford in these swift and perilous times."[317] Prof. Dienes argues that precisely because of the separate nature of the military community there is a "vital need for channels of communication between the military sector and civilian society."[318] These channels are necessary because "[b]oth the military and the larger civilian society have an

[313] Zillman, *supra* note 6, at 433.
[314] *See supra* notes 65-95 and 96-100 and accompanying text.
[315] Dienes, *supra* note 19, at 817. *See also* Cortright v. Resor, 447 F.2d 245, 256 (2nd Cir. 1971) (Oakes, C.J., dissenting) ("[A] Specialist Cortright and a General Gavin must equally be permitted to persuade the public, the Congress or the Executive that, for example, a given course of military-diplomatic action or foreign policy is wrong.")
[316] Zillman, *supra* note 6, at 432.
[317] Vagts, *supra* note 5, at 191.
[318] Dienes, *supra* note 19, at 817.

interest in the expression of ideas, opinions, attitudes, and grievances by military personnel."[319]

It can be reasoned that the value of speech as a source of information would also increase with the knowledge of the speaker. This knowledge may or may not correlate with the rank of the military member. While an airman may possess first-hand information on the reliability of a weapons system, a general would be capable of speaking to the necessary force structure for a certain deployment. The comments of experts who disagree with official military policy may change the public's support for a particular issue under debate.[320]

While the courts have not provided military members with substantial free speech protections, Congress and the President have established at least three channels for dissent and redress regarding matters of official concern. Senator Nunn has highlighted that Article 138 provides military personnel with a right to redress through the chain of command.[321] The military member is guaranteed by statute the right to communicate individually with members of Congress or an Inspector General, without incurring retaliatory action.[322] Finally, military personnel have the right to seek a correction of military records from the Secretary of Defense.[323] While these channels do permit the airing of formal grievances, the harder question is to determine what means of informal or merely personal expressions of disapproval should be permitted, and if not, what type of sanctions are permissible.

C. Protecting Military Interests From Threats Posed by Civilians and Government Employees

Although a commander may impose substantial restrictions on the speech of military personnel, her ability to protect military interests from threats posed by the speech of civilians and government employees is more limited. Under the public forum doctrine, a commander can limit access to the base so long as the restrictions are reasonable and viewpoint-neutral. Threats from civilian activity outside of the base remain beyond the reach of the commander. Government employees have a First Amendment right to speak on subjects of public concern when the individual's interests outweighs the military's interests in promoting the efficiency of its public service. If the

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[319] *Id.* at 819.
[320] Zillman, *supra* note 6, at 432.
[321] Nunn, *supra* note 18, at 32 n.30 (citing 10 U.S.C. § 938 (1988)). *See also* Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) ("The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.").
[322] *Id.* (citing 10 U.S.C.A. § 1034 (West 1994)).
[323] *Id.* (citing 10 U.S.C. § 1552 (1988)).

speech is protected, then it cannot serve as the basis for most administrative actions.

1. Restrictions Applicable to Civilians

The ability of government authorities to protect the compelling interests of the military is primarily limited to the property that the government owns. The Supreme Court has "adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[324] The Court has recognized three types of forums: traditional public forums, designated or limited public forums, and nonpublic forums. A court's categorization of the government property in question is critical to the permissibility of the restriction because it determines the level of scrutiny that will be applied. The forum analysis permits a commander to protect the military interests only within the physical confines of the base.

Traditional public forums are those places such as streets, sidewalks and public parks that "by long tradition or by government fiat have been devoted to assembly or debate."[325] Courts will apply strict scrutiny to content-based exclusions within the public forum. If the exclusion is a content-neutral time, place, and manner restriction, then it must be narrowly tailored to achieve a significant government interest and leave open ample alternative channels of communication.[326] Applying these standards to a military base, the Supreme Court in *Flower v. United States* held that a base commander could not prohibit the distribution of leaflets by a previously "barred" civilian on a street within the base that was open to the public.[327] As clarified by later opinions, the controlling factors in *Flower* were that "the military ha[d] abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression."[328]

Designated public forums are the second category of government property, and are formed when the government designates a "place or channel of communication for use by the public at large for assembly or speech, for use by certain speakers, or for the discussion of certain subjects."[329] If the government limits the use of the forum to particular purposes for which it was

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[324] Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985). *See generally* Major Andy K. Hughes, *The Regulation of Printed Materials on Military Installations*, 1992-OCT ARMY LAW. 16 (1992); John C. Cruden and Calvin M. Lederer, *The First Amendment and Military Installations*, 1984 DET. C.L. REV. 845 (1984).

[325] Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

[326] *Id.* at 45.

[327] Flower v. United States, 407 U.S. 197 (1972) (per curiam). The Court summarily reversed the defendant's conviction without the benefit of briefs or oral arguments. *Id.* at 199 (Rehnquist, J., dissenting).

[328] United States v. Albertini, 472 U.S. 675, 685-86 (1985).

[329] Greer v. Spock, 473 U.S. 788, 802 (1985).

created, then restrictions must only be reasonable and viewpoint-neutral.[330] Courts will not find that a public forum has been created "in the face of clear evidence of a contrary intent" or "when the nature of the property is inconsistent with expressive activity."[331] In *Rigdon v. Perry*, a district court found that base chapels were designated public forums because "it has been the government's clear intent that certain facilities on military property (e.g., chapels) and personnel (e.g., chaplains) be dedicated exclusively to the free exercise rights of its service people."[332]

The third category, nonpublic forums, consists of all other government property.[333] Within nonpublic forums, the government may restrict speech based upon content and "need only be reasonable, so long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."[334] In *Greer v. Spock*,[335] Army regulations at Fort Dix prohibiting political demonstrations and speeches and requiring prior approval of literature were challenged both "facially" and "as applied." The base commander denied access to political candidates in order to avoid the appearance of partisan political favoritism and to preserve the training environment of the troops.[336] The Supreme Court held that the base was a nonpublic forum because military authorities had not "abandoned any claim of special interest in regulating the distribution of unauthorized leaflets or the delivery of campaign speeches for political candidates."[337]

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[330] *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

[331] Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 803 (1985) (internal citations omitted).

[332] Rigdon v. Perry, 962 F.Supp 150, 163 (D.D.C. 1997).

[333] *See* International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-79 (1992).

[334] General Media Communications, Inc. v. Cohen, 131 F.3d 273, 279 (2nd Cir. 1997) (quoting Lee, 505 U.S. at 679).

[335] Greer v. Spock, 424 U.S. 828 (1976).

[336] *Id.* at 833 n.3.

[337] *Id.* at 837. In at least two other military contexts, courts have rejected arguments that the government created a designated public forum. In Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985), the Supreme Court held that the Combined Federal Campaign was a nonpublic forum because the government did not intend to create a forum for expressive conduct. Furthermore, the Court concluded that restriction on the type of organizations that could participate in the campaign were reasonable and viewpoint neutral. *Id.* at 789-811. In General Media Communications, Inc. v. Cohen, 131 F.3d 273 (2nd Cir. 1997), the Second Circuit found that military exchanges were nonpublic forums because they were primarily created for commercial purposes, were not open to the public, and were authorized to stock only certain products. *Id.* at 280. The court determined that Congress could ban the sale of certain adult magazines within the exchanges. The ban advanced the legitimate government interests in avoiding the appearance of official endorsement of the material and protected the "military's image and core values." *Id.* at 283-84. For court opinions discussing whether military bases were converted into public forums during an "open house," see United States v. Albertini, 472 U.S. 675, 686 (1985) (dictum) ("Nor did Hickam [Air Force Base] become a public forum merely because the base was used to communicate ideas or information during the open house."); Brown v. Palmer, 944 F.2d 732, 739 (10th Cir. 1991) (en banc)

It must be emphasized that when courts conduct a forum analysis to determine whether speech restrictions are permissible, the relevant inquiry concerns the nature of the forum and not the potential threat to military interests. It is entirely possible that a group of civilians shouting anti-military slogans and burning flags on a public sidewalk outside of Andrews A.F.B. would pose a substantial threat to good order and discipline. Undoubtedly, more than one base commander during the Vietnam War would have relished the opportunity to assert jurisdiction over these civilian demonstrators.

Strict limitations are placed on the government's ability to restrict this type of civilian speech.[338] Military commanders have the authority *ex ante* to protect the military's interests from civilian threats only by restricting access to the base or by regulating the speech of those on the base in a reasonable and viewpoint-neutral manner. The commander may also issue an exclusion order *ex post* to any individual that poses a threat to good order and discipline, even if the order interferes with or is based upon the exercise of First Amendment rights.[339] Put differently, the base commander's ability to restrict a civilian's

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(stating government did not intend to create public forum during open house at Peterson Air Force Base); Persons For Free Speech at SAC v. United States Air Force, 675 F.2d 1010 (8th Cir. 1982) (stating government did not intend to create public forum during open house at Offutt Air Force Base), *cert. denied*, 459 U.S. 1092 (1982).

[338] *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988). In Boos, the Supreme Court examined a District of Columbia provision (D.C. CODE ANN. § 22-1115) that prohibited the display of any sign bringing a foreign government into disrepute within 500 feet of a foreign embassy or building occupied by an embassy official. A similar prohibition applied to assemblies. The Court found that the display provision was content-based because it applied to an entire category of speech, namely "signs or displays critical of foreign governments." *Id.* at 319. It was not viewpoint–based because the determination of which viewpoint is permitted depends upon the policies of foreign governments. *Id.* at 319. Applying strict scrutiny, the Court found that although the display provision may advance the government's interest in protecting the dignity of foreign officials, it was not narrowly tailored to serve that interest. *Id.* at 326-29. *See also* Brown v. Palmer, 944 F.2d 732, 739 (10th Cir. 1991) (en banc) ("[T]he appellees were still free to advocate their own views of pacifism on the public streets immediately leading into Peterson AFB and they had access to the many other public forums within the immediate vicinity of Peterson AFB to reach the public that visited there during the open houses.").

[339] *See e.g.*, Bridges v. Davis, 443 F.2d 970 (9th Cir. 1971) (per curiam), *reh'g denied*, 445 F.2d 1401 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972). In Bridges, three ministers and eight servicemen sought an injunction against the commanding officers of Naval and Marine bases in Hawaii. The commanders had issued orders barring the ministers from base. In August 1969, the ministers had invited AWOL military personnel to seek sanctuary in their church and twenty-four military fugitives entered the church. *Id.* at 971. After military police arrested twelve of the members and returned them to the base prison, the ministers were permitted to conduct services in the prison. Although warned about the prison rules, one of the ministers permitted the prisoners to drink a bottle of wine and eat birthday cake. *Id.* at 972. Despite additional warnings, another minister conducted services in a short sleeved shirt and trousers, quoted songs that contained a four letter word and joined the prisoners in smoking cigarettes. After the base commander determined that the service had "a disturbing effect on the entire military community" and so enraged one prison guard that he said he would refuse to perform church duties involving the ministers, an order was issued barring the ministers from

speech and thereby protect the military interests is determined by whether the military "owns" the land on which the civilian is standing.

The authority of other government officials to protect the military interests is limited by traditional First Amendment doctrine. Content-based restrictions must be necessary to achieve a compelling state interest unless the speech falls into an unprotected category of speech.[340] Content-neutral time, place, and manner regulations must be narrowly tailored to advance a significant government interest and not foreclose adequate alternative channels of communication.[341] For example, Congress can pass a statute that makes it illegal to wear a military uniform without authority. It cannot, however, create an exception only for those actors that wear uniforms and portray the armed forces in a positive manner. In *Schacht v. United States*,[342] the Supreme Court noted that such a statute would seem constitutional on its face because it only has an incidental effect on speech.[343] The Court, however, struck the exemption clause from the statute, reasoning that "Congress has in effect made it a crime for an actor wearing a military uniform to say things during his performance critical of the conduct or policies of the Armed Forces."[344] Since the exemption was triggered based upon the viewpoint of the actor's speech, it "cannot survive in a country which has the First Amendment."[345]

2. Restrictions Applicable to Government Employees

The government has a greater degree of latitude in protecting its interest in the efficiency of its service from threats posed by government employees, to include federal civil servants[346] and independent contractors.[347] In *Pickering v. Bd. of Educ.*,[348] the Supreme Court announced a two-part balancing test to determine whether a government employee's speech is protected by the First Amendment, and therefore, cannot be the basis for adverse administrative action. First, the speech must address a matter of public concern. If it does, then a court must determine whether the employee's interest as a citizen "in commenting on matters of public concern" is

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base. *Id.* at 972-73. Applying the standard articulated in Cafeteria & Restaurant Workers, etc. v. McElroy, 367 U.S. 886 (1961), the court found that the order was not patently arbitrary or discriminatory given the totality of the circumstances. *Id.* at 973-74.

[340] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Cohen v. California, 403 U.S. 15 (1971).

[341] *See, e.g.*, Clark v. Community For Creative Non-Violence, 468 U.S. 288 (1984); Hague v. CIO, 307 U.S. 496 (1937).

[342] Schacht v. United States, 398 U.S. 58 (1970).

[343] *Id.* at 61 (citing United States v. O'Brien, 391 U.S. 367 (1968)). The statute at issue was 18 U.S.C. § 702.

[344] *Id.* at 62.

[345] *Id*. at 63.

[346] See *supra* note 10.

[347] See *supra* note 11.

[348] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

outweighed by the government's interest as employer "in promoting the efficiency of the public services it performs through its employees."[349] If the employee's rights outweigh the agency's interests, then no administrative action may be taken against the individual.

In *Pickering*, a teacher was dismissed after sending a letter to the local newspaper concerning a proposed tax increase.[350] The letter was highly critical of the way school officials had handled past bond issue proposals and the allocation of money between educational and athletic programs.[351] The Court concluded that the letter addressed a matter of public concern.[352] Weighing in Pickering's favor was the fact that the speech did not endanger "either discipline by immediate superiors or harmony among coworkers,"[353] and did not impact the actual operation of the school.[354] Additionally, teachers are more likely to be informed on the issue of school fund allocation and should be able to speak freely on the issue to inform the debate.[355] Although facts in the letter were false, Pickering did not make any claim of special access or knowledge and the information was contained in the public record.[356] On the other hand, the school failed to show that the speech "in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."[357] Therefore, Pickering's speech was protected by the First Amendment and could not be the basis for his dismissal.

The case of *Rankin v. McPherson*[358] is an example of speech by a government employee that might be subject to prosecution under Article 88 if made by a military member. McPherson was employed in a clerical capacity in a county constable office. After hearing of the assassination attempt on President Reagan and in the course of discussing the administration's policies, she remarked to a co-worker "if they go for him again, I hope they get him."[359] The remark was overheard by a fellow co-worker and reported to Constable Rankin. After confirming that she did in fact make the comment, Rankin fired her.[360]

The Supreme Court found that the speech was protected by the First Amendment. First, considering that it was made during a conversation of the

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[349] *Id.* at 568.
[350] *Id.* at 564.
[351] *Id.* at 566.
[352] *Id.* at 571.
[353] *Id.* at 570.
[354] *Id.* at 571.
[355] *Id.* at 571-72.
[356] *Id.* at 572.
[357] *Id.* at 572-73 (footnote omitted).
[358] Rankin v. McPherson, 483 U.S. 378 (1987) (5-4 opinion), *reh'g denied*, 483 U.S. 1056 (1987).
[359] *Id.* at 381.
[360] *Id.* at 382.

President's policies, the speech dealt with a matter of public concern.[361] The Court noted that neither the inappropriate nor controversial nature of the statement was relevant to this determination because debate on public issues should be "uninhibited, robust, and wide-open."[362] Second, the Court concluded that McPherson's free speech interests outweighed Constable Rankin's interests in discharging her. There was no evidence that the speech interfered with the efficiency of the office, impaired employee relationships, or discredited the office since the statement was not conveyed to the public.[363] The Court stated that where "an employee serves no confidential, policymaking, or public contact role, the danger of the agency's successful functioning from that employee's private speech is minimal."[364] Writing in dissent, Justice Scalia cautioned that the Court's statement "is simply contrary to reason and experience."[365] He pointed out that it "boggles the mind" to think that McPherson had the right to say what she did, "so that she could not only not be fired for it, but could not be formally reprimanded for it, even prevented from saying it endlessly into the future."[366] Even if the employment decision was intemperate, "we are not sitting as a panel to develop sound principles of proportionality for adverse actions in the state civil service."[367]

The *Pickering* test is used to determine the permissible government restrictions on the speech of federal civil servants.[368] For example, in *Sigman v. Department of the Air Force*,[369] the Merit System Protection Board upheld

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[361] *Id.* at 386.

[362] *Id.* at 387 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)). The Court also noted that the private nature of the conversation does not prevent the statement from addressing a matter of public concern. *Id.* at 386 n.11.

[363] *Id.* at 388-89.

[364] *Id.* at 390-91. In concurrence, Justice Powell explained that he thought it was unnecessary to engage in the Pickering analysis. In his opinion

> [i]f a statement is on a matter of public concern, as it was here, it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace. The risk that a single, off-hand comment directed at only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on fanciful.

Id. at 393 (Powell, J., concurring).

[365] *Id.* at 400. Justice Scalia was joined in dissent by Chief Justice Rehnquist, Justice White, and Justice O'Connor.

[366] *Id.* at 399.

[367] *Id.*

[368] It has been reported that "Pentagon officials are considering a proposal to create a personnel system that would place civilian employees under some military rules." The proposal would not, however, place civilian under the UCMJ. Lisa Daniel, *Civilian workers may face military rules*, AIR FORCE TIMES, Sep. 15, 1997, at 11.

[369] Sigman v. Department of the Air Force, 37 M.S.P.B. 352 (1988), *aff'd*, 868 F.2d 1278 (Fed. Cir. 1989). For additional cases, see *supra* note 11.

the Air Force's removal of a GS-05 for unauthorized leave and three specifications of disrespectful, disruptive and intimidating behavior. The employee's actions included writing a four page memorandum that "expressed her concern over her heavy workload, personal problems, and management's internal personnel policies regarding distribution of work."[370] The Board found her speech did not address a matter of public concern because the memo was "personal, highly critical of the appellant's supervisors, and concern[ed] internal matters that are not related to the public."[371] Additionally, the Board concluded that the agency's interests in promoting the efficiency of public service that it performs outweighed her free speech interests. The memorandum was distributed to all offices in the division and "had a very disruptive effect."[372] The employee's supervisor also felt "intimidated and frightened by the memo, which contained abusive and insulting language and made references to bodily harm."[373]

D. The Inadequacy of Alternative Standards

As the preceding discussion indicates, there are at least two alternative free speech standards currently utilized by the courts that could be applied to the First Amendment claims of military personnel. First, courts could apply the traditional free speech doctrine that determines permissible restrictions on civilian expression. Second, courts might provide military members with the same protections that are recognized for government employees. The analysis of each standard must consider not only the government's ability to limit the speech, but also what types of sanctions are permitted.

Before examining the potential effectiveness of each alternative, it must be realized that the vast majority of military personnel are not deterred from speaking out on controversial subjects or against official policy because of the threat of criminal sanctions. First, many military personnel will simply agree with official policy. Second, even those who may disagree are subject to the forces of conformity exerted by the unwritten dictates of military custom. Because of the role of custom, "many first amendment questions in the military will not reach the courts . . . The military Establishment, however, must itself bear the major responsibility for protecting first amendment values among its commanders."[374]

The role of military custom in shaping both the behavior and speech of military personnel has not been lost on commentators. Although stated over forty years ago, the observations of Professor Vagts remain true: "A change of station, a missed promotion, a separation from active duty, all these can bring

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[370] *Id.* at 354.
[371] *Id.* at 355.
[372] *Id.* at 356.
[373] *Id.*
[374] Zillman, *supra* note 6, at 436.

not only temporary inconvenience but also lasting ruin for a lifetime's career."[375] Contrasting the effectiveness of criminal sanctions and military custom, he further posits that "a man who feels that a certain way of expressing himself is frowned upon by superiors, or may be deemed contrary to the 'customs of the service,' or may provoke a bad efficiency rating, is more likely to abstain from both the conduct directly disapproved and conduct resembling it than a man concerned only with avoiding a clearly defined criminal enactment."[376] When combined with the "judicious use of administrative sanctions," military custom and tradition "will usually provide a sufficient deterrent to prevent the average officer from openly advocating major deviations from accepted policies."[377]

As this discussion highlights, however, military custom can only be effective if the airman actually values the approval of his peers and seeks to remain a member of the community "in good standing." The force of custom may be negated if the member has no intention of pursuing a career,[378] has become ambivalent about serving in the armed forces, or has been inducted involuntarily. These situations may arise more often during a large-scale draft, but is still present in the all-volunteer force. Since a unit may be activated or deployed on very short notice, the commander must be able to protect the military mission and interests by applying additional sanctions when necessary. The question then becomes whether the commander should resort to criminal punishment or administrative sanctions, to include separation.

A few noted commentators have advocated the use of administrative sanctions in the majority of cases. Zillman and Imwinkelried explain that "there is serious question whether it is advisable to criminally punish the problem soldier."[379] Suggesting that there are many servicemembers who are wasting both their own time and military resources, they conclude that the prompt identification and removal of these individuals "through noncriminal, nonstigmatizing means does not harm any military interest."[380] Nevertheless, Zillman and Imwinkelried realize that many military supporters "doubtlessly view the suggestion that military nonperformers be merely fired rather than jailed as absurd."[381] While this insistence upon criminal punishment is justified on a number of grounds,[382] the commentators suggest that "it is

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[375] Vagts, *supra* note 5, at 210.
[376] *Id.*
[377] *Id.* at 213.
[378] *Id.* ("The deterrent force of custom and tradition may, however, be inadequate to deal with the occasional firebrand or fanatic, particularly when the person is not seeking a career in the service and thus has little to lose.").
[379] Zillman and Imwinkelried II, *supra* note 4, at 403.
[380] *Id.* at 404.
[381] *Id.* at 402.
[382] *Id.* The authors identify five justifications: 1) "the primary purpose of the military, fighting wars, is hard and dangerous"; 2) "the work of the military, defending national interests or even the nation itself, is a vital national activity"; 3) "despite the rhetoric over the glory of the

possible to identify those truly unique military duties meriting criminal sanctions."[383]

It could be argued that the public forum analysis should be applied to determine the free speech rights of military personnel. Under this alternative framework, the permissibility of the restriction would not depend upon the "status" of the individual, but instead on the physical location of the speech. A soldier's statements on a public sidewalk during a protest rally, off-duty and out-of-uniform, would be given the full protections recognized for political speech. Only when the soldier is on-base could the government impose reasonable, viewpoint neutral regulations. In a particular case, the military may be able to restrict on-base speech if it constitutes a clear threat to good order and discipline and the restriction is narrowly tailored.

It could even be suggested that military personnel should be provided the full host of free speech protections even if the speech occurs on-base. The argument would be that since many members either live or spend a significant amount of time on-base, the base effectively becomes their "town" and should be treated accordingly. Therefore, an airman speaking to other airmen in the dormitory would be granted full First Amendment protection.

It is clear that the forum analysis is not the analytical framework utilized by the courts reviewing free speech challenges to military convictions. Recall that 2nd Lt. Howe was convicted under Article 88 for his participation in an off-base Vietnam War sidewalk demonstration.[384] Additionally, Stone was convicted under Article 134 for delivering a false presentation to a high school assembly.[385] Instead, the military member remains subject to the prohibitions contained in the UCMJ regardless of whether the speech is in a public forum. The fact the speech is uttered in a public form is relevant only to the extent that it is evidence of the actual commission of the crime, i.e., whether it was discrediting to the service.

The key to understanding why the military is permitted to restrict the speech of military personnel off-base can be discerned by examining the underlying compelling government interests that are advanced. Military regulations operate to protect the maintenance of good order and discipline, the reputation of the service in the public eye, and a politically-disinterested force. These threats may materialize whether the servicemember is on-base or off. For example, a group of soldiers planning an on-base political protest would pose a threat to good order and discipline whether the discussions took place in the squadron room, the dormitory, or at an off-base coffee shop. Because of

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military, the great bulk of soldiers suffering casualties are from the lower social classes, generally poorly paid, and often lightly rewarded in prestige"; 4) "the military is by nature an emergency force"; and 5) "in many cases the objective of battle or war is only dimly perceived or even actively opposed by the combat troops." *Id.*

[383] *Id.* at 403.

[384] *See supra* notes 206-15 and accompanying text.

[385] *See supra* notes 135-42 and accompanying text.

the critical importance of unit cohesion to the readiness and discipline of the military, the military must be able to restrict this type of activity.

Many commentators may view these restrictions as oppressive and argue that personal autonomy concerns and the interest in the free flow of information require more generous free speech protections. Congress and the President, however, have established a variety of official channels that protect and guarantee military personnel the right to air grievances. Additionally, as the regulations governing members' political activity highlight,[386] the commander's discretion has been limited to those activities that pose a threat to good order and discipline. Courts remain willing to review irrational, invidious or arbitrary application of these regulations, and the absence of such findings is a testament to the responsible use of discretion by military commanders.

It appears that strong arguments can be made to rebut assertions that the traditional civilian First Amendment standards would be adequate to safeguard the military's interests. At least one commentator, however, has called on the courts to evaluate the free speech claims of military personnel under the same two-prong *Pickering* test applicable to government employees and federal civil servants.[387] Only two courts have adopted this test, and both cases involved the free speech claims of military reservists.[388]

At first glance, this suggestion seems reasonable for two reasons. First, the majority of free speech challenges reviewed in Part I arose out of either Vietnam or the Gulf War. Second, even for those cases arising during peacetime, the application of the *Pickering* test would not appear to alter the courts' ultimate free speech determinations. For example, in the Article 134 convictions for indecent language,[389] the speech does not appear to address any matter of public concern. In those cases involving speech or expressive conduct that might address a matter of public concern, such as desecrating the

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[386] *See supra* notes 230-31.

[387] Linda Sugin, Note, *First Amendment Right of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855 (1987) (arguing that courts may find free speech issues arising in combat situations to be nonjusticiable under political question doctrine but that in peace-time situations courts should evaluate free speech claims under the *Pickering* test).

[388] Lee v. United States, 32 Fed.Cl. 530 (Fed.Cl. 1995) (finding that Air Force Reserve officer's expression of his inability to launch nuclear weapons because of moral reservations was not a matter of public concern under the *Pickering* test, and military's compelling need to ensure that all members will carry out orders outweighs any protection to which speech was entitled); Banks v. Ball, 705 F.Supp. 282 (E.D. Virginia, 1989) (concluding that Naval Reservist's interests in communicating on matter of public concern with Congress on official stationery without authorization in violation of Article 1149 of Navy Regulations was outweighed by military's national security interest in uniformity, esprit de corps and efficiency under the *Pickering* test, and that Article 1149 was a proper time, place, and manner regulation) *aff'd sub nom.* Banks v. Garrett, 901 F.2d 1084 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 821 (1990), *reh'g denied*, 498 U.S. 993 (1990).

[389] *See supra* notes 118-21 and accompanying text.

flag[390] or making comments about the President,[391] the military's interests in the efficiency of the service and the maintenance of proper "employee relationships" would seem to trump any individual interest in expression.

Even if the ultimate resolution of the cases would not change, there are at least two reasons why courts should not apply the *Pickering* test to free speech claims arising during peacetime. First, this distinction fails to consider the critical importance of readiness and unit cohesion. In the current world environment, personnel may be called into a potential combat situation on extremely short notice. Commanders do not have the luxury of rectifying dissension within the ranks on the plane ride overseas. Additionally, as the Supreme Court noted in *Brown v. Glines*, military personnel can be called to assist with civil disorder or a natural disaster even if a combat situation is not a foreseeable possibility.[392]

Second, even in peacetime the court's application of the *Pickering* test would be an intrusive and disruptive inquiry into the personnel decisions of the military. Courts would be able to review not only criminal prosecutions under the UCMJ, but also administrative discharges and re-assignments. The military would be forced to expend a tremendous amount of time and effort justifying each prosecution or personnel decision challenged by a disgruntled airman. Even in peacetime, the potential disruption to both commanders and the military community is severe. The Supreme Court recognized the intrusive nature of this type of examination in *Orloff v. Willoughby*.[393] Although Orloff had been lawfully inducted into the service, he was denied a commission after he refused to provide information on the loyalty certificate. He requested the court to order the military to either commission him in the Medical Corps or discharge him. In holding that Orloff did not have *habeas corpus* to obtain judicial review of the commissioning decision, the Court noted that while Orloff's claim was under consideration by the courts "he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place."[394]

Even during the turmoil created by the Vietnam War, courts were reluctant to examine the military's personnel decisions. In *Cortright v. Resor*,[395] the Second Circuit refused to interfere with an Army's transfer and reassignment decision. Cortright, a member of an Army band unit, was transferred from New York to Texas following his involvement in a number of Vietnam War protests. As explained by the commanding General, Cortright's

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[390] *See supra* notes 127-30 and 177-88 and accompanying text.
[391] *See supra* notes 221-25 and accompanying text.
[392] *See supra* notes 250-51 and accompanying text.
[393] Orloff v. Willoughby, 345 U.S. 83 (1953). *See supra* note 33.
[394] *Id.* at 94.
[395] Cortright v. Resor, 447 F.2d 245 (2nd Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

actions were "weakening [the band's] general morale, its discipline and effectiveness" and the transfer was meant to strengthen the band's mission and make it a better military unit.[396] Relying heavily on the Supreme Court's decision in *Orloff*, the court held that:

> [T]he Army has a large scope in striking the proper balance between servicemen's assertions of the right to protest and the maintenance of the effectiveness of military units to perform their assigned tasks—even such a relatively unimportant one as a military band's leading a Fourth of July parade. Any other holding would stimulate 'the flood of unmeritorious applications that might be loosed by such interference with the military's exercise of discretion and the effect of the delays caused by these in the efficient administration of personnel who have voluntarily become part of the armed forces.[397]

Although there are strong arguments against the courts adopting the *Pickering* test to adjudge the free speech claims of military personnel, the test is not antithetical to the protection of military interests. Legal advisors should encourage military commanders to consider the protections afforded by the two-prong test in deciding whether to initiate actions against a member as well as the sanction to be imposed. This consideration is important because of the perceptions of inequality created by the blind application of one set of free speech protections for government employees and another set of protections for military personnel. Given the increased presence of both government employees and independent contractors within the military environment, this observation may be particularly true.

Imagine that a government employee during the Gulf War explains that he does not believe that the United States should engage in foreign wars for the purpose of protecting access to crude oil. This speech would address a matter of public concern. Depending upon the position of the employee in the organization and the impact of the speech on the efficiency of the office, his speech might be protected. If a court determines that the speech is protected, the government would not be able to fire him, impose administrative sanctions or even prevent him from saying it again. On the other hand, if a military member made the statement, then the speech is arguably unprotected. The comment appears to attack the war aims of the government and, therefore, would seem to at least meet the formal definition of a disloyal statement as outlined in Article 134.[398] Consequently, he would be subject to criminal prosecution.

Although prosecution for this statement appears highly unlikely in this scenario, the threat to the underlying military interests does not seem to be

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[396] *Id*. at 249 (internal quotation marks omitted).
[397] *Id.* at 255 (quoting United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371, 375 (2nd Cir. 1968).
[398] *See supra* note 107.

dependent on the identity of the speaker. In *Brown v. Glines*, the Supreme Court recognized that the "[u]nauthorized distributions of literature by military personnel are just as likely to undermine discipline and morale as similar distributions by civilians."[399] Therefore, if the military member is subject to prosecution while the government employee is protected, then a feeling of inequality is likely to pervade the workplace. Even if the government employee's speech is not protected, the most severe type of sanction that can be imposed is some form of adverse administrative action.

Consequently, the military commander should be advised to initiate criminal prosecutions in two instances. First, prosecutions should be sought when the speech poses a serious threat of actual or potential harm to military interests that substantially outweighs any interest in personal autonomy or the free flow of information to the public. For example, if the airman attempts to publish and distribute literature that advocates the overthrow of the government, then prosecution under Article 134 seems completely justified.

Second, commanders should also be advised to proceed with criminal sanctions in circumstances where military custom is likely to be ineffective. In these instances, prosecutions would serve as a significant deterrence to future disruptive speech. Although the determination is case specific, custom is less likely to be effective when acceptance and advancement within the military community is not valued by either an individual or a distinct group of individuals. These conditions are more likely to be experienced when the retention rates within the military are declining and when service conditions become especially harsh. In this manner, the commander can create a sufficient incentive for the member to honorably fulfill his service obligation.

III. CONCLUSION

The application of the First Amendment to the military community remains an important yet divisive endeavor. Courts have recognized that the Constitution places the primary responsibility for regulating and maintaining the military in the Legislative and Executive branches. Because of the unique nature of the military's mission, courts realize that many of the traditional First Amendment values must be conditioned by the countervailing needs of the military. Consequently, military commanders are permitted to restrict and punish the speech of servicemembers when the good order and discipline of the service is threatened. Speech that is otherwise "private" or occurs off-base nevertheless remains subject to regulation through the application of either the specific Articles of the UCMJ, service regulations, or the specific orders of commanders. Courts remain willing to review irrational, arbitrary, or invidious applications of these restrictions.

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[399] Brown v. Glines, 444 U.S. 348, 356 n.13 (1980). *See supra* notes 240-55 and accompanying text.

The judicial deference to the military and the substantial discretion possessed by commanders may be troubling to many. It is necessary, however, for the continued maintenance of the military as an effective and efficient fighting force. The free speech rights of military personnel may seem sharply curtailed when contrasted with the rights of civilians. A review of the limitations on the right of civilians to speak on-base and government employees to disrupt the workplace indicates, however, that the speech restrictions on military members are consistent with the special purposes of the military.

Most free speech issues in the military community will never be litigated before the courts. Consequently, military commanders must in the first instance balance the free speech rights of military personnel and the needs of the military. By carefully assessing the competing arguments both for and against permitting members to speak on various issues in a variety of circumstances, legal advisors will continue to constitute an indispensable source for prudent and responsible recommendations.

United States v. Marshall: Ineffective Assistance of Pretrial Counsel

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I. OVERVIEW

The Sixth Amendment of the U.S. Constitution guarantees every accused the right to the effective assistance of counsel.[1] But does this right extend to the pretrial stage, where critical decisions such as whether to accept or reject a plea bargain can expose an accused to greater peril at trial?[2] In the military, the decision to accept an offer of nonjudicial punishment[3] or to demand trial by court-martial can carry even graver consequences. Does a subsequent fair trial remedy any prejudice the accused may have suffered as the result of an ill-advised election?

In *United States v. Marshall,*[4] the United States Court of Appeals for the Armed Forces (CAAF) grappled with this very issue. It examined a case where the commander's offer of nonjudicial punishment proceedings remained open until the first day of trial. Technical Sergeant (TSgt) Larry Marshall asserted that in making the decision to reject an Article 15 and proceed to trial by court-martial, he had been denied his right to the effective assistance of counsel.[5]

This article examines the *Marshall* opinion and analyzes state and federal court decisions on the issue of pretrial effective assistance of counsel. Based on this study, it offers counsel practical guidance to avoid the likelihood of such a claim or of its success.

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[1] *See* Strickland v. Washington, 466 U.S. 668, 684 (1984)

[2] Some commentators have argued that *Strickland's* inquiry into effectiveness of counsel after the fact is unfair since "the publicly-funded lawyers who represent most criminal defendants are overworked, underpaid, and all to often either inexperienced or burnt out." Donald A. Dripps, *Ineffective Assistance of Counsel: The Case For An* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997).

[3] Punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) 10 U.S.C.A. § 815 (West 1983 & Supp. 1997): It authorizes a commanding officer to impose nonjudicial punishment upon members of his or her command. Proceedings are not criminal prosecutions. *See* United States v. Kendig, 36 M.J. 291 (C.M.A. 1993). Moreover, punishments under this codal provision are generally less severe than can be awarded by a court-martial. *See* MANUAL FOR COURTS-MARTIAL, United States, [hereinafter Manual], Part V, para. 5, (1995 ed.).

[4] United States v. Marshall, 45 M.J. 268 (1996).

[5] *Id* at 270.

II. *UNITED STATES V. MARSHALL*

A. Synopsis

On 28 February and 1 March 1991, TSgt Larry Marshall was tried by a special court-martial at Travis Air Force Base, California. Contrary to his pleas, he was found guilty of disobeying a lawful order to provide a specimen for a blood alcohol test, driving under the influence of alcohol, and being drunk and disorderly in violation of Articles 92, 111, and 134, Uniform Code of Military Justice (UCMJ), respectively.[6] He was sentenced to a bad conduct discharge and reduction to the pay grade of E-1.

Technical Sergeant Marshall appealed his conviction to the Air Force Court of Military Review.[7] He asserted that his civilian defense counsel was ineffective. On 23 September 1992, the Air Force court rejected this assertion and affirmed the findings and sentence in an unpublished decision.[8]

Technical Sergeant Marshall then sought review in the United States Court of Military Appeals[9] on the basis he was denied effective assistance of counsel. In an order dated 9 March 1994, that court set aside the decision of the Air Force court and ordered a fact-finding hearing pursuant to *United States v. DuBay*,[10] "solely for the purpose of determining the advice given as to the matter raised" in Technical Sergeant Marshall's affidavits and the "tactical and legal considerations on which the advice was based."[11]

A *DuBay* hearing was held at Travis Air Force Base on 19 and 26 May 1994. After further review in light of the *DuBay* hearing and the findings of fact, the Air Force Court of Criminal Appeals reaffirmed its earlier decision that Technical Sergeant Marshall was not denied effective assistance of counsel.[12]

On 17 July 1995, the CAAF granted review of the issue of whether Technical Sergeant Marshall was denied effective assistance of counsel when he turned down an Article 15 after his civilian defense counsel provided incorrect and untenable advice concerning the outcome of going to trial.

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[6] 10 U.S.C.A. §§ 892, 911, and 934 (West 1983 & Supp. 1995). Appellant initially faced three Charges, violations of Articles 92, 111, and 134, UCMJ, respectively. Charge I, violation of Article 92, UCMJ, was withdrawn by the convening authority before arraignment. Charge II, violation of Article 111, UCMJ, and Charge III, violation of Article 134, UCMJ, were then renumbered as Charge I and Charge II respectively.

[7] Effective October 5, 1994, pursuant to Pub. L. No. 103-337 § 924, 108 Stat. 2663, the United States Court Of Military Appeals was renamed the United States Court of Appeals for the Armed Forces and each Court of Military Review was renamed the Court of Criminal Appeals.

[8] United States v. Marshall, ACM S29406 (A.F.C.M.R. 23 September 1992).

[9] *See supra* note 7.

[10] United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

[11] Marshall, 45 M.J. at 269.

[12] United States v. Marshall, ACM S29406 (f rev) (A.F.Ct .Crim.App. 8 February 1995).

B. Facts

On 18 December 1990, Technical Sergeant Larry Marshall met with Mr. B, a civilian attorney who practiced military law in Fairfield, California. Technical Sergeant Marshall had received two "referral" Enlisted Performance Reports (EPRs)[13] from his former duty station in Korea.[14] Technical Sergeant Marshall sought Mr.. B's advice in appealing the EPRs and having them removed from his records. At this first meeting, Technical Sergeant Marshall provided Mr. B with a copy of a previously submitted unsuccessful appeal which included copies of the EPRs and may have included copies of an Unfavorable Information File entry and a control roster action.[15] Marshall was very concerned that his career was in jeopardy and his intent was to salvage his career.[16]

Mr. B advised Technical Sergeant Marshall that the process of appealing the EPRs could be lengthy, and they would first have to exhaust administrative remedies and then apply to the Air Force Board for Corrections of Military Records.[17] Mr. B discussed his fee with Technical Sergeant Marshall, however, Marshall did not retain Mr. B on this occasion.[18]

On 22 December 1990, Technical Sergeant Marshall was apprehended at the gate of Travis Air Force Base for driving while intoxicated.[19] On 3 January 1991, Marshall was offered an Article 15 for wrongfully driving on a suspended license, and drunk and disorderly conduct.[20] At the time of the incident, Technical Sergeant Marshall had 17 and one-half years of active duty with no prior nonjudicial punishments.[21]

On or about 7 January 1991, Technical Sergeant Marshall met with Mr. B. In later testimony at the *DuBay* hearing, Mr. B could not remember

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[13] Negative ratings or comments on EPRs can be devastating to an enlisted member's career. Therefore, administrative procedures have been established to refute and correct perceived unfair reports. *See* Air Force Instruction 36-2401, Correcting Officer and Enlisted Evaluation Reports (3 June 1994).

[14] *Marshall*, 45 M.J. at 270.

[15] *Id*. Control rosters are governed by Air Force Instruction 36-2907, Unfavorable Information File (UIF) Program ¶2.1 (July 1 1996) [hereinafter AFI 36-2907]. They allow the commander a formal method of listing officers and airmen whose conduct or performance require special observation. A UIF is a formal repository for unfavorable information of an individual's conduct, bearing, behavior and integrity, both on and off duty. UIFs are also governed by AFI 36-2907.

[16] *Marshall*, 45 M.J. at 270.

[17] Record of *DuBay* hearing, pp. 13-14. The Air Force Board for Correction of Military Records was established by congressional statute for the purpose of correcting errors or injustices in military records. Application procedures to the Board are governed by Air Force Instruction 36-2603, Air Force Board For Corrections Of Military Records ¶ 3 (March 1 1996).

[18] Record of *DuBay* hearing, p. 14.

[19] *Marshall*, 45 M.J. at 270.

[20] *Id*.

[21] Record of *DuBay* hearing, pp. 15-16.

whether Technical Sergeant Marshall had been offered the Article 15 or had merely been advised that it would be offered.[22] Although Technical Sergeant Marshall admitted to Mr. B that he had been drunk and disorderly, his license had not yet been suspended. Mr. B assumed an administrative discharge would be an inevitable result of a decision to accept the Article 15.[23] At the *DuBay* hearing, Mr. B could not recall the basis for this conclusion, other than he believed that the accused had been told this by the commander, or the accused made the assumption that an administrative discharge was inevitable.[24] Mr. B did not attempt to verify whether Technical Sergeant Marshall's commander or anyone at the Travis Air Force Base legal office was contemplating an administrative discharge.[25] In Mr. B's opinion, Technical Sergeant Marshall had two alternatives, neither of which were attractive. If Technical Sergeant Marshall accepted the Article 15, he would then face an administrative discharge board. If he turned down the Article 15, he would be court-martialed.[26] In Mr. B's opinion, Technical Sergeant Marshall had a better chance of saving his career in a court-martial than in an administrative discharge board. Mr. B based this evaluation in part upon the differing burdens of proof in boards and courts.[27] In a board, the burden of proof would be by a preponderance of the evidence. Additionally, the members would be looking at Technical Sergeant Marshall's entire record, including both his on-duty performance and off-duty conduct.[28] Given the two referral EPRS, Mr. B was of the opinion that Marshall stood a better chance in a court-martial.[29] He also felt that members are sometimes reluctant to adjudge a bad conduct discharge in a court-martial.[30] Marshall did not retain Mr. B at this time.

On 14 January 1991, the initial Article 15 was withdrawn, and a second Article 15 was offered.[31] The second Article 15 contained four specifications: dereliction of duty for driving with a suspended license, driving while intoxicated, disorderly conduct, and failure to obey an order to submit to a blood alcohol test.[32]

On 15 January 1991, Technical Sergeant Marshall went to the office of the Area Defense Counsel, Captain T, to seek advice on this second Article 15. Captain T advised Marshall of his rights relating to the Article 15.[33] He explained Marshall's options of accepting the Article 15, or turning it down

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[22] *Id* at 42.
[23] *Id* at 44-45.
[24] *Id.*
[25] *Id* at 46.
[26] *Marshall*, 45 M.J. at 272.
[27] *Id*.
[28] Record of *DuBay* hearing, p.56.
[29] *Marshall*, 45 M.J. at 272.
[30] *Id.*
[31] Record of *DuBay* hearing, pp. 48-49.
[32] *Id*.
[33] *Marshall*, 45 M.J. at 270.

and demanding trial by court-martial. Technical Sergeant Marshall was concerned that by accepting the Article 15 he would be admitting guilt. He wanted to respond to the suspended license allegation. Captain T informed Marshall that accepting the Article 15 was not an admission of guilt, and he could submit a statement to his commander regarding the offenses.[34] Technical Sergeant Marshall made another appointment to see Captain T the next day, 16 January 1991, but later canceled that appointment.[35] Technical Sergeant Marshall was wary of Captain T, seeing him as a government attorney.[36]

Technical Sergeant Marshall went back to see Mr. B on 16 January 1991. According to Technical Sergeant Marshall, Mr. B advised him to turn down the Article 15 and demand a trial by court-martial.[37] According to Technical Sergeant Marshall, Mr. B told Marshall he would be admitting his guilt by accepting the Article 15.[38] Based on his *DuBay* hearing testimony, it is not clear what advice Mr. B gave Technical Sergeant Marshall as to the effect of accepting the Article 15. During his testimony, Mr. B indicated that he discussed the meaning of accepting the Article 15 with Technical Sergeant Marshall.[39] According to Mr. B's testimony, he indicated that if Technical Sergeant Marshall accepted an Article 15, that would not be admitting guilt and that the Article 15 was nonjudicial.[40] Nevertheless, post-trial submissions by Mr. B indicated he believed it would be inappropriate to accept an Article 15 if one of the specifications were groundless and equated the Article 15 process to a *Care*[41] inquiry. In other words, Mr. B indicated in his post-trial submissions that he could not let Technical Sergeant Marshall plead guilty to an offense he did not commit.[42]

Apparently, Mr. B thought an administrative discharge was a foregone conclusion if Marshall accepted the Article 15.[43] However, Mr. B never tried to verify that a discharge was contemplated, or an inevitable consequence of accepting the Article 15.[44] In fact, an affidavit from the assistant trial counsel

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[34] See Record of *DuBay* hearing, Appellate Exhibit XVM: Captain T's Affidavit dated 12 August 1992.
[35] *Id.*
[36] *Id.*, App. Ex. XX; Appellant's Affidavit dated 22 July 1992.
[37] *Marshall*, 45 M.J. at 270.
[38] *Id.* at 272.
[39] *Id.*
[40] *Id.*
[41] United States v. Care, 40 C.M.R. 247 (1969). The record of trial in guilty plea cases must demonstrate that the elements of each offense charged had been explained to the accused, and also that the military judge inquired into the accused's intent for the offenses charged. This is to make clear the basis for a determination by the military judge whether the acts or omissions of the accused constituted the offense to which he is pleading guilty.
[42] *See* Original Record of Trial for United States v. Marshall, Allied Papers: Response to SJA's Post Trial Recommendation, p. 3, Vol. I.
[43] *Marshall*, 45 M.J. at 273.
[44] Record of *DuBay* hearing, pp. 15-16, and Appellate Exhibits XXV and XXVI.

was submitted at the *DuBay* hearing. Assistant trial counsel noted that Mr. B never contacted him regarding the likelihood of an administrative discharge should Technical Sergeant Marshall accept the Article 15. Further, to assistant trial counsel's knowledge, no one on the government's side was pushing an administrative discharge action, although it had not been ruled out.[45] Although Mr. B denied making any promises to Marshall,[46] Technical Sergeant Marshall stated in his post-trial affidavits that Mr. B had advised him that he would not receive a bad conduct discharge at the court-martial, despite the fact that he would be convicted of some of the charges.[47] Based upon Mr. B's advice, Technical Sergeant Marshall turned down the Article 15 and demanded trial by court-martial.[48]

On 8 February 1991, charges were referred to a special court-martial. Additional charges of failing to obey lawful orders were referred on 15 February 1991.[49] Trial was scheduled for 28 February 1991.

On 12 February 1991, Mr. B, Captain T and Technical Sergeant Marshall met to discuss Marshall's decision to refuse the Article 15 and the subsequent court-martial. Captain T continued to recommend acceptance of the Article 15 and pointed out the folly of risking a bad conduct discharge at a court-martial.[50] Mr. B told Captain T that his compensation package included representation at an administrative discharge board after the court-martial, because he told Technical Sergeant Marshall it was unlikely that Marshall would receive a punitive discharge from the court-martial.[51]

A second meeting occurred among the three parties on 27 February 1991, the day before trial. Captain T informed Technical Sergeant Marshall and Mr. B the Article 15 was still being offered by the convening authority, and Marshall could still accept it and avoid the court-martial.[52] At this point, Mr. B interrupted Captain T, instructed Captain T that his role was limited solely to procedural questions, and stated "we're going with the court-martial," and "I'm the expert here."[53] Mr. B told Technical Sergeant Marshall to turn down the Article 15 and acknowledged that Marshall would be convicted of at least some of the charges.[54]

During the court-martial, Mr. B handled Technical Sergeant Marshall's case. Technical Sergeant Marshall was convicted on three charges and was sentenced to a bad conduct discharge and reduction to E-1.[55]

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[45] Record of *DuBay* hearing, Appellate Exhibit XXV.
[46] *Marshall*, 45 M.J. at 272.
[47] *Id.*
[48] *Id.* at 270.
[49] *See supra* note 6.
[50] Record of *DuBay* hearing, Appellate Exhibit XVII: Captain T's affidavit dated 24 Oct 1991.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Marshall*, 45 M.J. at 269.

C. Issues

On appeal of his conviction, Technical Sergeant Marshall alleged ineffective assistance of counsel. Specifically, Technical Sergeant Marshall alleged that Mr. B: 1) gave him "flat out wrong advice" that accepting the Article 15 would be an admission of guilt;[56] 2) told Technical Sergeant Marshall that he would not receive a bad conduct discharge from the court-martial members;[57] 3) interfered with military defense counsel's attempts to dissuade Technical Sergeant Marshall from proceeding to court-martial;[58] and 4) Mr. B's "tactical" decision to proceed to a court-martial in lieu of an Article 15 was unreasonable.[59]

D. Holding

The Court found that Technical Sergeant Marshall received conflicting advice from his civilian attorney and military defense counsel, and an obvious tension existed between them. Nonetheless, viewed in its entirety, Technical Sergeant Marshall was presented with legal advice concerning his options and the practical ramifications of those available options.[60]

E. Rationale

In *Strickland v. Washington*,[61] the U.S. Supreme Court set forth the standard for measuring a claim of ineffective assistance of counsel. In order for an accused to prevail, he must establish the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is reliable.[62]

The basis of the *Strickland* standard is to ensure that criminal defendants receive a fair trial.

The Court of Appeals for the Armed Forces applied *Strickland's* two-prong test that requires the defendant to demonstrate: (1) his counsel's

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[56] *Id.* at 272.
[57] *Id.*
[58] *Id.* at 270.
[59] *Id.*
[60] *Id.* at 273.
[61] Strickland v. Washington, 466 U.S. 668 (1984).
[62] *Id.* at 687.

performance was deficient, and (2) the deficient performance prejudiced his defense. As stated by the *Marshall* opinion's author, Judge Sullivan, "in order to constitute ineffective assistance, counsel's errors must be so serious as to deprive the defendant of a fair trial, 'a trial whose result is reliable.'" [63]

At the outset, the court noted that proceedings under Article 15 do not trigger the Sixth Amendment right to counsel.[64] However, the Court of Appeals for the Armed Forces "assumed" the Sixth Amendment and its standard for effective counsel applied to Technical Sergeant Marshall's case where the offer to accept nonjudicial punishment in lieu of trial by court-martial remained open until the first day of trial.[65] Further, the court presumed the competence of Mr. B,[66] noting "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[67]

Addressing Marshall's first allegation of ineffectiveness, the Court noted, during the *DuBay* hearing, Mr. B denied giving advice to Marshall that acceptance of an Article 15 punishment was an admission of guilt.[68] Further, the court pointed out, while both Mr. B and Captain T differed on the probable course of action by Technical Sergeant Marshall's command, neither disputed that an administrative discharge action was legally possible on the basis of nonjudicial punishment.[69] Thus, even if Mr. B's complained-of advice was defective, it was not prejudicial to Technical Sergeant Marshall.[70]

The court then focused on Marshall's second allegation, that Mr. B told Marshall he would not receive a bad conduct discharge from court-martial members. The court held that an erroneous sentence estimation by defense counsel is not necessarily deficient performance rising to the level of

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[63] *Marshall*, 45 M.J. at 270 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984))

[64] *Id*. at 271. Article 15 does not expressly require that a lawyer be made available to a service member before deciding to elect nonjudicial punishment or demand trial by court-martial. Neither does Manual, *supra* note 3, Part V, expressly require counsel. Nevertheless, under Air Force Instruction 51-202, Nonjudicial Punishment ¶ 4.7.1 (October 1 1996), a service member has a right to a military lawyer to explain to the service member his or her rights under Article 15. *See also* United States v. Mack, 9 M.J. 300, 320-21 (C.M.A. 1980).

[65] *Id.* at 271. In Technical Sergeant Marshall's case, preferral of charges occurred after he decided to forgo nonjudicial punishment and demanded trial by court-martial. Since adversary proceedings had been initiated against him at the time of the averred ineffectiveness of his counsel, a Sixth Amendment claim arose. *See* United States v. Kendig, 36 M.J. 291, 296 (C.M.A. 1993).

[66] *Strickland*, 466 U.S. at 689.

[67] *Id*. at 690.

[68] The court failed to address the difference between Mr. B's *DuBay* testimony and his post-trial submissions to the convening authority, in which he explained that Technical Sergeant Marshall couldn't have accepted the Article 15, because the acceptance was tantamount to a guilty plea.

[69] *Marshall*, 45 M.J. at 272.

[70] *Id*.

ineffective assistance of counsel.[71] Moreover, civilian counsel advised Technical Sergeant Marshall, even if he did not receive a bad conduct discharge, there still might be an administrative discharge board following the court-martial.[72]

Interestingly, the court did not directly address Technical Sergeant Marshall's complaint that his civilian defense counsel interfered with his military defense counsel's efforts to dissuade Technical Sergeant Marshall from proceeding to a court-martial. The court simply concluded, "in advising appellant, counsel's performance did not fall 'measurably below the performance [ordinarily expected] of fallible lawyers."[73]

As for the final allegation, "untenable tactical reasons for proceeding to court," the court examined the end result of Marshall's court-martial.[74] After evaluating the entire record of trial, the court concluded that civilian defense counsel did provide effective legal assistance to Technical Sergeant Marshall.[75] The court observed civilian defense counsel submitted a clemency submission that led to a recommendation by the staff judge advocate to the convening authority to approve only a reduction to the grade of E-5 and to suspend the bad conduct discharge.[76] Prior to the clemency decision, however, Technical Sergeant Marshall committed additional acts of misconduct that resulted in the preparation of a new staff judge advocate recommendation and eventual approval of the bad conduct discharge adjudged by the court-martial.[77]

III. SIGNIFICANCE OF *MARSHALL*

The most important aspect of the *Marshall* decision was the CAAF's recognition that a claim of ineffective assistance of counsel could exist when a defendant demonstrates that ineffective representation prior to court-martial caused him or her to proceed to trial rather than accept a more lenient offer from the government, such as a pretrial agreement or an Article 15.

Practitioners should be careful not to read the *Marshall* decision too broadly. Ordinarily, no Sixth Amendment claim to effective assistance of counsel attaches to nonjudicial punishment proceedings.[78] The *Marshall* court took great pains to point out that the Article 15 offered to Technical Sergeant Marshall remained open until the day of his court-martial, *after* Technical

[71] *Id.* at 273 (citing United States v. Gordon, 4 F.3d 1567, 1570 (10th Cir. 1993).
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *See supra* note 62.

Sergeant Marshall's right to effective counsel had been triggered by the preferral of charges.[79]

On the other hand, practitioners should also be aware that the *Marshall* decision contrasts sharply with the decisions of state and federal appellate courts on the issue of ineffective pretrial counsel. While the *Marshall* court stringently applied *Strickland's* two-prong test, civilian appellate courts have applied a modified *Strickland* test. Rather than ensuring the defendant received a fair trial, which the CAAF did by noting the ultimate outcome in *Marshall*[80], state and federal courts focus on counsel's particular duties to consult with the defendant on important decisions and keeping the defendant informed of important developments in the course of the prosecution.

IV. STATE AND FEDERAL CASES

The rejection of the offer to accept the Article 15 in lieu of trial in *Marshall* is arguably no different than those situations in civilian state and federal cases involving offers of pretrial agreements or plea bargains where the accused relies on counsel's advice, rejects an offer, is convicted and receives a less favorable sentence.

For example, in *Lloyd v. State*,[81] the Georgia Supreme Court addressed the issue of ineffective assistance of counsel where defense counsel failed to communicate a plea offer to his client. The defendant in *Lloyd*, who had been convicted of murder, contended on appeal that she had been denied effective assistance of counsel. She alleged her attorney failed to communicate to her a pretrial plea bargain offer to plead guilty to voluntary manslaughter. Counsel admitted having failed to communicate the offer, and explained his action was based upon his strong belief that his client ultimately would be acquitted.[82] He implied that had he communicated the offer, he would have recommended that his client reject it.[83] The failure to communicate the offer of a prosecutor for the defendant's consideration, according to the Georgia Supreme Court, fell below the standard of care expected in the legal profession.[84]

In fashioning a remedy for Lloyd, the court properly recognized that a fair trial could not remedy the specific deprivation suffered.[85] Applying a modified *Strickland* test, the *Lloyd* court did not focus on whether the defendant received a fair trial, but whether the defendant could show that "but for counsel's unprofessional errors, the result of the proceeding would have

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[79] *Marshall*, 45 M.J. at 271.
[80] *Id* at 273.
[81] Lloyd v. State, 373 S.E.2d 1 (1988).
[82] *Id*. at 1.
[83] *Id.* at 2 n.3.
[84] *Id.* at 3.
[85] *Id.* at 2 n.4.

been different."[86] Logically, in a case of ineffective assistance of pretrial counsel based upon failing to communicate a plea offer, such prejudice can only be shown by some indication that the defendant was amenable to the offer made by the government.[87] The court affirmed Lloyd's conviction, concluding that counsel's failure to communicate the offer constituted deficient representation, but the evidence failed to establish that the defendant would have accepted (or even considered) it.[88] The defendant, therefore, failed to establish prejudice.

In *Turner v. State of Tennessee*,[89] the defendant was charged with felony murder and kidnapping. On advice of counsel, he rejected an offer to plead guilty in exchange for a two-year sentence.[90] He was convicted and sentenced to imprisonment for life plus forty years.[91] The defendant petitioned the federal court for a writ of habeas corpus, seeking reinstatement of the offered plea bargain. The district court granted a conditional writ, holding that counsel's advice to reject the offer was incompetent, and that the defendant was prejudiced by it. The Sixth Circuit Court of Appeals affirmed the district court's decision. The court noted that defendant's testimony that he would have accepted the offer had his counsel advised him of it the offer, was subjective, self-serving, and, by itself, insufficient to satisfy the *Strickland* test for prejudice.[92] However, unlike the court in *Lloyd*, the *Turner* court found that objective evidence in the record corroborated the defendant's claim.[93] Therefore, there was a reasonable probability that, had counsel provided effective representation, the defendant would have accepted the offer. The state, however, was allowed to withdraw the plea[94] offer pursuant to *United States v. Morrison*,[95] upon showing that the withdrawal was not the product of prosecutorial vindictiveness.

In *In re Alvernaz*,[96] the California Supreme Court addressed the issue of a rejected plea bargain prior to trial, and whether a defendant may challenge a subsequent conviction and sentence on the ground of ineffective assistance of counsel in the decision to reject the offered plea bargain. In *Alvernaz*, the court concluded that when a defendant demonstrates that ineffective pretrial representation caused him or her to proceed to trial rather than to accept a plea

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[86] *Id.* at 3 (citing *Strickland*, 466 U.S. at 694).
[87] *Id.*
[88] *Id.* at 4.
[89] Turner v. State of Tennessee, 858 F.2d 1201 (6th Cir. Tenn. 1988), *vacated and remanded* 492 U.S. 902 (1989).
[90] *Turner*, 858 F.2d at 1203.
[91] *Id.*
[92] *Id.* at 1206.
[93] *Id.* at 1206-07.
[94] Turner v. Tennessee, 726 F.Supp. 1113 (M.D. Tenn. 1989).
[95] United States v. Morrison, 449 U.S. 361 (1981).
[96] In re Alvernaz, 830 P.2d 747 (1992), *writ of habeas corpus granted*, Alvernaz v. Ratelle, 831 F. Supp. 790 (S.D.Cal. 1993).

bargain, the defendant has been deprived of the effective assistance of counsel, even if the defendant thereafter receives a fair trial.[97] A five-count information was filed against petitioner in *Alvernaz* alleging offenses committed against three Mexican farm workers. Petitioner alleged that after a pretrial plea bargaining session, his attorney advised him the prosecution had offered to permit petitioner to plead guilty to one count of robbery.[98] The plea offer would only carry a maximum penalty of two and one-half years of confinement.[99] When petitioner questioned his attorney about the consequences of not prevailing at trial, his attorney told him the maximum penalty would be approximately eight years in prison and, with deduction of credits, a maximum sentence of approximately four years.[100] Petitioner also alleged he was encouraged by his attorney's prediction of a "70-80%"[101] chance of prevailing should he go to trial. Had he known that losing the case would actually subject him to a life sentence with prison confinement in excess of 16 years, he would have accepted the prosecutor's one-count offer.[102]

The California Supreme Court held that a defendant is deprived of his federal constitutional rights to effective assistance of counsel when his lawyer gives him substandard advice that induces him to reject a plea offer.[103] Even a fair trial following rejection does not adequately cure the error, and the remedy should be resubmission of the plea bargain.[104]

In summarizing the case law in this area,[105] the California Supreme Court in *Alvernaz* concluded that: "[A]ll federal and state courts presented with the issue where counsel's ineffective representation results in defendant's rejection of an offered plea bargain, and in defendant's decision to proceed to trial, give rise to a claim of ineffective assistance of counsel."[106]

The modified approach applied by state and federal courts is to evaluate the three following areas. First, did defense counsel actually and accurately communicate the offer to the defendant? Second, what advice, if any, was given by counsel, and what was the disparity between the terms of the proposed plea bargain and the probable consequences of trial, as viewed at the time of the offer. Finally, did the defendant indicate he or she was amenable to negotiating a plea bargain?[107]

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[97] *Id.* at 751.
[98] *Id*. at 752.
[99] *Id.*
[100] *Id.* at 753.
[101] *Id*.
[102] *Id.* at 754.
[103] *Id.* at 757.
[104] *Id.* at 965.
[105] *See, e.g.*, Lewandowski v. Makel, 949 F.2d 884 (6th Cir. 1991); United States v. Rodriguez, 929 F.2d 747 (1st Cir 1991); Johnson v. Duckworth, 793 F.2d 898 (7th Cir. 1986); State v. Simmons, 309 S.E.2d 493 (N.C. App. 1983).
[106] *Alvernaz*, 830 P.2d at 757-58 n.5.
[107] *Id.* at 761.

The *Alvernaz* court stated that limiting the *Strickland* prongs only to performance and prejudice at trial, and not pretrial matters, was an "overly narrow reading of *Strickland's* delineation of the functions of counsel . . . [and] . . . the position that a fair trial remedies the ineffective assistance which led the defendant to reject an offered plea bargain disregards petitioner's specific complaint of constitutional injury."[108]

Nonetheless, the court concluded, on the basis of the record before it, that Alvernaz failed to sustain his burden of establishing that he would have accepted the offered plea bargain, had he received constitutionally adequate assistance from counsel.[109]

Alvernaz subsequently filed a writ of habeas corpus with the United States District Court of the Southern District of California.[110] Granting the writ, the federal district court determined that an evidentiary hearing was mandatory on the issue of whether or not Alvernaz would have accepted the plea bargain.[111] Similar to the California Supreme court, the federal district court applied a modified *Strickland* standard. Contrary to the California Supreme Court, the federal district court found that Alvernaz was prejudiced by his counsel's ineffectiveness.[112]

The federal district court in *Alvernaz* adopted the view of the California Supreme Court that, where counsel's ineffective representation results in a defendant's rejection of an offered plea bargain and in defendant's decision to proceed to trial, the first prong of *Strickland* was satisfied under the facts of the case.[113] The second prong of *Strickland* (a showing of prejudice) was satisfied by a preponderance of evidence that there was a reasonable probability that, had Alvernaz known the true sentencing ramifications of losing at trial, he would have accepted the plea offer.[114]

According to the federal district court, the following objective evidence from the evidentiary hearing supported Alvernaz's claim: (1) Alvernaz's assertions that he would've accepted the offer had he received competent advice; (2) the testimony of Alvernaz's attorney who speculated that, had he advised Alvernaz correctly, Alvernaz would have accepted the plea; (3) the testimony of Alvernaz's family members which supported Alvernaz's claim; (4) Alvernaz was rational and followed the advice of his counsel; (5)Alvernaz based his decision to go to trial on incorrect risk factors; and (6) Alvernaz was open to a plea bargain.[115] Additionally, the federal district court examined the general trend of plea practice in the California state courts, and relied upon the

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[108] *Id.* at 758.
[109] *Id.* at 752.
[110] Alvernaz v. Ratelle, 831 F. Supp. 790 (S.D. Cal. 1993).
[111] *Id* at 791.
[112] *Id* at 792-93.
[113] *Id* at 792.
[114] *Id* at 793.
[115] *Id* at 793-95.

opinions of the state judges who ruled on the state habeas petition, in finding a reasonable probability that the trial court would have accepted the plea offered to Alvernaz.[116]

In fashioning a remedy for Alvernaz, it was the federal district court's opinion that a new trial could not cure the specific deprivation suffered.[117] The court noted that since the harm was suffered before trial, they believed a new trial would not suffice.[118] Instead, the federal district court ruled that the appropriate remedy was the reinstatement of the lost plea bargain.[119]

V. CONCLUSION

Every accused has a constitutional right to participate in making certain decisions that are fundamental to his or her defense, including whether to plead guilty, waive a jury, testify in his or her own behalf, or appeal.[120] The crucial decision to reject a lenient government offer and proceed to trial should not be made by a defendant encumbered "with a grave misconception as to the very nature of the proceeding and possible consequences."[121] The rendering of ineffective assistance of counsel, resulting in a defendant's decision to reject an offered plea bargain and proceed to trial, constitutes a constitutional violation which is not remedied by a fair trial.

Military practitioners should be aware that the Sixth Amendment right to effective counsel attaches after preferral of charges.[122] While the CAAF was willing to recognize a claim of ineffective assistance of pretrial counsel,[123] the court stringently applied the *Strickland* standard and ultimately focused on whether the defendant was deprived of a fair trial. State and federal courts, however, have applied a modified *Strickland* test that focuses on the decision whether to accept a plea offer or proceed to trial.

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[116] *Id* at 796.
[117] *Id* at 797.
[118] *Id.*
[119] *Id*.
[120] Jones v. Barnes, 463 U.S. 745, 751 (1983).
[121] Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981).
[122] United States v. Kendig, 36 M.J. 29, 295 (C.M.A. 1993).
[123] In United States v. Sorbera, 43 M.J. 818 (A.F.Ct.Crim.App. 1995) the Air Force Court of Criminal Appeals also recognized a claim of ineffective assistance of pretrial counsel. In that case, the accused was charged with committing indecent acts with his daughter. Even though his commander had ordered him not to have contact with his daughter, the defense counsel advised the accused to call his ex-wife and offer her custody of the girl and child support. He also suggested the accused advise his ex-wife of the ramifications of the child's continuing to lie to authorities. The accused did so and urged his ex-wife to keep the child from returned to Germany to testify against him. As a result, an additional charge of obstruction of justice was preferred against the accused. Applying the *Strickland* standard, the court held that by failing to advise the client of the potential consequences of his actions the attorney's legal advice in the pretrial stage rose to the level of ineffective assistance of counsel.

To discourage ineffective assistance of pretrial counsel claims, defense counsel are encouraged to memorialize in some fashion prior to trial: (1) the fact that a plea bargain offer was made, regardless of the terms; (2) the accused was advised of the offer, its precise terms, and the maximum and minimum punishments the defendant would face if the plea bargain was accepted or, alternatively, if it was rejected and the case proceeded to trial; and (3) the accused's response to the plea bargain offer. By taking such actions, and by memorializing them in writing, defense counsel should be able to show that their actions during the pretrial stage were within the standards established in the Constitution and should be able to overcome subsequent claims of ineffectiveness.