OpJAGAF 2019-7, 08 March 2019, ADMINISTRATIVE DISCHARGES, Evidence in Discharge Cases Involving Child Exploitation

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TOPIC

This opinion discusses the introduction of evidence in discharge boards involving child exploitation.

Text of the decision

We were asked to provide an opinion as to whether the government may introduce and display images and/or videos containing child pornography in discharge board cases.

We conclude the government may not introduce and display the actual images and/or videos containing child pornography in discharge board cases. However, the government may proffer the testimony of an investigating officer who viewed the images and/or videos to discuss where they were found and what they depict.

Background

Child pornography courts can be difficult, complex, and emotional trials. And court members can be fickle creatures. There is no statutory requirement to impose a sentence including a punitive discharge in child pornography cases,[1] and (much to the chagrin of many prosecutors) members may find an accused guilty of a child pornography offense without issuing such a sentence. Even if a court does adjudge a punitive discharge, for a variety of reasons the sentence could be overturned on appeal. Sometimes an offender is discovered by a local internet crimes against children task force, and the local or federal authorities maintained jurisdiction. There are a number of reasons why an Airman would be administratively discharge for possessing child pornography. The question that naturally arises is what evidence may be used to demonstrate a basis for discharge exists.

Law

In 1982, the United States Supreme Court observed that "the exploitative use of children in the production of pornography has become a serious national problem."[2] Congress has penalized certain activities relating to material constituting or containing child pornography. One may not mail, transport, or ship by any means, including by computer, any child pornography.[3] One may not knowingly receive or distribute any child pornography or any material that contains child pornography using any means of interstate or foreign commerce, including by computer.[4] The

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[1] *See* Title 10, United States Code (U.S.C.) § 934; see also Manual for Courts-Martial (MCM) United States (2019 Edition), Rule for Courts-Martial (R.C.M.) 1003, *Punishments*.
[2] *New York v. Ferber*, 458 U.S. 747, 749 (1982).
[3] *See* 18 U.S.C. § 2252A (a)(1).
[4] *See* 18 U.S.C. § 2252A (a)(2).

statute criminalizes many other acts relating to child exploitation. 18 U.S.C., Chapter 110 does not define "distribution", nor does it define who may lawfully view child pornography. The MCM defines distribution as delivery "to the actual or constructive possession of another,"[5] and explains wrongfulness is based on the fact or circumstances of the case.[6]

On July 27, 2006, the anniversary of the abduction of Adam Walsh, the son of John Walsh, host of the television program America's Most Wanted, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act.[7] The act created a national database of sex offenders at the Federal Bureau of Investigation, listing each sex offender and any other person required to register in a jurisdiction's sex offender registry. Congress amended 18 U.S.C. § 3509, adding subsection (m), prohibiting reproduction of child pornography: "In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title [18 USCS § 2256]) shall remain in the care, custody, and control of either the Government or the court."[8] Further, "[n]othwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in *any criminal proceeding*, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography ((as defined by section 2256 of this title [18 USCS § 2256]), so long as the Government makes the property or material reasonably available to the defendant."[9] (*Emphasis added*.)

Also in 2006 Congress found that "[i]t is imperative to prohibit the reproduction of child pornography in *criminal cases* so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a *criminal* defense."[10] (*Emphasis added*.)

In 2014, the Supreme Court opined, "In a sense, every viewing of child pornography is a repetition of the victim's abuse."[11] Additionally, in 2018, Congress made the following findings:

(1) The demand for child pornography harms children because it drives production, which involves severe child sexual abuse and exploitation.
(2) The harms caused by child pornography begin, but do not end, with child sex assault because child pornography is a permanent record of that abuse and trafficking in those images compounds the harm to the child.

…

(4) The American Professional Society on the Abuse of Children has stated that for victims of child pornography, "the sexual abuse of the child, the memorialization of that abuse which becomes child pornography, and its subsequent distribution and viewing become psychologically intertwined and each compound the harm suffered by the child-victim".

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[5] MCM, Section IV, paragraph 95c(6).
[6] MCM, Section IV, paragraph 95c(12).
[7] *Validity, Construction, and Application of 18 U.S.C.A. §3509 (m) Prohibiting Reproduction of Child Pornography Used as Evidence in Criminal Trials*, 47 A.L.R. Fed. 2d 25.
[8] 18 U.S.C. § 3509 (m)(1).
[9] 18 U.S.C. § 3509 (m)(2).
[10] Pub. L. No. 109-248, 120 Stat. 623 (2006).
[11] *Paroline v. United States*, 572 U.S. 434, 457 (2014).

(5) Victims suffer continuing and grievous harm as a result of knowing that a large, indeterminate number of individuals have viewed and will in the future view images of their childhood sexual abuse. Harms of this sort are a major reason that child pornography is outlawed.…[12]

Air Force Instruction 51-201 notes the "[r]esponsibility regarding handling of child pornography differs based on the status of the child pornography. Child pornography retained as evidence, not as court exhibits, is retained by AFOSI or other responsible law enforcement."[13]

Discussion

Congress has been clear in its purpose to limit the viewing and distribution of child pornography, even in the context of criminal trials. It only requires the Government to make the contraband "reasonably available" to the defendant for discovery purposes in criminal trials. For the purposes of courts-martial, legal offices are not the custodians of the evidence; rather, AFOSI or other law enforcement offices retain the contraband as evidence.

The Adam Walsh Act, and the other statutes cited above pertain to criminal trials. Administrative involuntary discharges are adverse administrative actions, not criminal trials. Congress did not discuss administrative involuntary discharges in its findings or any statute relating to child pornography. Yet it is clear alleged misconduct involving the possession, distribution, or production of child pornography could form the basis for an administrative involuntary discharge action.[14] The Government bears the burden to prove each factual allegation in the notification memorandum by a preponderance of the evidence.[15] But since the provisions in 18 U.S.C. Chapter 110 or the Adam Walsh Act relate to criminal trials, how does the Government meet its burden at administrative discharge boards?

The investigative agency in charge of the investigation will produce a report of investigation. That report will provide an explanation of how the investigators became aware of the alleged misconduct. It will describe where the contraband was found and will provide forensic information about the contraband. The Government can introduce portions of the report that are competent, relevant, material, and not unduly repetitious. Likewise, the investigator assigned to the case can testify about the contraband.

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[12] *Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018*, Pub. L. No. 115-299, 132 Stat. 4383 (2018).
[13] Air Force Instruction 51-201, *Administration of Military Justice*, 18 January 2019, paragraph 5.12.2.
[14] *See* 10 U.S.C. §§ 1181, 14902; Department of Defense Instruction (DoDI) 1332.14, *Enlisted Administrative Separations*, January 27, 2014 (Incorporating Change 3, Effective March 22, 2018); DoDI 1332.30, *Commissioned Officer Administrative Separations*, 11 May 2018; AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004 (Incorporating through Change 7, 2 July 2013) (last updated through AFGM2018-01, 14 June 2018); AFI 36-3208, *Administrative Separation of Airmen*, 9 July 2004 (Incorporating through Change 7, 2 July 2013) (last updated through AFGM2018-01, 14 June 2018); and AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, 14 April 2005 (Incorporating through Change 3, 20 September 2011).
[15] Air Force Manual (AFMAN) 51-507, *Enlisted Discharge Boards and Boards of Officers*, 24 January 2019, paragraph 5.1.2.1.1.

This does beg the question: if the Government cannot introduce the contraband during the discharge board, is the defense entitled to discovery of the actual contraband to prepare for the administrative discharge board? As mentioned, the Adam Walsh Act applies to criminal trials, not administrative boards. The Administrative Procedures Act (APA) does not discuss discovery or the introduction of child pornography at administrative proceedings.[16] There are cases that discuss the scope of discovery under the APA. Other courts have held, as a general rule, "all parties to [administrative proceedings] should be permitted access to whatever materials may be available for uncovering of relevant probative evidence for use [at the hearing]."[17]

"There is no question that due process requires the prosecution in a criminal case to disclose evidence in its possession which may be helpful to the accused. Presumably, the essentials of due process at the administrative level require similar disclosures by the agency where consistent with the public interest."[18] In *Sperry*, the plaintiff requested "far-reaching discovery and inspection of a mass of statements and documents accumulated by the Federal Trade Commission in the period from the commencement of the investigation to the present."[19] The court upheld the Commission's denial of his request because the denial was "based in substantial measure by balancing the necessity of allowing Sperry wide – if not complete – access to the Commission's files against the desirability of preventing the disclosure of information made confidential in the public interest by Commission Rule."[20] The plaintiff "ha[d] not shown that he has been 'denied the right to present its evidence,' or that the Commission [was] suppressing evidence essential to its defense."[21] The court also disagreed with Sperry's contention that the Commission's denial of its motion for discovery contravened statutory rights guaranteeing access to material evidence. The right under 5 U.S.C. § 556 to present a case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of facts does not extend to unlimited privilege to examine all of a commission's files.[22] The court conceded the Government had "facilities for investigation not available to a private litigant, as is customarily the case with Government agencies."[23] However, "to hold, as Sperry urges, that a respondent is therefore entitled to what appears to be tantamount to a complete disclosure of the Commission's files would be to fashion a new rule in administrative proceedings of very wide implications which would not be in the public interest."[24]

In the context of dismissal from the U.S. Merchant Marine Academy, the Second Circuit ruled that:

> [D]ue process only requires for the dismissal of a Cadet from the Merchant Marine Academy that he be given a fair hearing at which he is apprised of the charges against him and permitted a defense. It would be most unwise, if not impossible, for this Court to spell out in detail the specific components of a fair hearing in the context of expulsion from the Academy without

[16] *See* 5 U.S.C. Chapter 5.
[17] *In re Coca-Cola Co*., 1975 FTC Lexis 250 (FTC 1975).
[18] *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 142. (S.D.N.Y. 1966).
[19] *Id*., at 138.
[20] *Id*., at 142.
[21] *Id*., at 143.
[22] *Id*.
[23] *Id*., at 144.
[24] *Id*.

> the benefit of findings by a District Court because Regulations which appear harsh in the abstract to Judges more attuned to adversary civilian trials may prove entirely reasonable within the confines of Academy life. For the guidance of the parties, however, the rudiments of a fair hearing in broad outline are plain. The Cadet must be apprised of the specific charges against him. He must be given an adequate opportunity to present his defense both from the point of view of time and the use of witnesses and other evidence. We do not suggest, however, that the Cadet must be given this opportunity both when demerits are awarded and when dismissal is considered. The hearing may be procedurally informal and need not be adversarial.[25]

Other Second Circuit cases have also made clear that the procedural due process requirements that exist in other settings may not be required in the context of school and military disciplinary proceedings. *See, e.g.*, *Winnick v. Maning*, 460 F.2d 545, 549 (2d Cir. 1972) (recognizing that due process procedures vary with context; for example, "[t]he right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings"); *Andrews v. Knowlton*, 509 F.2d 898, 905 (2d Cir. 1975) ("[B]efore a cadet can properly be dismissed or separated from his service academy, he must have a hearing, be apprised of the specific charges against him, and be given an adequate opportunity to present his defense both from the point of view of time and the use of witnesses and other evidence. A military proceeding conducted within these bounds of procedural due process would be proper and immune from constitutional infirmity.").

Recently, the Eastern District of New York held the Merchant Marine Academy did not violate its existing rules when it required the cadet to conduct the cross-examination of the alleged victim through written questions asked by the Superintendent.[26] Although the plaintiff could not directly cross-examine the alleged victim, the Superintendent did not undermine his ability to present his case. The Superintendent did not limit plaintiff's "time to give an opening or question Academy witnesses, or his right to call his own witnesses."[27] Although the Superintendent did not call exculpatory witnesses on plaintiff's behalf, plaintiff "had the opportunity to call any witnesses that he believed would support his defense (and did call such witnesses)."[28] The limitations during the cross-examination also did not violate due process, as plaintiff "engaged in extensive cross-examination … and was given the opportunity to undermine his credibility in a number of different ways."[29]

The Eastern District of New York addressed procedural due process with respect to discovery at the Merchant Marine Academy in *Cassidy v. United States*.[30] Generally, "[d]ue process requires that individuals have 'notice and opportunity for hearing appropriate to the nature of the cases prior to a deprivation of life, liberty, or property."[31] "Notice must be 'reasonably calculated, under

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[25] *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967).
[26] *Doe v. United States Merch. Marine Acad.*, 307 F. Supp. 3d 121, 126 (E.D.N.Y. 2018).
[27] *Id.*, at 155.
[28] *Id.*
[29] *Id.*
[30] *Cassidy v. United States*, 2018 U.S. Dist. Lexis 198733; 2018 WL 6088146.
[31] Id., at 39 (citing *Rosa R. v. Connelly*, 889 F.2d 435, 438 (2d Cir. 1989) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950)); *see also Mathews v. Eldridge*, 424 U.S. 319,

all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[32] The court stated, "[i]n a suit under the [Administrative Procedures Act], discovery rights are significantly limited. The respondent agency must turn over the whole administrative record as it existed at the time of the challenged agency action, but normally no more."[33]

Additionally, "to determine in any given case what procedures due process requires, the court must carefully determine and balance the nature of the private interest affected and the government interest involved, taking into account history and the precise circumstances surrounding the case at hand."[34] Moreover, "deference is due to the agency's judgment as to what constitutes the whole administrative record … [and] an agency's designation of the administrative record is generally afforded a presumption of regularity."[35]

"The Constitution grants Congress 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'"[36] "Congress has exercised its control over military discipline through the Uniform Code of Military Justice, which 'establishes an integrated system of investigation, trial, and appeal that is separate from the criminal justice proceedings conducted in the U.S. district courts.'"[37] However, "Congress has directed the President to make the Rules for Court-Martial compatible with civilian justice 'so far as he considers practicable,' and the President has directed courts-martial to apply civilian rules of evidence as far as practicable."[38] In addition, "[t]he Court of Appeals for the Armed Forces (CAAF) has been cautious 'about applying statutes outside the Code to the conduct and review of court-martial proceedings' because it views the Uniform Code of Military Justice as 'Congress's primary expression of the rights and responsibilities of service members.'"[39] The CAAF has "not turned a blind eye … to all statutes outside the Code,"[40] and thereafter addressed the applicability of the Adam Walsh Act to courts-martial. In establishing the Adam Walsh Act, Congress made clear its purpose: "to restrict the viewing of child pornography and the repeated violation of victims' privacy."[41]

Given Congress's purpose in avoiding the repeated violation of victims' privacy rights, we decline to conclude Congress intended to permit discovery of child pornography in the administrative

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333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (quotations and citation omitted)).

[32] *Id*., citing *Rosa R.*, 889 F. 2d, at 438 (quoting *Mullane*, 339 U.S., at 314).

[33] *Cassidy*, 2018 U.S. Dist. Lexis, at 48 (quotations citations omitted).

[34] *Id*., at 39 (quoting *Wasson*, 382 F. 2d, at 811).

[35] *Id*., at 49 (quotations and citation omitted).

[36] *United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000) (citing *Weiss v. United States*, 510 U.S. 163 (2000)).

[37] *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998).

[38] Captain Sasha N. Rutizer, *Look But Don't Copy: How the Adam Walsh Act Shields Reproduction of Child Pornography in Courts-Martial*, 2012 Army Law. 17 (citing Article 36, Uniform Code of Military Justice, which empowers the President to prescribe rules for courts-martial "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 [federal civilian court].").

[39] *Id*. (quoting *Dowty*, 48 M.J., at 106).

[40] *Id*.

[41] *Id*., at 18.

discharge basis context absent a specific statutory provision to the contrary. Although the Adam Walsh Act and 10 U.S.C. § 3509 (m)(2) direct the Government to provide "ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial," the context of the act is "any criminal proceeding," not adverse administrative actions.[42] Congress provided the Service Secretaries with statutory bases to separate military personnel and was aware those provisions existed when it added paragraph (m) to Section 3509.

In discharge cases in which child pornography is a basis, neither the separation authority (for enlisted members) nor the Show Cause Authority (for officers) will need to review the contraband prior to ordering a board. However, Respondent must receive a full and fair hearing. Respondent must receive notice of the charges against him/her and a fair opportunity to present a defense. Respondent should also receive the opportunity to appear, and to present statements, evidence, and witnesses on his/her behalf. Respondent's counsel is permitted (and encouraged) to cross examine the government's witness(es) who testify about the contraband. Counsel may attempt to impeach the credibility of the witness. Counsel may attack the witness' memory of what is in the report or of the contraband itself. Counsel may dispute the reliability of the report. Counsel may argue Respondent did not have access or control to the media device on which the contraband was discovered when the misconduct allegedly occurred. Counsel may assert Respondent did not knowingly download the images. But in the context of administrative discharge boards, Respondent and Respondent's Counsel have no right to inspect, view, or examine the contraband evidence.

Conclusion

As established above, the Government cannot introduce the actual images or videos of child pornography during the board hearing. As such, the administrative record will not contain the actual images, videos, or depictions. The Adam Walsh Act applies to criminal trials, not administrative discharge boards, and accordingly does not mandate that Respondent's Counsel be provided the opportunity to review the images prior to the board hearing. Respondent receives procedural due process so long as Respondent receives notice of the basis for discharge and a fair opportunity to present a defense, and to appear and present statements and witnesses on his or her behalf.

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[42] 10 U.S.C. § 3509 (m).