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## MILITARY JUSTICE EDITION

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THE DEMISE OF *UNITED STATES V. WILSON*: A SUGGESTED  
APPROACH TO C.A.A.F.’S CALL FOR CHANGE

*COLONEL LOUIS J. PULEO\**

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## I. INTRODUCTION

Staff judge advocates stubbornly adhere to the standardized format for the convening authority's action and promulgating order set out in the Manual for Courts-Martial (MCM)<sup>1</sup> despite a historical record of drafting errors. This unquestioning obedience leads to unnecessary appellate litigation and, at times, unintended windfalls for appellants.<sup>2</sup> Recent decisions by the Court of Appeals for the Armed Forces (C.A.A.F.) serve to highlight the dire consequences that can follow when inattention is coupled with the awkward grammatical construction that currently exists in the model forms. This article proposes a new format for drafting the convening authority's action and promulgating orders based on the following principles: (1) address each step of the convening authority's action—"approve, act, execute"—separately; (2) address and resolve, within the action, some of the more common post-trial issues that arise; and (3) address the requirements as generically as is appropriate to avoid, to the extent one can, drafting errors. This format revision, which has been suggested on a number of occasions by C.A.A.F.,<sup>3</sup> is, however, no substitute for the staff judge advocate's careful review and oversight of post-trial matters to ensure accurate and timely processing. To the extent drafting errors can be avoided, it remains the responsibility of the staff judge advocate.<sup>4</sup>

Of the number of examples from which to choose, *United States v. Wilson* serves as the seminal reminder of how slavish adherence to form can result in an unintended windfall for the appellant.<sup>5</sup> Convicted of rape, assault, adultery, and unlawful entry into a dwelling, Wilson was sentenced to eight years of confinement, forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge.<sup>6</sup> In taking action, the convening authority disapproved all confinement in excess of three years and three months, and sought to approve and execute the remaining punishment as

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<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 16 and 17 (2008) [hereinafter MCM].

<sup>2</sup> *E.g.*, *United States v. Wilson*, 65 M.J. 140 (2007) (finding, after the accused was convicted of rape, adultery, assault and unlawful entry, that the convening authority's action unambiguously disapproved the dishonorable discharge despite contrary evidence in the record of trial); *see also* *United States v. Johnson-Sanders*, 48 M.J. 74, 75 (1998) (Crawford, J., dissenting) (noting the proliferation of unnecessary post-trial errors that have resisted the Court's attempts to "stem[] the tide" of such errors); *United States v. Garza*, 61 M.J. 799 (A. Ct. Crim. App. 2005) (finding clerical error when convening authority's action failed to mention adjudged punitive discharge); *United States v. Yarbrough*, 36 M.J. 1071, 1075 (A.C.M.R. 1993) (Crean, J., concurring) ("Too many cases before this Court are so replete with senseless administrative errors that someone viewing the military justice system from the outside could conclude that it was being administered by a group of bumbling idiots out of a 'Looney Tunes' cartoon . . .").

<sup>3</sup> *United States v. Politte*, 63 M.J. 24, 26 n.11 (2006); *see Wilson*, 65 M.J. at 141.

<sup>4</sup> *United States v. Johnston*, 51 M.J. 227, 229 (1999) (lamenting the numerous cases involving "sloppy staff work and inattention to detail.").

<sup>5</sup> *Wilson*, 65 M.J. at 140.

<sup>6</sup> *Id.* at 140-41.

follows: “[t]he remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed.”<sup>7</sup> On review, the Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence, including the adjudged dishonorable discharge.<sup>8</sup> Raising the issue on appeal to C.A.A.F., Wilson claimed that the lower court erred by approving the dishonorable discharge despite the convening authority’s clear and unambiguous statement to the contrary.<sup>9</sup>

Recognizing the “substantial discretion” with which the convening authority is vested in taking action on a court-martial sentence and relying on the “clear and unambiguous” expression by the convening authority in this case, C.A.A.F. held that when the action is “facially complete and unambiguous,” its meaning will be given effect.<sup>10</sup> Thus, in the majority’s view, the plain language of the action was an unambiguous statement that the convening authority had disapproved the dishonorable discharge.<sup>11</sup>

The Court’s opinion in *Wilson* drew two dissents. Both dissenting judges agreed with the fundamental principle that a convening authority’s action should be given effect when complete and unambiguous. Chief Judge Effron, however, disputed whether the action in this case complied with extant regulations, and thus, whether the action was “complete.”<sup>12</sup> Relying on a change in the 1984 Manual for Courts-Martial,<sup>13</sup> which mandated an explicit expression of approval or disapproval from the convening authority when acting on a sentence, the Chief Judge found the action in *Wilson* “incomplete” because it did not expressly disapprove the dishonorable discharge.<sup>14</sup> Thus “incomplete,” it would be necessary to return the case to the convening authority for corrective action.<sup>15</sup>

Judge Baker, interpreting the same language, found that while one sentence in the action disapproved confinement in excess of three years and three months, another sentence, that approved the remaining punishment, placed the dishonorable discharge in “limbo” between that which is expressly disapproved and that which is expressly approved.<sup>16</sup> He argued that while not “incomplete,” as Chief Judge Effron found, the language did result in ambiguity, which would require remand in order to clarify the convening authority’s intent.<sup>17</sup>

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<sup>7</sup> *Id.* at 141.

<sup>8</sup> *Id.* at 140.

<sup>9</sup> *Id.*

<sup>10</sup> *Wilson*, 65 M.J. at 142.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> MCM, *supra* note 1, R.C.M. 1107(d)(1) (1984).

<sup>14</sup> *Wilson*, 65 M.J. at 142-43.

<sup>15</sup> *Id.* at 143.

<sup>16</sup> *Id.* at 144.

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

Despite the divergence of opinions in *Wilson*, the majority's focus on the plain language of the action paragraph illustrates the consequences of continuing to rely upon the method and language of the current forms contained in the MCM. Regardless of whether the grammatical construction of an action is ultimately viewed as "clear and unambiguous," "ambiguous," or "incomplete," there is little doubt that the convening authority in *Wilson* did not intend to disapprove the punitive discharge and, as a consequence of sloppy drafting, the accused received an unintended windfall. Yet, the fault lies not only with those who draft the post-trial documents<sup>18</sup> but also on the ungainly forms upon which they rely. As Judge Crawford observed, "since [the Court's] return of these cases has neither stemmed the tide of post-trial errors by SJAs nor resulted in timely and meaningful review by convening authorities, I suggest that it is time to explore alternatives."<sup>19</sup> This article heeds that call and proposes an alternative model to the current format for actions and promulgating orders.

The need for change gathers support as *Wilson*'s progenies engender similar inequities. In *United States v. Burch*, the Court looked at whether the appellant was prejudiced by spending 223 days in confinement beyond that authorized by the convening authority's action.<sup>20</sup> Convicted of willfully damaging military property, assault consummated by a battery, and assault consummated by a battery upon a child under the age of sixteen, Burch was sentenced to confinement for one year, reduction to E-1, and a bad conduct discharge.<sup>21</sup> In accordance with the terms of the pretrial agreement, the convening authority was obligated to suspend all confinement in excess of forty-five days provided the accused committed no further misconduct during the probationary period.<sup>22</sup> After serving his agreed upon sentence to confinement, but prior to the convening authority's action, Burch committed "further misconduct," violating the conditions of his pretrial agreement.<sup>23</sup> The command properly vacated the suspension and placed the accused in the brig to serve the remainder of the adjudged sentence.<sup>24</sup> Unfortunately, in his action, the convening authority provided that the "execution of that part of the sentence adjudging confinement in excess of 45 days is suspended for a period of 12 months."<sup>25</sup> Neither the accused nor his defense counsel

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<sup>18</sup> *Johnston*, 51 M.J. at 231 (Crawford, J., dissenting) ("I agree with the majority that the Judge Advocate General . . . should be aware of the numerous cases that are coming before this Court due to sloppy staff work and inattention to detail.").

<sup>19</sup> *Johnson-Sanders*, 48 M.J. at 75 (Crawford, J., dissenting).

<sup>20</sup> 67 M.J. 32 (2008).

<sup>21</sup> *Id.* at 32-33.

<sup>22</sup> *United States v. Burch*, 2007 CCA LEXIS 351, at \*11-\*13 (N-M. Ct. Crim. App. Sept. 13, 2007) (under the terms of the pretrial agreement, the probationary period began after trial and continued through the period of suspension).

<sup>23</sup> *Id.* at \*12.

<sup>24</sup> *Id.* at \*13-\*14.

<sup>25</sup> *Id.* at \*14.



protested confinement beyond forty-five days nor did the accused take any steps to contest the vacation of his suspension.<sup>26</sup>

The Navy-Marine Corps Court of Criminal Appeals, interpreting *Wilson*, found itself limited to the “four corners of the unambiguous and complete” convening authority’s action despite the “glaring inconsistency with the rest of the record,” which clearly indicated the convening authority’s intent to vacate the suspension and execute the remainder of the accused’s sentence to confinement.<sup>27</sup> Constrained by *Wilson*, the court found that the accused’s Fifth Amendment right to due process had been violated when he was held in confinement after the convening authority’s action purported to suspend all confinement beyond forty-five days.<sup>28</sup> However, in a clever analysis, the service court addressed whether the violation prejudiced the accused by applying the harmless beyond a reasonable doubt test.<sup>29</sup> Recognizing *Wilson* for the limited purpose of determining the approved sentence only with reference to the language contained in the convening authority’s action, the lower court found that *Wilson* did not apply when assessing prejudice.<sup>30</sup> Accordingly, nothing in *Wilson* prevented the court from looking to the entire record to determine whether the error was harmless beyond a reasonable doubt.<sup>31</sup> Turning to the record, the court had no trouble finding that the convening authority did not intend to release the accused at the time of his action and the accused’s continued confinement, serving the remainder of his adjudged confinement, was due to his breach of the pretrial agreement arising from his own misconduct.<sup>32</sup>

C.A.A.F., chastising the lower court for its “novel precept that confinement not authorized by a convening authority’s action does not prejudice an accused because of events preceding the action,” reiterated its holding in *Wilson* even more forcefully: “‘when the plain language of the convening authority’s action is facially complete and unambiguous, its meaning must be given effect,’ without reference to circumstances not reflected in the action itself.”<sup>33</sup> Clearly then, drafting errors within the convening authority’s action, despite evidence to the contrary on the record, will provide unintended relief to the accused.

So far, all attempts to moderate *Wilson*’s impact have been frustrated. In *United States v. Dowis*, the Navy-Marine Corps Court of Criminal Appeals found ambiguity in the convening authority’s action, despite the unambiguous declaration that “the sentence is approved, with the exception of the bad conduct discharge, and will be executed,” because the

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<sup>26</sup> *Id.* at \*18.

<sup>27</sup> *Id.* at \*16.

<sup>28</sup> *Burch*, 2007 CCA LEXIS 351 at \*16.

<sup>29</sup> *Id.* at \*17-\*20.

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

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

<sup>32</sup> *Id.* at \*19.

<sup>33</sup> 67 M.J. at 33.

action also contained a provision forwarding the case for review under Article 66, Uniform Code of Military Justice (UCMJ).<sup>34</sup> Had the convening authority intended to disapprove the punitive discharge, which was the only punishment vesting the court with jurisdiction, he would not have forwarded the case for review under Article 66, UMCJ. Relying on this internal incongruity, the court remanded the case to clarify the convening authority's intent.<sup>35</sup> In a summary disposition, C.A.A.F. overturned the lower court, citing *Wilson*, putting to an end any attempt to infuse ambiguity into the otherwise plain language of the action itself by way of internal inconsistencies within the "four corners" of the document.<sup>36</sup>

In *United States v. Lawhorn*, the Navy-Marine Corps Court of Criminal Appeals, against the backdrop of *Dowis*, found that the convening authority disapproved the bad conduct discharge when the action stated, "the sentence with the exception of the bad conduct [sic] discharge is approved and will be executed."<sup>37</sup> Recognizing the draconian consequences of *Wilson*, the Court counseled the military justice community to adhere to the forms contained in Appendix 16 of the Manual for Courts-Martial.<sup>38</sup> The Court warned:

[Staff Judge Advocates] deviate from the model language in Appendix 16 of the Manual for Courts-Martial at their peril, and at the peril of their [Convening Authority] clients. When faced with an action that deviates from Appendix 16, and knowing that adherence to the Appendix generally results in an action whose meaning is unambiguous, this court may ultimately conclude that the use of different language is a deliberate, unambiguous attempt to produce a result other than that which the model language is intended to accomplish.<sup>39</sup>

This "adherence" or, more specifically, the inattentive attempts to do so, are exactly the problem. Appendix 16 forms seek to accomplish three separate processes, i.e., approval, action, and execution, in one poorly constructed sentence. This slavish devotion to the wording in Appendix 16, in the face of continuing drafting errors, is the wrong approach.<sup>40</sup> Rather, the military

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<sup>34</sup> 2007 CCA LEXIS 435, at \*2 (N-M. Ct. Crim. App. Oct. 23, 2007).

<sup>35</sup> *Id.* at \*3.

<sup>36</sup> *United States v. Dowis*, 66 M.J. 384 (2008).

<sup>37</sup> 2009 CCA LEXIS 77, at \*4 (N-M. Ct. Crim. App. Feb. 27, 2009).

<sup>38</sup> MCM, *supra* note 1, app. 16.

<sup>39</sup> *Lawhorn*, 2009 CCA LEXIS 77, at \*9-\*10.

<sup>40</sup> *E.g., Politte*, 63 M.J. at 25 (" . . . the sentence is approved except for that part of the sentence extending to a bad conduct discharge."); *United States v. Gosser*, 64 M.J. 93, 95 (2006) (" . . . except for the bad-conduct discharge, the sentence is approved and ordered executed."); *Dowis*, 2007 CCA LEXIS 435, at \*3, *rev'd*, 66 M.J. 384 (2008) (" . . . the

justice community should realize the error of its historic ways and change the model language and format.

## II. THE FORM

The remainder of this article suggests such a change, and the text that follows is intended to correspond to the model form set forth in Appendix 1. The format includes both the initial convening authority's action and the required contents of the promulgating order (Court-Martial Order).<sup>41</sup> Practitioners should modify the model to conform to case-specific circumstances and unique service regulations.

While the convening authority's action and the promulgating order are two distinct concepts, they are usually combined within one document, the promulgating order,<sup>42</sup> and both are given effect if personally signed by the convening authority.<sup>43</sup> Although it may address other matters, the primary purpose of the convening authority's action is to set forth, in writing, the convening authority's decision on the adjudged sentence.<sup>44</sup> The promulgating order's purpose is to publish the results of trial and the convening authority's action.<sup>45</sup> All services have regulations concerning the publication, format, and distribution of the convening authority's action and promulgating court-martial order.<sup>46</sup> The format proposed by this article attempts to address and incorporate, when possible, the requirements for each of the services.

Following the familiar outline contained in Appendix 17, MCM, the proposed promulgating order incorporates all the requirements set forth by Rule for Courts-Martial (R.C.M.) 1114(c), *viz.*, type of court-martial, convening command, the charges and specification (or a summary thereof), accused's pleas, findings or disposition for each specification and charge, the sentence, and the convening authority's action (or a summary).<sup>47</sup>

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sentence is approved, with the exception of the bad conduct discharge, and will be executed.”).

<sup>41</sup> See AIR FORCE INSTRUCTION 51-201, ¶10.8.1 (Dec. 21, 2007) [hereinafter AFI 51-201] (“Prepare initial CMOs when the convening authority takes action on a case where the court returned any finding of guilty and a sentence.”); NAVY JUDGE ADVOCATE GENERAL INSTRUCTION. 5800.7E w/ Chg 1 and 2, MANUAL OF THE JUDGE ADVOCATE GENERAL, ¶ 0155a (June 20, 2007) [hereinafter JAGMAN] (“The promulgating order and convening authority's action may be continued within the same document, when signed personally by the convening authority.”).

<sup>42</sup> *Id.*

<sup>43</sup> Compare MCM, *supra* note 1, R.C.M. 1107(f)(1) (requiring convening authority to personally sign the action), with R.C.M. 1114(e) (authentication of promulgating order requires either personal signature of the convening authority or “a person acting under the direction of” the convening or other substitute authority).

<sup>44</sup> MCM, *supra* note 1, R.C.M. 1107(f)(1).

<sup>45</sup> MCM, *supra* note 1, R.C.M. 1114(a)(2).

<sup>46</sup> JAGMAN, ¶ 0155; AFI 151-20, ch. 10; ARMY REGULATION, 27-10, ch. 12, MILITARY JUSTICE, (Nov. 16, 2005) [hereinafter AR 27-10].

<sup>47</sup> MCM, *supra* note 1, R.C.M. 1114(c)(1).

## A. DNA Processing

Federal law requires the collection of DNA samples from service members convicted of certain “qualifying offenses,”<sup>48</sup> which are, in part, offenses under the UCMJ “for which a sentence of confinement for more than one year may be imposed.”<sup>49</sup> Implementing this requirement, a Department of Defense directive requires commanders and staff judge advocates to annotate on “the top of all post-trial Confinement Orders...and the top of the first page of all initial promulgation orders, in bold with ‘**DNA processing required. 10 U.S.C. §1565.**’”<sup>50</sup> This requirement is applicable to Department of Defense members, as well as the Department of Homeland Security for Coast Guard personnel.<sup>51</sup>

## B. Heading and Dates

The heading of the promulgating order satisfies the requirements to identify the command that convened the court-martial, the type of court-martial,<sup>52</sup> as well as incorporates any sequential numbering system adopted by the services.<sup>53</sup> The date of the promulgating order shall be the same as the date the convening authority took action.<sup>54</sup> Any corrections to a promulgating order, which cause another order to be republished in its place, should bear the date of the initial action.<sup>55</sup>

## C. Charges

The charges and specifications, or a summary thereof, along with the pleas, findings “or other disposition of each charge and specification,” must be included in the promulgating order.<sup>56</sup>

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<sup>48</sup> 10 U.S.C. § 1565 (2010).

<sup>49</sup> 10 U.S.C. § 1565(d)(1).

<sup>50</sup> Memorandum from Secretary of Defense, subject: DoD Policy on Collecting DNA Samples from Military Prisoners, (Apr. 18, 2005); see AR 27-10, app. F (list of qualifying offenses); AFI 51-201, fig. 13.2; NAVY, SECNAV Notice 5800, subj: Policy For Implementing the Deoxyribonucleic Acid (DNA) Analysis Backlog Elimination Act of 2000 (June 6, 2002).

<sup>51</sup> Memorandum from Secretary of Defense, *supra* note 50.

<sup>52</sup> MCM, *supra* note 1, R.C.M. 1114(c)(1).

<sup>53</sup> AFI 51-201, ¶ 10.5; AR 27-10, ¶ 12-5; JAGMAN, ¶ 0155.

<sup>54</sup> MCM, *supra* note 1, R.C.M. 1114(c)(2).

<sup>55</sup> *United States v. Diaz*, 40 M.J. 335, 338 n.1 (1994).

<sup>56</sup> MCM, *supra* note 1, R.C.M. 1114(c)(1); *United States v. Alexander*, 63 M.J. 269, 274 (2006); *United States v. Beram*, 1992 CMR LEXIS 445 (N.M.C.M.R. Apr. 13, 1992) (listing specification by numbers only does not satisfy the summary description requirement of R.C.M. 1114(c)).

It is recommended that the promulgating order recite each specification verbatim and not rely on a “summery thereof.”<sup>57</sup> Summaries invite ambiguity and raise questions concerning whether the convening authority approved certain factual or aggravating aspects of a specification that may have been omitted from the summary of the specification. In *United States v. Alexander*, C.A.A.F. addressed whether the convening authority “approved” certain sentencing enhancing factors that were omitted from the Staff Judge Advocate’s Recommendation (SJAR).<sup>58</sup> The question presented was whether the convening authority had approved the accused’s conviction for use of marijuana, while receiving special pay,<sup>59</sup> when: the SJAR<sup>60</sup> did not include the aggravating circumstance of “while receiving special pay” in the summary of the offense and the convening authority’s action did not specifically address the findings, but the promulgating order set forth the specification verbatim and noted that the accused was found guilty of the aggravating circumstance.<sup>61</sup>

Concurrently with *Alexander*, the Court addressed the case of *United States v. Vanderschaaf*,<sup>62</sup> which presented a similar question of whether the convening authority had approved several specifications alleging the use of drugs “on divers occasions,” when the SJAR’s summary of the charges did not include the phrase “on divers occasions.”<sup>63</sup> Similar to *Alexander*, the promulgating order recorded the specifications as charged and noted the accused was found guilty of drug use on “divers occasions.”<sup>64</sup> Distinguishing cases where the SJAR entirely omits any reference to a specification,<sup>65</sup> from cases where the SJAR merely omits some aggravating factors or details of the specification, the Court found that as long as a general description of the specification was given in the SJAR, the appellate courts could apply the presumption that the convening authority approved the findings rendered by the court-martial.<sup>66</sup>

While a general description may be “close enough”<sup>67</sup> for purposes of curing any ambiguity among the SJAR, the action, and the promulgating order, ambiguities or omissions in the promulgating order will, at the very least, lead to unnecessary appellate litigation and may require corrective

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<sup>57</sup> MCM, *supra* note 1, R.C.M. 1114(c)(1).

<sup>58</sup> 63 M.J. 269, 270 (2006).

<sup>59</sup> “While receiving special pay under 37 U.S.C. § 310” is an aggravating circumstance that must be pled and, if proven, adds five years to the maximum sentence authorized. MCM, pt. IV, ¶ 37 (2005).

<sup>60</sup> MCM, *supra* note 1, R.C.M. 1106.

<sup>61</sup> *Alexander*, 63 M.J. at 271.

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

<sup>63</sup> *Id.* at 271-72.

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

<sup>65</sup> *Diaz*, 40 M.J. at 337-38.

<sup>66</sup> *Alexander*, 63 M.J. at 275-76.

<sup>67</sup> *Id.* at 278 (Erdmann, J., concurring in part, dissenting in part).

action.<sup>68</sup> It is recommended that the promulgating order record the specifications verbatim; however, exceptions should be made for voluminous or repetitive charges and specifications. To avoid ambiguity and challenge on appeal, in those cases where a summary is appropriate, it should sufficiently describe the nature of the offense and any aggravating factors relevant to the maximum punishment.

#### D. Sentence

The promulgating order shall contain the sentence adjudged by the court-martial<sup>69</sup> and the date the sentence was adjudged.<sup>70</sup> Beyond merely recording the adjudged sentence, the purpose of the promulgating order is to publish the convening authority's action on the sentence. In doing so, it is useful to remember the sequence of post-trial events as they relate to the sentence in order to avoid confusion. Starting with the sentence adjudged at court-martial and prior to the convening authority's action, certain adjudged punishments take effect within that intervening period by operation of law, without any further direction by the convening authority.<sup>71</sup> If the convening authority wants to "postpone" these punishments from taking effect until taking action in the case, he must defer<sup>72</sup> the punishment either for a specific period of time or until a certain event, such as his action.<sup>73</sup> Upon taking action on the sentence, he must do so in the following sequence: (1) approve the sentence; (2) act on the sentence if he desires to change the quality, quantity, or type of the punishment; and (3) order the sentence executed.<sup>74</sup> As reflected within the proposed model, it is important to keep the sequence of "approve, act, execute," in mind as it relates to post-trial processing of a case.

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<sup>68</sup> United States v. Ord, 63 M.J. 279, 280 (2006) (affirming lower court's judgment returning case for new SJAR and convening authority's action when the initial promulgating order and SJAR omitted mention of a guilty finding).

<sup>69</sup> MCM, *supra* note 1, R.C.M. 1114(c).

<sup>70</sup> MCM, *supra* note 1, R.C.M. 1114(c)(2); United States v. Zeltinger, 65 M.J. 298 (2007) (directing promulgating order be corrected to include date the sentence was adjudged).

<sup>71</sup> UCMJ art. 58a and 58b (2010) (reduction and forfeiture of pay by operation of law); United States v. Phillips, 64 M.J. 410, 412 (2007) (citing Article 57(a)(1) recognizing certain adjudged punishments like forfeiture and reduction take effect prior to convening authority's action).

<sup>72</sup> MCM, *supra* note 1, R.C.M. 1101(c)(1) ("Deferment of a sentence...is a postponement of the running of the sentence.").

<sup>73</sup> MCM, *supra* note 1, R.C.M. 1101(c)(6).

<sup>74</sup> MCM, *supra* note 1, R.C.M. 1107.

## E. Approval

The convening authority must act on the adjudged sentence by approving, disapproving, changing, commuting, suspending, remitting, or mitigating the sentence, in whole or in part.<sup>75</sup> However, his first act must be to expressly approve or disapprove of the adjudged sentence.<sup>76</sup> Simple statements of approval or disapproval are recommended to avoid the drafting errors caused by the awkward grammatical structure of the present MCM forms. To accomplish this simplicity, the recommended model separates the approval/disapproval paragraph into discrete parts: (1) explicitly state that part of the sentence that is disapproved; (2) specifically approve the remaining portion of the sentence; and (3) identify with particularity the final approved sentence. This approach would minimize any drafting errors or ambiguity, since the sentence that the convening authority finally approves is expressly listed within the action and not left to be deduced by the appellate court based upon the parts of the sentence that were approved or disapproved.<sup>77</sup>

One other feature in the proposed form includes articulating the convening authority's rationale for taking a particular action, which is repeated throughout the model promulgating order/action. Although the convening authority does not have to state his reason for taking a particular action,<sup>78</sup> it is recommended that he do so in order to clearly communicate his intent for the reviewing authorities. This recommendation serves two purposes: (1) such a statement of purpose would minimize appellate litigation if the convening authority took corrective action to mitigate a trial error, and (2) it would avoid granting an accused a windfall when, for example, the convening authority provides sentencing relief as a matter of corrective action but without explanation and the appellant later claims on appeal that the favorable action was a matter of clemency and asks the appellate court to take additional remedial measures to address the same legal error.<sup>79</sup>

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<sup>75</sup> UCMJ art 60(c)(1) and (2) (2010); MCM, *supra* note 1, R.C.M. 1107(d); United States v. Pfluger, 65 M.J. 127 (2007).

<sup>76</sup> MCM, *supra* note 1, R.C.M. 1107(d)(1) ("The approval or disapproval [of the sentence] shall be explicitly stated.").

<sup>77</sup> *E.g.*, United States v. Shumante, 2008 CAAF LEXIS 1288 (C.A.A.F. Oct. 16, 2008) (noting the ambiguity in a convening authority's action that purported to suspend a punishment that was not approved).

<sup>78</sup> MCM, *supra* note 1, R.C.M. 1107(c).

<sup>79</sup> *E.g.*, United States v. Brennan, 58 M.J. 351, 355 (2003) (finding illegal post-trial confinement, the Court remanded case for corrective action after assuming that favorable action taken by the convening authority was a matter of clemency rather than corrective action); *see also* United States v. Hamilton, 47 M.J. 32 (1997) (remedial power of convening authority); United States v. Hill, 27 M.J. 293 (1988) (recognizing power of the convening authority to take corrective action and thus avoid corrective action on appeal).

The convening authority does not have to approve or act on the findings, unless he intends to disapprove a finding of guilty or change a finding of guilty to guilty to a lesser-included offense.<sup>80</sup> If he does not act specifically on the findings, he is deemed to implicitly approve the findings.<sup>81</sup> Under previous MCM provisions,<sup>82</sup> the staff judge advocate was required to report in his recommendation the findings and sentence adjudged by the court-martial. If the staff judge advocate erroneously reported the findings to the convening authority, it was presumed that the convening authority approved only those findings as reported by the SJAR and not those that were actually found at the court-martial. In *United States v. Diaz*, when the staff judge advocate failed to include in his recommendation the findings of guilty to certain specifications and the convening authority took no specific action related to the findings, “in absence of any more compelling evidence to the contrary, [the convening authority] implicitly approves the findings as they are reported to him” within the SJAR.<sup>83</sup> In such a case, the record would be returned to the command for a new post-trial processing unless the appellate court determines that dismissing the affected finding would “not prejudice the appellant and would ‘adequately vindicate the interests of military society.’”<sup>84</sup>

Since the amendments to R.C.M. 1106,<sup>85</sup> the staff judge advocate is no longer required to list the charges, specifications, pleas, and findings in his recommendation.<sup>86</sup> However, the holding in *Diaz* is not without continuing consequence: thus, one must ensure that the results of trial, which now must be provided to the convening authority by the staff judge advocate, accurately reflect the findings of the court-martial.<sup>87</sup> If they do not, extending the Court’s rationale in *Diaz*, the accused will claim that the convening authority approved only the findings as reflected by the results of trial and not those actually found by the court-martial.

The suggested model follows the traditional approach for changing a finding of guilty to a lesser-included offense or for disapproving findings of guilty to a specification.<sup>88</sup> Thus, if the convening authority does disapprove a specification without ordering a rehearing, he should dismiss that specification.<sup>89</sup>

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<sup>80</sup> MCM, *supra* note 1, R.C.M. 1107(c).

<sup>81</sup> *United States v. Alexander*, 63 M.J. 269, 275 (2006); *United States v. Diaz*, 40 M.J. 335, 343 (1994).

<sup>82</sup> MCM, *supra* note 1, R.C.M. 1106(d)(3)(A) (current version at Exec. Order No. 13,468, 73 Fed. Reg. 43827, 43830-31 (July 28, 2008)).

<sup>83</sup> 40 M.J. at 343.

<sup>84</sup> *Alexander*, 63 M.J. at 275 (quoting *Diaz*, 40 M.J. at 345).

<sup>85</sup> Exec. Order No. 13,468, 73 Fed. Reg. 43827 (July 28, 2008).

<sup>86</sup> Compare MCM, *supra* note 1, R.C.M. 1106(d)(3)(A), with Exec. Order No. 13,468, 73 Fed. Reg. 43827, 43830-31 (July 28, 2008) (amendments to R.C.M. 1106(d)).

<sup>87</sup> Exec. Order No. 13,468, 73 Fed. Reg. at 43831.

<sup>88</sup> MCM, *supra* note 1, app. 16 (2008).

<sup>89</sup> MCM, *supra* note 1, R.C.M. 1107(c)(2)(A).



## F. Action

The proposed form does not contain all the various permutations that could be used by the convening authority in his action and Appendix 16, MCM, remains an important reference resource. However, the proposed model contains some important stylistic modification. For example, when dealing with suspending confinement the proposed format suggests addressing each component part separately, i.e., (1) identify the amount of confinement to be suspended; (2) specify beginning and ending of the suspension period; and (3) account for the remission<sup>90</sup> of the confinement at the end of the suspension period.<sup>91</sup> This method, similar to separating the disparate parts that make up the convening authority's action, is designed to address each aspect of suspension in order to avoid drafting errors that may occur under the present model.<sup>92</sup>

Note that the "Action" section of the proposed form incorporates the same statement of convening authority's intent as was suggested in the "Approval" section. To reiterate, this evidences the convening authority's rationale for taking the action, which although not required,<sup>93</sup> will avoid providing an accused a windfall if the convening authority has already taken corrective action in order to address legal error.<sup>94</sup> Furthermore, such an approach may avoid any ambiguity, such as whether sentencing relief was granted because of the pretrial agreement or because of other circumstances that are not evident to the court on appeal.

In order to avoid other ambiguous circumstances, the proposed model does address some of the actions dealing with forfeiture of pay and reduction in pay grade. One important suggestion is to note the accused's end of enlistment within the action. This reminder will help avoid the consequences of *United States v. Perron*.<sup>95</sup> If the pretrial agreement contemplates suspending forfeitures, either adjudged or by operation of law, it is imperative that the parties acknowledge and avoid events that could defeat the intent of the parties, potentially vitiating the knowing and

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<sup>90</sup> MCM, *supra* note 1, R.C.M. 1108(a) ("Remission cancels the unexecuted part of the sentence to which it applies.").

<sup>91</sup> MCM, *supra* note 1, R.C.M. 1108(a) (upon successful completion of the probationary period, the suspended part of the sentence shall be remitted); R.C.M. 1108(d) ("The convening authority shall provide in the action that unless the suspension is sooner vacate, the expiration of the period of suspension shall remit the suspend portion of the sentence.").

<sup>92</sup> See *supra* note 3.

<sup>93</sup> *United States v. Finster*, 51 M.J. 185, 186 (1999) (recognizing that one "distinguishing" feature of the military justice system is the convening authority's "unfettered" discretion over the sentence "without having to state a reason."); MCM, *supra* note 1, R.C.M. 1107(d).

<sup>94</sup> See *United States v. Brennan*, 58 M.J. 351, 355 (2003) (finding illegal post-trial confinement, the Court remanded the case for corrective action after assuming that favorable action taken by the convening authority was a matter of clemency rather than corrective action); *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988) (recognizing power of the convening authority to take corrective action and thus avoid corrective action on appeal).

<sup>95</sup> 58 M.J. 78 (2003).

voluntary aspects of the pleas.<sup>96</sup> This would result in setting aside the findings and sentence.<sup>97</sup> In *Perron*, the expiration of the accused's enlistment placed him in a no pay status. Therefore, the intended benefit of the accused's pretrial agreement that required the convening authority to suspend forfeitures could not be realized.<sup>98</sup> Because the forfeiture provision was a material term of the agreement, the Court found that the government's breach, predicated on a mutual misunderstanding of the parties, rendered the accused's pleas involuntary and improvident.<sup>99</sup> As such, the findings and sentence were reversed, and the case was remanded for a rehearing.<sup>100</sup>

The circumstances that can undermine the pretrial agreement's forfeiture protection provisions are numerous and varied.<sup>101</sup> For example, if the pretrial agreement contemplates a specified amount of money as support for the accused's family, failure to take into account a reduction in grade may act as a breach of the agreement, if the effect was to reduce the amount available to the accused. Thus, when constructing forfeiture protection for the benefit of the accused's family,<sup>102</sup> the government must ensure that the accused is not only protected from forfeitures, adjudged and mandatory,<sup>103</sup> but also from any reduction in pay grade, adjudged and mandatory, that would reduce or eliminate the agreed upon support protections.<sup>104</sup> Failure to do so will allow the accused to attack his plea on appeal.<sup>105</sup>

Further refinement to the standard format includes a paragraph addressing breach of the pretrial agreement. Any pretrial agreement should be structured so that the probationary period begins as early as possible, ensuring the accused's good behavior from the execution of the agreement

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<sup>96</sup> Compare *id.* at 82 (finding voluntariness of a guilty plea, when made pursuant to a pretrial agreement, depends upon the Government fulfilling the terms of the agreement), *with* Puckett v. United States, 129 S. Ct. 1423, 1430 (2009) (“ . . . it is entirely clear that a breach [of the pretrial agreement] does not cause the guilty plea, when entered, to have been unknowing or involuntary.”).

<sup>97</sup> *Perron*, 58 M.J. at 86 (nullifying pretrial agreement and allowing the accused to withdraw his guilty pleas because forfeiture provisions of pretrial agreement could not be given effect).

<sup>98</sup> *Id.* at 79-80.

<sup>99</sup> *Id.* at 82.

<sup>100</sup> *Id.* at 86.

<sup>101</sup> *E.g.*, United States v. Olson, 25 M.J. 293 (C.M.A. 1987) (government recouping money arising from false travel claims caused a breach of the pretrial agreement); United States v. Albert, 30 M.J. 331 (1990) (end of active duty enlistment causing breach of pretrial agreement); United States v. Mitchell, 50 M.J. 79 (1999) *rev'd*, 58 M.J. 251 (2003) (service regulations preventing extension of enlistment breach pretrial agreement).

<sup>102</sup> United States v. Cowan, 34 M.J. 258 (1992) (recognizing power of convening authority to suspend forfeiture of pay contingent upon creating and maintaining an allotment for support of a family member).

<sup>103</sup> United States v. Emminizer, 56 M.J. 441, 442 (2002) (using the term “mandatory” to refer to forfeiture by operation of law in accordance with Article 58b(a), UCMJ).

<sup>104</sup> *But see* AFI 51-201, ¶ 9.23.3 (“The provisions of Article 58a, UCMJ, do not apply to the Air Force. All reductions in grade will be based upon adjudged and approved sentences.”).

<sup>105</sup> *See* United States v. Lundy, 63 M.J. 299 (2006).

until the end of the suspension period.<sup>106</sup> Counsel should remember that any period after trial, but prior to the convening authority's action, that postpones the effect of a certain type of punishment, e.g., confinement, reduction in pay grade or forfeiture of pay, is a deferment and not a "suspension" of the punishment.<sup>107</sup> A period of suspension can only occur after the convening authority approves the punishment and then acts to suspend the execution of the punishment for a specific period.<sup>108</sup> Despite the differences between deferment and suspension, if the accused breaches the agreement during the deferment period, the command may withdraw from the pretrial agreement provided that the convening authority complies with the same procedural protections as would apply to vacating a suspended sentence under R.C.M. 1109.<sup>109</sup>

The model provides a way for the convening authority to state his intent not to be bound by the terms of the pretrial agreement in the case of the accused's breach. This avoids any ambiguity or confusion as may arise during appellate review and prevents a windfall gained by an accused who, due to an error in the convening authority's action, might otherwise evade the consequences of his post-trial misconduct.<sup>110</sup>

## G. Execution

The convening authority's action must include a statement executing or suspending the approved sentence.<sup>111</sup> Execution is an order that directs the sentence be carried out,<sup>112</sup> and suspension is a probationary period "during which the suspended part of an approve sentence is not executed . . . ."<sup>113</sup> If the probationer successfully completes the probationary period, the suspended portion of the punishment is automatically remitted.<sup>114</sup>

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<sup>106</sup> *E.g.*, United States v. Smith, 46 M.J. 263, 264 (1997) (probationary period began when parties signed the pretrial agreement).

<sup>107</sup> MCM, *supra* note 1, R.C.M. 705(c)(2)(D); United States v. Burchett, 2004 CCA LEXIS 39 (N-M. Ct. Crim. App. Feb. 27, 2004) (prior to convening authority's action, characterization of any hearing to determine whether the accused breach the terms of the pretrial agreement as a "vacation hearing" is improper as no sentence has been approved and suspended, thus there was no suspension to vacate).

<sup>108</sup> United States v. Hunter, 65 M.J. 399, 401-03 (2008); MCM, *supra* note 1, R.C.M. 1108(b) ("The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence . . . .").

<sup>109</sup> MCM, *supra* note 1, R.C.M. 1109.

<sup>110</sup> *E.g.*, United States v. Burch, 67 M.J. 32 (2008) (finding that the convening authority's unambiguous suspension of confinement in excess of the terms of the pretrial agreement should have been given effect despite contrary evidence in the record that the suspension was properly vacated due to appellant's post-trial misconduct).

<sup>111</sup> MCM, *supra* note 1, R.C.M. 1107(f)(4)(B).

<sup>112</sup> MCM, *supra* note 1, R.C.M. 1113(a) discussion.

<sup>113</sup> MCM, *supra* note 1, R.C.M. 1108(a).

<sup>114</sup> *Id.* ("Remission cancels the unexecuted part of a sentence to which it applies.").

Although the convening authority is required to execute the adjudged sentence, the more common forms of punishment take effect before the convening authority's formal declaration of execution.<sup>115</sup> Thus, confinement takes effect from the date the sentence is adjudged.<sup>116</sup> Adjudged forfeitures and reduction in pay grade take effect fourteen days after the sentence is adjudged, unless, in the very rare circumstance, the convening authority approves and orders the sentence executed sooner.<sup>117</sup> Even punitive discharges, under certain circumstances, are self-executing.<sup>118</sup>

Given the awkward grammatical structure of the action format contained in Appendix 16, MCM, drafting mistakes have led to the unintentional disapproval of an adjudged punitive discharge. This happens when the clause, "except for the [punitive discharge]," is situated in the sentence so as to effectively except the discharge from the approved punishment. The proposed model minimizes this potential drafting error by separating the "execution" section from the "approval" and "action" section. It also includes an all-purpose standardized execution language, *to wit*: "In accordance with the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations, and this action, the sentence is ordered executed." This should be sufficient for executing the approved sentence without further need to specifically except out the punitive discharge. This approach, however, has been met with resistance, which I attribute to the force of habit rather than to legal insufficiency or ambiguity. It is beyond cavil that the convening authority has no power to execute the punitive discharge in his initial action if he is acting "in accordance with the Uniform Code of Military Justice . . . ." This approach has withstood scrutiny, albeit begrudgingly.<sup>119</sup> In *United States v. Bailey*, C.A.A.F. addressed the suggested language and, after recognizing that the convening authority has no authority to execute the bad conduct discharge, found that to "the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity," having no effect on the action.<sup>120</sup> C.A.A.F then advised the community "[t]o avoid any error in this regard, the model 'Forms for Action' in the Manual for Courts-Martial . . . be revised," citing Judge Geirke's counsel in *United States v. Politte*.<sup>121</sup> Evidently, the Court did not realize that at least one practitioner took Judge Geirke's recommendations to heart and decided to lead the way by separating the

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<sup>115</sup> *United States v. Phillips*, 64 M.J. 410, 412 (2007).

<sup>116</sup> UCMJ art. 57(b) (2010).

<sup>117</sup> UCMJ art. 57(a)(1) (2010).

<sup>118</sup> See Exec. Order No. 13,468, 73 Fed. Reg. 43827, 43,931-32 (July 28, 2008) (amending MCM, *supra* note 1, R.C.M 1113(d) and 1114(a)(4)).

<sup>119</sup> *United States v. Capps*, NMCCA 200800758 (N-M. Ct. Crim. App. Mar. 31, 2009) (After finding that the suggested language was a legal nullity, the Court, on reconsideration, reversed itself and found the suggested wording "does not purport to execute the bad-conduct discharge.").

<sup>120</sup> *United States v. Bailey*, 2009 CAAF LEXIS 1375, at \*1 (C.A.A.F. Dec. 16, 2009).

<sup>121</sup> *Id.* (citations omitted).

“approve,” “act,” and “execute” parts of the convening authority’s action as recommended in this article. In the wake of such resistance, despite the absence of any real legal objection to the sufficiency of the proposed clause, and in order to quell any further discomfort by such a radical departure from the past, I have added the syncategorematic phrase to the model form: “[p]ursuant to Article 71, UCMJ, the punitive discharge may not be executed until after final judgment.”

## H. Confinement Credit

The convening authority’s action must direct credit for any illegal pretrial confinement granted by the military judge under R.C.M. 305(k).<sup>122</sup> Pursuant to service regulations, the convening authority’s action<sup>123</sup> should address credit for any pretrial confinement, whether legal<sup>124</sup> or illegal.<sup>125</sup> However, failure of the convening authority’s action to direct judicially ordered confinement credit granted pursuant to R.C.M. 305(k) credit would require remand to the convening authority for correction,<sup>126</sup> even if the accused does not suffer prejudice.<sup>127</sup>

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<sup>122</sup> MCM, *supra* note 1, R.C.M. 1107(f)(4)(F); *United States v. Stanford*, 37 M.J. 388 (C.M.A. 1993) (finding error, but no prejudice, the Court returned the case to convening authority to correct omission of pretrial confinement credit).

<sup>123</sup> *Stanford*, 37 M.J. at 391; *compare* *United States v. Barr*, 2007 CCA LEXIS 245, at \*6-\*7 (N-M. Ct. Crim. App. July 17, 2007) (noting the distinction between the convening authority’s action, under R.C.M. 1107, and the promulgating order, under R.C.M. 1114, as the latter does not require confinement credit be contained therein), *with* *United States v. Hogan*, 2008 CCA LEXIS 480 (A.F. Ct. Crim. App. Oct. 28, 2008) (ordering correction to the promulgating order due, in part, for not reflecting the convening authority’s action directing pretrial confinement credit).

<sup>124</sup> *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) (finding that Defense Department regulations incorporated federal law governing pretrial confinement credits).

<sup>125</sup> A.R., 27-10, ¶ 5-32a (convening authority’s action must reflect any pretrial confinement credit); *JAGMAN*, app. j, (no specific requirement to record pretrial confinement credit in the action; however, any such credit is reflected in the results of trial).

<sup>126</sup> *Barr*, 2007 CCA LEXIS 245, at \*7-\*9, (N-M. Ct. Crim. App. July 17, 2007) (criticizing *United States v. Stanford*, 37 M.J. 388 (C.M.A. 1993) for applying a per se rule of remand, rather than a prejudice analysis, when the convening authority’s action fails to include judicially ordered confinement credit).

<sup>127</sup> *Compare* *United States v. Lipscomb*, 2009 CCA LEXIS 450 (A. Ct. Crim. App. Nov. 24, 2009) (finding neither convening authority’s action nor promulgating order reflecting judicially ordered credit, case not remanded), *with* *United States v. Youngberg*, 38 M.J. 635 (A.C.M.R. 1993) (similar deficiency, case remanded) and *United States v. Gaither*, 41 M.J. 774 (A.F. Ct. Crim. App. 1995).

## I. Conditions of Suspension

The conditions of suspension are customarily included in the pretrial agreement;<sup>128</sup> however, the proposed model explicitly<sup>129</sup> includes what is implicitly incorporated, as a matter of law,<sup>130</sup> into the action, *viz.*, “an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the code.”<sup>131</sup> Although not required to be incorporated into the convening authority’s action or otherwise expressed as a condition of suspension,<sup>132</sup> it is prudent to include this provision, especially if the suspension was not done pursuant to a pretrial agreement but as a matter of clemency or as remedial action. In absence of a pretrial agreement, nothing at trial<sup>133</sup> would alert the accused to the conditions of suspension. One should note the distinction between the implied “misconduct” condition, when the convening authority suspends a punishment upon taking his action, and the need for an express “misconduct” provision if the convening authority wants to be able to withdraw from the pretrial agreement because of the accused’s misconduct prior to taking action.<sup>134</sup> The proposed model provides a redundant way to ensure the accused is aware of the conditions of suspension.

## J. Place of Confinement

Unless otherwise provided by the service Secretary, the convening authority must designate, within the action, the place of confinement.<sup>135</sup> Air Force regulations provide a generic designation to “the Air Force Corrections System” allowing the Air Force Security Force Command to manage prisoner assignment and transfer.<sup>136</sup> Navy regulations allow the

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<sup>128</sup> MCM, *supra* note 1, R.C.M. 705(c)(2)(D), (d)(2) (requirement that all “terms, conditions, and promises” of the pretrial agreement be in writing); R.C.M. 1108(c)(1) and (2) (conditions of suspension must be in writing with a copy served on the probationer).

<sup>129</sup> *Spriggs v. United States*, 40 M.J. 158, 159-60 (C.M.A. 1994) (example of a case in which the conditions of suspension are explicitly outlined in convening authority’s action).

<sup>130</sup> *Id.* at 161 n.2.

<sup>131</sup> *Id.*; MCM, *supra* note 1, R.C.M. 1108(c); *see also* *United States v. Mayville*, 32 M.J. 838 (N.M.C.M.R. 1991) (R.C.M. 1108(c) implied at law conditions do not require notice to the probationer as required by 1108(c)(2)).

<sup>132</sup> *See Mayville*, 32 M.J. at 839 (The court interprets, “the concluding sentence of that section of R.C.M. 1108, to mean that, at least as to setting any conditions of suspension, the convening authority may simply state in his action that a certain punishment is suspended and effectively create a properly conditioned suspension.”).

<sup>133</sup> The “misconduct clause” within a pretrial agreements as well as the plea agreement inquiry by the military judge, under R.C.M. 910(f), serve to put the accused on notice that his misconduct may void the terms of the pretrial agreement.

<sup>134</sup> *United States v. Dean*, 67 M.J. 224, 229-30 (2008) (finding no implied condition to “behave well” as part of a pretrial agreement that does not have an express misconduct clause).

<sup>135</sup> MCM, *supra* note 1, R.C.M. 1107(f)(4)(C).

<sup>136</sup> AFI 51-210, ¶ 9.4 and fig. 9.9.

convening authority to designate the initial place of confinement in his action but subsequent assignment and transfer are governed by service regulations, which may override the initial designation.<sup>137</sup> Army regulations prohibit designation of the place of confinement within the action.<sup>138</sup>

## K. Deferment

Deferment postpones the running of confinement, forfeitures, or reduction in rank.<sup>139</sup> It is not suspension of a punishment, which can only happen after the convening authority's action, nor is it an act of clemency.<sup>140</sup> Deferral can only apply to a sentence that has not been ordered executed;<sup>141</sup> thus, a punishment cannot be simultaneously deferred and suspended.<sup>142</sup> With the exception of confinement, which may be deferred beyond the action by the convening authority, deferment of forfeitures or reduction end when the convening authority takes action.<sup>143</sup> Thus, in his action the convening authority may initiate or continue to defer confinement during appellate review.<sup>144</sup> However, all forms of deferment are terminated when the convening authority suspends or executes the punishment, the deferment is rescinded, the case is final under Article 70, UCMJ, or the deferment expires under its own terms.<sup>145</sup>

The convening authority's decision on a request for deferment must be in writing and included within the record of trial.<sup>146</sup> If the convening authority defers confinement<sup>147</sup> or rescinds deferment of confinement<sup>148</sup>

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<sup>137</sup> JAGMAN, 0157 (b)(1) and 0169; *United States v. Smead*, 68 M.J. 44 (2009).

<sup>138</sup> A.R. 27-10, ¶ 5-32.

<sup>139</sup> MCM, *supra* note 1, R.C.M. 1101(c).

<sup>140</sup> *Id.*, discussion (c)(1).

<sup>141</sup> UCMJ art. 57a (2010); MCM, *supra* note 1, R.C.M. 1011(c)(2) and (6). There are exceptions: under Article 57a(c), UCMJ, the Secretary concerned can order deferment of confinement that has been ordered executed when the case is pending review before C.A.A.F. under Article 67(a)(2). *See* MCM, *supra* note 1, R.C.M. 1203(c) (authorizing Secretary concerned to defer executed sentence of confinement in cases forward by the Judge Advocate General to C.A.A.F.). The convening authority can defer confinement after the sentence is ordered executed under Article 57a(b). *United States v. Toy*, 60 M.J. 598, 601 (N-M. Ct. Crim. App. 2004) (when in custody of state or foreign jurisdiction defer confinement of a court-martial sentence until accused is returned to military custody); R.C.M. 1107(d)(3). In addition, the appellate courts may defer confinement that has been executed. *Moore v. Atkins*, 30 M.J. 249, 253 (C.M.A. 1990).

<sup>142</sup> MCM, *supra* note 1, R.C.M. 1101(c)(6)(B) and discussion; *see* R.C.M. 1101 analysis, at A21.

<sup>143</sup> MCM, *supra* note 1, R.C.M. 1101(c)(6).

<sup>144</sup> *Moore*, 30 M.J. at 251-52; *see United States v. Cole*, 24 M.J. 18 (C.M.A. 1987); *United States v. Mills*, 12 M.J. 1 (C.M.A. 1981); *Corley v. Thurman*, 3 M.J. 192 (C.M.A. 1977) (Perry J., dissenting).

<sup>145</sup> MCM, *supra* note 1, R.C.M. 1101(c)(6) and (c)(7); *see* R.C.M. 1101(c) discussion and analysis, at App 21; *United States v. Ledbetter*, 2 M.J. 37, 39 (C.M.A. 1976).

<sup>146</sup> MCM, *supra* note 1, R.C.M. 1103(b)(3)(D).

<sup>147</sup> MCM, *supra* note 1, R.C.M. 1107(f)(4)(E); R.C.M. 1113(d)(2)(A) discussion.

<sup>148</sup> MCM, *supra* note 1, R.C.M. 1101(c)(7)(D).

before or concurrent with his action, that decision, along with the relevant dates, must be reflected in his action.<sup>149</sup> If, however, the convening authority denies the request, the rationale for such denial, using the criteria set out in R.C.M. 1101(c)(3), should be set out in a separate memorandum and attached to the record.<sup>150</sup>

The proposed model includes both the mandatory reporting requirements for deferred confinement, as well as those concerning forfeiture and reduction. It reminds those drafting the document, as well as the convening authority, that when denying a request for deferment of any punishment, to set forth the basis for the denial using the criteria within R.C.M. 1101(c), and ensure that those matters are attached to the record of trial.<sup>151</sup>

## L. Companion Cases

Some service regulations require that companion cases be noted within the record of trial. In cases subject to Article 66, UCMJ, appellate review, Army regulations provide that the trial counsel will annotate, on the cover of the original record of trial, companion cases in order to facilitate assignment of cases to the Court of Criminal Appeals and avoid possible conflicts of interest among appellate defense counsel.<sup>152</sup> Navy regulations require mention of companion cases within the convening authority's action for the purposes of comparative sentence assessment.<sup>153</sup> Apart from service regulations, companion cases often raise issues of sentence disparity as the Courts of Criminal Appeals exercise their sentencing appropriateness review

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<sup>149</sup> MCM, *supra* note 1, R.C.M. 1107(f)(4)(E).

<sup>150</sup> MCM, *supra* note 1, R.C.M. 1103(b)(3)(D); *compare* United States v. Sloan, 35 M.J. 4, 7 (C.M.A. 1992) (“When a convening authority acts on an accused’s request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the accused) and must include the reasons upon which the action is based.”), *with* MCM 1101 analysis at, App 21 (1991 Amendments) (“Although written reasons for denials are not mandatory, and their absence from the record of trial will not per se invalidate a denial decision, their use is strongly encouraged.”).

<sup>151</sup> United States v. McClary, 2010 CCA LEXIS 5, at \*20 (C.G. Ct. Crim. App. Jan. 19, 2010) (finding convening authority’s initial unspecified denial of accused’s deferment request error even though the convening authority later provided his rationale); United States v. James, 2007 CCA LEXIS 80, at \*11 (A.F. Ct. Crim. App. Feb. 16, 2007) (finding denial of deferment of forfeitures without stated reasons was error); United States v. Phillips, 2006 CCA LEXIS 61, at \*28 (N-M. Ct. Crim. App. Mar. 16, 2006) (failure to state reasons for denying deferral was error); United States v. Zimmer, 56 M.J. 869, 874 (A. Ct. Crim. App. 2002) (finding error when convening authority failed to state his reasons for denying accused’s request to defer forfeitures).

<sup>152</sup> A.R. 27-10, ¶ 13-6.

<sup>153</sup> JAGMAN, ¶ 0151(a)(5); United States v. Ortiz, 52 M.J. 739, 741 (N-M. Ct. Crim. App. 2000).



function.<sup>154</sup> Including the sentence of companion cases within the promulgation order and action serves as a prophylactic measure designed to avoid or minimize sentencing disparity claims on appeal.<sup>155</sup> It also provides the opportunity for the convening authority to assess sentence disparity issues during his action and take corrective action if necessary.<sup>156</sup>

## M. Post-Trial Delay

When the Courts of Criminal Appeals reviews a case under Article 66(c), UCMJ, affirming only those findings and parts of the sentence as “it finds correct in law and fact,” the Court must take into account “all the facts and circumstances reflected in the record, including [any] unexplained and unreasonable post-trial delay.”<sup>157</sup> Breach of the post-trial processing time lines gives rise to a presumption of unreasonable delay, triggering a due process analysis.<sup>158</sup> This presumption may be avoided, despite the breach, if the circumstances are shown to warrant additional time for post-trial processing.<sup>159</sup> The Court’s frustration with the excessive post-trial delay was, in part, due to the unexplained nature of the delay.<sup>160</sup> Thus, if the record demonstrates good cause, either the presumption of unreasonableness will not apply or the delay will be judged reasonable.<sup>161</sup> Good cause for delay is “case-specific” reasons other than delay caused by “administrative matters, manpower constraints or the press of other cases.”<sup>162</sup>

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<sup>154</sup> E.g., *United States v. Lacy*, 50 M.J. 286 (1999); *United States v. Rencher*, 1998 CCA LEXIS 151 (A.F. Ct. Crim. App. Feb. 20, 1998); *United States v. Myers*, 1990 CMR LEXIS 1605 (A.F.C.M.R. Dec. 26, 1990); *United States v. Scantland*, 14 M.J. 531 (A.C.M.R. 1982).

<sup>155</sup> See generally, *United States v. Olinger*, 12 M.J. 458, 460-61 (C.M.A. 1982) (noting, as a factor undermining the appellant’s sentencing disparity claim, that there was evidence on the record that the convening authority was aware of the sentences in companion case when he approved the appellant’s sentence).

<sup>156</sup> *United States v. Hamilton*, 47 M.J. 32, 35 (1997) (noting convening authority not required to review record for error but may, and is encouraged to, take corrective action as necessary).

<sup>157</sup> *United States v. Bodkins*, 60 M.J. 322, 324 (2004) (quoting *United States v. Tardif*, 57 M.J. 219, 224 (2002)).

<sup>158</sup> *United States v. Moreno*, 63 M.J. 129, 142 (2006).

<sup>159</sup> *Id.* at 143.

<sup>160</sup> *Id.* at 136; *United States v. Toohey*, 63 M.J. 353, 359-60 (2006) (644 days between trial and convening authority’s action “excessive and unexplained,” 146 days between convening authority’s action and docketing with Court of Criminal Appeals “wholly unexplained”); *United States v. Bauerbach*, 55 M.J. 501, 507 (A. Ct. Crim. App. 2001) (“Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice . . .”).

<sup>161</sup> *Moreno*, 63 M.J. at 143.

<sup>162</sup> *Id.*; compare *United States v. Brown*, 62 M.J. 602, 605 n.2 (N-M. Ct. Crim. App. 2005) (“Affidavits submitted in cases that only provide generalized rationale for [post-trial delay] are not given great weight.”), and *United States v. Cooper*, 2007 CCA LEXIS 48, at \*6-\*7 (N-M. Ct. Crim. App. Feb. 28, 2007) (criticizing affidavits explaining post-trial delay that are based on generic “operational requirement” averments without detailed case-specific factors), with *Bauerbach*, 55 M.J. at 507 (“Acceptable explanation [for post-trial delay] may include excessive defense delay in submission of R.C.M. 1105 matters, post-trial absence or mental illness of the accused, exceptionally heavy military justice post-trial workload, or

To assist the Court, it is recommended that staff judge advocates document the reasons for the delay.<sup>163</sup> Not only will an explanation potentially avoid the presumption, but also such rationale is necessary in applying the “second prong” of the post-trial delay due process analysis.<sup>164</sup> The proposed model includes a section specifically designed to address these concerns.<sup>165</sup> It provides the command with a specific format to include, within the record, the case-specific reasons for delay; thus, providing the courts with evidence necessary to address the issue of post-trial delay without having to speculate or resort to post-trial affidavits.<sup>166</sup> Further, because the format requires a specific explanation, it also serves to hold those who are responsible for post-trial processing accountable for any delay in excess of C.A.A.F.’s established timelines.<sup>167</sup>

Service regulations also place the onus on commanders and staff judge advocates to account for post-trial processing delays in the record.<sup>168</sup> Thus, noting the reasons for delay in the action and promulgating order would satisfy those service requirements.<sup>169</sup>

#### N. Substitute Convening Authority

“The convening authority shall take action on the sentence...unless it is impracticable.”<sup>170</sup> When impracticable, the case shall be forwarded to the general court-martial convening authority for initial action.<sup>171</sup> Circumstances that make it impracticable for the original convening authority to act include: decommissioning or inactivation of the command; disqualification of the convening authority due to a legal impediment, such as the convening authority is an accuser<sup>172</sup> or was a member of the court-martial prior to becoming the convening authority; or operational necessity

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unavoidable delays as a result of operational deployments.”), *and* United States v. Mancillas, 2006 CCA LEXIS 339, at \*20 (N-M. Ct. Crim. App. Dec. 18, 2006) (accepting delay caused by combat deployments as reasonable).

<sup>163</sup> *Moreno*, 63 M.J. at 143.

<sup>164</sup> *Id.* at 135 (applying the four factor test espoused in *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (length of delay, reasons for delay, appellant’s assertions of right to speedy review, and prejudice) in assessing whether accused’s due process right to timely review and appeal have been violated).

<sup>165</sup> *E.g.*, United States v. Reyes, 49 C.M.R. 872 (N.C.M.R. 1975) (example of convening authority explaining post-trial delay within action).

<sup>166</sup> *See Toohey*, 63 M.J. at 360 (lamenting, “[n]othing in the record satisfactorily explains these [post-trial] delays.”).

<sup>167</sup> *Moreno*, 63 M.J. at 142 (establishing as “unreasonable” any delay between the completion of trial and the convening authority’s action in excess of 120 days).

<sup>168</sup> *E.g.*, JAGMAN 0151(a)(3) (“In all cases, the convening authority shall ensure the actions taken at every step in the post-trial process are properly documented, including justification for any delay that occurs.”).

<sup>169</sup> JAGMAN 0151(a)(3)-(4); A.R. 27-10 ¶ 5-41.

<sup>170</sup> MCM, *supra* note 1, R.C.M. 1107(a).

<sup>171</sup> *Id.*

<sup>172</sup> AFI 51-201, ¶ 9.21, “Disqualification of Convening Authority.”

placing the command on alert status for immediate movement.<sup>173</sup> The reasons for the impracticality should be included in the record.<sup>174</sup> The proposed model accomplishes this requirement by including the rationale as part of the action, and thus as part of the record, avoiding the burdensome task of trying to justify the circumstances several months or years after the fact through post-trial affidavits.<sup>175</sup>

All services have regulations governing the impracticability contingency and procedures for substituting the convening authority.<sup>176</sup> Deviation from the service regulation on this point is not fatal to an action taken by the subsequent convening authority who was not otherwise contemplated by the service rules. In *United States v. Watson*,<sup>177</sup> the accused's command, 1st Marine Division (MarDiv), located at Camp Pendleton, California, was deployed to Operation Desert Shield/Storm prior to the convening authority acting in his case. Before deploying the Commanding General (CG), 1st MarDiv, entered into a memorandum of understanding with the CG, Marine Corps Base (MCB), Camp Pendleton, requiring the latter to act as the general court-martial convening authority for the division's remain-behind elements, including those cases pending post-trial action.<sup>178</sup> Unfortunately, this arrangement was contrary to extant service regulations that required the case to be forwarded, upon impracticability of the original convening authority to act, to the officer exercising general court-martial jurisdiction over the command.<sup>179</sup> CG, MCB, Camp Pendleton, was not such an officer. Rather, the operational chain of command for 1st MarDiv was: CG, I Marine Expeditionary Force, a command that deployed to Operation Desert Shield/Storm; CG, Fleet Marine Forces, Pacific; Commander, Pacific Fleet; and, finally, Commander-in-Chief, Pacific Command. None of the last three commands were "nearby," as the Court specifically noted, the Pacific Fleet Commander was "thousands of miles away in Hawaii."<sup>180</sup> Placing the "realities of command," above the technical aspects of the service regulations, the Court

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<sup>173</sup> MCM, *supra* note 1, R.C.M. 1107(a) discussion.

<sup>174</sup> *Id.*; *United States v. Newlove*, 59 M.J. 540 (A. Ct. Crim. App. 2003) ("Absent such a documented transfer of jurisdiction, action in a case must be taken by the same GCMCA who convened the court-martial or his successor in command.") (quoting *United States v. Barry*, 57 M.J. 799, 803 (A. Ct. Crim. App. 2002)); *United States v. Holsapple*, 2003 CCA LEXIS 462 (A. Ct. Crim. App. Oct. 6, 2003).

<sup>175</sup> See *Holsapple*, 2003 CCA LEXIS 462, at \*6 (ordering government to produce affidavit from original convening authority explaining transfer of appellant's case to another convening authority); *United States v. Solnick*, 39 M.J. 930, 934 (N.M.C.M.R. 1994) (use of affidavits to establish impracticability of original convening authority to act); see generally *United States v. Ginn*, 47 M.J. 236 (1997) (limiting use of post-trial affidavits as a means for Criminal Courts of Appeals fact-finding authority).

<sup>176</sup> JAGMAN 0151(b); AFI 51-201, ¶ 9.21; A.R. 27-10, ¶ 5-33.

<sup>177</sup> 37 M.J. 166 (C.M.A. 1993).

<sup>178</sup> *Id.* at 167.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 168.

found the CG, MCB was the *de facto* commander “for the time being” in accordance with Article 60(c)(1), UCMJ.<sup>181</sup> Thus, service regulations were not an impediment for the CG, MCB to act as the substitute convening authority, given the original commander’s impracticality to act and the unavailability of those superior in the operational chain of command.

*Watson*’s rationale had been extended to other cases in which substitute convening authority’s actions have been challenged as contrary to service specific regulations.<sup>182</sup> Where the service regulation is not mandated by statute or is not an implementation of the President’s authority to prescribe rules for courts-martial, violation of service regulations are not considered jurisdictional and will generally not vitiate an action by a substitute convening authority.<sup>183</sup>

#### O. Matters Considered

This paragraph incorporates the matters that must be considered by the convening authority before taking his action on the sentence, specifically setting out that he considered the results of trial, the recommendation of his staff judge advocate and any addendums thereto and any matters submitted by the accused or his counsel under R.C.M. 1105 or 1106(f).<sup>184</sup> Other matters may be included in this paragraph if considered by the convening authority, including the record of trial, personnel records of the accused, or any other matters, provided that when considering adverse matters, the accused was given notice and an opportunity to comment.<sup>185</sup>

Nothing in the UCMJ or under the Rules for Courts-Martial require the convening authority to state in his action what matters he considered prior to making his decision.<sup>186</sup> However, as suggested by C.A.A.F., it is preferable that the convening authority refer to such matters to facilitate appellate review.<sup>187</sup> It is also suggested that the convening authority’s action be generic in its reference to matters considered, noting them as outlined by the form, and not separately list each item. This is especially important in cases where the clemency matters are voluminous and attempting to separately list all the material is subject to drafting errors. Such a generic reference would allow the court to apply the presumption of

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<sup>181</sup> *Id.*

<sup>182</sup> *United States v. Stamper*, 2006 CCA LEXIS 364 (A.F. Ct. Crim. App. Dec. 15, 2006); *United States v. Ross*, 2006 CCA LEXIS 358 (A.F. Ct. Crim. App. Dec. 13, 2006); *United States v. Ratliff*, 42 M.J. 797 (N-M. Ct. Crim. App. 1995); *United States v. Robinson*, 1995 CCA LEXIS 425 (N-M. Ct. Crim. App. Apr. 21, 1995).

<sup>183</sup> *Solnick*, 39 M.J. at 933.

<sup>184</sup> MCM, *supra* note 1, R.C.M. 1107(b)(3)(A); *Alexander*, 63 M.J. at 273-74.

<sup>185</sup> MCM, *supra* note 1, R.C.M. 1107(b)(3)(B).

<sup>186</sup> *United States v. Stephens*, 56 M.J. 391, 392 (2002).

<sup>187</sup> *Id.*

regularity<sup>188</sup> and would also avoid appellate challenges to the adequacy of the action if the action fails to mention a certain document or item.<sup>189</sup>

### III. CONCLUSION

While no approach can eliminate all potential errors, the purpose of the model is to minimize the opportunity for error by taking a more straightforward and simple approach to the convening authority's action and promulgating order. The proposed action accomplishes this simplicity by heeding C.A.A.F.'s call to revise the format and address each part of the action separately.<sup>190</sup> The proposal also provides a convenient way for those drafting the post-trial document to address some of the more common errors on appeal, such as post-trial delay or substitution of the convening authority, without having to resort to post-trial affidavits or *DuBay* hearings<sup>191</sup> months or years after the fact. It serves as a checklist of possible issues that can be addressed by the convening authority to explain why corrective action is not warranted or, in the alternative, take corrective action as necessary.

While the proposed form was not intended to wholly supplant Appendix 16 and 17 of the MCM, especially as those forms set forth actions not addressed by this article, it does address the need for a simple and direct method of drafting the initial action and promulgating order.

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<sup>188</sup> *United States v. Williams*, 61 M.J. 584, 587 (N-M. Ct. Crim. App. 2005) (applying presumption to find convening authority considered clemency matters based upon action's reference to the record of trial and SJA's advice); *United States v. Lewis*, 2007 CCA LEXIS 422, at \*10 (N-M. Ct. Crim. App. Oct. 11, 2007), *rev'd on other grounds*, 66 M.J. 470 (2008), *aff'd*, 2008 CCA LEXIS 297 (N-M. Ct. Crim. App. Aug. 14, 2008) (applying presumption in rejecting appellant's claim that the convening authority's action was defective because clemency matters were not submitted, when the addendum SJAR referred to the clemency matters and the action stated that the convening authority considered "the results of trial, the Staff Judge Advocate's Recommendation, and the appellant's personnel records."); *United States v. Godreau*, 31 M.J. 809, 811 (A.F.C.M.R. 1990) (applying the presumption of regularity if the staff judge advocate's recommendation addressed clemency in a certain way); *cf. United States v. Mark*, 47 M.J. 99 (1997) (finding no presumption of regularity when there was no evidence that the staff judge advocate's recommendation was served on the convening authority); *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989) ("Speculation concerning the consideration [by the convening authority] of [clemency] matters simply cannot be tolerated in this important area of command prerogative.") (citation omitted).

<sup>189</sup> *E.g.*, *United States v. Laramore*, 2007 CCA LEXIS 185 (N-M. Ct. Crim. App. June 12, 2007).

<sup>190</sup> *See supra* note 3.

<sup>191</sup> *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) (authorizing post-trial fact-finding hearings).

## **Appendix 1**

### **DNA Processing Required by 10 U.S.C. § 1565.**

#### **DEPARTMENT OF THE XXXXX COMMAND ADDRESS**

General/Special Court-Martial Order No. X-XXXX

DATE

Grade, Name, SSN (last four), Service, was arraigned and tried (at/on board), at a (General/Special Court-Martial), convened by (Command) on (date) for the following offenses:

#### **CHARGES**

List of charges including pleas and findings.

#### **SENTENCE**

Sentence adjudged on (Date): (List sentence awarded).

#### **APPROVAL**

1. (Approve Sentence): In the General/Special Court-Martial case of United States v. Grade, Name, Service, SSN (last four), the sentence as adjudged is approved.
2. (Disapprove Part of Sentence): In the General/Special Court-Martial case of Unites States v. Grade, Name, Service, SSN (last four), the following action on the sentence is taken:
  - a. (As a matter of clemency)(In accordance with the pretrial agreement)(As a matter of corrective action)(Upon a change in the findings of guilt and reassessment of the sentence) the adjudged sentence of (list punishments) is disapproved.
  - b. The remaining part of the adjudged sentence consisting of (specific list of punishments) is approved.
3. (Disapprove Finding of Guilty): The finding of Guilty to Specification X of Charge Y, violation of Article XX, UCMJ is disapproved. Specification X of Charge Y is dismissed.

4. (Change Offense to a Lesser-Included Offense): The finding of Guilty to Specification X of Charge Y, violation of Article XX, UCMJ, is changed to a finding of Guilty to the lesser included offense of (identify offense)(description and date of offense), in violation of Article XX, UCMJ.

### **ACTION**

*(Used to modify, change, mitigate, remit, or suspend, any part of the adjudged sentence. This section is not required if the sentence is to be approved without change and executed as adjudged.)*

#### **Confinement.**

1. (Pursuant to the pretrial agreement:)(As a matter of clemency:)(As a matter of corrective action, in order to correct the potential for prejudice arising from (specify):)
  - a. Execution of confinement (in excess of XX months/days) is suspended.
    - i. The suspension period shall begin from the date of this action and continue for (XX months/years)(the remainder of the accused's confinement plus XX months thereafter.).
    - ii. At that time, unless vacated, the suspended part of the confinement sentence will be automatically remitted.

*Comment: See R.C.M. 1108: suspension grants the accused a probationary period during which the approved but suspended part of the sentence is not executed. Remember sentencing chain of events: 1) Defer (postpones the running of the sentence); then, 2) Act, by a) approving/disapproving sentence; b) suspending-changing-remitting-mitigating punishment; and, finally, c) Execute. One notable exception to this chain of events is the ability to defer confinement beyond the convening authority's action. See R.C.M. 1101, 1107.*

#### **Forfeiture of Pay (The accused's end of obligated service is (date)).**

1. (Pursuant to the pretrial agreement:)(As a matter of clemency:)(As a matter of corrective action, in order to correct the potential for prejudice arising from (specify):)

- a. Adjudged Forfeiture of Pay (and Allowances):
- i. (Suspend all forfeiture of pay/allowances): Execution of adjudged forfeiture of pay (and allowances) is suspended for XX months from the date of this action. At that time, unless sooner vacated, the unexecuted forfeiture of pay (and allowances) will be automatically remitted.
  - ii. (Suspend only part of the forfeiture of pay): The accused will forfeit \$XXX.00 pay per month for XX months, execution of adjudged forfeiture of pay in excess of that amount per month is suspended for a period of XX months from the date of this action. At that time, unless sooner vacated, the unexecuted forfeiture of pay will be automatically remitted.
  - iii. (Suspend forfeiture of pay with allotment conditions): The accused will forfeit \$XXX.00 pay per month for XX months, execution of adjudged forfeiture of pay in excess of that amount per month is suspended for a period of XX months from the date of this action, provided that the accused creates and maintains, during the entire period of suspension, an allotment of his military pay (allowances) to (named dependant) in the amount (not less than \$XXX.00 per month)(of the monthly adjudged forfeitures)(other). At the end of the suspension period, unless sooner vacated, the unexecuted forfeiture of pay will be automatically remitted.
- b. Waiver of Forfeiture of Pay (Allowances) by Operation of Law:
- i. Forfeiture of pay (and allowances) by operation of law (in excess of \$XXX.00 pay per month) is waived (for six (6) months from the date of this action) (for the period of the accused's confinement) provided the accused creates and maintains an allotment (in the amount of the waived forfeitures)(for \$XXX.00 per month), during the period of waiver, to (name), a dependant of the accused.



*Comment: The authority to waive forfeitures under Art. 58b is limited to six months from the convening authority's action provided the accused remains in confinement or on parole.*

*Comment: If the forfeiture of pay is subject to the terms of a PTA, ensure that the suspension of the adjudged forfeitures and the waiver of the automatic forfeiture of pay and allowances are in accordance with the agreement of the parties. Remember you have to synchronize deferment of adjudged and automatic forfeitures, suspension of adjudged forfeiture of pay, and waiver of automatics so that they reflect the intent of the parties to the agreement. This may include synchronizing the forfeiture of pay with reduction in pay grade if the pretrial agreement is based upon a specific dollar amount that the parties intend to be paid to the accused's dependants.*

### **Reduction in Pay Grade.**

1. (Pursuant to the pretrial agreement:)(As a matter of clemency:)(As a matter of corrective action, in order to correct the potential for prejudice arising from (specify):)
  - a. Adjudged Reduction in Pay Grade:
    - i. The accused will serve in the pay grade of E-X, execution of the adjudged reduction below that pay grade is suspended for a period of XX months from this action. At that time, unless sooner vacated, the suspended part of the reduction in pay grade will be automatically remitted.
  - b. Reduction in Pay Grade by Operation of Law:
    - i. (Acknowledge Art 58a reduction if applicable): Pursuant to Art 58a, UCMJ and applicable service regulations, the accused is reduced to the pay grade of E-1, by operation of law.
    - ii. (Remit the automatic reduction): Reduction in pay grade by operation of law, under Art 58a, UCMJ, and applicable service regulations, is remitted.
    - iii. (Suspend automatic reduction): The accused will serve in the pay grade of E-X, and the reduction in pay grade by operation of law, under Art 58a, UCMJ, and service regulations is suspended for XX months from the date of this action at which time the

suspended portion of the reduction by operation of law will be automatically remitted. The accused will serve in the pay grade of E-X, unless any part of the sentence, which triggered the reduction in pay grade by operation of law (or the adjudged sentence to reduction), is sooner vacated. In that event the accused will be reduced, by operation of law, to the pay grade of E-1.

- iv. (Partial suspension/reduction during confinement): The accused will serve in pay grade E-1 until he is released from confinement. Thereafter, the accused will serve in the pay grade of E-X, and the reduction in pay grade by operation of law, under Art 58a, UCMJ, and service regulations, is suspended for XX months from the time of his release. The suspended portion of the reduction by operation of law will be automatically remitted at the end of the probationary period unless any part of the sentence, which triggered the reduction in pay grade by operation of law (or the adjudged sentence to reduction), is vacated. In that event the accused will be reduced, by operation of law, to the pay grade of E-1.

*Comment: If the Convening Authority suspends the automatic reduction, he should also suspend any adjudged reduction in pay grade. SJAs must ensure that the actions taken to suspend the automatic reduction provisions coincide with the actions taken to suspend the adjudged reduction. See United States v. Cabral, 20 M.J. 269 (C.M.A. 1985)*

### **Breach of Pretrial Agreement.**

Having (waived) (afforded the accused) the procedural protections under R.C.M. 1109, Manual for Courts-Martial, (Yr), and based upon a finding that the accused has violated a condition of his suspension and his obligations under the pretrial agreement, I am no longer bound by the terms of and hereby withdraw from that agreement. The records of the vacation proceeding will be attached to the record of trial.

## **EXECUTION**

In accordance with the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations, and this action, the sentence is ordered executed. Pursuant to Article 71, UCMJ, any punitive discharge may not be executed until after final judgment.

## CONFINEMENT CREDIT

The accused will be credited with XX days of confinement against the approved sentence to confinement.

## CONDITIONS OF SUSPENSION

(The conditions of suspension are contained within the pretrial agreement.) (Unless otherwise stated therein,) pursuant to R.C.M. 1108(c)(3), Manual for Courts-Martial (Yr), this action suspending part of the sentence includes the condition that the accused not violate any punitive article of the Uniform Code of Military Justice during the suspension or deferment period.

(Unless otherwise contained in the pretrial agreement, as a condition to the waiver (suspension) of forfeiture of pay (and suspension of reduction), the accused must do all that is necessary to establish and maintain, during the entire period of (deferral) (suspension) waiver, an allotment so that the intended recipient of the benefit will receive the full amount of the (deferred) (suspended) waived forfeitures. Failure to do so will be regarded as breach of the agreement and will allow the convening authority to vacate (any suspended or) waived forms of punishments.)

*Comment: Modify as necessary to conform the amount to that contained in the pretrial agreement.*

## PLACE OF CONFINEMENT

XXX is designated as the place of confinement.

## DEFERMENT

1. Deferment of Confinement:
  - a. (Defer confinement option 1): (By his request) (Pursuant to the terms of the pretrial agreement), the accused's service to confinement was deferred from (date) until (date).
  - b. (Defer confinement option 2): (By his request) (Pursuant to the terms of the pretrial agreement), the accused's service to confinement was deferred on (date). (That deferment is terminated as of the date of this action.) (The execution of confinement is deferred until (date) (the completion of appellate review).

c. (Defer confinement option 3): (By his request) (Pursuant to the terms of the pretrial agreement), the accused's service to confinement was deferred on (date). In accordance with R.C.M. 1101, that deferment was rescinded on (date).

d. (Denial of deferment option 4): The accused requested deferment of confinement. Applying the R.C.M. 1101 criteria, that request was denied on (date).

and

e. (Deferment matters attached to record): Matters related to the request for deferment are attached to the record of trial.

2. Deferment of Adjudged Reduction in Pay Grade:

a. (Defer Reduction option 1): (Reduction to pay grade E-X) (Reduction below the pay grade of E-X) was deferred on (date) until (date).

b. (Defer reduction option 2): (Reduction to pay grade E-X) (Reduction below the pay grade of E-X) was deferred on (date). That deferment is terminated as of the date of this action.

c. (Defer reduction option 3): (Reduction to pay grade E-X) (Reduction below the pay grade of E-X) was deferred on (date). In accordance with R.C.M. 1101, that deferment was rescinded on (date).

d. (Denial to defer reduction option 4): The accused requested deferment of his adjudged reduction in pay grade. Applying the R.C.M. 1101 criteria, that request was denied on (date).

and

e. (Deferment matters attached to record): Matters related to the request for deferment are attached to the record of trial.

3. Deferment of Adjudged Forfeiture of Pay/Allowances:

a. (Defer forfeiture option 1): (Adjudged forfeiture of pay (and allowances)) (Adjudged forfeiture of pay in excess of \$XXX.00 pay per month) was deferred on (date) until (date).

- b. (Defer forfeiture option 2): (Adjudged forfeiture of pay (and allowances)) (Adjudged forfeitures of pay in excess of \$XXX.00 pay per month) was deferred on (date). That deferment is terminated as of the date of this action.
- c. (Defer forfeiture option 3): (Adjudged forfeiture of pay (and allowances)) (Adjudged forfeiture of pay in excess of \$XXX.00 pay per month) was deferred on (date). In accordance with R.C.M. 1101, that deferment was rescinded on (date).
- d. (Denial of deferment option 4): The accused requested deferment of his adjudged forfeiture of pay (and allowances). Applying the R.C.M. 1101 criteria, that request was denied on (date).

and

- e. (Deferment matters attached to record): Matters related to the request for deferment are attached to the record of trial.

4. Deferment of Forfeitures by operation of law.

- a. (Defer automatic forfeiture option 1): Automatic forfeiture of pay (and allowances) required under Article 58b, UCMJ, was deferred from (date) until (date) (the date of this action).
- b. (Defer automatic forfeiture option 2): Automatic forfeiture of pay required under Article 58b, UCMJ, in excess of \$XXX.00 pay per month was deferred from (date) until (date)(the date of this action).

and

- c. (Deferment matters attached to record): Matters related to the request for deferment are attached to the record of trial.

### COMPANION CASES

(There are no closely related cases to this case.) (United States v. Accused II, is a closely related case. In taking this action, as a matter of possible sentencing disparity, I have considered the circumstances of Accused II's case.) (The case of United States v. Accused II is a closely related case. That case is pending court-martial.)

## **POST-TRIAL DELAY**

This action was taken within 120 days of the announcement of sentence; or

This action was taken in excess of 120 days from the announcement of sentence. This delay was caused by (specify). (Despite the delay, I find no material prejudice to the substantial rights of the accused and corrective action is not warranted.) (Because of the delay, I have taken corrective action to address any potential for prejudice.)

## **SUBSTITUTE CONVENING AUTHORITY DUE TO IMPRACTICALITY**

It was impractical for the original convening authority to act in this case due to (explain). In accordance with R.C.M. 1107(a), Manual for Courts-Martial and service regulations this case was forward to this command for action. It is noted that this command is:

(the superior General Court-Marital Convening Authority within the original convening authority's chain of command).

(has been appointed as substitute convening authority in accordance with (reference), which will be attached to the record).

(other explanation regarding authority to act).

## **MATTERS CONSIDERED**

Prior to taking action in the case, I considered the results of trial, the recommendation of the staff judge advocate and any addendums thereto and all matters submitted by the defense and the accused in accordance with R.C.M. 1105 and 1106 (add additional matters as appropriate).

*Comment: Ensure that R.C.M. 1105 and 1106 matters have been submitted-- do not rely on the boilerplate. If the defense and accused has waived the right to submit such matters, include that fact in the action.*

*Comment: Include forwarding Instructions in accordance with service regulations.*

DISTRIBUTION: (In accordance with individual service regulations).

THE PRACTICE OF CRIMINAL LAW IN THE GUANTÁNAMO  
MILITARY COMMISSIONS

LIEUTENANT COLONEL DAVID J. R. FRAKT\*

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## I. INTRODUCTION

Guantánamo, and its military commissions, is a place and a legal regime that has captured the imagination of the public, not just in America, but around the globe. Particularly in the legal community, and especially among military lawyers, many are intensely curious about this highly controversial system to try detainees. Over the past three years, I have been asked variations of the same question by dozens, if not hundreds, of people, including my law students, fellow JAG officers, attorneys, members of the press, friends, and neighbors, namely: “What was Guantánamo like?” or “What were the military commissions like?” or “What was it like defending a detainee?” In this article, I attempt to answer these questions, while at the same time capturing some of the key lessons I learned from my experience as a defense counsel for two detainees.

In January 2008, I received an invitation to apply for a position as a prosecutor or defense counsel with the Office of Military Commissions. I had just completed a law review article about military commissions,<sup>1</sup> and thought it would be a fascinating opportunity. So I volunteered for a defense counsel position and, in late February, I was contacted by the Chief Defense Counsel, who interviewed me. Apparently, I had what he was looking for; I was offered the position.<sup>2</sup> From late April 2008 to early August 2009, I served as a defense counsel for the Office of Military Commissions-Defense (OMC-D). Upon arrival, I was immediately assigned as detailed (lead) counsel (solo counsel at the time) on two referred cases, *United States v. Mohammed Jawad*<sup>3</sup> and *United States v. Ali Hamza al*

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<sup>1</sup> See David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315 (2007). The “final draft” manuscript for this article was submitted in December 2007, but the article was updated in June 2008 prior to going to press.

<sup>2</sup> The Chief Defense Counsel was seeking JAGs with significant criminal prosecution and defense experience, with expertise in international law and the law of war considered a desirable bonus. I had, by the Air Force standards of today, a significant amount of trial experience (seventy-plus courts-martial, roughly half as trial counsel and half as defense counsel) and had also done a tour in the International Law Division at Pacific Air Forces Headquarters. In addition, I had taught criminal law, criminal procedure, evidence and a seminar on war crimes in my civilian capacity as a law professor, and had done scholarly analysis of the Military Commissions Act of 2006. *See id.*

<sup>3</sup> Charge Sheet, Mohammed Jawad, *United States v. Jawad* (Military Comm’n, Guantánamo Bay, Cuba Oct. 9, 2007), available at <http://www.defense.gov/news/Jan2008/d20080130jawadcharge.pdf> [hereinafter *Jawad Charge Sheet*]. For a webpage devoted to the *Jawad* case, see generally *Mohammed Jawad*, U.S. DEP’T OF DEF., <http://www.defense.gov/news/commissionsJawad.html> (last visited June 15, 2011). *See also* David J. R. Frakt, *Mohammed Jawad and the Military Commissions of Guantánamo*, 60 DUKE L.J. 1367 (2011); David J. R. Frakt, *Closing Argument at Guantánamo: The Torture of Mohammed Jawad*, 22 HARV. HUM. RTS. J. 1 (2009); AMNESTY INT’L, UNITED STATES OF AMERICA, FROM ILL-TREATMENT TO UNFAIR TRIAL: THE CASE OF MOHAMMED JAWAD, CHILD ‘ENEMY COMBATANT’ (2008).

*Bahlul*.<sup>4</sup> During my stint as defense counsel, both cases were resolved. Mr. al Bahlul went to trial, was convicted of all charges,<sup>5</sup> and received a life sentence,<sup>6</sup> which he is now serving while his conviction is on appeal. In contrast, after extensive pretrial litigation, the Convening Authority dismissed all charges against Mr. Jawad.<sup>7</sup> Shortly thereafter, Mr. Jawad was released unconditionally back to his native country of Afghanistan on order of the federal judge who granted his petition for a writ of habeas corpus.<sup>8</sup> Thus, I became the first and, thus far, the only defense counsel to see two military commission cases through to a resolution.

Between my two cases, I made approximately a dozen trips to Guantánamo Bay, spending sixty days on the island. I made a total of eight court appearances before the military commission, comprising of two arraignments, five motion hearings with numerous witnesses, both live and by video teleconference, and one trial between May and November 2008. All told, I spent fifteen days in a military commission courtroom. In addition, I argued one interlocutory appeal before the Court of Military Commission Review in Washington D.C. in January 2009, conducted one deposition, and made several appearances in Federal District Court in the related habeas corpus case. Given the small number of cases to go to trial<sup>9</sup> or to have significant pretrial litigation, this modest amount of lawyering makes me one of the most experienced military commission practitioners.

President Obama was elected the day after the conclusion of the trial of Ali Hamza al Bahlul. At the time, based on President Obama's comments about the military commissions while a Senator and presidential candidate, it appeared that Mr. al Bahlul's trial would be the last military commission at Guantánamo.<sup>10</sup> I assumed that my experience at

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<sup>4</sup> Charge Sheet, Ali Hamza Ahmad Suliman al Bahlul, *United States v. al Bahlul* (Military Comm'n, Guantánamo Bay, Cuba Feb. 8, 2008), available at <http://www.defense.gov/news/AE%201-13.pdf> [hereinafter *al Bahlul Charge Sheet*].

<sup>5</sup> Carol Rosenberg, *Bin Laden Propagandist Convicted*, MIAMI HERALD (Nov. 3, 2008), <http://www.miamiherald.com/1374/v-fullstory/story/753980.html>.

<sup>6</sup> Jane Sutton, *Bin Laden's Publicist Gets Life in Prison*, REUTERS (Nov. 3, 2008, 10:26 PM), <http://www.reuters.com/article/newsOne/idUSTRE49R5OZ20081104?sp=true>.

<sup>7</sup> Memorandum from Susan J. Crawford, Convening Auth. For Military Comm'ns (July 31, 2009), available at <http://www.defense.gov/news/Direction%20of%20CA%20-%20Jawad%2031%20JUL%202009.pdf>.

<sup>8</sup> *Bacha v. Obama*, No. 05-2385 (ESH), 2009 WL 2365846, at \*1 (D.D.C. July 30, 2009).

<sup>9</sup> As of this writing, six persons have been convicted by military commission, three by plea bargain and two by trial (Salim Hamdan and Ali Hamza al Bahlul, although only Hamdan's trial was contested).

<sup>10</sup> See Julian E. Barnes, *Obama to Continue Military Tribunals*, L.A. TIMES (May 15, 2009), <http://articles.latimes.com/2009/may/15/nation/na-military-tribunal15> ("The Obama administration will announce plans today to revive the Bush-era military commission system for prosecuting terrorism suspects, current and former officials said, reversing a campaign pledge to rely instead on federal courts and the traditional military justice system."). President Obama acknowledged that this decision was widely viewed as a breach of a campaign promise: "Now, some have suggested that this represents a reversal on my part." Press Release, The White House, Remarks by the President on National Security (May 21, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09) [hereinafter *Remarks by the President*]. However,

Guantánamo, while interesting from an historical standpoint, would not have much practical application for other practitioners. When President Obama suspended the military commissions the day after assuming office,<sup>11</sup> it appeared that the doors of the Expeditionary Legal Complex at Guantánamo were likely to be closed forever. Subsequently, the President had a change of heart, and decided to go with a “mend it, don’t end it” approach to military commissions.<sup>12</sup> On May 15, 2009 the Department of Defense announced a number of proposed improvements to the Manual for Military Commissions.<sup>13</sup> Over the course of the summer of 2009, Congress held several hearings in which additional changes to the Military Commissions Act of 2006 were considered.<sup>14</sup> I testified at one of these hearings on July 31, 2009,<sup>15</sup> and some of my recommendations were actually adopted.<sup>16</sup> In October 2009, the revised Military Commissions Act of 2009 was enacted and signed into law. In November 2009, the cabinet-level Detainee Review Task Force completed its work and the Attorney General announced that several detainees who had been previously charged had been cleared to go forward in the military commissions.<sup>17</sup> When the revised Manual for Military Commissions<sup>18</sup> was finally released on April 27, 2010,<sup>19</sup> the Military Commissions of Guantánamo were poised to begin anew in earnest.

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President Obama also asserted that he had never opposed “reform[ed]” military commissions. *Id.*

<sup>11</sup> William Glaberson, *Obama Orders Halt to Prosecutions at Guantánamo*, N.Y. TIMES (Jan. 21, 2009), <http://www.nytimes.com/2009/01/22/washington/22gitmo.html>.

<sup>12</sup> Remarks by the President, *supra* note 10.

<sup>13</sup> Press Release, U.S. Dep’t of Def., Defense Department Announces Proposed Rule Changes to Military Commissions (May 15, 2009), <http://www.defense.gov/releases/release.aspx?releaseid=12680>.

<sup>14</sup> See *Proposals for Reform of the Military Commissions System: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Proposals for Reform of the Military Commissions System*]; *Reforming the Military Commissions Act of 2006 and Detainee Policy: Hearing Before the H. Comm. on Armed Servs.*, 111th Cong. (2009); *Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. (2009).

<sup>15</sup> *Proposals for Reform of the Military Commissions System*, *supra* note 14, at 92–107 (prepared statement of David J. R. Frakt).

<sup>16</sup> I made eleven separate recommendations. My recommendations on the admissibility of coerced evidence, establishing a derivative evidence rule, and tightening the hearsay rules were largely adopted. My recommendations to improve discovery rules for the defense were partially adopted. My other recommendations—enhancing choice of counsel for defendants, adding a pretrial investigation requirement, creating a statute of limitations, improving the speedy trial requirement, authorizing credit against an adjudged sentence for pretrial confinement, incorporating an age limit, and amending and clarifying the substantive crimes and elements eligible to be tried—were not adopted.

<sup>17</sup> Press Release, U.S. Dep’t of Justice, Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees (Nov. 13, 2009), <http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html> (“The Attorney General has also determined, in consultation with the Secretary of Defense, that the prosecutions of five other Guantanamo Bay detainees who were charged in military commissions may be resumed in that forum.”).

<sup>18</sup> MANUAL FOR MILITARY COMMISSIONS, UNITED STATES (2010) [hereinafter MMC].

Although the latest round of military commissions has been slow to get off the ground, with just three guilty pleas<sup>20</sup> in over two years since the legislation passed, activity at the commissions appears to be accelerating. In March 2011, President Obama authorized military commissions for additional detainees.<sup>21</sup> On May 31, 2011, the Pentagon announced that the five alleged 9-11 co-conspirators would once again face trial by military commission.<sup>22</sup> The Office of Military Commissions-Prosecution (OMC-P), led by new Chief Prosecutor Brigadier General Mark Martins,<sup>23</sup> continues to prepare another thirty or more cases for current detainees. And the possibility remains open that additional cases will be brought as the war against al Qaeda and the Taliban continues.

As an aid to those lawyers, both military and civilian, who may have the opportunity to practice before military commissions in the future, I will discuss the most critical lessons I learned from my stint at OMC-D. The article focuses on the practical realities of practicing law at OMC-D and before the military commissions. The article draws most heavily on my experience defending Mohammed Jawad (and, to a lesser extent, Ali al Bahlul), but also draws from several other cases which have gone to trial or had significant pretrial litigation. Some of the lessons learned and advice offered herein will be specific to military counsel assigned to OMC-D, but much of it, it is hoped, will be of use to civilian defense attorneys and to lawyers assigned to (OMC-P) and perhaps even to military commission judges. The article should also provide some insight to the general interest reader about this unique legal regime.<sup>24</sup>

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<sup>19</sup> See David Frakt, *New Manual For Military Commissions Disregards the Commander-in-Chief, Congressional Intent and the Laws of War*, HUFFINGTON POST (Apr. 29, 2010, 6:23 PM), [http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c\\_b\\_557720.html](http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c_b_557720.html).

<sup>20</sup> See Carol Rosenberg, *Guantánamo Detainee Pleads Guilty to Conspiracy with al Qaeda*, MIAMI HERALD (Feb 16, 2011), <http://www.miamiherald.com/2011/02/16/2067629/terror-camp-trainer-pleads-guilty.html> (Noor Uthman Mohammed, a Sudanese “terror camp trainer,” pleaded guilty and received a reduced sentence in exchange for cooperation); Peter Finn, *Youngest Guantanamo Detainee Pleads Guilty*, WASH. POST (Oct. 25, 2010, 11:21 PM), [http://www.washingtonpost.com/wp-dyn/content/article/2010/10/25/AR2010102500383\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/10/25/AR2010102500383_pf.html); Reuters, *Guantanamo Detainee Ibrahim Ahmed Mahmoud al Qosi Pleads Guilty*, WASH. POST, July 8, 2010, at A3.

<sup>21</sup> Mark Landler & Scott Shane, *Obama Clears Way for Guantánamo Trials*, N.Y. TIMES, Mar. 8, 2011, at A19 (“President Obama on Monday reversed his two-year-old order halting new military charges against detainees at Guantánamo Bay, Cuba, permitting military trials to resume with revamped procedures.”).

<sup>22</sup> *9/11 Defendants Charged at Guantánamo With Terrorism and Murder*, N.Y. TIMES, June 1, 2011 at A18 (“Military prosecutors have refiled terrorism and murder charges against Khalid Shaikh Mohammed and four other men in the Sept. 11 attacks, using a revamped trial process at Guantánamo Bay, Cuba, the Pentagon said Tuesday.”)

<sup>23</sup> *New Military Commissions Chief Prosecutor Announced*, DoD News Release No 543-11 (June 23, 2011), <http://www.defense.gov/releases/release.aspx?releaseid=14598>

<sup>24</sup> See also, David J. R. Frakt, *The Difficulty of Defending Detainees*, 48 WASHBURN L.J. 381, 387–88 (2009)(describing some of the logistical difficulties and cultural barriers that made defending a detainee particularly challenging).

I have organized this article in chronological order from the early phases of being assigned to the Office of Military Commissions and detailed to a case through discovery, pre-trial litigation, and trial.

## II. PRELIMINARY/GENERAL OBSERVATIONS

In my nearly ten years on active duty and five years as a Reservist, I have been stationed or attached to five base legal offices, one area defense counsel office, one numbered air force headquarters and one major command headquarters. OMC-D was unlike any of these other JAG assignments in several respects. First, OMC is a joint environment and a true total force effort. We had JAGs and paralegals, both active, reserve and guard, from all services, plus Department of Defense (DoD) civilians, and contractors serving as intelligence analysts. There is a similar blend of personnel at OMC-P. The office was also top-heavy with very experienced officers. There were far more O-4s, O-5s, and O-6s than O-3s. The presence of so many experienced lawyers from each service was a tremendous resource. For example, when I had to appear before an Army judge at Guantánamo, I was able to get the “inside scoop” about him from a couple of Army JAGs who had practiced extensively before him. Although I had potential grounds to challenge the judge for cause,<sup>25</sup> my Army colleagues assured me that he was an exceedingly fair judge and that I would be unlikely to do better if I managed to get him to recuse himself. Appearing in front of judges from other services is just one of the many challenges of practicing law at Guantánamo. One must adjust to differences in service culture and tradition as well as the individual idiosyncrasies of your judge. For example, one of the judges I appeared in front of refused to hold Rule 802 pretrial conferences.<sup>26</sup>

Second, the sheer size and complexity of the commissions operation can also be daunting. When I served as an area defense counsel in 2000 and 2001, I was the only lawyer assigned to the office, and I had one paralegal for support. We had one spare office for the occasional circuit defense counsel who would come to assist on a case or for a visiting defense counsel representing a client on a case in which I was conflicted. OMC-D, had, at one point, close to 140 employees, making it the largest legal defense operation in the entire Department of Defense and one of the largest military legal organizations ever assembled. We grew so big that we didn’t have a

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<sup>25</sup> The judge was a personal friend of one of the opposing counsel.

<sup>26</sup> Rule for Military Commissions (R.M.C.) 802 “Conferences” is identical to Rule for Courts-Martial (R.C.M.) 802. Compare MMC, *supra* note 18, R.M.C. 802, at II-68 (2010), with MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 802, at II-76 (2008) [hereinafter MCM]. The rule provides for routine administrative and scheduling matters and the like—“such matters as will promote a fair and expeditious trial”—to be discussed informally by the parties and judge in chambers or, more commonly, by teleconference. MMC, *supra* note 18, R.M.C. 802(a), at II-68. The accused need not be present. *Id.* R.M.C. 802(d), at II-69.

conference room spacious enough to hold an office meeting. Finding office space for such a large group was a challenge; unfortunately, we were not all able to work at the same location. Our offices were in leased spaces in several commercial office buildings spread throughout the Washington, D.C. metropolitan area. In some cases, trial teams were not even co-located. We also had multiple office spaces at Guantánamo. In any given week, up to a third of OMC-D personnel might be on the island.

Finally, learning to navigate the commissions' bureaucracy was frustrating and time-consuming. Because the computer networks in Washington, D.C. and the computer network at Guantánamo were administered by different organizations, each lawyer usually had four different e-mail accounts: a secure and unsecure account in Washington, D.C. and another pair of accounts at Guantánamo. There was also a large OMC administrative office in Crystal City, VA, which housed the Convening Authority and her legal staff, the Clerk of Commissions, the public affairs office, and other ministerial functions including travel arrangements to and from Guantánamo. Any matters relating to detainees (such as attorney visits, requests for medical attention, and delivery of legal materials or clothes for the courtroom) had to be coordinated through the Joint Task Force Legal Office at Guantánamo. Finally, there was a whole military unit at Guantánamo designed to support commission activities. This unit managed a fleet of vehicles for temporary duty personnel, assigned quarters (usually either Quonset hut like tents, or converted shipping trailers), provided security for court operations, and ran the court complex, including the complicated communications system.

## A. Personal Preparation

### 1. Security Clearance/Passport

My first step in preparing for this assignment was updating and upgrading my security clearance. If you are assigned to OMC-D, applying for a Top Secret/SCI clearance is an essential first step. While much of the evidence is only classified at the Secret level, almost anything having to do with the so-called High Value Detainees<sup>27</sup> is Top Secret (TS) or higher. Although background investigations for defense counsel are given high priority by the government, they still can take three or four months, which may be more than the amount of advance notice an officer might receive of an assignment to OMC. Some defense counsel who were detailed to represent the alleged 9-11 co-conspirators were not even allowed to meet with their clients prior to the arraignment because they were awaiting their

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<sup>27</sup> See *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/high-value> (last visited June 16, 2011) (“Sixteen men in Guantánamo have been described as ‘high-value detainees’ by United States officials.”).

background investigations to be concluded.<sup>28</sup> In addition, attorneys not familiar with procedures for storage and handling of classified materials and the use of the SIPRNET<sup>29</sup> would be well-served to start learning. Once I arrived in Washington, D.C., in addition to the usual in-processing tasks associated with a new military assignment, I was “read in” to various classified programs, trained as a courier for classified information, and issued a courier card. This is standard procedure for new counsel.

Also, anyone assigned to OMC should apply for an official U.S. Government passport right away, if not already in possession of one. It is very likely that the defense (or prosecution) of a Guantánamo detainee will require overseas travel. Another important step, once an attorney is assigned to a case and has identified the location of the crime scene and the whereabouts of the key witnesses, is to initiate the application for visas to countries to which travel may be needed.

## 2. Background Reading

Lawyers who will be practicing before the commissions should familiarize themselves with the basic sources of law for the commissions. The starting point, of course, is the Military Commissions Act (M.C.A.), the authorizing legislation for the commissions.<sup>30</sup> The next essential source to study is the Manual for Military Commissions (M.M.C.)<sup>31</sup> which contains the Rules for Military Commissions (R.M.C.),<sup>32</sup> the Military Commission Rules of Evidence (M.C.R.E.),<sup>33</sup> and a penal code containing the crimes punishable by military commission and their elements.<sup>34</sup> Military practitioners will find much of the content of the M.M.C. familiar because it was derived from the Manual for Courts-Martial.<sup>35</sup> However, there are a number of key differences that attorneys need to be aware of.<sup>36</sup> For those

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<sup>28</sup> *United States v. Khalid Sheik Mohammed* (Military Comm’n, Guantánamo Bay, Cuba May 22, 2008) (Commission Ruling D-002-006, Motions for Continuance of Initial Session/Arrestment), *available at* <http://www.defense.gov/news/d20080522Motions%20to%20Continue%20Initial%20Session%20and%20Arrestment%20Appellate%20Exhibits%2017%20thru%2021.pdf>.

<sup>29</sup> The SIPRNET is a secure government internet used for accessing, searching, and transmitting classified information. Often accessing the SIPRNET requires inserting a special hard drive in a dedicated computer. The hard drives are removed and stored in special safes when not in use. Use of the SIPRNET is essential for reviewing classified discovery materials and communicating with assigned intelligence analysts.

<sup>30</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, & 28 U.S.C.).

<sup>31</sup> MMC, *supra* note 18.

<sup>32</sup> *Id.* pt II.

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

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

<sup>35</sup> Robert M. Gates, *Foreword* to MMC, *supra* note 18 (“Pursuant to 10 U.S.C. § 949a, the M.M.C. is adapted from the Manual for Courts-Martial.”).

<sup>36</sup> I discussed many of the crucial distinctions in my first article on the commissions. *See* Frakt, *supra* note 1. Note that this article analyzed the 2006 M.C.A. and the 2007 M.M.C., which have since been revised in several important respects, particularly with respect to the rules of evidence relating to hearsay and the

more familiar with federal criminal practice, the Congressional Research Service has prepared a report comparing military commissions to federal criminal trials.<sup>37</sup> Another important source is the Regulation for Trial by Military Commissions (R.T.M.C.).<sup>38</sup> This administrative regulation contains guidance of many mundane but important processes such as witness funding and travel, the appointment of expert witnesses and consultants, the taking of depositions, and post-trial and appellate procedures. One chapter focuses on the role of defense counsel,<sup>39</sup> and another is devoted to the role of trial counsel.<sup>40</sup> Before making a court appearance or filing any motions, commission attorneys must study the Military Commission Trial Judiciary Rules of Court,<sup>41</sup> paying particular attention to Rule 3, “Motion Practice.” A cover letter from the Chief Military Commissions Judge included with the rules mandates, “[a]ll counsel practicing before Military Commissions shall become familiar with these Rules and shall comply with them.”<sup>42</sup> If the opportunity arises to appear before the Court of Military Commissions Review, the C.M.C.R. has published its own rules.<sup>43</sup> All of the key sources of law can be found online at the official Department of Defense Military Commissions webpage,<sup>44</sup> or at the National Institute of Military Justice (NIMJ) military commission webpage.<sup>45</sup>

For those wishing to go beyond the basic legal texts and get additional historical, cultural, and legal context, there are a number of fine books on al Qaeda, terrorism, torture, and related topics that I recommend. Many military commission counsel consider the 9-11 Commission Report<sup>46</sup> to be essential reading. Another excellent book on the topic is the Pulitzer

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admissibility of coerced statements. See JONATHAN TRACY & MARY WELD, NAT’L INST. OF MILITARY JUSTICE, CHANGES TO THE MANUAL FOR MILITARY COMMISSIONS (2010), available at <http://www.wcl.american.edu/nimj/documents/2010ChangestoManualforMilitaryCommissions-finalmay4.pdf?rd=1>; see also Frakt, *supra* note 19.

<sup>37</sup> See JENNIFER K. ELSEA, CONG. RESEARCH SERV., R 40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT (2010).

<sup>38</sup> U.S. DEP’T OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSIONS (2007), available at [http://www.defense.gov/news/Apr2007/Reg\\_for\\_Trial\\_by\\_mcm.pdf](http://www.defense.gov/news/Apr2007/Reg_for_Trial_by_mcm.pdf) [hereinafter R.T.M.C.].

<sup>39</sup> *Id.* at 36–53 (Chapter 9).

<sup>40</sup> *Id.* at 32–35 (Chapter 8).

<sup>41</sup> U.S. DEP’T OF DEF., MILITARY COMMISSIONS TRIAL JUDICIARY RULES OF COURT (2007), available at <http://www.defense.gov/news/Nov2007/MCTJRulesofCourt.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> U.S. DEP’T OF DEF., COURT OF MILITARY COMMISSION REVIEW, RULES OF PRACTICE (2008), available at [http://www.defense.gov/news/USCMCR%20Rules%20\(10%20Apr%2008\)%20\(39%20pages\)%20\(2\).pdf](http://www.defense.gov/news/USCMCR%20Rules%20(10%20Apr%2008)%20(39%20pages)%20(2).pdf)

<sup>44</sup> *Commission Cases*, U.S. DEP’T OF DEF, <http://www.defense.gov/news/commissions.html> (last visited June 16, 2011).

<sup>45</sup> *Military Commissions Act and Resources*, NAT’L INST. OF MIL. JUST., [http://www.wcl.american.edu/nimj/military\\_commission\\_law.cfm](http://www.wcl.american.edu/nimj/military_commission_law.cfm) (last visited June 16, 2011). NIMJ has also prepared a series of analysis papers of various aspects of military commission practice which can be found at this site.

<sup>46</sup> NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).



Prize winning, *The Looming Tower*.<sup>47</sup> Steve Coll's, *The Ghost Wars*,<sup>48</sup> is an indispensable work for those seeking an understanding on the pre-9/11 recent history of Afghanistan. In addition, Jane Mayer's, *The Dark Side*,<sup>49</sup> Jordan Paust's, *Beyond the Law*,<sup>50</sup> and Phillippe Sands', *Torture Team*<sup>51</sup> provide exceptional insight into the development and use of enhanced interrogation techniques on detainees.<sup>52</sup> To understand the larger legal context of the military commissions, I also strongly recommend *Guantánamo and the Abuse of Presidential Power*<sup>53</sup> and *The Enemy Combatant Papers: American Justice, the Courts, and the War on Terror*.<sup>54</sup> On the lighter side, Clive Stafford Smith's, *Eight O'Clock Ferry to the Windward Side*,<sup>55</sup> provides an amusing look at what Guantánamo was like for detainee lawyers in the early years of the commissions and habeas corpus litigation. To get a better understanding of what motivates detainee attorneys and how such lawyers, especially civilian habeas corpus counsel, have handled the unique challenges of representing detainees, read *The Guantánamo Lawyers*.<sup>56</sup> It will also help you to establish a positive relationship with your client if you have an understanding of their local culture and religion. The interpreters that we used to communicate with our clients proved to be invaluable resources for insights into our clients' upbringing and worldviews.

## B. Assembling a Defense Team

One of the keys to success as a military commission defense counsel is assembling a compatible, cohesive defense team. When I was an area defense counsel, I typically represented my clients on my own. On a couple of complex or high profile cases, a senior defense attorney (then called circuit counsel) was appointed by my superiors to assist me. In a couple of other cases, my client hired a civilian attorney at his own expense, and I

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<sup>47</sup> LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* (2007).

<sup>48</sup> STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* (2004).

<sup>49</sup> JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

<sup>50</sup> JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* (2007).

<sup>51</sup> PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).

<sup>52</sup> See also *THE ENEMY COMBATANT PAPERS: AMERICAN JUSTICE, THE COURTS, AND THE WAR ON TERROR* (Joshua L. Dratel & Karen J. Greenberg eds., 2008) [hereinafter *ENEMY COMBATANT PAPERS*]; *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Joshua L. Dratel & Karen J. Greenberg eds., 2005).

<sup>53</sup> JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006).

<sup>54</sup> *ENEMY COMBATANT PAPERS*, *supra* note 52.

<sup>55</sup> CLIVE STAFFORD SMITH, *EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO BAY* (2007).

<sup>56</sup> *THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW* (Mark Denbeaux & Jonathan Hafetz eds., 2009).

then collaborated with that attorney. At OMC-D, the cases are, for the most part, handled by teams of attorneys. The initial assignment (detailing) of lead counsel on a case is made by the Chief Defense Counsel, as is his<sup>57</sup> responsibility under the M.C.A. and M.M.C.<sup>58</sup> The Chief Defense Counsel may also assign any number of assistant defense counsels and will do so based on the complexity of the case and seriousness of the charges.<sup>59</sup> Typically, assistant defense counsel assignments are made in full consultation with the detailed defense counsel. It is the lead defense counsel's responsibility to try to assess the particular demands of the case, assess his or her own strengths and weaknesses, and assemble a team accordingly. Some detailed counsel chose to supplement their teams with civilian defense counsel. For non-capital cases, the Chief Defense Counsel maintains a list of civilian attorneys who have expressed an interest in volunteering to serve as defense counsel and who have met certain qualifying criteria. For capital cases, the John Adams Project,<sup>60</sup> a collaborative effort of the ACLU and the National Association of Criminal Defense Lawyers, has recruited a highly experienced pool of capital-qualified defense counsel to assist military counsel, the vast majority of who have never tried a capital case. Initially, the John Adams Project provided funding for these counsel. The 2009 Military Commissions Act has authorized such counsel to be paid with federal funds.<sup>61</sup>

When I was an area defense counsel, I tried two cases per month and had dozens of clients at any given time facing non-judicial punishment, discharges, demotions, and other administrative actions. Based on this experience, I assumed that I could easily handle the two cases assigned to me on my own. It quickly became apparent that I was deluding myself. The workload involved in even one military commission case can be absolutely staggering. Military commission cases present numerous novel and complex issues, many of first impression. It became clear to me after my first substantive hearing before the commission that I needed help. Fortunately, there was a wealth of talented JAGs in the office who had not yet been assigned as lead counsel. In late June, I asked the Chief Defense Counsel to assign Lieutenant Commander (now Commander) Katharine Doxakis, a Navy Reservist, as assistant counsel on both of my cases. As both cases moved closer to trial, I requested another attorney, Major Eric Montalvo, USMC (now retired), to be assigned to my trial team.

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<sup>57</sup> Thus far, all Chief Defense Counsels have been men.

<sup>58</sup> MMC, *supra* note 18, R.M.C. 501(b), at II-22.

<sup>59</sup> *Id.*

<sup>60</sup> *John Adams Project—American Values*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/national-security/john-adams-project-american-values> (last visited June 16, 2011).

<sup>61</sup> See Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2578, 2581 (2009) (§ 948k(c)(2) & § 949a(b)(2)(C)); see also MMC, *supra* note 18, R.M.C. 506(b), at II-32.

Fortunately, this request was also granted.<sup>62</sup> Over the fifteen months that I was assigned to OMC-D, I had at least five different paralegals working on the cases: one Marine, two Army (including one Guardsman), and two Air Force, one active and one Reserve. In addition, I had a civilian contractor intelligence analyst assigned to my cases to help wade through the intelligence reports and mounds of other classified evidence and to do additional research and analysis on classified databases. At the time that I started working at OMC-D, there were no investigative personnel assigned to the defense, and any requests for investigative assistance had to go to the Convening Authority, who routinely denied them, including multiple such requests from my team.<sup>63</sup> As a result, my team did its own investigative work in addition to our legal work. By late 2009, several full-time military investigators had been assigned to OMC-D and were available to do investigative work for the various trial teams.

One of the challenges of being a lead defense counsel was managing the trial team. Most of the attorneys assigned to OMC-D were experienced trial attorneys who were used to functioning as lead counsel. This often caused friction, particularly when a more experienced counsel, or even a higher-ranking counsel, was assigned to work for someone else. Sometimes this occurred simply as a matter of timing of arrival at OMC-D. The most notorious example of this involved the defense team for Omar Khadr, which essentially imploded over disagreements between Khadr's lead counsel, Lieutenant Commander William Kuebler, the Chief Defense Counsel, and other lawyers assigned to the case, including another Navy JAG who outranked him. The kerfuffle ultimately led to all of the lawyers detailed to Khadr being fired.<sup>64</sup> Those teams that were most effective were those that had a good balance of strengths that complemented one another. In my view, an ideal trial team would include someone with excellent research and writing skills, someone with excellent investigative skills, and of course, one or more attorneys who were highly skilled courtroom advocates in motion practice, oral argument, and in the direct and cross-examination of witnesses.

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<sup>62</sup> Both attorneys were later excused from representing Ali al Bahlul when he refused all representation.

<sup>63</sup> United States v. Jawad (Military Comm'n, Guantánamo Bay, Cuba Sept. 18, 2008) (Defense Motion For Appointment of Expert Consultants Dr. Allen Keller and Dr. Katherine Porterfield, and Defense Investigator David Fechheimer (D-023)), *available at* <http://www.defense.gov/news/Jawad%20-%20D-023%20-%20Motion%20fro%20Appointment%20of%20Experts.pdf>.

<sup>64</sup> Steven Edwards, *Khadr's U.S. Military Lawyer Fired*, CANWEST NEWS SERVICE (Apr. 3, 2009), *available at* <http://freedomion.com.pa/phpBB2/viewtopic.php?p=1342284>.

### C. Dealing with the Press

Another unusual aspect of practice at Guantánamo was the intense media interest. Thus, in addition to trial advocacy skills, lawyers with strong public relations and media skills were particularly valuable at OMC-D, where cases are often fought as much in the court of public opinion as in the courtroom. Reporters, usually from newspapers but also from television and radio, attended all hearings at Guantánamo and often flew to Guantánamo on the same flights with the trial teams and peppered us with questions en route. The press corps had the option of observing the proceedings in the courtroom or following the action live in the media center on closed-circuit TV, enabling them to file stories in real time from their computers. After court proceedings were concluded for the day, counsel could hold a press conference in the briefing room, which was constructed in an old aircraft hangar adjacent to the expeditionary legal complex. (The hangar also housed the media center.) I sometimes had as many as a dozen journalists and NGO trial observers<sup>65</sup> at my press conferences. There were also numerous informal opportunities to talk to the press corps while “on Island.” There were only a couple of restaurants on the naval base where journalists were allowed to eat, and they always traveled in a pack, escorted by an official minder. Many of the defense counsel would socialize with them after duty hours at these restaurants. Counsel with particularly high profile cases also received a steady barrage of media inquiries and interview requests by phone and e-mail. The strong public interest, both domestically and internationally, in military commissions often resulted in the lead counsel receiving a considerable amount of press attention, while the assistant counsels who labored in relative obscurity often received little public recognition for their work. For example, during my tour at OMC-D, I was interviewed twice on the Rachel Maddow Show on MSNBC,<sup>66</sup> several times on public radio programs,<sup>67</sup> and dozens of times by journalists, resulting in being quoted over one hundred

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<sup>65</sup> The trial observers, primarily from human rights organizations like Amnesty International, Human Rights First, Human Rights Watch, and the ACLU were not allowed to ask questions at the press conferences but were allowed to attend. Many of the trial observers blogged about their observations on websites such as Salon, dailykos, Huffington Post, and Jurist.

<sup>66</sup> See Interview by Rachel Maddow with David J. R. Frakt, *The Rachel Maddow Show* (MSNBC television broadcast May 15, 2009), available at [http://www.msnbc.msn.com/id/26315908/ns/msnbc\\_tv-rachel\\_maddow\\_show/#30773594](http://www.msnbc.msn.com/id/26315908/ns/msnbc_tv-rachel_maddow_show/#30773594); Interview by Rachel Maddow with David J. R. Frakt, *The Rachel Maddow Show* (MSNBC television broadcast Jan. 12, 2009), available at <http://rss.msnbc.msn.com/id/26315908/vp/28629277#28629277>.

<sup>67</sup> See *Preserving Guantanamo History*, BBC/PRI's The World (July 30, 2009), <http://www.theworld.org/2009/07/30/preserving-Guantanamo-history>; *As It Happens*, CBC (July 29, 2009); BBC/PRI's The World (Jan. 30, 2009); *Closing Guantánamo*, Nat'l Pub. Radio, On Point with Tom Ashbrook (Jan. 22, 2009); *The Politics of Patriotism*, Wis. Pub. Radio, Here on Earth (July 21, 2008), [http://www.wpr.org/hereonearth/archive\\_080721k.cfm](http://www.wpr.org/hereonearth/archive_080721k.cfm); BBC/PRI's The World (July 4, 2008).

times in major newspapers and magazines,<sup>68</sup> including several articles that appeared in the *Early Bird*.<sup>69</sup>

While this press attention was generally welcomed by military defense counsel, it was potentially problematic in several respects. First, there are possible ethical issues implicated by making comments to the media.<sup>70</sup> The Military Commissions Chief Prosecutor, Colonel Lawrence Morris, USA, clearly violated these rules in one of my cases, potentially subjecting himself to professional discipline and making himself an easy target for complaints to the military judge about his ethics.<sup>71</sup> Specifically, Colonel Morris referenced multiple confessions by my client, Mohammed Jawad, in an interview with *The Washington Post*,<sup>72</sup> despite the fact that the relevant Army Rule of Professional Responsibility clearly prohibits any reference by a prosecutor to “the existence or contents of any confession.”<sup>73</sup> Attorneys practicing before the commissions should thoroughly familiarize themselves with the relevant rules of professional responsibility in this area.<sup>74</sup> Second, responding to the constant media inquiries can be so time-

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<sup>68</sup> For example, I was quoted in *The New York Times*, *The Washington Post*, *Los Angeles Times*, *USA Today*, *The Miami Herald*, *Newsweek*, *The Nation*, and *The New York Review of Books*.

<sup>69</sup> THE EARLY BIRD, <http://ebird.osd.mil> (last visited July 9, 2011). The *Early Bird* is the DoD’s daily compilation of news articles related to defense and national security issues, which is widely read by military leaders.

<sup>70</sup> Seth R. Deam, *Does Labeling the System “Unfair” Threaten Fairness? Trial Publicity Rules for Defense Attorneys in Military Commissions*, 19 *GEO. J. LEGAL ETHICS* 663 (2006); C. Peter Dungan, *Avoiding “Catch-22s”: Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, 30 *J. LEGAL PROF.* 31 (2005–06); Jessica A. Hinkie, *Free Speech and Rule 3.6: How the Object of Attorney Speech Affects the Right to Make Public Criticism*, 20 *GEO. J. LEGAL ETHICS* 695 (2007).

<sup>71</sup> *United States v. Jawad* (Military Comm’n, Guantánamo Bay, Cuba June 19, 2008) (transcript of hearing, pp. 99–100) (on file with author).

<sup>72</sup> Josh White, *Detainee’s Attorney Seeks Dismissal Over Abuse*, *WASH. POST* (June 8, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/07/AR2008060701904.html> (“Morris said that Jawad made confessions at the scene of his capture and more than once in the few hours following the incident, all without any duress.”). COL Morris’s statement, in addition to being unprofessional, was inaccurate. The military judge later ruled that the confessions referred to by COL Morris were the product of torture and suppressed them. *United States v. Jawad* (Military Comm’n, Guantánamo Bay, Cuba Nov. 19, 2008) (Ruling on Defense Motion to Suppress Out-of-Court Statements By the Accused Made While In U.S. Custody (D-021)) [hereinafter Ruling on Defense Motion Nov. 19, 2008], in 1 *NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER* 349–351 (2009); *United States v. Jawad* (Military Comm’n, Guantánamo Bay, Cuba Oct. 28, 2008) (Ruling on Defense Motion to Suppress Out-Of-Court Statements of the Accused to Afghan Authorities (D-022)) [hereinafter Ruling on Defense Motion Oct. 28, 2008], in 1 *NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER* 345–46 (2009).

<sup>73</sup> U.S. ARMY, *ARMY REG. 27-26, RULES OF PROF’L CONDUCT FOR LAWYERS R. 3.6* (Tribunal Publicity) (1992).

<sup>74</sup> For members of the Air Force JAG Corps, see U.S. AIR FORCE, *TJS-2, RULES OF PROF’L CONDUCT AND STANDARDS OF CIVILITY R. 3.6* (2005) (Trial Publicity); U.S. AIR FORCE, *TJS-3, STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.3* (Public Statements (Prosecutors)), *Standard 4-2.3* (Public Statements (Defense Counsel)), & *Standard 8-1.1* (Extrajudicial

consuming that it becomes a distraction from more important work. I occasionally found myself spending an hour or more explaining some complex concept of military law to a journalist, only to be aggravated upon reading the story that I wasn't even quoted! Also, journalists often call in the evenings and on weekends, whenever they are working on a story. It is important to keep in mind that while maintaining positive relations with the media is desirable, there is no obligation to respond to each and every request for information. Third, attention from the media (or the lack thereof) can cause inflated or bruised egos and friction within teams and within the unit. Effectively managing a trial team required ensuring that everyone on the team received as much recognition as possible. While some attorneys were happy to work in the shadows, others craved the limelight. While it is helpful for one attorney to be the public face of the trial team, when other members of the trial team share in presenting information to the public and the press, it helps maintain good morale. For anyone going to work at the Office of Military Commissions, but particularly those detailed as lead counsel, getting some media training is imperative, especially if you've never worked on a high profile case before.<sup>75</sup> Understanding how to work with the media and use it your client's advantage, and understanding the differences between what is "on the record," "off the record," and "on background" is essential to effectively representing your client and staying out of trouble.

#### D. Advocacy Outside the Courtroom

The atmosphere surrounding military commission cases is highly politically charged. Decisions to hold or release a detainee, to prosecute or not prosecute, and to provide a favorable plea bargain or not are influenced by a wide variety of diplomatic and political factors which may have little to

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Statements by Lawyers) (2002). Each service and state bar has similar rules. See, e.g., U.S. ARMY, ARMY REG. 27-26, RULES OF PROF'L CONDUCT FOR LAWYERS R. 3.6 (Tribunal Publicity) (1992); U.S. NAVY & MARINE CORPS, JAGINST 5803.1C, PROF'L CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL (2004). Each state has its own ethics rules governing pretrial publicity as well, generally modeled on the ABA Model Rules of Professional Conduct, Rule 3.6, Pretrial Publicity.

<sup>75</sup> I was fortunate to have been involved, albeit tangentially, in one high-profile case when I was on active duty, the Tarnak Farms incident involving Air Force pilot Major Harry Schmidt. See generally MICHAEL FRISCOLANTI, FRIENDLY FIRE: THE UNTOLD STORY OF THE U.S. BOMBING THAT KILLED FOUR CANADIAN SOLDIERS IN AFGHANISTAN (2005); C. Peter Dungan, *Rules of Engagement and Fratricide Prevention: Lessons From the Tarnak Farms Incident*, 9 UCLA J. INT'L L. & FOREIGN AFF. 301 (2004). I had also attended a useful media training session by retired Air Force JAG Frank Spinner, best known for his high-profile defense in the Kelly Flinn case. Nevertheless, I was insufficiently prepared for the level of media interest in commission cases. See generally James Schwenk, *Military Justice and the Media: The Media Interview*, 12 USAFA J. LEG. STUD. 15 (2002-03); John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77 (2002).

do with the merits of the case. Those defense counsel who have achieved good results for their clients have devoted a considerable amount of time to creative advocacy outside the courtroom, including filing lawsuits designed to slow or shutdown the commissions process, a process dubbed “crossover advocacy” by one commentator.<sup>76</sup> For example, Major Michael Mori made numerous trips to Australia to garner public support for his client, David Hicks.<sup>77</sup> His zealous advocacy resulted in a highly favorable pretrial agreement for his client, who is now free.<sup>78</sup> Air Force Lt Col Yvonne Bradley and her co-counsel, Clive Stafford Smith, made numerous trips to the U.K. to press the case for Binyam Mohammed’s release, at one point meeting with the British Foreign Minister and Members of Parliament.<sup>79</sup> Lt Col Bradley also gave interviews to BBC and other leading British press outlets.<sup>80</sup> She ultimately succeeded in persuading the U.K. to obtain his release.<sup>81</sup> Omar Khadr’s defense team spent a great deal of time in Canada, meeting with government officials and pursuing litigation in the Canadian courts to force his release. Despite several victories in the courts, including the Supreme Court of Canada,<sup>82</sup> the team was unable to secure his release, but they did ultimately obtain Canadian cooperation in working out a favorable plea agreement for their client.

The defense team for Salim Hamdan, led by Navy Lt. Cdr Charlie Swift, filed suit in Federal Court alleging that the original military commissions created by Executive Order were unconstitutional. The case

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<sup>76</sup> Peter Margulies, *The Detainees’ Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFFALO L. REV. 347 (2009); see also Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725 (2010)

<sup>77</sup> See Ellen Yaroshfsky, *Zealous Lawyering Succeeds Against All Odds: Major Mori and the Legal Team for David Hicks at Guantánamo Bay*, 13 ROGER WILLIAMS U. L. REV. 469 (2008). See generally Joshua L. Dratel, *Guantánamo Bay: The Global Effects of Wrongful Detention, Torture & Unchecked Executive Power: Transcript: Navigating The New Military Commissions: The Case of David Hicks*, 10 N.Y. CITY L. REV. 385 (2007)

<sup>78</sup> Rory Callinan, *Aussie Taliban Goes Free*, TIME (Dec. 29, 2007), <http://www.time.com/time/world/article/0,8599,1698999,00.html>.

<sup>79</sup> *Binyam Mohamed’s Military Lawyer Lt Col Yvonne Bradley to Meet David Miliband and the ISC, and Address Parliamentary Hearing and Press Conference*, REPRIEVE (Feb. 10, 2009), [http://www.reprive.org.uk/2009\\_02\\_10Yvoneschedule2](http://www.reprive.org.uk/2009_02_10Yvoneschedule2).

<sup>80</sup> Julie Sell, *An Air Force Lawyer Fights to Free a Guantánamo Inmate*, MCCLATCHY (Feb. 13, 2009), <http://www.mcclatchydc.com/2009/02/13/62151/an-air-force-lawyer-fights-to.html>;

Trevor Timpson, *I Thought He was a Terrorist*, BBC NEWS (Feb. 13, 2009), [http://news.bbc.co.uk/2/hi/uk\\_news/7885310.stm](http://news.bbc.co.uk/2/hi/uk_news/7885310.stm).

<sup>81</sup> Robert Booth, Richard Norton-Taylor, & Peter Walker, *Binyam Mohamed Returns to Britain After Guantánamo Ordeal*, GUARDIAN (Feb 23, 2009),

<http://www.guardian.co.uk/uk/2009/feb/23/binyam-mohamed-guantanamo-plane-lands>. The commission charges had earlier been dismissed without prejudice but were slated to be sworn again. Peter Finn, *Charges Against 5 Detainees Dropped Temporarily*, WASH. POST (Oct. 22, 2008),

<http://www.washingtonpost.com/wp-yn/content/article/2008/10/21/AR2008102100873.html>.

<sup>82</sup> Ian Austen, *Canada’s Supreme Court Says Inmate’s Rights Were Violated at Guantánamo*, N.Y. TIMES (Jan. 29, 2010), <http://www.nytimes.com/2010/01/29/world/americas/30canada.html>.

eventually made its way to the U.S. Supreme Court, delaying all military commission proceedings for years. Their victory at the Supreme Court in *Hamdan v. Rumsfeld*<sup>83</sup> resulted in significant improvements to the rules and procedures in the military commission regime in which he was ultimately tried. After the Supreme Court's decision, Hamdan's defense team continued to pursue remedies in federal court, but their efforts to get a federal judge to stay his trial while adjudicating his habeas corpus petition failed. Hamdan was acquitted of the most serious charges against him, received a light sentence,<sup>84</sup> and was released to his home country of Yemen. This was due in large part to the skillful advocacy, both in and out of the courtroom, by his defense team.

The *Jawad* defense team, which I led, also engaged in non-traditional advocacy outside the confines of the Guantánamo courtroom. For example, we met with the Afghan Ambassador to the United States in an effort to persuade him to put pressure on the United States to release him. My co-counsel, Major Montalvo, also met with a number of high-level Afghan officials in two trips to Afghanistan, including the Minister of Defense and the Attorney General. Major Montalvo also initiated a lawsuit in conjunction with the Afghan Independent Human Rights Commission designed to force Afghanistan to seek Jawad's repatriation.<sup>85</sup> Further, Major Montalvo went to the UN in New York City and met with UNICEF representatives, where, along with one of Omar Khadr's attorneys, he held a press conference<sup>86</sup> to highlight the U.S. failure to comply with the Child Soldier Protocol.<sup>87</sup> The *Khadr* and *Jawad* defense teams also met with representatives of the European Union in an effort to persuade them to put pressure on the U.S. not to try child soldiers. I also met regularly with the M.C.A. Coalition, an alliance of civil rights and civil liberties advocacy groups, to strategize on how to shape public opinion and influence public policy related to national security and terrorism issues. Most importantly, I

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<sup>83</sup> 548 U.S. 557 (2006).

<sup>84</sup> Jerry Markon & Josh White, *Bin Laden Driver Gets 5 1/2 Years; U.S. Sought 30*, WASH. POST, Aug. 8, 2008, at A1. Hamdan was given sixty-one months credit against his sentence for time already served, leaving him with just five months to serve after his conviction. The prosecutors had asked for thirty years. The Washington Post called the short sentence "a stunning rebuke." *Id.* The London Times called "the stunningly light sentence" . . . "nothing short of a disaster for George Bush." Tim Reid, *Analysis: Bin Laden Driver Salim Hamdan Trial a Disaster for George Bush*, TIMES ONLINE (Aug. 8, 2008),

[http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article4482417.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article4482417.ece).

<sup>85</sup> See Press Release, U.S. Dep't of Def., *United States v. Jawad* (May 25, 2009), [http://www.aihrc.org.af/2010\\_eng/Eng\\_pages/Press\\_releases/2009/pre\\_Jawad\\_eng\\_26may2009.pdf](http://www.aihrc.org.af/2010_eng/Eng_pages/Press_releases/2009/pre_Jawad_eng_26may2009.pdf); Aunohita Mojumdar, *Afghanistan: Kabul Court Ruling Could Free Afghan Terrorism Suspects Held at Guantánamo*, EURASIANET, June 22, 2009, <http://www.eurasianet.org/departments/insightb/articles/eav062309.shtml>.

<sup>86</sup> Editorial, *Military Lawyers: Release Gitmo Youths*, CBS NEWS (Aug. 14, 2009, 3:49 PM), <http://www.cbsnews.com/stories/2009/04/30/terror/main4979688.shtml>.

<sup>87</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/49 (May 25, 2000).



represented Jawad in habeas corpus litigation in Federal Court, partnering with attorneys from the ACLU National Security Project. This lawsuit, the first civil litigation of my career, ultimately led to Jawad's release when the writ of habeas corpus was granted.<sup>88</sup>

### III. PRE-TRIAL PREPARATION AND INVESTIGATION

#### A. Discovery

Of course, while pursuing every possible angle to avert a trial, it is also necessary to prepare for trial. When I practiced as a military defense counsel, the typical starting point for trial preparation was to read the police report, which was usually provided in the first batch of discovery turned over at the time of preferral of charges, if not before. Usually, in the Air Force, such reports came from the Office of Special Investigations for felonies or the Security Forces Investigations branch for less serious crimes. Occasionally, when one of our Air Force miscreants was working in a joint environment, I might get an Army CID or Naval Investigative Service report. More rarely, a criminal complaint might arise out of an inspector general or command-directed investigation, or come from a civilian police agency that had decided to waive jurisdiction and let the military handle the matter. Regardless of the source, there was always some kind of report of investigation which detailed, normally in chronological fashion, the nature of the misconduct alleged and the investigative steps taken. Such reports usually also include summaries of witness and subject interviews, as well as sworn statements. The reports would also include descriptions and photographs of any physical evidence and identify where the evidence was being stored. The report would typically be prepared by the lead investigative agent and would identify any other persons who assisted in the investigation.

When I arrived at OMC-D, I was surprised to learn that there was no comparable product for any of the detainees facing charges before the military commissions. Although there was a Criminal Investigation Task Force (CITF) assigned to investigate criminal allegations involving detainees, the CITF never compiled their investigative activities into any organized report. Rather, individual leads, or requests for investigative assistance, were sent to individual agents in the field. The agents' reports would then be filed in an electronic database but not collated into any useful format. Often the reports failed to identify the individual conducting the interview or interrogation, and they never identified the name of the

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<sup>88</sup> William Glaberson, *Judge Orders Guantánamo Detainee to Be Freed*, *N.Y. Times* (July 30, 2009), [http://www.nytimes.com/2009/07/31/us/31gitmo.html?\\_r=1](http://www.nytimes.com/2009/07/31/us/31gitmo.html?_r=1). Because military lawyers generally are prohibited from suing the United States, defense counsel must receive special dispensation from their service Judge Advocate General before making a court appearance in habeas litigation.

interpreter used, an important piece of information. Summaries of witness interviews generally lacked standard information that would be expected in a law enforcement interview, such as a home or work address and telephone number, making it difficult to locate the witness later. Numerous intelligence agencies and military units were involved in interrogating detainees in the theater of war at various overseas detention facilities and at Guantánamo. These reports would also be filed based on the names and identifying numbers given to the detainee, if any, but, again, no real effort was made to collate the materials related to any specific individual.

Thus, in all the commission cases with which I am familiar, the discovery that was provided to the defense was a disorganized hodge-podge of intelligence reports, reports of interrogation, and various other pieces of information, often without apparent correlation to one another and frequently with little or no obvious relevance to the individual or the crimes of which he was accused. In one case where I was lead defense counsel, there was no apparent rhyme or reason to the numbering system for the documents (i.e. chronological order, grouping by subject matter) and no effort had been made to label or name the various documents or explain their significance. Further complicating matters was the fact that much of the material was classified, so discovery was often provided electronically by SIPRNET or delivered by courier. The classified information had to be stored in classified safes, complicating the review of such evidence by the attorneys. Often, there were thematically related materials where some documents were classified, while other closely related items were not, further complicating our efforts to logically organize the material because they could not be stored together. The sheer volume of the discovery materials also made it difficult to read, digest, and organize them. For example, in the *Jawad* case, the prosecution once dumped 6,000 pages of discovery on my paralegal in one day,<sup>89</sup> most of which turned out to be irrelevant, but all of which had to be reviewed. My trial team spent countless days just trying to read the discovery and organize it in some kind of logical order.<sup>90</sup>

The flip side of the problem of too much discovery that many defense counsel have experienced is obtaining all the discovery materials to which the defense is entitled. My experience in the *Jawad* case is perhaps typical. The same day I was detailed as defense counsel, my first action was

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<sup>89</sup> See *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba Aug. 27, 2008) (Motion to Dismiss for Violation of R.M.C. 703 and R.M.C. 707), available at <http://www.defense.gov/news/Jawad%20-%20D%20-%200017%20Motion%20to%20Dismiss%20Speedy%20Trial.pdf> [hereinafter *Defense Aug. 27, 2008 Motion to Dismiss*].

<sup>90</sup> For a sense of the challenges in obtaining full discovery, see *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba June 2, 2008) (Defense Motion to Compel Discovery Pursuant to RMC 701(1) and 905(b)(4)), available at <http://www.defense.gov/news/Jawad%20-%20D%20-%200010%20Motion%20to%20Compel%20Discovery.pdf> [hereinafter *Defense Discovery Motion*]; see also Frakt, *supra* note 19, at 394–99.

to send a detailed discovery request to the prosecution.<sup>91</sup> I filed multiple motions to compel a response,<sup>92</sup> but over three months later, I still had not received a written response to the discovery request. Finally, in response to a motion to dismiss for a speedy trial violation, the court intervened and ordered the government to answer my discovery request;<sup>93</sup> even then, they were largely non-responsive. In an affidavit by Lt Col Darrel Vandeveld, my original opposing lead counsel in the *Jawad* case, he explained that his reasons for resigning from the case had much to do with the discovery process:

My ethical qualms about continuing to serve as a prosecutor relate primarily to the procedures for affording defense counsel discovery. I am highly concerned, to the point that I believe I can no longer serve as a prosecutor at the Commissions, about the slipshod, uncertain “procedure” for affording defense counsel discovery . . . . [D]iscovery in even the simplest of cases is incomplete or unreliable.<sup>94</sup>

This problem of receiving timely and complete discovery was not limited to the *Jawad* case. For example, on the eve of the Hamdan trial, the government delivered over 600 pages of discovery, which the defense team was unable to thoroughly review before the trial commenced the next morning.<sup>95</sup> I and several other attorneys and paralegals, who happened to be at Guantánamo at the time, were recruited to review the materials to determine if there was anything important in them. Failure of the government to provide timely and complete discovery resulted in the

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<sup>91</sup> Memorandum from David J. R. Frakt to the Office of the Chief Prosecutor (Apr. 29, 2008), available at <http://www.defense.gov/news/Jawad%20-%20D%20-%200010%20Motion%20to%20Compel%20Discovery.pdf> (Attachment 1). This discovery request was tailored to the types of evidence that I believed were relevant and available, based on my limited understanding of the nature of documentation related to detainees after my one day on the job at OMC-D. After I learned more about additional types of evidence that were likely to be available, I created a model discovery request for the use of other defense counsel which refined my initial discovery request. Undoubtedly, other counsel have further refined the discovery request, which is maintained on a shared network drive at OMC-D for the use of military defense counsel.

<sup>92</sup> Defense Discovery Motion, *supra* note 90.

<sup>93</sup> Defense Aug. 27, 2008 Motion to Dismiss, *supra* note 89.

<sup>94</sup> Lieutenant Colonel Darrel J. Vandeveld, *Declaration of Lieutenant Colonel Darrel J. Vandeveld, September 22, 2008*, CENTER FOR THE STUDY OF HUM. RTS. IN THE AMS., <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-prosecution-lawyers/declaration-of-lieutenant-colonel-darrel-vandeveld-september-22-2008> (last visited July 8, 2011).

<sup>95</sup> Transcript of Record at Appellate Exhibit 301, Ruling on Motion (D-029), para. 50 & Appellate Exhibit 302, Declaration of Professor Charles Swift, *United States v. Hamdan* (Military Comm’n, Guantánamo Bay, Cuba July 21, 2008).

imposition of sanctions and other remedies in both the *Hamdan*<sup>96</sup> and *Jawad*<sup>97</sup> cases. A significant part of the problem identified by Lt Col Vandeveld in his declaration was the necessity for coordination with various intelligence agencies before documents could be released to the defense. This problem was highlighted in the case of *United States v. al Bahlul*, where the prosecutor acknowledged in a pretrial hearing that they still had not turned over all discovery materials to the defense less than a month before the trial was to commence. According to the Trial Counsel, “In order to present material to the Court and to the accused, the prosecutors are required to undergo an extensive review process . . . . And that is our primary obstacle to turning over that evidence.”<sup>98</sup> In order to spur the other agencies involved to prioritize the processing of the needed documents, the prosecutor took the unusual step of requesting the court to issue a written order imposing a deadline on the government.<sup>99</sup>

## B. Preparing a Trial Brief—Identifying the Elements of the Charges

The next step in trial preparation for many defense lawyers (and prosecutors) after reviewing the initial discovery and police report is to prepare a trial brief, or proof analysis, in which each of the elements of the offenses is analyzed. The proof analysis usually identifies what evidence will likely be offered to prove each element of the offense, as well as potential weaknesses in the evidence and theories under which such evidence might be excluded, limited, or rebutted. For a court-martial, the elements required to be proven are specified in the Manual for Courts-Martial, along with extensive interpretive discussion of the elements. The specific jury instructions associated with each offense are available for review in the Military Judge’s Benchbook.<sup>100</sup> Any questions of interpretation of the elements can usually be resolved by reference to the

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<sup>96</sup> Transcript of Record at Appellate Exhibit 303, Ruling on Defense Motion for Compliance with Discovery Order and for Sanctions (D-049), *United States v. Hamdan* (Military Comm’n, Guantánamo Bay, Cuba July 28, 2008).

<sup>97</sup> Ruling on Defense Motion Oct. 28, 2008, *supra* note 72, in 1 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 345, 345n.2 (2009) (“These findings of fact come primarily from the accused’s September 26, 2008 declaration which the Military Commission admitted into evidence as a remedy for the Government’s inability to provide timely discovery to the Defense.”); *see also* *United States v. Jawad* (Military Comm’n, Guantánamo Bay, Cuba) (D-017 Ruling on Defense Motion to Dismiss—Violation of RMC 703 and 707, para.3) (“[T]he government delay in responding to the defense discovery requests does warrant relief.”).

<sup>98</sup> Transcript of Record at 140, *United States v. Al Bahlul* (Military Comm’n, Guantánamo Bay, Cuba Sept. 24, 2008), available at <http://www.defense.gov/news/01%20al%20Bahlul-trans-Pages%201to%20333-Redacted.pdf>.

<sup>99</sup> *Id.* at 142.

<sup>100</sup> U.S. ARMY, DEPARTMENT OF THE ARMY PAMPHLET 27-9, MILITARY JUDGES’ BENCHBOOK (2010) [http://www.army.mil/usapa/epubs/pdf/p27\\_9.pdf](http://www.army.mil/usapa/epubs/pdf/p27_9.pdf).

published decisions of the military courts of appeal, found in the Military Justice Reporters.

For charges before the military commissions, the preparation of a proof analysis is not quite as simple. Although the elements of the offenses are spelled out in the Manual for Military Commissions, these elements don't always provide adequate guidance as to what needs to be proven. The Discussion in the M.M.C. is minimal and often misleading. There is no military commission judges' benchbook and no prior court decisions to guide the attorney. Many of the crimes authorized to be tried by military commission have no counterpart in the U.C.M.J., so standard military references may not be helpful. Thus, even the ordinarily simple task of determining what the prosecution needs to prove can be vexingly complex. A review of some of the litigation surrounding one of the commonly charged offenses at Guantánamo, Murder in Violation of the Law of War, is illustrative of this problem.

Many of the accused have been charged with the offense of "Murder in Violation of the Law of War"<sup>101</sup> (MIVOLW) or some variant thereof, such as attempted MIVOLW, solicitation to commit MIVOLW, or conspiracy to commit MIVOLW. Unfortunately, the definition of this offense in the statute provides little guidance as to how it is to be applied, stating simply:

Any person subject to this chapter who intentionally kills one or more persons, including privileged belligerents, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.<sup>102</sup>

In early 2007, pursuant to authority in the M.C.A. to issue implementing regulations defining the procedures, rules of evidence, and elements of the offenses in the statute,<sup>103</sup> the Secretary of Defense published the first Manual for Military Commissions.<sup>104</sup> Part IV of the M.M.C., entitled "Crimes and Elements," lists the elements for Murder in Violation of the Law of War:

1. One or more persons are dead;
2. The death of the person resulted from the act or omission of the accused;

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<sup>101</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2609 (2009) (§ 950t(15)).

<sup>102</sup> *Id.*

<sup>103</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2608 (2006) (§ 949a(a)).

<sup>104</sup> MANUAL FOR MILITARY COMMISSIONS, UNITED STATES (2007), available at <http://www.defenselink.mil/news/d20070118MCM.pdf> [hereinafter MMC 2007].

3. The killing was unlawful;
4. The accused intended to kill the person or persons;
5. The killing was in violation of the law of war; and
6. The killing took place in the context of and was associated with an armed conflict.<sup>105</sup>

No discussion was offered to explain the elements, leaving only a circular definition: Murder in violation of the law of war is defined as when a person is killed during a war in violation of the law of war. A comment in the first MMC (actually a cross-reference to a comment to another offense)<sup>106</sup> suggested, at least to the prosecution, that any hostile acts committed by an unlawful combatant qualified as a violation of the law of war. In other words, the mere status of being an unlawful combatant was sufficient to satisfy the element of “in violation of the law of war.” Although there was scant support for such an interpretation, this became the official position of the U.S. government before the military commissions. However, those defending the detainees took the position that the status of unlawful combatancy merely conferred jurisdiction on the commission and was insufficient to establish a violation of the law of war.<sup>107</sup> In the first case to go to a contested trial before the military commissions, *United States v. Hamdan*, this issue was not resolved until after the close of evidence when the parties were hashing out the findings instructions for the jury.<sup>108</sup> This meant that neither side knew what the prosecution had to prove until after the close of the evidence, an unenviable position for any trial lawyer.

The issue of the meaning of “in violation of the law of war” was also litigated in the *Jawad* case and in the *Khadr* case. COL Stephen Henley, USA, issued a ruling defining the elements on September 24, 2008.<sup>109</sup> His definition of the offense was markedly different than that provided to the jury by the judge in the *Hamdan* trial. The judge in the *Khadr* case refused to even respond to the parties request to define the elements in advance of trial, leaving them unsure of what the elements

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<sup>105</sup> *Id.* at IV-12, para. 15(b).

<sup>106</sup> *See id.* at IV-12, para. 15(c). This paragraph references the offense of Intentionally Causing Serious Bodily Injury. *See id.* at IV-11, para. 13(d).

<sup>107</sup> *See, e.g.,* *United States v. Jawad* (Military Comm’n, Guantánamo Bay, Cuba May 28, 2008) (Defense Motion to Dismiss for Failure to State an Offense and for Lack of Subject Matter Jurisdiction Under R.M.C. 907), *available at*

<http://www.defense.gov/news/d20080528Defense%20Motion%20To%20Dismiss%20for%20Failure%20to%20State%20an%20Offense%20-%20Lack%20of%20Subject%20Matter%20Jurisdiction%20D-007.pdf>.

<sup>108</sup> Transcript of Record at 3823, *United States v. Hamdan* (Military Comm’n, Guantánamo Bay, Cuba).

<sup>109</sup> *United States v. Jawad* (Military Comm’n, Guantánamo Bay, Cuba) (D-007 Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction), *available at* [http://www.defenselink.mil/news/RULING%20D-007%20\(subject%20matter%20jurisdiction\)%20\(2\).pdf](http://www.defenselink.mil/news/RULING%20D-007%20(subject%20matter%20jurisdiction)%20(2).pdf) [hereinafter Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction].

were.<sup>110</sup> Although Judge Henley provided clarification of how he would instruct the members on the “in violation of the law of war” element, this was not the only element of the crime that was disputed in the *Jawad* case. Jawad was charged with attempted MIVOLOW. The parties disputed the intent required to satisfy the elements of attempt. The M.C.A. defines an attempt as an act “done with specific intent to commit an offense under Chapter 47A of title 10 United States Code.”<sup>111</sup> Thus, the prosecution had to prove that Jawad had the specific intent to commit murder in violation of the law of war. According to the pretrial advice, which I argued was defective,<sup>112</sup> the Legal Advisor informed the Convening Authority that this meant only that the prosecution had to prove that Jawad had the specific intent to kill. Specific intent to kill is, of course, the standard mens rea for common law attempted murder. I argued, however, that specific intent to commit MIVOLOW required a specific intent to violate the law of war, which, in turn, would require that the actor have some familiarity with the law of war. Given that my client was fourteen or fifteen years old at the time of the attack (he was alleged to have thrown a hand grenade which injured two U.S. servicemembers and their Afghan interpreter) and functionally illiterate with little formal education, it seemed unlikely that the government could prove a specific intent to violate the law of war. Thus,

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<sup>110</sup> See *United States v. Khadr* (Military Comm’n, Guantánamo Bay, Cuba Nov. 14, 2008) (Government’s Motion—Request for Finding’s Instruction on Charge I, II and III (as it pertains to Murder in Violation of the Law of War)), *available at* [http://www.defense.gov/news/AE-295-AE295-E\(P009\).pdf](http://www.defense.gov/news/AE-295-AE295-E(P009).pdf).

<sup>111</sup> Here is the full explanation of attempt in the Manual for Military Commission: 28) ATTEMPTS.

a. Text. (a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under chapter 47A of title 10, United States Code, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

b. Elements.

(1) That the accused did a certain overt act; (2) That the act was done with the specific intent to commit a certain offense under chapter 47A of title 10, United States Code; (3) That the act amounted to more than mere preparation; and (4) That the act apparently tended to effect the commission of the intended offense.

<sup>112</sup> *United States v. Jawad* (Military Comm’n, Guantánamo Bay, Cuba May 20, 2008) (Defense Motion to Dismiss for Unlawful Influence), *available at* <http://www.defense.gov/news/Jawad%20-%20D%20-%200004%20Motion%20to%20Dismiss%20Unlawful%20Influence%202.pdf>. A section of this motion is devoted to a discussion of the allegedly defective pretrial advice. *See id.*

the meaning of this element was potentially determinative to the outcome of the case, yet neither side could predict with any confidence how the judge would ultimately interpret this element. The trial judge never ruled on this matter before the charges were dismissed, so this remains an open question for future cases.

There was yet another dispute about the elements of MIVOLW in the *Jawad* case. The military judge requested that both sides brief the issue of whether the accused's status as an alien unlawful enemy combatant (AUEC) was a separate element of the offense that had to be proved by the prosecution beyond a reasonable doubt, or rather was a preliminary matter of law that the judge could determine by a preponderance of the evidence. After reviewing the briefs submitted by the parties, the judge determined that "unlawful enemy combatant status is also a substantive component of the offenses and must be proven to the higher standard of beyond reasonable doubt."<sup>113</sup> This ruling came on September 24, 2008, nearly a full year after charges were sworn, eight months after referral, and more than six months after arraignment.

### C. Pretrial Investigation

A very useful feature of the military justice system is the Article 32 pretrial investigation.<sup>114</sup> The Article 32 investigation gives the prosecution an opportunity to do a trial run of their case and provides a vehicle to provide the defense with discovery and a preview of the government's case. The key witnesses normally appear and testify under oath, subject to cross-examination by the defense, thereby locking in their trial testimony. A thorough Article 32 Investigating Officer will typically analyze whether a prima facie case has been made, identify the major legal issues likely to arise in the case, and provide some analysis of those issues. The Article 32 hearing also helps to identify weak or unsupported charges so they can be dismissed prior to referral.<sup>115</sup> Unfortunately, the military commissions do not have any equivalent pretrial investigation process (nor is there a preliminary probable cause hearing in front of the judge). The M.C.A. specified that Article 32 would not apply to military commissions.<sup>116</sup> The lack of pretrial investigation not only hampers the defense but is also problematic for the Convening Authority, who must rely solely on the

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<sup>113</sup> Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction, *supra* note 109.

<sup>114</sup> See 10 U.S.C. § 832 (2006); MCM, *supra* note 26, R.C.M. 405, at II-34. An Article 32 Investigation is a quasi-judicial hearing headed by an investigating officer, usually an experienced JAG officer, who determines whether there are reasonable grounds for the charges and makes recommendations as to the disposition of the charges to the Convening Authority.

<sup>115</sup> MCM, *supra* note 26, R.C.M. 407(a)(1), at II-40.

<sup>116</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2576 (2009) (§ 948b(d)(1)(C)).



prosecution and Legal Advisor to provide advice and information about the case in making the referral decision. Despite the lack of an investigative report by a police agency or a pretrial investigation report by a neutral lawyer, the Legal Advisor's pretrial advice is not required to provide more than the most basic information.<sup>117</sup> Further, this information doesn't have to be wholly accurate either. Only the most blatant mischaracterizations are sufficient to render pretrial advice defective.<sup>118</sup> Although I have argued that the Secretary of Defense could, and should, create a pretrial investigation requirement by regulation to address some of these concerns,<sup>119</sup> he has chosen not to do so.

The lack of a systematic, reliable pretrial investigation process means that diligent defense counsel must perform their own independent investigation into the truth of the charges. While many defense counsels routinely do some independent investigation into the charges as part of their pretrial preparation, such as visiting the scene of the crime and interviewing key witnesses, there are a number of complications that make investigating offenses allegedly committed by detainees especially challenging. The typical military defendant commits his crimes at or near the base where he or she is stationed, and is charged within months of the offense. This means that the crime scene is nearby and many of the witnesses are likely to be locals, often other military members. Witnesses are typically willing to talk to military defense attorneys, who are perceived as military officers doing their duty rather than sleazy defense lawyers trying to get their guilty clients off on a technicality, and the event is likely to be fresh in the witness' minds. In contrast, in military commissions, the crime was typically committed several years before in a war zone half a world away. For example, charges against my client, Mohammed Jawad, were referred in January 2008, for a crime allegedly committed in Kabul, Afghanistan in December 2002. Indeed, comparable charges filed under the UCMJ would be barred by the five-year statute of limitations for non-capital offenses.<sup>120</sup> There is no statute of limitations under the M.C.A., which applies to offenses committed "before, on, or after September 11, 2001."<sup>121</sup> As such, some detainees have been accused of crimes dating back as early as 1996.<sup>122</sup> Witnesses to such dated events can be very hard to find, and even if they can

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<sup>117</sup> MCM, *supra* note 26, R.C.M. 406, II-40 ("The advice need not set forth the underlying analysis or rationale for its conclusions.").

<sup>118</sup> *Id.* ("Information which is incorrect or so incomplete as to be misleading *may* result in a determination that the advice is defective.") (emphasis added).

<sup>119</sup> *Proposals for Reform of the Military Commissions System*, *supra* note 14, 92–107 (prepared statement of David J. R. Frakt); Frakt, *supra* note 1, at 348–49.

<sup>120</sup> 10 U.S.C. § 843 (2006).

<sup>121</sup> § 1802, 123 Stat. at 2576 (§ 948d(a)).

<sup>122</sup> *See, e.g.*, Charge Sheet, Abd Al-Rahim Hussein Muhammed Abdu Al-Nashiri, United States v. Al-Nashiri (Military Comm'n, Guantánamo Bay, Cuba June 30, 2008), *available at* <http://www.defense.gov/news/nashirichargesheet.pdf>.

remember what happened, they aren't always willing to talk to an American military officer, especially a defense lawyer.

Because the crime allegedly committed by Jawad occurred in an active war zone, and because of the lack of investigative resources available at the time, the investigation into the offense was superficial and incomplete. As such, my defense team recognized the critical need to go to Afghanistan to investigate the incident that formed the basis for the charges, but it was not easy to do so. Afghanistan remains an active war zone, and visits to the combat zone unrelated to the primary combat mission are strongly discouraged. Even if one can get permission to travel to the theatre, transportation in and out of a war zone is extremely hard to come by. Obtaining billeting, transportation, security, logistical, and translator support all require high-level approvals and extensive advance coordination. There are weapons and other specialized training requirements that must be satisfied before one can undertake such a mission. Fortunately, I had two dedicated Marines<sup>123</sup> on my team who already had much of the training and knew how to work the Marine bureaucracy to get things done, but even with their exceptional skills and dedication, it took many weeks to make the arrangements. My colleagues made two investigative trips to Afghanistan and were able to track down most of the key witnesses and meet with them, despite the dearth of accurate contact information provided by the government. They photographed and measured the scene of the crime and unearthed previously unknown eyewitnesses. By carefully surveying the scene, they were able to discredit the testimony of one of the key government witnesses. They also learned that the government had paid witnesses for their testimony, potentially exculpatory information that had not been disclosed by the prosecution.<sup>124</sup> The kind of information that they obtained on the ground in Kabul could not have been obtained through phone calls and e-mail; they had to place themselves in danger to obtain it. Not every defense counsel would be willing, or able, to do what these brave officers did.

#### D. Pretrial Agreements

Once the defense counsel has completed his pretrial investigation and assessed the strength of the government's case, frequently the next step is to initiate the plea bargaining process. While not every defendant is guilty, and many are not guilty of every crime with which they are charged, most defendants are guilty of something, or at least there is a strong chance that they will be convicted of one or more offenses at trial. When I was a

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<sup>123</sup> The Marines were Major Eric Montalvo, (USMC, ret.) and Capt Kris Kannady.

<sup>124</sup> See Daphne Eviatar, *Military Lawyer Claims U.S. Paid Gitmo Prosecution Witnesses*, WASH. INDEP. (Aug. 4, 2009, 6:00 AM), <http://washingtonindependent.com/53655/gitmo-detainee-claims-u-s-paid-prosecution-witnesses> (In fairness to the prosecutors, I don't believe they knew their witnesses had been paid by the original investigator.).

military prosecutor and later defense counsel, the pretrial agreement (PTA) process usually would start with an informal discussion between the defense counsel and trial counsel, or perhaps the chief of military justice. The defense counsel might suggest a potential offer that his client may agree to sign. The prosecutor would consult with her Staff Judge Advocate about what kind of pretrial agreement she would be willing to support and would relay this information to the defense counsel. Eventually, both sides would agree, in principle, on the terms. Only then would the defense counsel submit a former written offer of pretrial agreement signed by the accused. Thus, in most cases, the defense counsel knew that the PTA offer was going to be approved when it was submitted. The informal plea bargaining process is made possible by the fact that there is usually an ongoing working relationship between the defense counsel and the prosecution. In fact, at least in the Air Force, the defense counsel is typically selected for the position by the SJA at the base legal office from among the eligible attorneys in the office, so the defense/prosecution relationship is built on an existing relationship of trust and mutual respect.

Although the rules for military commissions regarding pretrial agreements are similar to PTA rules in courts-martial,<sup>125</sup> there are two major differences between court-martial and commission PTA practice. In courts-martial, it is typically a mandatory term of the agreement that the accused elect trial (and sentencing) by military judge alone,<sup>126</sup> saving the time, trouble, and mission interruption of convening the court members. In military commissions, there is no option for judge-alone trial or sentencing.<sup>127</sup> Another difference between courts-martial practice and the military commissions is the ability of the Convening Authority to agree to a sentence range with both a maximum and a minimum sentence.<sup>128</sup> The upper and lower sentence limit could be so close (e.g. 20 years and 19 years, 364 days) that the parties would have effectively agreed to a fixed pre-determined sentence, much as is often done in civilian criminal trials. The Manual for Military Commission does not explain how this provision is to be enforced if the military commission panel members were to render a sentence below the agreed range. As there are no mandatory minimum sentences under the M.C.A., the members could theoretically choose to give

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<sup>125</sup> Compare MMC, *supra* note 18, R.M.C. 705, at II-57, with MCM, *supra* note 26, R.C.M. 705, at II-67.

<sup>126</sup> MCM, *supra* note 26, R.C.M. 903(a)(2), at II-89.

<sup>127</sup> There is no R.M.C. 903 at all.

<sup>128</sup> See MMC, *supra* note 18, R.M.C. 705, at II-58 (“For example, the convening authority may agree to approve no sentence in excess of a specified maximum or outside a specified and agreed upon range . . . .”); see also R.T.M.C., *supra* note 38, at 67. Notes for Figure 12.2, Sample Appendix A to Offer for Pretrial Agreement, states: “Contrary to limitations imposed by case-law in the court-martial system, the convening authority may approve an accused’s option to plead guilty when the sentence limitation proposed by the accused includes a ‘range limitation’ of confinement. A range provides both a minimum and a maximum confinement . . . .” *Id.*

a very light sentence, or no punishment at all. It is a cardinal rule of military justice that the Convening Authority can never increase the adjudged sentence.<sup>129</sup> To avoid this potential problem, the government developed a novel approach in the pretrial agreement of Noor Uthman Muhammed. As a condition of the pretrial agreement, the defense was forced to enter into a stipulation with the government by which the members were informed that the minimum legal sentence they could adjudge was the minimum sentence agreed to in the pretrial agreement. This eliminated the possibility of the members adjudging less than the agreed minimum.

In addition, the process of obtaining a pretrial agreement in military commissions has, thus far, been quite different. So far, there have been four pretrial agreements successfully negotiated in the commissions. The first, involving Australian David Hicks, was very controversial. Under pressure from the White House to do a political favor for Australian Prime Minister John Howard,<sup>130</sup> the Convening Authority directly negotiated what the Prosecutor considered an insultingly favorable sweetheart deal with Hicks's counsel: a nine-month sentence and transfer to Australia. The trial counsel and Chief Prosecutor were cut completely out of the loop and were very upset by what they perceived as political meddling in the process.<sup>131</sup> As a demonstration of their dissatisfaction, they argued for, and received, the maximum sentence of seven years from the jury for the charge to which Hicks pled guilty.<sup>132</sup>

Perhaps in response to the negative reaction from the prosecution to the initial pre-trial agreement in Hicks, the Convening Authority, the Hon. Susan Crawford, instituted a very rigid, formal, pretrial agreement process in subsequent cases. She refused to meet with, or even talk on the phone, with defense counsel to discuss pretrial agreements (or virtually anything else, for that matter),<sup>133</sup> although the rules clearly authorized her to do so.<sup>134</sup>

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<sup>129</sup> See MCM, *supra* note 26, R.C.M. 1107(d)(1), II-151 (“The convening or higher authority may not increase the punishment imposed by a court-martial.”). The same rule appears in the MMC: “The convening or higher authority may not increase the punishment imposed by a military commission.” MMC, *supra* note 18, R.M.C. 1107(d)(1), at II-153.

<sup>130</sup> Scott Horton, *At Gitmo, No Room for Justice*, HARPER'S MAG. (Oct. 22, 2007, 12:22 AM), <http://www.harpers.org/archive/2007/10/hbc-90001470>.

<sup>131</sup> Transcript of Record at 735–38, 748–752, *United States v. Hamdan* (Military Comm'n, Guantánamo Bay, Cuba Apr. 28, 2008) (testimony of Colonel Morris Davis); see also Scott Horton, *The Great Guantánamo Puppet Theater*, HARPER'S MAG. (Feb. 21, 2008, 8:24 AM), <http://harpers.org/archive/2008/02/hbc-90002460>.

<sup>132</sup> *Id.*; see also Tim McCormack, *David Hicks' Trial was a Political Fix by Two Governments*, THE AGE (May 21, 2007), <http://www.theage.com.au/news/opinion/david-hicks-trial-was-a-political-fix-by-two-governments/2007/05/20/1179601235371.html>.

Interestingly, having demonstrated their willingness to impose the maximum sentence, nearly the entire Hicks jury was “recycled” for the *al Bahlul* case nearly eighteen months later. Jane Sutton, *Al Qaeda Media Chief Stands Mute at Guantánamo*, REUTERS (Oct. 27, 2008, 5:39 PM), <http://www.reuters.com/article/domesticNews/idUSTRE49Q59020081027?sp=true>.

<sup>133</sup> I personally made numerous requests to meet with the Convening Authority to discuss a possible PTA and even informed her that the rules authorized her to participate in such

Rather, she insisted that she would only consider a pretrial agreement that was signed by the accused and only after it had been formally routed through the Chief Prosecutor and the Convening Authority Legal Advisor so they could express their views. This approach arguably violated the Rules for Military Commission<sup>135</sup> and effectively preempted the pretrial agreement process in many cases because defense counsel were unwilling to ask their clients to sign something (and thereby possibly raise false hopes of being released or receiving a favorable deal) without any indication that the offer was likely to be accepted.<sup>136</sup> Attempts to discuss a pretrial agreement with the Chief Prosecutor were equally futile. The Chief Prosecutor insisted that he had no insight as to what kind of agreement the Convening Authority was likely to approve and that he was merely a conduit to pass on any formal written offer. When pressed to provide his personal views of what a reasonable offer would be, he typically responded with wildly unrealistic terms, such as, in the case of my client Mohammed Jawad, a twenty-year cap (with no credit for the nearly seven years he had already been incarcerated at that point). This figure was apparently based on the plea agreement that “American Taliban” John Walker Lindh negotiated,<sup>137</sup> which was used as a baseline by the Chief Prosecutor.<sup>138</sup>

The Chief Prosecutor, Legal Advisor, and Convening Authority that I was working with have all subsequently been replaced, so it is possible that these policies have changed. There have been three pretrial agreements negotiated under the new regime. The first guilty plea did not go smoothly, with the military judge at one point ordering the detention authorities to honor a term of the plea bargain, and then later rescinding her order.<sup>139</sup> Sudanese detainee Ibrahim al Qosi pled guilty to providing material support to terrorism by serving as a cook for Osama bin Laden and his followers. Unfortunately, the specifics of the pretrial agreement, including the length of the sentence to be served, have been kept secret. One term that was negotiated was reneged upon by the government, according to his defense counsel. The prosecution promised to seek to have al Qosi housed in Camp

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informal discussions. She sent me a curt response informing me that I was “confused” about the process.

<sup>134</sup> MMC, *supra* note 18, R.M.C. 705(d)(1), at II-58–II-59 (“Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the legal advisor, convening authority, or their duly authorized representatives.”).

<sup>135</sup> *See id.* R.M.C. 705(d)(2), at II-59 (“After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer.”).

<sup>136</sup> *See* Vandeveld, *supra* note 94, ¶ 6.

<sup>137</sup> *See* ‘I plead guilty,’ Taliban American Says, CNN (July 17, 2002, 9:48 AM), <http://archives.cnn.com/2002/LAW/07/15/walker.lindh.hearing/index.html>.

<sup>138</sup> Transcript of Record at 749, 763, United States v. Hamdan (Military Comm’n, Guantánamo Bay, Cuba Apr. 28, 2008) (testimony of Colonel Morris Davis).

<sup>139</sup> Carol Rosenberg, *War Crimes Panel Gives al Qaeda Cook 14-Year Sentence*, MIAMI HERALD (Aug. 11, 2010), <http://www.miamiherald.com/2010/08/11/1771545/war-court-jury-chosen-to-sentence.html#ixzz12djH29tT>.

4, the communal camp where he was already living, while serving his sentence. However, the detention authorities at Guantánamo denied the request.<sup>140</sup> If the government had followed its own regulation, this should not have happened.<sup>141</sup> Another pretrial agreement was reached in late October 2010 in the Omar Khadr case (after the trial on the merits had already commenced in August but had to be postponed due to the illness of the lead defense counsel). This pretrial agreement was widely perceived to have been facilitated by the intense international and domestic political pressure to settle the case and avert the unseemly spectacle of the United States becoming the first civilized nation to put a child soldier on trial for war crimes. Finally, in February 2011, a pretrial agreement was reached in the case of Noor Uthman Mohammed. This pretrial agreement appeared to go smoothly and generated little press attention.

There are a number of factors that make reaching a plea agreement difficult in the military commissions and explain the limited number of plea bargains to be struck thus far. The absence of a personal working relationship between the defense counsel and those with input into the decision for the government (the Chief Prosecutor, the Legal Advisor to the Convening Authority, and the Convening Authority) is a major factor hampering the negotiation process. There is also significant resistance on the part of detainees to enter into pretrial agreements. Aside from the usual desire of not wanting the stigma of a conviction, most of the detainees view the military commissions as an illegitimate process. They do not wish to legitimize it and acknowledge the authority of the United States to punish them by entering into such agreements. The detainees are often persons of very strong personal convictions who find the plea bargaining process foreign and repellent. My client, Mohammed Jawad, summed up this sentiment nicely, telling me: “There are two ways that I can leave Guantánamo—as a criminal convicted in a military commission or as a free man. I don’t care how long it takes, I would rather leave a free man.”

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<sup>140</sup> Mike Melia, *Navy Lawyer Says Military Broke Plea Deal Pledge*, MIAMI HERALD (Oct. 11, 2010), <http://www.miamiherald.com/2010/10/11/1868520/navy-lawyer-says-military-broke.html#ixzz12dgTS4EH>.

<sup>141</sup> R.T.M.C., *supra* note 38, at 61. Rule 12-7, Coordination with Commanders for Certain Purposes, states:

The convening authority and the accused may agree to include provisions related to the nature of confinement. Prior to reducing any such arrangement to print, the convening authority shall coordinate with the Commander of Joint Task Force Guantánamo and receive written confirmation that such an arrangement is acceptable and will be honored. Should such an arrangement be agreeable to the Commander, the Commander will return a signed writing to that effect and the convening authority may proceed with the PTA.

*Id.*

## E. Developing an Attorney-Client Relationship

A key to any successful defense is a positive attorney-client relationship based on mutual trust and rapport. There are numerous cultural and logistical obstacles that make it difficult to develop such a relationship at Guantánamo,<sup>142</sup> most obviously the fact that military defense attorneys are officers of the United States wearing the same uniform as their captors (and often, their tormentors). Many of the more militant detainees, such as my client, al Bahlul, viewed any U.S. military officer as a representative of their enemy and were unwilling to be represented at all. Others viewed the entire military commission process as illegitimate, and did not want to appear to be cooperating in any way. Many detainees had developed psychological problems while in detention, often as a result of maltreatment by guards or interrogators, particularly in the early years of the war. Most of the detainees come from countries with legal systems very different than our own and had difficulty understanding the glacial pace of the proceedings. Communicating through interpreters, although necessary, sometimes hampered the development of the relationship. Despite the many challenges to creating a constructive attorney-client partnership, a few defense attorneys (and more than a few habeas counsel) have managed to do so. The key to success in this area is persistence. The only really effective way to gain the detainee's trust is to make the trip to Guantánamo to visit him as often as possible and to keep coming, even if the client declines to meet with you on one or more occasions.<sup>143</sup> It is also helpful to talk about matters other than the legal case. Treating a detainee as a fellow human being, even a friend, can work wonders. Sharing photos of one's family, for example, has been a particularly effective way to break the ice.

## IV. INTO THE COURTROOM

In almost every court-martial that I tried, the first day that I (and my client) made a court appearance in the case was also the day the trial commenced, whether it was litigated or a guilty plea. Occasionally, a court-martial is preceded by a day or half a day of motion practice. It is the rarest of court-martials, usually involving only the most serious charges, which requires a pretrial hearing significantly in advance of the commencement of trial. But what is the exception in military practice is the rule in the military

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<sup>142</sup> This subject is addressed at length in my article *The Difficulty of Defending Detainees*. See Frakt, *supra* note 24. See generally THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW, *supra* note 56.

<sup>143</sup> One of the few matters over which the detainees have control at Guantánamo is the decision whether to meet with their attorney. It is very common for detainees to refuse an attorney visit; I personally experienced this rejection more than once. This is very frustrating for attorneys who go through a lot of time and trouble to set up these visits and travel to Guantánamo.

commissions. The military commission practitioner must be prepared to engage in months, and sometimes years, of extensive pretrial litigation before the members are even brought to the Island.

### A. Speedy Trial

In courts-martial, either the preferral of charges or the imposition of pretrial confinement or other pretrial restraint under R.C.M. 304 starts a 120-day speedy trial clock.<sup>144</sup> By day 120, the accused must be brought to trial or released. If the failure to bring the accused to trial within 120 days is the government's fault, the remedy is dismissal, with prejudice, of the charges.<sup>145</sup> In military commissions, the accused have all been detained for many years. However, they are, according to the government, not in pretrial restraint, but rather are detained under the law of war as enemy combatants. In fact, there is no counterpart in the Rules for Military Commission to R.C.M. 305, "Pretrial Confinement."<sup>146</sup> Although there is at least a theoretical<sup>147</sup> 120-day speedy trial clock<sup>148</sup> in the military commissions, it is not triggered by the preferral, or service, of charges, or even referral of charges to trial. Rather, the clock commences with the formal arraignment of the accused.<sup>149</sup>

So far, other than the *Hicks* case, which resulted in a quick guilty plea, no case has even come close to getting to trial in 120 days. In the *al Bahlul* case, the second-fastest case, the defense filed no motions, and at one point, demanded a speedy trial. However, there were still two pretrial hearings held at the request of the government and it took over 170 days from arraignment to trial. Salim Hamdan was arraigned on June 4, 2007, but his trial did not begin until July 14, 2008. Omar Khadr's arraignment also commenced on June 4, 2007, but the military judge dismissed the charges for lack of jurisdiction before the arraignment was completed.<sup>150</sup> After the charges were reinstated by the Court of Military Commission Review, the arraignment was completed on November 8, 2007.<sup>151</sup> After an

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<sup>144</sup> MCM, *supra* note 26, R.C.M. 707(a), at II-71.

<sup>145</sup> MMC, *supra* note 18, R.M.C. 707(d)(1), at II-63.

<sup>146</sup> Interestingly, the Table of Contents to the MMC, which was obviously cut and pasted from the MCM, lists Pretrial Restraint in the chapter headings: "Chapter III: Initiation of Charges; Apprehension; Pretrial Restraint; Related Matters." *Id.* at ii.

<sup>147</sup> See Frakt, *supra* note 1, at 345 (explaining why speedy trial clock is illusory).

<sup>148</sup> The M.C.A. makes clear that the speedy trial rules which apply in courts-martial do not apply to commissions. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2576 (2009) (§ 948b(d)(1)(A)).

<sup>149</sup> MMC, *supra* note 18, R.M.C. 707(a)(2), at II-62.

<sup>150</sup> Transcript of Record, United States v. Khadr (Military Comm'n, Guantánamo Bay, Cuba June 4, 2007) (transcript of motion session), *available at* [http://www.defense.gov/news/Jun2007/d20070604KhadrROTVoll\(Redacted\).pdf](http://www.defense.gov/news/Jun2007/d20070604KhadrROTVoll(Redacted).pdf).

<sup>151</sup> Transcript of Record, United States v. Khadr (Military Comm'n, Guantánamo Bay, Cuba Nov. 8, 2007) (arraignment), *available at*



additional fourteen months of pretrial litigation, he was scheduled to commence trial on January 26, 2009, but the trial was postponed while the Obama Administration conducted a review of detainees and detention-policies, including the military commissions.<sup>152</sup> After some additional motion hearings, his trial finally commenced in August 2010, only to be suspended for an additional two and a half months when his military defense counsel fell ill.<sup>153</sup> Ibrahim al Qosi was charged in February 2008 and referred to trial on March 5, 2008.<sup>154</sup> He pled guilty in August 2010. Charges against Noor Uthman Muhammed were referred to trial in December 2008.<sup>155</sup> He pled guilty in February 2011.

When I made my first appearance in the *Jawad* case, on May 7, 2008, I was handed a proposed trial schedule by the military judge, which would have moved the case from arraignment to trial in the allotted time period. The proposed trial schedule looked something like this:

Day 1 – Arraignment  
Day 30 – Law Motions  
Day 60 – Evidentiary Motions  
Day 90 – AUEC (Jurisdictional) Hearing<sup>156</sup>  
Day 120 – Assembly of Commission/Commencement of Trial

While seemingly reasonable on paper, this proposal turned out to be unrealistic, even though the *Jawad* case moved at unprecedented speed for a litigated military commission case. We ended up having two “law motion” hearings, at day 43, and days 97–98, then an evidentiary hearing on days 140–141. The AUEC hearing was scheduled for around day 220 but we never got to it because an interlocutory appeal filed by the government stayed all further proceedings in the case. While the military commission process may eventually be streamlined, particularly as the many unresolved legal issues surrounding the commissions are addressed by the appellate courts, commencing a trial within 120 days of arraignment in future cases seem unlikely absent a plea agreement.

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[http://www.defense.gov/news/Nov2007/Khadr%20ROT%20d20071108Vol\\_IIArraignment\(Redacted\).pdf](http://www.defense.gov/news/Nov2007/Khadr%20ROT%20d20071108Vol_IIArraignment(Redacted).pdf).

<sup>152</sup> The Case of Omar Ahmed Khadr, Canada, Human Rights First, <http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions/cases/omar-ahmed-khadr/>.

<sup>153</sup> Daphne Eviatar, *Khadr Lawyer Collapses as Historic War Crimes Trial Gets Underway*, HUFFINGTON POST (Aug. 12, 2010, 6:54 PM), [http://www.huffingtonpost.com/daphne-eviatar/khadr-lawyer-collapses-as\\_b\\_680742.html](http://www.huffingtonpost.com/daphne-eviatar/khadr-lawyer-collapses-as_b_680742.html).

<sup>154</sup> Charge Sheet, Ibrahim Ahmed Mahmoud al Qosi, United States v. al Qosi (Military Comm’n, Guantánamo Bay, Cuba Feb. 8, 2008), <http://www.defense.gov/news/d20080305alqosicharges.pdf> [hereinafter al Qosi Charge Sheet].

<sup>155</sup> Charge Sheet, Noor Uthman Muhammed, United States v. Muhammed (Military Comm’n, Guantánamo Bay, Cuba Dec. 5, 2008), <http://www.defense.gov/news/Referred%20Charge%20Sheet.pdf>.

<sup>156</sup> See *infra* Part IV(c)(1).

The reasons for the glacial process of these cases are legion. Some of the reasons for delay include: the need to have mental health evaluations to determine the accused's competence to stand trial or to represent himself; the slow pace of discovery, frequently caused by difficulty in getting documents declassified or authorized for release to the defense by different government stakeholders; the need to travel overseas, including combat zones, to interview witnesses and investigate the charges; replacement of defense counsel;<sup>157</sup> replacement of military judges;<sup>158</sup> availability of military judges;<sup>159</sup> lack of adequate courtroom space;<sup>160</sup> injunctions ordered by federal judges in parallel litigation; and withdrawal and re-preferral of charges due to errors in the charges or other factors.<sup>161</sup> However, the single greatest factor in the slow pace of progress of commission cases is the sheer volume of motions that must be resolved prior to trial. Even if the military judge were able to devote herself full-time to a single military commissions case, a luxury which none of the judges had,<sup>162</sup> preparing well-researched and written rulings on all the motions could take many months. At the time the military commissions were suspended by President Obama in January 2009, there were scores of motions awaiting rulings. If those prosecutions are re-initiated, many of the motions will have to be relitigated. For the foreseeable future, the nature of pretrial motion practice at Guantánamo virtually guarantees that the 120-day speedy trial standard will remain more of an aspiration than a realistic timeline.

## B. Motion Practice

In seventy-plus courts-martial I tried as trial or defense counsel, I wrote or responded to perhaps two-dozen pretrial motions, most just a couple of pages long. Motions were always resolved immediately prior to trial on the briefs. If evidence on the motion was required, the evidentiary hearing was normally held immediately prior to the trial. A separate hearing to resolve pretrial motions is a rarity in military practice. The practice is

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<sup>157</sup> Because many commission cases have dragged on for years, many defense counsels have completed their tour at OMC-D before their case has reached a conclusion. Many defense counsels are Reservists or Guardsmen on one-year tours. Other defense counsels have been fired by the detainee.

<sup>158</sup> Judges have frequently been replaced due to retirements and rotation to new military assignments.

<sup>159</sup> Military commission judges are also full-time military judges and must coordinate their commission cases with their service docket.

<sup>160</sup> There are only two military commission courtrooms at Guantánamo.

<sup>161</sup> For example, in October 2008, charges against five detainees were withdrawn in response to the resignation of Lt Col Darrel Vandeveld. William Glaberson, *U.S. Drops Charges for 5 Guantánamo Detainees*, N.Y. TIMES, Oct. 21, 2008, at A1. On December 18, 2008, the Convening Authority erroneously withdrew all charges against all detainees then facing trial while attempting to replace panel members.

<sup>162</sup> All of the military commission judges currently assigned are also full-time military judges with busy dockets.

quite different at Guantánamo. In every case except *Hicks* (where a plea agreement was reached shortly after referral), there have been multiple pretrial motion hearings. It is revealing that in the *Jawad* case, the judge anticipated that at least three separate pretrial hearings would be required, even before he knew anything about the specifics of the case.

The first few cases to be referred to trial at Guantánamo (with two exceptions) have generated a staggering number of pretrial motions. The M.C.A. created an entire legal system from scratch. There were numerous aspects to the law that required interpretation and clarification, with little or no precedent to guide the lawyers and judges.

The initial batch of three cases to be referred to trial included *United States v. David Hicks*, *United States v. Salim Hamdan*, and *United States v. Omar Khadr*. While a plea deal was struck quickly in the *Hicks* case, averting the need for pretrial litigation, the *Hamdan* and *Khadr* defense teams were incredibly creative and thorough in their effort to defend the rights and interests of their clients, and generated reams of court filings. In all, the Hamdan team filed fifty-three distinct motions before their client was ultimately tried in August 2008.<sup>163</sup> The Khadr defense team managed to file 120 distinct motions before resolving the case by pretrial agreement in October 2010. The Prosecution also kept busy in the *Khadr* case, not only in responding to the 120 defense motions, but by filing thirty original motions of their own.<sup>164</sup> The defense counsel who have followed in the footsteps of these early military commission pioneers have had the good fortune to be able to draw upon the work of their predecessors, with each successive generation of defense attorneys refining the legal theories, and often adding new theories of their own.<sup>165</sup>

The next case to be referred to trial, in January 2008, was *United States v. Mohammed Jawad*.<sup>166</sup> My colleagues and I filed twenty-seven distinct defense motions on behalf of Mr. Jawad, with dozens of supplemental filings, before the case was suspended in January 2009 (the charges were ultimately dismissed on July 31, 2009).<sup>167</sup> Ali Hamza al Bahlul was the next to be referred on February 26, 2008.<sup>168</sup> However, he

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<sup>163</sup> The motions, responses, and rulings can be found in the appellate exhibits section of the record of trial, located on the Military Commissions Hamdan page. See *Salim Ahmed Hamdan*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/commissionsHamdan.html> (last visited July 11, 2011).

<sup>164</sup> See *Omar Ahmed Khadr*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/commissionsKhadr.html> (last visited July 11, 2011).

<sup>165</sup> In addition to the many motions publicly available on the DoD Military Commissions webpage, <http://www.defense.gov/news/commissions.html>, many more defense motions are maintained in shared network drives at OMC-D, where they can be accessed by other defense attorneys preparing to defend their own clients.

<sup>166</sup> Jawad Charge Sheet, *supra* note 3.

<sup>167</sup> Many of the motions can be found at the military commission *Jawad* page. See *Mohammed Jawad*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/commissionsJawad.html> (last visited July 11, 2011).

<sup>168</sup> al Bahlul Charge Sheet, *supra* note 4.

refused to be represented by his appointed lawyer (me) and ordered that nothing be done on his behalf, so there was little pretrial motion practice. Charges against Ahmed al Darbi were the next to be referred, on March 3, 2008.<sup>169</sup> Pretrial litigation in his case has generated twenty defense motions and fourteen prosecution motions to date. The case is ongoing.<sup>170</sup> Charges against Ibrahim al Qosi were referred on March 5, 2008.<sup>171</sup> Twenty-three defense motions and ten prosecution motions later, the case was finally resolved with a plea bargain in August 2010.<sup>172</sup>

Not surprisingly, the largest and most complex case of all, the 9-11 conspiracy case, generated the most furious fusillade of filings. The charges against Khalid Sheikh Mohammed and his fellow alleged 9-11 co-conspirators were referred to trial on May 9, 2008.<sup>173</sup> Before the charges were withdrawn on January 21, 2009,<sup>174</sup> there were 134 defense motions including those from the five separate defense teams appointed to represent these defendants, as well as pro se motions.<sup>175</sup> Two other cases, *United States v. Mohammed Kamin*,<sup>176</sup> and *United States v. Noor Uthman Mohammed*,<sup>177</sup> also generated a significant number of filings.

For the military commission practitioner (or indeed any attorney handling a terrorism or war crimes case or doing research in these fields), these motions, and the related responses, replies, answers, and rulings serve as an invaluable resource. Unfortunately, although the Department of Defense Military Commissions website contains most of the motions and

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<sup>169</sup> Charge Sheet, Ahmed Mohammed Ahmed Haza al Darbi (Military Comm'n, Guantánamo Bay, Cuba Dec. 20, 2007), available at <http://www.defense.gov/news/d20080303darbi.pdf>.

<sup>170</sup> Many of the motions can be found at the military commissions al Darbi page. See *Ahmed Mohammed Ahmed Haza al Darbi*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/commissionsalDarbi.html> (last visited July 11, 2011).

<sup>171</sup> al Qosi Charge Sheet, *supra* note 154.

<sup>172</sup> Many of the motions can be found at the military commissions al Qosi page. See *Ibrahim Ahmed Mohmoud al Qosi*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/commissionsQosi.html> (last visited July 11, 2011).

<sup>173</sup> Charge Sheet, Khalid Sheikh Mohammed et al., *United States v. Mohammed* (Military Comm'n, Guantánamo Bay, Cuba Apr. 15, 2008), available at <http://www.defense.gov/news/d20080509Mohammed.pdf>.

<sup>174</sup> Memorandum from Susan J. Crawford, Convening Auth. for Military Comm'ns (Jan. 21, 2010), <http://www.defense.gov/news/KSM%20Charges%20Dismissed%2021%20Jan%202010%20Redacted.pdf>.

<sup>175</sup> Many of the motions can be found at the military commissions 9-11 co-conspirators page. See *Sept.-11 Co-Conspirators*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/commissionsCo-conspirators.html> (last visited July 11, 2011). Charges against the alleged co-conspirators were dismissed without prejudice on January 21, 2010. Memorandum from Susan J. Crawford, *supra* note 174. The case is currently on hold while the Obama Administration determines the appropriate forum in which to try the case. Josh Gerstein, *Chances Dim for Swift 9/11 Decision*, POLITICO (June 20, 2010, 7:07 AM), <http://www.politico.com/news/stories/0610/38754.html>.

<sup>176</sup> See *Mohammed Kamin*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/commissionsKamin.html> (last visited July 11, 2011).

<sup>177</sup> See *Noor Uthman Muhammed*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/commissionsNoor.html> (last visited July 11, 2011).

rulings, it does not contain all of them. What is on the site is sometimes inadequately described or mislabeled, complicating efforts to conduct research in this area, and when charges against a detainee are dismissed, the maintainers of the website sometimes remove the materials related to that detainee. Fortunately, the National Institute of Military Justice (NIMJ) has collected the judicial rulings into a Military Commissions Reporter, now comprising two volumes. According to NIMJ, “The Military Commission Reporter seeks to include every unclassified decision, order, and ruling issued by the military commissions conducted at the U.S. Naval Base, Guantánamo Bay, Cuba, and all substantive opinions and rulings of the United States Court of Military Commission Review.” These very helpful Reporters can be found at the NIMJ website.<sup>178</sup>

### C. Pretrial Motions

While it is impossible to discuss the nature and contents of all of these pretrial motions, some of the key categories of motions are worth noting.

#### 1. Jurisdiction

In court-martial practice, the jurisdiction of the court-martial is rarely an issue. The U.C.M.J. applies to any crime committed by any active duty military member at any time, anywhere,<sup>179</sup> so the only thing needed to prove both personal and subject matter jurisdiction is that the military member was on active duty at the time of the offense,<sup>180</sup> a matter rarely disputed but easily proven by military personnel records if needed. Military commissions, by contrast, are courts of distinctly limited jurisdiction. Personal jurisdiction is limited to “alien unprivileged enemy belligerents” (AUEB) under the 2009 M.C.A. (previously “alien unlawful enemy combatants” or AUECs).<sup>181</sup> Subject matter jurisdiction is limited to a

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<sup>178</sup> *Military Commissions Act and Resources*, NAT’L INST. OF MILITARY JUSTICE, [http://www.wcl.american.edu/nimj/military\\_commission\\_law.cfm](http://www.wcl.american.edu/nimj/military_commission_law.cfm) (last visited July 11, 2011). There are now two volumes of opinions. Volume 1 is available at 1 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER (2009), available at [http://www.wcl.american.edu/nimj/documents/reporter\\_june19\\_000.pdf?rd=1](http://www.wcl.american.edu/nimj/documents/reporter_june19_000.pdf?rd=1). Volume 2 is available at 2 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER (2009), available at [http://www.wcl.american.edu/nimj/documents/2MC\\_Issue2\\_January2010.pdf?rd=1](http://www.wcl.american.edu/nimj/documents/2MC_Issue2_January2010.pdf?rd=1).

<sup>179</sup> MCM, *supra* note 26, R.C.M. 203, at II-15 (“[C]ourts-martial may try any offense under the code, and in the case of general courts-martial, the law of war.”). The U.C.M.J. not only has specific punitive articles, but also a “general article” which allows the prosecutors to punish “all disorders and neglects to the prejudice of good order and discipline” and “all conduct of a nature to bring discredit upon the armed forces” as well as to assimilate state crimes through the Federal Assimilative Crimes Act. *Id.* Art. 134, at IV-111.

<sup>180</sup> 10 U.S.C. § 802(a)(1) (2006); MCM, *supra* note 26, R.C.M. 202, at II-13.

<sup>181</sup> MMC, *supra* note 18, R.M.C. 202, at II-15.

specific list of crimes in the M.C.A.,<sup>182</sup> and other crimes under the law of war.”<sup>183</sup>

Under the 2006 M.C.A., there was initially a question as to whether the military commission even had the power to determine its own jurisdiction. Two of the first three cases to be brought were dismissed *sua sponte* by the military judges for lack of personal jurisdiction, with two different judges opining that the statute did not confer upon them the power to determine jurisdiction.<sup>184</sup> This issue was resolved by the CMCR, which determined that military commissions could resolve jurisdictional issues.<sup>185</sup> This point has since been clarified in the 2009 M.C.A. and 2010 M.M.C.<sup>186</sup> None of the persons to appear before military commissions have been previously determined by a competent tribunal to be an AUEB or AUEC. Thus, unless conceded by the defense, the military commission is required to hold an evidentiary hearing to determine if the accused is, in fact, an AUEB. The burden is on the government to prove the accused’s status by a preponderance of the evidence. So far, military commission judges have conducted the hearing two different ways. In most of the cases, a separate hearing was held. However, in *United States v. al Bahlul*, the military judge, reasoning that the same evidence which would support the charges would also tend to prove the accused’s status as an AUEC, conducted the hearing simultaneously with the trial. That is, he indicated that he would hear the evidence presented by the government and then, prior to turning the case over to the members, he would determine whether the government had proven jurisdiction status by a preponderance of the evidence.<sup>187</sup> In another case, the judge refused the government’s request to follow this procedure.<sup>188</sup>

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<sup>182</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2607 (2009) (§ 950t).

<sup>183</sup> § 1802, 123 Stat. at 2576 (§ 948d).

<sup>184</sup> *United States v. Hamdan* (Military Comm’n, Guantánamo Bay, Cuba June 4, 2007) (Decision and Order: Motion to Dismiss for Lack of Jurisdiction (Corrected Order)), in 1 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 6–9 (2009); *United States v. Khadr* (Military Comm’n, Guantánamo Bay, Cuba June 4, 2007) (Order on Jurisdiction), in 1 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 152–54 (2009).

<sup>185</sup> *United States v. Khadr* (Court of Military Commission Review Sept 24, 2007) (Opinion of the Court and Action on Appeal by the United States Filed Pursuant to 10 U.S.C. § 950(d)), in 1 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 443–466 (2009).

<sup>186</sup> § 1802, 123 Stat. at 2576 (§ 948d); MMC, *supra* note 18, R.M.C. 201(b), at II-14 (“A military commission always has jurisdiction to determine whether it has jurisdiction.”); MMC, *supra* note 18, R.M.C. 202 (c), at II-15 (“A military commission is a competent tribunal to make a finding sufficient for jurisdiction.”).

<sup>187</sup> Transcript of Record at 216–17, *United States v. al Bahlul* (Military Comm’n, Guantánamo Bay, Cuba Oct. 27, 2008), available at <http://www.defense.gov/news/01%20al%20Bahlul-trans-Pages%201to%20333-Redacted.pdf>.

<sup>188</sup> *United States v. al Qosi* (Military Comm’n, Guantánamo Bay, Cuba Dec. 3, 2009) (Ruling: Defense Motion for Article 5 Status Determination, or, Alternatively, Dismissal for Lack of Personal Jurisdiction (D-023)), in 2 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 49–50 (2010).

To date, no detainee has successfully challenged the jurisdiction of the commissions. But the potential remains. There are two potential defenses in the AUEC hearing. First, the accused could admit being a combatant, but claim to be a lawful combatant. For example, a member of the Taliban accused of belligerent acts against the U.S. or coalition forces in the early part of the war would have a viable argument that they were a lawful combatant under the international law of war.<sup>189</sup> Second, the accused could challenge the sufficiency of the evidence tending to prove that he “has engaged in hostilities against the United States or its coalition partners,” “purposefully and materially supported hostilities against the United States or its coalition partners,” “or was a part of al Qaeda at the time of the alleged offense.”<sup>190</sup>

Defense counsels in several cases have tried a variety of other approaches to challenge the jurisdiction of the military commissions outside the AUEC hearing. In both the *Jawad* and *Khadr* cases, the defense asserted that the court lacked jurisdiction because of the age of the accused.<sup>191</sup> In both cases, the commission disagreed.<sup>192</sup> Counsel have also challenged the jurisdiction of the commission under a Bill of Attainder theory,<sup>193</sup> failure to

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<sup>189</sup> President Bush’s unilateral determination that the Taliban were all unlawful combatants and not entitled to Prisoner of War status is not binding on the commission. There is significant scholarly debate on the status of Taliban fighters. Scholarly articles arguing that Taliban might be lawful combatants include: George H. Aldrich, *The Taliban, al Qaeda and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 891–98 (2002); Steven W. Becker, “*Mirror, Mirror on the Wall . . .*”: *Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563, 574–76 (2003); Lt. Col. Joseph P. “Dutch” Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 38 (2004); Joshua S. Clover, Comment, “*Remember, We’re the Good Guys*”: *The Classification and Trial of the Guantánamo Bay Detainees*, 45 S. TEX. L. REV. 351, 353–54 (2004); Ray Murphy, *Prisoner of War Status and the Question of the Guantánamo Bay Detainees*, 3 HUM. RTS. L. REV. 257, 257–278 (2003).

<sup>190</sup> § 1802, 123 Stat. at 2575 (§ 948a(7)).

<sup>191</sup> *United States v. Jawad* (Military Comm’n, Guantánamo Bay, Cuba June 13, 2008) (Defense Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to R.M.C. 907(b)(1)(a) (Child Soldier)), available at <http://www.defense.gov/news/Jawad%20-%20D%20-%20012%20Motion%20to%20Dismiss%20Child%20Soldier.pdf>.

<sup>192</sup> *United States v. Jawad* (Military Comm’n, Guantánamo Bay, Cuba Sept. 24, 2008) (Ruling on Defense Motion to Dismiss—Lack of Personal Jurisdiction: Child Soldier (D-012)), in 1 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 338–341 (2009); *United States v. Khadr* (Military Comm’n, Guantánamo Bay, Cuba Apr. 30, 2008) (Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the M.C.A. in Regard to Juvenile Crimes of a Child Soldier (D-022)), in 1 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 223–29 (2009).

<sup>193</sup> *United States v. Khadr* (Military Comm’n, Guantánamo Bay, Cuba Feb. 20, 2008) (Ruling on Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder) (D-013)), in 1 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 173–74 (2009); *United States v. Mohammed, et al.* (Military Comm’n, Guantánamo Bay, Cuba Dec. 4, 2008) (D-062 Defense Reply Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder)), available at <http://www.defense.gov/news/D062-%20Defense%20Reply%20-%20of%20Attainder.pdf>.

state an offense punishable under the law of war,<sup>194</sup> absence of an armed conflict,<sup>195</sup> and failure to afford a presumption of lawful combatancy under the Geneva Conventions.<sup>196</sup> None of these efforts have been successful.

## 2. Motions Relating to the Mental Health of the Accused

Another source of delay in several cases has been the need to assess the mental capacity of the accused, either their competence to stand trial and assist with their defense<sup>197</sup> or their competence to represent themselves.<sup>198</sup> Because of the harsh conditions many of the accused have experienced in detention and the length of their detention, many of the detainees have developed mental health issues, such as post-traumatic stress disorder and depression.<sup>199</sup> The rules for mental health evaluations in military commissions are identical to the rules in courts-martial.<sup>200</sup> The difficulty in finding cleared, qualified mental health professionals and the time it takes for them to arrange to travel to Guantánamo and meet with the detainees caused considerable delay in the *Khadr* and *Jawad* cases and in the first attempt to try the five alleged 9-11 co-conspirators, two of whom had significant mental health issues, according to their counsel.<sup>201</sup>

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<sup>194</sup> United States v. Jawad (Military Comm'n, Guantánamo Bay, Cuba Sept. 24, 2008) (Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction (D-007)), in 1 NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 331–333 (2009); United States v. Khadr (Military Comm'n, Guantánamo Bay, Cuba Apr. 21, 2008) (Ruling on Defense Motion to Dismiss Charge One for Failure to State an Offense and for Lack of Subject Matter Jurisdiction (D-008)), in 1 NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 199–202 (2009).

<sup>195</sup> United States Mohammed, et al. (Military Comm'n, Guantánamo Bay, Cuba Nov. 3, 2008) (Joint Defense Motion to Dismiss All Charges for Lack of Subject Matter Jurisdiction (Absence of Armed Conflict)), available at [http://www.defense.gov/news/D-061%20Defense%20MTD%20for%20Lack%20of%20Jurisdiction%20\(absence%20of%20armed%20conflict\).pdf](http://www.defense.gov/news/D-061%20Defense%20MTD%20for%20Lack%20of%20Jurisdiction%20(absence%20of%20armed%20conflict).pdf).

<sup>196</sup> United States v. Jawad (Military Comm'n, Guantánamo Bay, Cuba Sept. 9, 2008) (Ruling on Defense Motion to Dismiss—Lack of Personal Jurisdiction (D-002)), in 1 NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 327–28 (2009).

<sup>197</sup> See, e.g., United States v. Hamdan (Military Comm'n, Guantánamo Bay, Cuba May 15, 2008) (Order for Examination Under R.M.C. 706), in 1 NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 93–96 (2009).

<sup>198</sup> See, e.g., United States v. Mohammed, et al. (Military Comm'n, Guantánamo Bay, Cuba June 25, 2009) (Defense Motion Requesting the Military Commission Order a New Inquiry Into the Mental Health of Mr. Mustafa al Hawsawi), available at <http://www.defense.gov/news/Jun%202009/D-118%20Def%20Mot%20re%20706%20and%20Gov%20resp%203.9.pdf> [hereinafter Mohammed June 25, 2009 Defense Motion].

<sup>199</sup> See HUMAN RIGHTS WATCH, *LOCKED UP ALONE, DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTÁNAMO* (2008).

<sup>200</sup> Compare MMC, *supra* note 18, R.M.C. 706, at II-60–II-61, with MCM, *supra* note 26, R.C.M. 706, at II-69–II-70.

<sup>201</sup> See, e.g., Mohammed June 25, 2009 Defense Motion, *supra* note 198.



### 3. Unlawful Influence Motions

The Military Commissions Act contains robust protection against the exertion of unlawful influence on the independent judgment of both the prosecution and defense.<sup>202</sup> Several of the early military commission cases were plagued by accusations of unlawful influence, principally by the Legal Advisor to the Convening Authority, Air Force Reserve Brigadier General Thomas Hartmann. Numerous motions and multiple hearings were devoted to this issue. Ultimately, Gen Hartmann was fully or partially disqualified from further participation in three separate cases<sup>203</sup> before he was finally removed from his position in September 2008.<sup>204</sup> All of the individuals who were accused of attempting to exert unlawful influence have since been replaced, so it does not appear that this is likely to be a significant issue in the future.

### 4. Motions Relating to Abuse, Torture and the Rights of the Accused

One of the ongoing questions at Guantánamo is what rights to the accused have under international law and the U.S. Constitution? This issue was complicated by the U.S. Supreme Court's decision in *Boumediene v. Bush*,<sup>205</sup> which suggested that detainees did have some rights under the U.S. Constitution, but failed to specify what they were, other than the right of habeas corpus. What remedies do detainees have, if any, for abuse or torture at the hands of U.S. or allied forces? A number of motions filed by the defense attempted to answer these questions. For example, I filed a motion to dismiss charges on the basis of torture and outrageous government

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<sup>202</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2575–76 (2009) (§ 949b).

<sup>203</sup> *United States v. al Darbi* (Military Comm'n, Guantánamo Bay, Cuba Oct. 2, 2008) (Ruling on Defense Motion to Dismiss for Unlawful Influence (D-011)), in 1 NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 354–56 (2009); *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba Aug. 14, 2008) (Ruling on Motion to Dismiss—Unlawful Influence (D-004)), in 1 NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 322–26 (2009); *United States v. Hamdan* (Military Comm'n, Guantánamo Bay, Cuba May 9, 2008) (Ruling on Motion to Dismiss (Unlawful Influence) (D-026)), in 1 NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 78–90 (2009).

<sup>204</sup> Peter Finn, *Guantánamo Trials' Overseer Reassigned*, WASH. POST (Sept. 20, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/19/AR2008091903507.html>; see also Mike Melia, *Pentagon Official Removed from 2nd Gitmo Trial*, HUFFINGTON POST (Aug. 14, 2008, 3:01 PM), <http://www.huffingtonpost.com/huff-wires/20080814/guantanamo-military-trials>; Mike Melia, *Advisor to Guantánamo Trials Faces More Criticism*, CNSNEWS.COM (Aug. 13, 2008), <http://www.cnsnews.com/node/34071>; Jane Sutton, *U.S. General Barred from Another Guantánamo Trial*, REUTERS (Aug. 14, 2008, 4:13 PM), <http://ca.reuters.com/article/topNews/idCAN1337894520080814>. After General Hartmann was disqualified from a third case, *United States v. Khadr*, in September 2008, he was finally removed from his position as Legal Advisor. See Andy Worthington, *The Dark Heart of Guantánamo*, HUFFINGTON POST (Oct. 2, 2008, 10:26 AM), [http://www.huffingtonpost.com/andy-worthington/the-dark-heart-of-guantan\\_b\\_131188.html](http://www.huffingtonpost.com/andy-worthington/the-dark-heart-of-guantan_b_131188.html).

<sup>205</sup> 553 U.S. 723 (2008).

conduct in the *Jawad* case.<sup>206</sup> Although the judge denied the motion to dismiss, the ruling affirmed the power of the tribunal to dismiss charges on this basis, encouraging other counsel to file similar motions in other cases.<sup>207</sup> Coercion and torture were also alleged in several motions to suppress statements and other evidence, particularly where enhanced interrogation methods were utilized. In the *Jawad* case, our successful motion to suppress<sup>208</sup> caused the government to file an interlocutory appeal to the CMCR,<sup>209</sup> causing even more delay. Other motions attempted to determine whether detainees were entitled to equal protection, due process, the right against compelled self-incrimination, and protection from ex post facto laws under the Constitution, and, if so, what impact that would have on the government's ability to prosecute them. Several detainees also asserted, unsuccessfully, rights under the Geneva Conventions.

## 5. Procedural Motions

In addition to the many substantive motions on the law, there were an inordinate number of motions to compel discovery or production of witnesses, requests for bills of particulars, motions for the appointment of experts and consultants, and motions for delays, continuances, and stays by both sides for every reason imaginable. For many of the defense counsel, delay was an integral part of the defense strategy, as it was hoped that a change in the political leadership of the country might result in the abandonment of military commissions altogether, or at least changes to the military commission rules and procedures which would be more favorable to the accused.

### D. Courtroom Practice

At first glance, the two military commission courtrooms of Guantánamo are not substantially different in appearance than any courtroom on any U.S. military base. The smaller courtroom contained a judge's bench, a witness stand, a jury box with comfortable seating for nine,

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<sup>206</sup> See *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba May 28, 2008) (Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 902).

<sup>207</sup> *United States v. Jawad* (Military Comm'n, Guantánamo Bay, Cuba Sept. 24, 2008) (Ruling on Defense Motion to Dismiss—Torture of the Detainee (D-008)), in 1 NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 334–38 (2009); *United States v. Mohammed et al.* (Military Comm'n, Guantánamo Bay, Cuba July 8, 2008) (Defense Motion to Dismiss for Outrageous Government Conduct or for an Evidentiary Hearing and to Stay All Other Proceedings Pending Resolution of this Motion (Ramzi bin al Shibh)), available at <http://www.defense.gov/news/KSM%20et%20al%20-%20D%20-%200014%20Motion%20to%20Dismiss%20Outrageous%20Government%20.pdf>.

<sup>208</sup> See, e.g., Ruling on Defense Motion Nov. 19, 2008, *supra* note 70; Ruling on Defense Motion Oct. 28, 2008, *supra* note 72.

<sup>209</sup> Brief of Appellant, *United States v. Jawad*, D-021 (Court of Military Commission Review Dec. 4, 2008), available at <http://www.defense.gov/news/Dec2008/4Dec08ProsecutionBrief.pdf>.

tables for the prosecution and defense, a lectern from which the attorneys could argue or examine witnesses, and a station for the court reporter, an open spectator gallery and a jury deliberation room. The larger courtroom was similar except that it featured six rows of defense tables, a larger jury box than usual to accommodate capital juries,<sup>210</sup> and a soundproof witness gallery sealed behind glass, which enabled the court to go into closed session without clearing the gallery. However, there were some features in the courtroom which would not be found in a standard military courtroom, which reflected some of the unique features and requirements of military commission practice.

### 1. Stoplights and Translators

Hidden away in a backroom, not visible to anyone in the courtroom, were a group of interpreters, who provided (more or less) simultaneous translation of the proceedings into the primary language of the accused. The accused was furnished with a pair of headphones which enabled him to listen to the simultaneous translation. However, in some case, the accused refused to wear the headphones. In such cases, the military judge had the option of broadcasting the translation into the courtroom. However, doing so substantially slowed the proceedings because the translation could not be simultaneous, or it would drown out the speaker. In these cases, consecutive translation was used, forcing the speaker to pause frequently to give the translator a turn. Detainees speak several different languages, including Arabic, Farsi, and Pashto. Highly skilled interpreters of these languages are in short supply and in great demand for intelligence and defense work around the globe. As such, the quality of the translators available to serve as interpreters for the commissions was highly variable. In at least one instance, the quality of the translation was so poor that the defense requested a stay of proceedings until a better translator could be hired.<sup>211</sup>

Consecutive translation was also utilized when the accused spoke, so that the judges and parties could understand the accused. Because some of the interpreters were not able to keep up with a lawyer speaking at full speed, the commissions used a stoplight system. There was a panel of red, yellow, and green lights on the prosecution table, the defense table, the speaker's lectern, at the judge's bench, and in the witness box.<sup>212</sup> A green light indicated that the interpreter was keeping current. A yellow light meant that the speaker needed to slow down. A red light meant the speaker

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<sup>210</sup> A non-capital commission, just like a non-capital general court-martial, requires five members, or jurors. MMC, *supra* note 18, R.M.C. 501(a)(1), at II-22. A capital commission requires a minimum of twelve jurors. *Id.* R.M.C. 501(1)(2), at II-22; *see also* MCM, *supra* note 26, R.C.M. 501(a)(1)(A)–(B), at II-42.

<sup>211</sup> Anthony S. Barkow, *Translation Problems Hinder Military Commission Proceedings*, ACSBLOG (Sept. 24, 2008), <http://www.acslaw.org/acsblog/node/12659>.

<sup>212</sup> This system is almost identical to the system used for the military tribunals at Nuremberg. One can see a dramatization of the system in use in the film *Judgment at Nuremberg*.

needed to stop so the interpreter could catch up. Often, the proceedings were interrupted by the judge pointing to the stoplights or reminding the counsel or witness to slow down. Sometimes, the interpreter would come over the loudspeaker asking the speaker to repeat something. The need to interpret every word into the language of the accused meant that proceedings were excruciatingly slow and halting, and it was difficult to get into a rhythm as an advocate, particularly in oral argument. Direct and cross-examination of witnesses have natural stopping points after each question, but the witnesses, unlike the counsel, were unfamiliar with the system, and constantly had to be admonished to slow down or pause. The weakness of the interpretation system was a constant source of irritation and occasional source of humor, such as when my client Ali al Bahlul stopped speaking in Arabic and lapsed into English to correct the interpreter's translation of his words.<sup>213</sup>

## 2. Technology

The courtrooms also contain some other modern technological advances, such as the ability to broadcast a witness via video teleconference (VTC). In the smaller courtroom, a large video screen was affixed to a pillar directly behind the witness stand, so when a witness testified remotely, they still appeared to be speaking from the witness stand. Although the option to have a witness testify remotely is a useful one, particularly since some witnesses may not be subject to be subpoenaed to appear in Guantánamo,<sup>214</sup> questioning a witness by VTC is very awkward. I used the system several times in the *Jawad* case, and each time there were technological glitches. There were sometimes horrible high-pitched feedback noises, and a couple of times we lost the video or audio feed.<sup>215</sup> The VTC had a lag-time of a couple seconds, as if talking to someone on the

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<sup>213</sup> I have had the opportunity to observe other war crimes tribunals using multiple languages, including the International Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone, and the International Criminal Court. In those tribunals, there are multiple official languages, and many of the counsel and judges speak different languages than the accused, the witnesses, and each other, yet interpretation doesn't seem to be a problem or to slow down the proceedings. All of the participants wear headphones and they can tune into a simultaneous translation into any one of several languages.

<sup>214</sup> R.M.C. 703(e) sets forth the procedure for compelling the production of witnesses, including the issuance of subpoenas and warrants of attachment. The rule is based on R.C.M. 703. The discussion to R.C.M. 703 makes it clear that "[a] subpoena may not be used to compel a civilian to travel outside the United States and its territories." No such caveat appears in the MMC, but there is no apparent legal authority for the proposition that a civilian could be forced against their will to travel to Cuba. A civilian might well be ordered to report to a U.S. government facility in the United States to give testimony remotely. Foreign nationals are also not subject to compelled appearance, and are likely to be more willing to testify at a VTC site near their home.

<sup>215</sup> One trick we discovered to cut back on the noise was to ask the witness to hold down their mute button when not speaking.

moon. This often caused the questioner and witness to talk over one another. It also made it difficult to interrupt the witness when there was an objection, because the witness would have already begun (and possibly completed) their answer before they would hear the objection interposed. Also, the witness at the remote site could only see the attorney questioning him, not the opposing counsel or judge, so their situational awareness was poor. One of my witnesses, a Harvard Medical School professor, attempted to use charts and diagrams to illustrate her testimony, but the testimony was extremely difficult to follow and to accurately reflect on the record. VTC testimony is also very time-consuming. When the pauses necessary for consecutive translation were added to the time lag of the VTC, it could triple or quadruple the amount of time the testimony would ordinarily take.

### 3. Courtroom 21

The commission courtrooms are also equipped with the latest in document retrieval and display capabilities, including the ability of witnesses to draw diagrams on video screens, in much the same way that sports color commentators or television weather presenters do. The system, called Courtroom 21, was designed by the Center for Legal and Court Technology at William & Mary Law School<sup>216</sup> and has quite robust capabilities, which the prosecutors used to good effect in the *Al Bahlul* and *Hamdan* trials. Although advanced courtroom technology is increasingly prevalent in federal and state courts, the Courtroom 21 technology far exceeded anything I have ever seen in a military courtroom. Special week-long training sessions were offered for counsel and paralegals to learn to operate the system.

### 4. Classified Information

Another difference between courts-martial and military commissions is the likelihood that classified evidence will need to be introduced or at least referenced. Under the 2007 MCM, the military judge could order a closed session, in which non-security cleared personnel (including the press) would be excluded from the courtroom while classified information was being discussed.<sup>217</sup> The 2010 MCM includes an updated rule, MCRE 505, for handling classified evidence. The revised rule is based on the Classified Information Procedures Act (CIPA) in use in federal courts.<sup>218</sup> In the *Jawad* case, which followed the 2007 MCM, for example, we entered into closed sessions during a motion to suppress to discuss

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<sup>216</sup> THE CENTER FOR LEGAL & CT. TECH., <http://www.legaltechcenter.net/default.aspx> (last visited July 11, 2011).

<sup>217</sup> MCM, *supra* note 18, Military Commission Rule of Evidence (MCRE) 505(f)(5), at III-27 (2007).

<sup>218</sup> 18 U.S.C. app. III.

specific interrogation methods which were utilized. This option does not exist under the new procedures. Rather, there are a complicated set of rules involving *in camera* sessions and alternatives to classified evidence.

Because of the complexity of the classification rules and uncertainties over what subject matter is classified, there are Court Security Officers (CSOs) present at all sessions of the military commissions. These CSOs can alert the military judge (through use of a red light on the judge's bench) to pause the proceedings anytime that they believe that a question calls for the disclosure of classified information, or that an argument is veering into classified territory. On several occasions, military judges have abruptly called a recess in the middle of a witness' testimony, to get guidance from the CSO and to pass that on to counsel in chambers. This can appear very odd when it happens because the military judge simply interrupts the questioning and calls a recess without explanation, so as not to alert the spectators of the potential security violation.

## 5. The Jury

The jurors, or "members" as they are officially known, are U.S. military officers from any of the four services selected by the Convening Authority from among a pool of available officers forwarded by each service. Unlike in courts-martial, there is no opportunity for enlisted personnel to serve as members,<sup>219</sup> even if the accused could be considered a low-ranking foot soldier. In the first three military commissions convened, *United States v. Hicks*, *United States v. Hamdan*, and *United States v. al Bahlul*, the members selected by the Convening Authority were all O-6s (Army, Air Force or Marine Colonels, or Navy Captains), lending the appearance to some observers of a stacked jury.<sup>220</sup> In fact, with a couple of substitutions, the Convening Authority referred the *al Bahlul* commission in October 2008 to the same panel members who had served on the *Hicks* jury, a decision that some observers felt further detracted from the legitimacy of the *al Bahlul* trial. Based on the negative perception of the jury selection process in the early commissions, the Convening Authority selected company and field-grade officers for the *al Qosi* and *Khadr* panels, as well as O-6s. In the *Khadr* case, the defense discovered during voir dire that all of the Air Force officers on the panel had specifically volunteered for commission service, as opposed to being nominated by a superior officer. *Khadr's* lawyer successfully challenged each of these officers for cause.<sup>221</sup>

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<sup>219</sup> MCM, *supra* note 26, R.C.M. 503(a)(2) & 903(a)(1), at II-46–II-47 & II-89.

<sup>220</sup> Sharon Kelly, *Report from Guantánamo: Al-Bahlul Case Shows Trials Should Be Held in Federal Courts*, JURIST (Nov. 1, 2008, 5:11 PM), <http://jurist.org/hotline/2008/11/al-bahlul-trial-shows-Guantánamo-should.php>; David McFadden, *Bin Laden Aide Boycotts His Own Guantánamo War Crimes Trial with Lawyer*, HUFFINGTON POST (Oct. 27, 2008, 8:28 PM), [http://www.huffingtonpost.com/2008/10/27/bin-laden-aide-boycotts-h\\_n\\_138207.html](http://www.huffingtonpost.com/2008/10/27/bin-laden-aide-boycotts-h_n_138207.html).

<sup>221</sup> Interview with Lt Col Jon Jackson, U.S. Army (Aug. 2010) (*Khadr's* detailed military defense counsel).

There are two aspects of commission practice which mirror court-martial practice. The first, which may be unfamiliar to civilian practitioners is that the members may ask questions, and even request evidence.<sup>222</sup> Member questions are submitted in writing. The judge and parties then review the question and the parties indicate any objections silently in writing so that the members are not aware of which party is objecting to their question. The judge then determines whether the question should be asked and if so, reads the question to the witness. Second, as in court-martial practice, only two-thirds of the commission members are required to convict, although unanimity is required to impose capital punishment. There is no such thing as a hung jury in a military commission.

## 6. Special Procedures for Detainees

There are several special procedures and accommodations for the unique nature of the accused in military commissions. First, detainees have the option of wearing their prison garb or civilian clothing, including the traditional dress of their culture. Second, all efforts are made to prevent any contact between the detainee and the members. Detainees are brought in to the courtroom well in advance of the members and the security personnel clear all the hallways when transporting a detainee. Third, a security forces videographer also records all detainee movements from the detention camps to the courtroom and from the holding cell to the prison to document the care taken by the guards in the transportation process. Often detainees arrive at the hearing in an agitated state from having been hooded or blindfolded while being transported. In one case, a detainee refused to attend a hearing for this reason. His lawyers asserted that being hooded brought flashbacks to abusive treatment he had experienced and aggravated his post-traumatic stress disorder. Fourth, judges have diverged widely in their interpretation of the rules regarding the presence of the accused. The latest version of the Rule, states that the “accused may expressly waive the right to be present at trial proceedings” but “[t]here is no right to be absent,” “and the accused may be required to be present over objection.”<sup>223</sup> Finally, when, and if, the detainee is brought into the courtroom, he is, at least initially, chained to the floor by the defense counsel table. Upon request, a compliant detainee may be unshackled, but two guards remain posted just a few feet behind him at all times.<sup>224</sup>

Although security is very tight, there is also significant effort made to be sensitive to the accused’s culture and religion. For example, the guards responsible for the movement of the detainee wear gloves at all times. In addition to the translation services provided previously discussed, the defense may have their own interpreter at the counsel table to facilitate

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<sup>222</sup> MMC, *supra* note 18, R.M.C. 913(c)(1)(f), at II-109; *Id.* MCRE 614, at III-50.

<sup>223</sup> *Id.* R.M.C. 804(c) discussion at II-70–II-71.

<sup>224</sup> *Id.* R.M.C. 804(c)(3), at II-70.

consultation between the accused and counsel and to clarify translations by the court interpreters. Also, the military judge maintains a schedule of the day's Muslim prayer times and recesses the commission to enable the detainee to pray in accordance with the requirements of his faith. A prayer mat, a washroom and an arrow facing Mecca are provided in the holding area where the detainee is held during breaks in court proceedings. The detainee is also brought culturally appropriate food during meal breaks.

#### E. Intangibles

Although military commissions have all the trappings of any American courtroom, there is also a quality of unpredictability and an air of surreal about them. At times, despite the efforts of the military judges to maintain the decorum of the process, there was a circus-like atmosphere to some of the hearings, particularly those involving the five alleged 9/11 co-conspirators, and the small army of defense lawyers who accompanied them. At other times, the seriousness of the crimes or the horrors of the abuse experienced by the detainees created high drama and an emotionally charged atmosphere. The unpredictability of the commissions was largely due to the unique nature of the accused. Courts-martial are highly sober affairs, with each participant playing his role with dignity and proper military decorum. The defendants, themselves soldiers, airmen, sailors or marines, are conscious that they are under scrutiny for their military bearing, and comport themselves in a dignified and serious manner, as befits the occasion. Detainees on the other hand, are not necessarily interested in impressing the court and may have little patience with the procedural niceties. While some have acted with deference and respect towards the judge, others have acted with obvious contempt and derision for the process, which they view as a form of show-trial or kangaroo court. In a court-martial, client control is rarely an issue, as the military defense counsel virtually always outranks his or her client, most likely an enlisted servicemember. Client control is considerably more challenging, and sometimes impossible, in the commissions. My former client, Ali al Bahlul, alternated between polite and respectful interactions with the judge and mockery, uncooperativeness and contempt. My client Mohammed Jawad was generally docile and compliant, but once became so frustrated that he stood up and started arguing with a witness and the judge. It took several minutes of gentle coaxing, and an unplanned promise that he would get the opportunity to testify, for me to calm him down.

Something unusual, often even bizarre, happened in every commission proceeding in which I was present. My first commission appearance, the arraignment of Ali al Bahlul, set the tone for all the subsequent sessions I attended. The commission administrators had decided to use Mr. al Bahlul's hearing as a sort of trial run for the new courtroom that had been constructed specifically for the 9-11 trial, complete with six



rows of defense tables for the anticipated half dozen defendants.<sup>225</sup> The debut of the high-tech courtroom was a spectacular flop, marred by sound and video failures in the courtroom and in the glassed-in soundproof spectator and media gallery, and by a total power failure. The microphone at the judge's bench was not functioning properly, so he wandered around the courtroom looking for a functioning microphone, finally settling at the defense table just a few feet from the accused (I was sitting in the next row because my client refused to sit near me). The judge's proximity to the alleged terrorist nearly caused a panic when the courtroom was plunged into darkness, causing a phalanx of guards to descend on my client, lest he make a move toward the judge. The military judge became so frustrated with the technical failures that he ordered the trial counsel to conduct the formal reading of the charges in the dark, with only the emergency exit sign providing dim illumination. This hearing also featured several displays of showmanship by Mr. al Bahlul, including his initial refusal to speak or answer any questions from the judge. Instead, he created and then held up a hand-written boycott sign. When the video-feed in the media gallery failed, Mr. al Bahlul accused the judge of trying to prevent the press from hearing his message; the judge then instructed the bailiff to carry the sign over to the gallery and hold it up to the glass partition so the press could see it. Mr. al Bahlul later broke his silence and launched into an hour long rant, espousing his views on a wide range of topics, including politics, propaganda and his assessment of the military commissions. A sampling of headlines from news accounts of the hearing sum up the debacle, for example: "Technical Flaws Mar Hearing in New Guantánamo Court," and "Glitches Mar Debut of Guantánamo War Court."<sup>226</sup>

The list of unusual occurrences in the military commission is too long to mention, but a few of the highlights (or lowlights) will provide a flavor of what I am talking about. For example, in one hearing, a government witness (a Special Forces soldier) attempted to enter the courtroom with a hood over his head to protect his identity. When the judge instructed the prosecution that the hearing could be closed to the public but the witness had to reveal himself at least to the accused, the witness refused. Another unusual aspect was that it sometimes seemed that more time was devoted to the testimony of lawyers than to witnesses of the alleged crimes. The former Chief Prosecutor, once the greatest proponent of the military commissions, testified repeatedly as a witness for the defense about the

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<sup>225</sup> Charges were originally sworn against six defendants but the Convening Authority referred the charges to commission against only five of them, dismissing the charges against Mohammed al-Qahtani, the alleged twentieth hijacker, because he had been tortured. See Bob Woodward, *Guantánamo Detainee was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>.

<sup>226</sup> Randall Mikkelsen, *Technical Flaws Mar Hearing in New Guantánamo Court*, REUTERS (May 8, 2008, 10:41 PM), <http://www.reuters.com/article/2008/05/08/idUSN07298545>; Carol Rosenberg, *Glitches Mar Debut of Guantánamo War Court*, MIAMI HERALD (May 8, 2008).

unlawful influence placed upon him by the Legal Advisor to the Convening Authority and by other political appointees in the Defense Department. In *Jawad*, the interim Chief Prosecutor who replaced Col Davis while awaiting the appointment of a permanent Chief Prosecutor also testified for the defense; he was cross-examined by the very Chief Prosecutor who replaced him—his current boss, who highlighted his continuing influence over the witness by instructing him, while he was still on the witness stand, to contact another employee and have him call him.

Col Davis was not the only prosecutor who made an appearance after resigning. The lead prosecutor in the *Jawad* case, Lt Col Darrel Vandeveld, was initially an incredibly aggressive prosecutor. In the first two hearings in which he appeared, he was repeatedly admonished for his tone or choice of language and more than once simply cut off by the military judge. By the third hearing, he had begun to have misgivings about the case and he was much less aggressive, even conciliatory at times. At one point, the assistant prosecutor felt compelled to jump in and correct him when he seemed to be conceding a point of law that was contrary to the government's official position. Shortly after this hearing, Lt Col Vandeveld resigned from the military commissions based on what he perceived as an ethical conflict. In the next hearing, he appeared as a defense witness and provided stinging criticism of the Office of Military Commissions–Prosecution.<sup>227</sup>

The Legal Advisor himself, Brig Gen Hartmann, took the stand to defend his actions in multiple hearings, including the *Jawad* and 9-11 cases. In another hearing, I presented the testimony of an Army General who was openly critical of the Legal Advisor's professionalism and leadership, a spectacle rarely seen in public.<sup>228</sup> On another occasion, a Marine Gunnery Sergeant who had testified for the government prepared a classified statement expanding on his statement at the behest of the defense. The statement contained significant exculpatory and mitigating evidence. After discussing the statement with the prosecutors, the witness then entered the defense offices and destroyed the document, erasing it from the classified computer where it was saved. The suppression hearing that was in progress had to be interrupted to have a mini-hearing on whether there was prosecutorial misconduct, with two of three defense counsel, one of two prosecutors and the defense paralegal all testifying on the matter. Although the judge determined that the prosecutors had not acted improperly, as a remedy, one of the defense counsel was permitted to testify as a fact witness to describe his discussions with the witness and the contents of the

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<sup>227</sup> Mike Melia, *Former Gitmo Prosecutor Blasts Tribunals*, CENTER FOR THE STUDY OF HUMAN RIGHTS IN THE AMS. (Sept. 26, 2008), <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-prosecution-lawyers/former-gitmo-prosecutor-blasts-tribunals>.

<sup>228</sup> Carol Rosenberg, *Guantánamo General Calls 2d General 'Bullying'*, MIAMI HERALD, Aug. 13, 2008, <http://www.mcclatchydc.com/2008/08/13/48053/guantanamo-general-calls-2nd-general.html>; Mike Melia, *Adviser to Guantánamo Trials Faces More Criticism*, CNSNEWS.COM (Aug. 13, 2008), <http://www.cnsnews.com/node/34071>.

statement. In all, seven different lawyers assigned at one time to the Office of Military Commissions took the stand in the *Jawad* case.

The military commissions were also marked by an unusual degree of friction and animosity between opposing counsel. Although all criminal trials are adversarial, the smooth functioning of the American criminal justice system relies heavily on positive relationships and cooperation between the prosecution and defense. After all, 97% of cases or more are resolved by plea bargains. The fact that military prosecutors and defense attorneys are all part of the profession of arms and usually of the same service results in a high degree of civility in courts-martial practice. From my perspective, the commissions were more contentious than the typical court-martial or civilian criminal case for several reasons. First, the stakes in military commissions, on both sides, were extremely high. For the accused, the commission was frequently a life or death matter, as most were facing the possibility of capital punishment or life in prison, if convicted. The stakes were also very high for the prosecution. Not only was the prosecution attempting to convict those they believed were responsible for some of the most heinous and notorious crimes in American history, but they were simultaneously attempting to legitimize the legal system in which they functioned. As a result, the government and the defense fought about every conceivable matter, and each side sought every possible advantage over the opposition. The parties often refused to accept a judge's ruling, frequently filing motions for reconsideration. In some instances, the government simply defied a judge's order with which they disagreed. In addition, the commissions operated in the glare of the media spotlight, which tends to have a polarizing effect on the parties. Further, because the Office of Military Commissions relied in large part on volunteers to fill the ranks of the prosecution and defense, quite a few of the defense counsel and prosecutors were not only personally committed to their cases or clients, but also they were often philosophically and ideologically committed to the positions they were advocating. The logistical difficulties in getting to, and operating in, Guantánamo were very stressful. Long absences from family exacerbated the irritation and the constant delays were very frustrating. As a result of all these factors, tensions ran high, and sometimes things got personal.

But just as the intensity of the commissions could create animosity among adversaries, it also forged great friendships with those whom one had the opportunity to work with under very challenging circumstances. I made the deepest connections of my military career with my comrades in the military commissions, on both sides of the courtroom. Many of the prosecutors acted with great honor and integrity in carrying out their duties, especially those who chose to resign for ethical reasons, even when they knew that such a decision would likely harm their careers.

## V. CONCLUSION

Although the current Administration has authorized military commissions to continue, the future of the military commissions remains clouded by legal and political uncertainty. So far, only one conviction obtained in a military commission trial, *United States v. Hamdan*, has been reviewed by an appellate court. (The CMCR is currently reviewing the appeal of the conviction of Ali Hamza al Bahlul.) And, although Hamdan's conviction was upheld by the CMCR,<sup>229</sup> the court's opinion is of limited significance for two reasons. First, Hamdan was tried under the 2006 M.C.A., and it is unclear to what extent the changes to the M.C.A. and MCM might affect the precedential value of the CMCR's ruling. Furthermore, the CMCR is only the intermediate court of appeal. Its ruling is likely to be appealed to the Court of Appeals for the D.C. Circuit, and possibly to the Supreme Court. Ultimately, it is likely to take several more years, and one or more Supreme Court rulings before we know if the M.C.A. is even constitutional and what constitutional rights, if any, apply to the detainees. In the meantime, those assigned to the Office of Military Commissions must soldier on as best they can. I hope they find this article helpful.

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<sup>229</sup> Carol Rosenberg, *Bush Era Conviction of Bin Laden Driver is Upheld*, Miami Herald online (June 25, 2011), <http://www.miamiherald.com/2011/06/25/2284625/bush-era-conviction-of-bin-laden.html> U.S. v. Hamdan, CMCR 09-002, June 24, 2011. Opinion available at: <http://media.miamiherald.com/smedia/2011/06/25/10/06/z68SV.So.56.pdf>.

THE CORROBORATION QUANDARY:  
A HISTORICAL OVERVIEW OF  
THE INTERPRETATION OF MRE 304(g)

COLONEL J. WESLEY MOORE\*

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## I. INTRODUCTION

The requirement that confessions be corroborated by independent evidence has been prominent throughout the history of military jurisprudence. Colonel William Winthrop, the widely renowned “Blackstone of military law”<sup>1</sup> noted, “As to the requisites to the admission in evidence of *extra-judicial* confessions—it has been seen, in the first place that a confession cannot be admitted in evidence till the *corpus delicti*—the fact that the alleged criminal act was in fact committed, by somebody—is proved.”<sup>2</sup> In its current formulation, Military Rule of Evidence 304(g), requiring that, as a prerequisite to their admission, confessions be corroborated by independent evidence, derives from substantially similar rules dating back more than 40 years.<sup>3</sup> In addition, the twin Supreme Court cases upon which the rule is based remain the definitive pronouncements on the requirement. While one might suppose a rule of such classic vintage to have matured into a well-settled and easily-applied rubric, a review of military case law applying the standard establishes quite the contrary. This article will analyze that case law in an attempt to distill some useful guidance and to provide an analytical framework by which one may more predictably engage in the highly fact-specific task of drawing the line in close cases between which confessions should and should not be admitted into evidence.

## II. BACKGROUND

Though the corroboration rule traces back to English common law, American practice has generally expanded the requirement beyond its English roots, based in large part on an inherent distrust of prosecutions based solely upon the accused’s confession.<sup>4</sup> It is difficult to state the rationale more comprehensively and succinctly than did the United States Supreme Court in 1954:

Its purpose is to prevent “errors in convictions based upon untrue confessions alone”:<sup>5</sup> its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude

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<sup>1</sup> Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006). See also Honorable Walter T. Cox III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 9 (1987).

<sup>2</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, 327 (2d ed. 1920).

<sup>3</sup> *Infra* note 27 and accompanying discussion.

<sup>4</sup> See *Opper v. United States*, 348 U.S. 84, 89-90 (1954).

<sup>5</sup> *Warszower v. United States*, 312 U.S. 342, 347 (1941).

involuntary confessions from consideration by the jury, [citations omitted] further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be “involuntary” within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made.<sup>6</sup>

The twin cases of *Smith v. United States*<sup>7</sup> and *Opper v. United States*<sup>8</sup> purported to resolve a split among the circuits. On the one side, what will hereinafter be referred to as the “substantial evidence” cases held corroboration of a confession required merely substantial evidence supporting the veracity of the confession, in which case it was only required that the corroborative evidence touch on the *corpus delicti* of the charged offense. The other line of cases followed what will hereinafter be referred to as the “elements” analysis, requiring independent evidence tending to establish “the whole of the *corpus delicti*.”<sup>9</sup> This rule was interpreted to require corroboration which proved “each of the main elements or constituent parts of the *corpus delicti*.”<sup>10</sup> At the outset, it is important to understand the term itself. *Corpus delicti*, does not mean “dead body” though in a murder case, the body certainly would fit the definition. Instead, “*corpus delicti*” means “injury against whose occurrence the law is directed,”<sup>11</sup> or as Col Winthrop stated, “the fact that the alleged criminal act was in fact committed, by somebody . . . .”<sup>12</sup>

#### A. *Opper v. United States*

Opper was charged with paying an Air Force contracting employee, Hollifield, to exert influence on the procurement process. After the alleged offense, Opper admitted to FBI agents that he paid money to Hollifield, but steadfastly maintained the money was just a loan and that there was never an agreement for Hollifield to influence the procurement process.<sup>13</sup> The government could directly corroborate one element—that the accused paid

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<sup>6</sup> *Smith v. United States*, 348 U.S. 147, 153 (1954).

<sup>7</sup> *Id.*

<sup>8</sup> *Opper*, 348 U.S. at 84.

<sup>9</sup> *Forte v. United States*, 94 F.2d 236, 244 (D.C. Cir. 1938).

<sup>10</sup> *Ercoli v. United States*, 131 F.2d 354, 355 (D.C. Cir. 1942).

<sup>11</sup> See *Opper*, 348 U.S. at 92 (quoting *Daeche v. United States*, 250 F. 566 (2d Cir. 1918)).

<sup>12</sup> *Winthrop*, *supra* note 2, at 327.

<sup>13</sup> *Opper*, 348 U.S. at 86-88.



money to Hollifield. They did this by proof that Opper had cashed a check for \$1,000. The prosecution also had evidence of a contemporaneous airline ticket in Hollifield's name to Chicago where Opper was located. This lined up with Opper's description of how the transaction was funded and when and where it occurred. So, in essence, the government was able to corroborate the "who, what, where, when and how" provided by Opper. As to the "why," the prosecution circumstantially contradicted Opper's denials of an illicit motive by independent proof of attempts made by Hollifield to assure the Air Force purchased Opper's products.<sup>14</sup>

In deciding the issue, the Supreme Court adopted the "substantial evidence" rationale, holding in an oft-quoted passage:

However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. [citation omitted]. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.<sup>15</sup>

The Court's analysis found the payment was adequately corroborated and that the motive was sufficiently proven by independent evidence. However, it is debatable how much of a relaxation of the so-called "elements" test this really represented. In this case, the government arguably had sufficient circumstantial evidence to support a conviction without the confession in issue. While certainly Opper's admission to actually making the transfer strengthens the government's case, clearly every element of the offense is either corroborated or independently proven. In fact, nothing in the *Opper* decision indicates a departure from the requirement quoted from Judge Learned Hand's opinion in *Deache v. United States*, the seminal case of the "substantial evidence" line of cases, that the independent evidence still "touch on" the *corpus delicti*.<sup>16</sup> To the contrary, *Opper's* requirement that the corroboration support the "essential facts admitted" would seem to preserve some vestige of the "elements" analysis. In fact, it would seem

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<sup>14</sup> *Id.* at 93-94.

<sup>15</sup> *Id.* at 93.

<sup>16</sup> *Daeche*, 250 F. at 566.

from this holding that every “essential fact” must be proved by either a corroborated admission or by independent evidence.

### B. *Smith v. United States*

The *Smith* case, decided during the same term as *Opper*, presented a slightly different issue, namely whether the corroboration requirement should be extended to cases where there is no tangible *corpus delicti*, such as, in that particular case, tax evasion. In that case, the accused was charged with understating his income over several years. In his statement to investigators, he admitted to a very modest initial net worth. The cornerstone of the prosecution’s case involved this modest figure, juxtaposed with other evidence of his rapidly increasing holdings over the next several years to prove circumstantially that he had significant unreported income during those years.<sup>17</sup> First, the court held that in cases where there is no tangible *corpus delicti*, “the corroborative evidence must implicate the accused in order to show that a crime has been committed.”<sup>18</sup> As in *Opper*, the Court took note of the two competing lines of cases, but in rather enigmatic fashion held:

In addition to differing views on the substantiality of specific independent evidence, the debate has centered largely about two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone, [citations omitted], and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged, [citations omitted]. We answer both in the affirmative.

The court continued, “All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense ‘through’ the statements of the accused.”<sup>19</sup> The first part of this holding seems to mirror the rationale behind the “elements” analysis, but the second at least raises the possibility that a confession could be corroborated by evidence unrelated to the charged offense that merely bolsters the confession itself. Taking this line of reasoning to its logical conclusion; however, would result in the corroboration requirement being completely subsumed within the requirement that confessions be voluntary, as those circumstances tending to show that a confession was given voluntarily would, in virtually every case

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<sup>17</sup> *Smith*, 348 U.S. at 155.

<sup>18</sup> *Id.* at 154.

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

have at least some tendency to bolster the reliability of the confession itself, but the text of the *Smith* decision tends to contradict the intent to allow this sort of “bootstrap” corroboration. The *Smith* decision itself noted the historical need to account for the counter-intuitive reality that false confessions are on occasion voluntarily made.<sup>20</sup>

The *Smith* court’s analysis of the facts does not render the concept any easier to grasp either. On the one hand, in rather straightforward fashion the Court noted that the admissions in question (as to the Appellant’s modest opening net worth) are directly corroborated by the Appellant’s tax returns over the previous years and by the fact these tax returns are consistent with his admission regarding those previous years.<sup>21</sup> Nonetheless, the Court went on to observe that the admissions could also be corroborated by the government’s other evidence tending to show, not the Appellant’s opening net worth, but bolstering the conclusion that he had committed the charged offense of tax evasion. Specifically, the court spoke of his lavish expenditures and drastically increased holdings over the prosecution years without a concomitant increase in his reported income.<sup>22</sup> Thus, while the Court purported to adopt the holding that the corroboration could bolster the confession without independently establishing the crime charged, it found the confession corroborated precisely because of the ample evidence tending to establish the commission of the charged crime. Thus, while the holding would seem to open the door to the kind of “bootstrap” corroboration mentioned earlier, the Court’s analysis seems only to prevent an accused from protesting the use of his otherwise uncorroborated confession to a single element in the face of other ample evidence of his overall guilt.

In fact, this conclusion is consistent with the general application of the “substantial evidence” rule prior to *Smith*. This line of cases largely harkens back to the opinion of Judge Learned Hand in the *Daeche* decision, where, as mentioned above it was held that the corroborative evidence must still touch on the *corpus delicti*.<sup>23</sup> The facts of the *Daeche* case are instructive. In that case, the Defendant was charged with conspiring with several others to sabotage warships containing munitions. The court in that case found other evidence of the existence of the conspiracy, combined with evidence of the Defendant’s attempts to obtain dynamite in furtherance of the conspiracy, sufficient to corroborate his confession to being a part of the conspiracy.<sup>24</sup> This was in contrast to the practice in some other courts of requiring the jury to conclude beyond a reasonable doubt there was sufficient independent evidence of the *corpus delicti* before they could consider the confession. In contrast, the court held in an oft-quoted passage,

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<sup>20</sup> *Id.* at 153.

<sup>21</sup> *Id.* at 158.

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

<sup>23</sup> *Daeche*, 250 F. at 571.

<sup>24</sup> *Id.* at 572.

“...any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the *corpus delicti* at all, neither beyond a reasonable doubt nor by a preponderance of proof.”<sup>25</sup>

### C. Interpreting *Smith* and *Opper*

Understood against this backdrop, it is clear that the *Smith* and *Opper* decisions, even though they affirmed a line of cases departing from some of the most stringent applications of the corroboration rule, also intended to maintain a requirement more strict and in addition to the requirement that the confession merely be voluntary. The touchstone of this more stringent requirement seems to be that the corroborative evidence at least “touch on” the *corpus delicti*, or as the *Smith* court stated, “implicate the accused in order to show that a crime has been committed.”<sup>26</sup>

### D. Military Cases Following *Smith* and *Opper*

Military courts did not immediately adopt the holdings in *Smith* and *Opper*. Instead, they continued to follow the “elements” rule as enunciated in paragraph 140a of the 1951 Manual for Courts Martial.<sup>27</sup> This provision was interpreted to require independent evidence tending to establish the existence of each element of the offense charged.<sup>28</sup> In fact, in the face of continued entreaties by appellate trial counsel to adopt the *Opper* rule, the Courts continued to uphold paragraph 140a as within the President’s authority to promulgate, notwithstanding the Supreme Court’s decision to create a more lenient rule in civilian courts.<sup>29</sup> It was not until the adoption of the 1969 Manual for Courts Martial that the *Smith* and *Opper* decisions became operative for military courts. Paragraph 140a of that Manual, survives almost entirely intact in MRE 304(g), with the exception that the MRE provision eliminated the requirement for Military Judges to instruct on corroboration in close cases, opting instead to treat corroboration entirely as a matter to be determined by the military judge.

Not surprisingly, much of the ensuing case law centered on the questions of the quantum of corroborative evidence necessary for a

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<sup>25</sup> *Id.* at 571.

<sup>26</sup> *Smith*, 348 U.S. at 154.

<sup>27</sup> That provision provided, in pertinent part, “An accused cannot legally be convicted upon his uncorroborated confession or admission. A court may not consider the confession or admission of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone.” MANUAL FOR COURTS MARTIAL, UNITED STATES, ¶ 140a (1951) [hereinafter MCM].

<sup>28</sup> *United States v. Isenberg*, 8 C.M.R. 149 (C.M.A. 1953).

<sup>29</sup> *See, e.g., United States v. Villasenour*, 19 C.M.R. 129 (C.M.A. 1955); *United States v. Smith*, 32 C.M.R. 105 (C.M.A. 1962).

confession or admission to be admissible. In that vein, two of the most oft-quoted passages permeating post-*Opper* military corroboration jurisprudence are found in the 1987 and 1988 Court of Military Appeals decisions in *United States v. Yeoman* and *United States v. Melvin*, where the quantum required is described as “slight”<sup>30</sup> or “very slight.”<sup>31</sup> Though the Court in *Melvin* recognized no mathematical formula could be employed, these statements beg the ultimate question, “How slight is very slight?” Perhaps the best starting point for understanding where this minimal threshold lies is by analyzing those cases falling below it.

## E. Corroboration Found Insufficient

Military cases since the 1968 adoption of the *Opper* rule where corroboration was found to be insufficient represent a distinct minority of decisions. They are, however, instructive on just what factors are still considered salient in analyzing a corroboration question. The ensuing discussion will first analyze those decisions of the Court of Military Appeals and the Court of Appeals for the Armed Forces and will then discuss published service court decisions wherein corroboration was found lacking.

### 1. Court of Military Appeals/Court of Appeals for the Armed Forces Decisions

#### a. *United States v. Rounds*

*Rounds*<sup>32</sup> is perhaps one of the most useful cases for one in search of the line of delineation between sufficient and insufficient corroboration. In that case, the accused admitted to several instances of illegal drug use. Though most were found to be sufficiently corroborated, one in particular was not. As to his cocaine use, the Appellant stated, “I did the cocaine in Houston. A couple times. On Thanksgiving and on New Years. [ . . . ] Ron [and] Terry never went to Houston. Just Eric and myself. That’s when I did the cocaine. Then and only then have I ever thought about it before.”<sup>33</sup> The proffered corroboration for the Thanksgiving cocaine use consisted of the testimony of an Airman Eric Sax, who stated that he left the accused in the company of known drug users, at least one of whom was known to have

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<sup>30</sup> “Moreover, ‘the quantum of evidence’ needed to raise such an inference is ‘slight.’” *United States v. Yeoman*, 25 M.J. 1, 4 (C.M.A. 1987) (quoting STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* 139 (2d ed. 1986)).

<sup>31</sup> “Although no mathematical formula exists to measure sufficient corroboration, our review of the federal court decisions cited below leads us to conclude that the amount of corroboration generally needed is not great. Considering the language of Mil.R.Evid. 304 (g)(1), we also conclude that the amount needed in military courts may be very slight.” *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988).

<sup>32</sup> *United States v. Rounds*, 30 M.J. 76 (C.M.A. 1990).

<sup>33</sup> *Id.* at 78.

been previously involved with cocaine and that he was absent from the party for about an hour.<sup>34</sup> The Court held the other drug uses were corroborated where the two corroborating witnesses' testimony "dovetailed" with the time, place and persons involved, holding, ". . . testimony concerning these two incidents clearly shows that appellant had both access and the opportunity to ingest the very drugs he admitted using in his confession."<sup>35</sup> Regarding the Thanksgiving use, however, the differentiating factor was that there was not testimony that drug use was taking place or that drugs were even available at the Thanksgiving party.

b. *United States v. Faciane*

In *Faciane*,<sup>36</sup> the accused admitted to fondling his daughter on three separate occasions. The proffered corroboration consisted of a social worker's account of the daughter's statements confirming the fondling as well as evidence of changes in her behavior after spending time with her father, to include sticking a toothbrush into her vagina and showing an increased interest in watching babies' diapers being changed at her daycare.<sup>37</sup> The social worker was allowed to recount the daughter's statements under the medical treatment exception to the hearsay rule. A unanimous Court of Military Appeals disagreed with the trial judge's application of the hearsay exception and found the remaining evidence insufficient to corroborate, stating, "Although the Government argues that appellant's exclusive custody of the child establishes that he had access and the opportunity to abuse her, we are unwilling to attach a criminal connotation to the mere fact of a parental visit."<sup>38</sup> This case appears to contradict the holding in *Rounds* that "access and opportunity" are sufficient to corroborate. Upon closer evaluation, however, it seems the differentiating factor has to do with the fact that access to contraband such as illegal drugs is quite different from access to one's own child, which carries no basis for inferring wrongdoing. In other words, access to illegal drugs "touches on the *corpus delicti*" while access to one's child does not. *Faciane*, in not considering the inadmissible hearsay on the corroboration issue, also apparently assumed that the corroborative evidence must be both admissible and admitted.

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<sup>34</sup> *Id.* at 79.

<sup>35</sup> *Id.* at 80.

<sup>36</sup> *United States v. Faciane*, 40 M.J. 399 (C.M.A. 1994).

<sup>37</sup> *Id.* at 400-401.

<sup>38</sup> *Id.* at 403.

c. *United States v. Duvall*

Against this backdrop, the *Duvall* case<sup>39</sup> is interesting in that it challenged a previously held assumption that the phrase, “independent evidence, either direct or circumstantial, has been introduced,” actually required that the corroborative evidence be properly admitted and considered by the finder of fact.<sup>40</sup> Duvall confessed to use of marijuana with a friend. The government was unsuccessful in getting testimonial immunity for the friend and sought at trial to have the friend’s corroborative statement admitted as a statement against interest. The military judge did not allow the trial counsel to provide the hearsay statement to the members, apparently believing this unnecessary, as he viewed the corroboration question as one on which he could rule under M.R.E. 104(a), which allows a military judge to consider otherwise inadmissible evidence with regard to predicate facts.<sup>41</sup> The Air Force Court upheld the military judge’s reasoning on what it considered to be an issue of first impression, holding, “The purpose of the corroboration rule is advanced by evidence, any evidence, tending to show that the confession is true, regardless of whether that evidence is itself admissible.”<sup>42</sup> The Court attempted to distinguish *Faciane* on the basis that *Faciane* was a bench trial, reasoning that in such a case, “Because the evidence which the Court of Military Appeals ruled inadmissible was not only used for corroboration, *but on the merits*, the integrity of the conviction itself was impeached.”<sup>43</sup> Reading the opinion as a whole, it is clear that the Air Force Court’s attempt to narrowly interpret the rule was motivated by the majority’s view that any other application of the rule unnecessarily removed relevant evidence from the purview of the fact finder. The Court seemed to indicate its impression that such developments as the *Miranda* rule had rendered many of the concerns underlying the corroboration rule obsolete.<sup>44</sup>

This holding would, however, not long survive. The Court of Appeals for the Armed Forces granted a petition for review in the case and Judge Effron, in his majority opinion, settled the issue holding, “Because the military judge’s ruling in this case precluded the members from considering any corroborating evidence in deciding what weight to give appellant’s

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<sup>39</sup> *United States v. Duvall*, 44 M.J. 501 (A.F. Ct. Crim. App. 1996), *rev’d*, 47 M.J. 189 (C.A.A.F. 1997).

<sup>40</sup> MCM, *supra* note 27, MIL. R. EVID. 304(g).

<sup>41</sup> *Duvall*, 44 M.J. at 502.

<sup>42</sup> *Id.* at 504-55. The Court did not mention the Army decisions in *Gaines* and *Shavers* (*supra* Parts II.E.3.b and II.E.3.c), however, since these cases were decided, the rule was amended to remove the requirement that the military judge instruct the members on the issue of corroboration.

<sup>43</sup> *Id.* at 504.

<sup>44</sup> “In a further effort to understand the rule, it is worth remarking that both *Smith* and *Warszower* preceded *Miranda v. Arizona*, 384 U.S. 436, (1966). *Miranda*’s sweeping prophylaxis went a long way toward alleviating the principal concern of the *Smith* holding, the unreliable confession.” *Id.*

confession, the findings that are based solely on the confession must be set aside.”<sup>45</sup> In addition to enforcing the plain meaning of the phrase “has been introduced,” the Court refuted the Air Force Court’s underlying assumption that concern regarding false confessions is an anachronistic relic of less civilized times.<sup>46</sup> So, not only has the requirement that the corroborative evidence be admissible been definitively settled, four justices of the Court of Appeals for the Armed Forces apparently believed the evils against which the rule was intended are still of concern.

## 2. Air Force Decisions

### a. *United States v. Greenberg*

The Air Force Court decided one of the first cases to find corroboration lacking under the *Opper* rule in its 1969 decision in *United States v. Greenberg*.<sup>47</sup> In that case, the accused pled guilty to drug use and larceny of a significant amount of morphine, but was found guilty contrary to his pleas of marijuana use and possession. The evidence supporting his conviction of these latter two offenses consisted of marijuana seized from his dormitory room and the testimony of an eyewitness who observed the accused smoke a cigarette on the night in question and observed that the odor of the smoke was “harsher than ordinary cigarette smoke.” The witness had never smelled burning marijuana.<sup>48</sup> After the Court ruled the fruits of the search should have been suppressed, it specifically quoted the *Opper* holding, but found the witness testimony insufficient standing alone to corroborate the confession, referring to it as “mere suspicion and conjecture” failing to “indicate the type of offense that was probably committed.”<sup>49</sup> Interestingly, this case has only been cited as authority once on an unrelated issue. Specifically, it’s assumption that the corroborative evidence must be admissible was not discussed in the *Duvall* case, which, as stated above, considered this an issue of first impression.

### b. *United States v. Springer*

In *Springer*<sup>50</sup> the Air Force considered a multiple larceny case in which it addressed sufficiency of the corroboration of admissions to several larcenies. In that case, the accused stipulated to various facts. As to certain items, the stipulation admitted that the items seized from the accused belonged to other individuals and were properly placed into the mails. As to

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<sup>45</sup> *United States v. Duvall*, 47 M.J. 189, 192 (C.A.A.F. 1997).

<sup>46</sup> *See id.* at n.3 (citing numerous cases and articles discussing ongoing concerns with false confessions).

<sup>47</sup> *United States v. Greenberg*, 41 C.M.R. 881 (A.F.C.M.R. 1969).

<sup>48</sup> *Id.* at 883.

<sup>49</sup> *Id.* at 884.

<sup>50</sup> *United States v. Springer*, 5 M.J. 590 (A.F.C.M.R. 1978).



these items, the Court found corroboration sufficient. As to the remaining items, the accused stipulated only that the items were turned over by the accused to the Air Force Office of Special Investigations. The Court found this to be insufficient.<sup>51</sup> Though the court discussed and rejected the idea that the offenses for which sufficient corroboration existed could corroborate the remaining offenses, it stopped short of adopting a *per se* rule, commenting, “We do believe, however, that under proper circumstances, evidence of similar offenses could provide the required corroboration such as when the items are alike or taken over a short period of time.”<sup>52</sup> In so holding, the Court specifically mentioned the holding of the Court of Military Appeals in *Seigle* where similar items were taken over a short period of time.<sup>53</sup>

c. *United States v. Lowery*

In *Lowery*,<sup>54</sup> the Air Force Court, in its most recent published decision to find corroboration insufficient, reviewed a conviction for several offenses, but the one of relevance to the present discussion was a charge of acting as accessory after the fact to the larceny of a camera. The accused admitted to being at the party from which the camera was stolen and to assisting his friends by allowing them to conceal the camera, which he knew to be stolen, in the trunk of his car. The corroborative evidence was a stipulation of expected testimony of the victim of the theft. His stipulated testimony related that he was at the party, fell asleep knowing the location of his camera and awoke to find it missing, with one of the accused’s cohorts being the only individual with access to the camera in the meantime. In finding the corroboration insufficient, the Air Force Court looked to the elements of the offense of accessory after the fact and concluded there was no corroboration of the accused’s admission that he knew the camera to be stolen.<sup>55</sup> The Court did not engage in a lengthy analysis, but did cite without discussion the Army’s *Dake* decision<sup>56</sup> and the *Springer* case discussed *supra*. While this could be seen as a reversion back to the old “elements” test, it is probably better understood as a holding that for the purposes of an inchoate crime such as accessory after the fact, the *mens rea* element is particularly important or stated differently the gravamen of the offense. In fact, though *Smith* was not cited, it nonetheless seems to have been followed in that the crime in question was one without a tangible *corpus delicti* and the evidence was found insufficient in that it failed to

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<sup>51</sup> *Id.* at 592.

<sup>52</sup> *Id.* at 592-93.

<sup>53</sup> See *infra* Part II.F.1.a and accompanying discussion.

<sup>54</sup> *United States v. Lowery*, 13 M.J. 961 (A.F.C.M.R. 1982).

<sup>55</sup> *Id.* at 963-4.

<sup>56</sup> See discussion *infra* Part II.E.3.d.

implicate the accused in order to demonstrate that the crime alleged had been committed.

### 3. Army Decisions

#### a. *United States v. Holler*

*Holler*<sup>57</sup> was the Army's first corroboration case following the adoption of the 1969 Manual. In that case, the accused was found on a military installation in possession of marijuana and with a pipe, the use of which could be tied to the accused. The pipe contained some "forbidden residue."<sup>58</sup> He subsequently confessed to bringing the marijuana onto the installation and using it. Significantly, the accused was not charged with possession, but instead with introduction onto a military installation and use. The court found the evidence sufficient to corroborate the confession to introduction, reasoning that a military installation is an "an extremely unlikely locus for domestic production."<sup>59</sup> As to the use specification, however, the Army Court found the possession to be insufficient corroboration. In reaching this decision, the Court analyzed military precedent prior the 1969 Manual. Though the government appellate counsel urged the Court to abandon previous precedent requiring the corroborative evidence to connect the accused to the crime, the Court avoided the issue, concluding, "Even if possession at one time and place would sufficiently corroborate the 'essential facts' of possession at a different time and in a different place, we hold that such possession is insufficient to corroborate use at a different time and different place."<sup>60</sup> In arriving at this decision, the Court noted the ambiguity introduced by the "essential facts" language of the new rule, stating, "This term has been used both as a synonym for "elements of the offense and for some web of facts and circumstances less than the essential elements of an offense."<sup>61</sup>

#### b. *United States v. Gaines*

The Army Court next addressed the issue in the *Gaines* case.<sup>62</sup> The specification at issue in that case charged the accused with felony-murder for a killing which allegedly took place during the course of a robbery. The Court found insufficient independent evidence of the robbery aspect of the felony-murder and accordingly modified the findings to the lesser included offense of involuntary manslaughter. The Court's decision in that case

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<sup>57</sup> *United States v. Holler*, 43 C.M.R. 461 (A.C.M.R. 1970).

<sup>58</sup> *Id.* at 466.

<sup>59</sup> *Id.* at 467.

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

<sup>61</sup> *Id.* at 468, n.4 (citations omitted).

<sup>62</sup> *United States v. Gaines*, 44 C.M.R. 375 (A.C.M.R. 1971).

turned on the fact that the corroborative evidence (that the victim previously possessed a large sum of money and that his empty wallet was found some distance from the body) was established through inadmissible hearsay to which the defense made a timely objection.<sup>63</sup> So, this case turned on the admissibility, not the sufficiency of the corroborative evidence.

c. *United States v. Shavers*

The Army Court revisited the *Opper* rule in the *Shavers* case.<sup>64</sup> In that case, an informant saw the accused take possession of “30 plates” of cocaine.<sup>65</sup> He subsequently confessed not only to the purchase but also to selling the cocaine to several regular customers. In the course of his interrogation, it was discovered that he maintained a customer list, which he voluntarily provided to investigators. At trial, the government sought to corroborate his confession with the customer list, which was admitted, over defense objection, as a record of a regularly conducted activity. The Army Court found the corroboration insufficient to accept the confession as to the sale or transfer of the cocaine, holding that the customer list should not have been admitted, because the accused’s otherwise uncorroborated confession was used to establish the foundation of the list.<sup>66</sup> In quoting the *Opper* decision, the Court noted the illusory nature of the distinction between the old *corpus delicti* rule and that enunciated in *Opper*, stating, “In the instant case, the distinction tends to blur as the ‘essential facts’ to be corroborated are the acts of the appellant in selling or transferring what he believed to be cocaine.”<sup>67</sup> So, this case is notable in that (1) it enforces the requirement that a confession cannot be corroborated with another uncorroborated confession, (2) it requires that corroborative evidence be admissible and (3) it indicates the survival of at least some vestige of the *corpus delicti* requirement embodied in the “essential facts” language of the rule.

d. *United States v. Dake*

In *Dake*,<sup>68</sup> the accused admitted to violating a general order which prohibited the use of the military mail system for commercial or business reasons, doing so in furtherance of a conspiracy with a Sergeant Hickel. The evidence, to include customs records and the items themselves indicated that the accused mailed several expensive electronics items from Japan to

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<sup>63</sup> *Id.* at 379.

<sup>64</sup> *United States v. Shavers*, 11 M.J. 577 (A.C.M.R. 1981).

<sup>65</sup> A plate was described as a 10-dollar packet. *Id.* at 578 n.1.

<sup>66</sup> *Id.* at 579. While one could argue that the list could be admitted under some other exception to or exclusion from the hearsay rule, ultimately the relevance of the list of names, absent some independent evidence tying an individual on the list to a purchase of cocaine, derives solely from the accused’s otherwise uncorroborated confession.

<sup>67</sup> *Id.* at 578 n.4.

<sup>68</sup> *United States v. Drake*, 12 M.J. 666 (A.C.M.R. 1981).

various members of his stateside unit. The Army Court found this evidence sufficient to corroborate violation of the order, but in the absence of any independent evidence of an agreement with Sergeant Hickel, the Court was unwilling to find the conspiracy charge adequately corroborated.<sup>69</sup> In essence, the Court found that the agreement was an “essential fact” of the conspiracy, requiring independent evidence.

e. *United States v. Loewen*

The Army Court’s next significant corroboration decision, *Loewen*,<sup>70</sup> was one of the most interesting. In that case, the accused admitted to stealing 26 prescription forms and forging prescriptions for himself and his wife, which they subsequently presented to the base pharmacy to receive various prescription medications. The pharmacy received the 26 prescriptions, 17 of which listed the accused as the patient and the remainder of which listed his wife. Surprisingly, the Court found, “Applying Mil.R.Evid. 304(g) to the appellant’s confession in this case, we find it uncorroborated, even though a tangible corpus delicti, i.e., a forgery by someone, was established by independent evidence.”<sup>71</sup> In reaching its decision, the Court placed great weight on the handwriting analysis of the prescription forms, which concluded the accused was likely not the author of a significant number of the signatures, contradicting his admission to signing all of them. In reaching its legal conclusions, the Court adopted one of the broadest interpretations of the military application of the *Smith* and *Opper* decisions to date. The Court cited *Smith* for the proposition that the *Smith* and *Opper* rules could actually be more onerous than the old *corpus delicti* rule. The Court concluded that the new rule “extends the corroboration requirement to include the identity of the accused as the perpetrator, an element not required to be corroborated under the old corpus delicti rule.”<sup>72</sup> The Court made no note that this holding from the *Smith* case was with regard only to offenses without a tangible *corpus delicti*. Despite the remarkable nature of this decision, it has not taken root as precedent. In fact, it has not been cited in a single case.

f. *United States v. Egan*

In *Egan*,<sup>73</sup> the accused admitted to the use of various drugs and to the distribution of Ecstasy. At trial, he was found guilty of the various use specifications, and as to the distribution was, found guilty of the lesser included offense of attempted distribution. His confession to the

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<sup>69</sup> *Id.* at 669-70.

<sup>70</sup> *United States v. Loewen*, 14 M.J. 784 (A.C.M.R. 1982).

<sup>71</sup> *Id.* at 787.

<sup>72</sup> *Id.*

<sup>73</sup> *United States v. Egan*, 53 M.J. 570 (A. Ct. Crim. App. 2000).

distribution was corroborated by the out-of-court statements of two accomplices and by the testimony of a local narcotics agent who identified one of the accomplices as active in the drug trade and the other as a known drug user. The officer also confirmed that the prices the appellant claimed to have paid for the pills was consistent with the market price in the area. Finally, the accused's address book was seized and contained phone numbers for the individuals and the establishment mentioned in his confession.<sup>74</sup> After the Army Court ruled that the hearsay statements of the accomplices were improperly admitted, it found the remaining corroborative evidence insufficient to corroborate the confession, stating, "Such evidence of the appellant's involvement in the local drug scene and his familiarity with London . . . , while certainly suspicious, does not justify an inference that the appellant could obtain ecstasy in London and had a propensity to distribute ecstasy to his fellow users."<sup>75</sup> Of note, the corroboration of the use specifications is not discussed in the opinion, as it apparently was not challenged at trial. Clearly, however, though the Court did not discuss the possible application of M.R.E. 404(b), it did not feel the evidence of use was sufficient to corroborate the attempted distribution. This holding is interesting in that the detective's testimony certainly established that the accused had access to the very drug he admitted to distributing, and his use established a propensity to possess it. Nonetheless, the appellant's confession alone was not sufficient to subject him to liability for attempted distribution. In analyzing the essential facts, the Court relied on the quotation from *Smith*, requiring that there be substantial independent evidence the offense was committed.<sup>76</sup>

#### 4. Navy/Marine Corps Decisions

##### a. *United States v. Kelly*

In the *Kelly* case,<sup>77</sup> the Navy-Marine Corps Court overturned the conviction based on ineffective assistance of counsel where defense counsel, "advised appellant to waive the Article 32 investigation and to plead guilty to all charges and specifications knowing that at the time of that advice and at the time of the appellant's waiver of the Article 32 investigation that the Government could not corroborate the drug use and distribution offenses."<sup>78</sup> While this is an extreme case where the ineffective assistance issue was actually raised by trial defense counsel in his post-trial clemency submissions,<sup>79</sup> it is an indication that a corroboration issue not addressed at

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<sup>74</sup> *Id.* at 578.

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

<sup>76</sup> *Id.* at 577 (quoting *Smith v. United States*, 348 U.S. 147 (1954)).

<sup>77</sup> *United States v. Kelly*, 32 M.J. 813 (N.M.C.M.R. 1991).

<sup>78</sup> *Id.* at 822.

<sup>79</sup> *Id.* at 815.

trial may come back to haunt all of the parties, a fully provident guilty plea notwithstanding.<sup>80</sup>

b. *United States v. Harjak*

Aside from *Kelly*, *Harjak*<sup>81</sup> is the only published Navy case in which corroboration was truly found lacking. It involved a father charged with sodomy and indecent acts upon his 10-year-old daughter. The evidence against him consisted chiefly of his confession and his daughter's out-of-court statement made to investigators and admitted under the residual hearsay exception to the hearsay rule. The investigating agent also testified that the accused's daughter provided the agent with a pair of her panties, which contained seminal fluid of someone with the same blood type as the accused.<sup>82</sup> Finally, the agent testified that when asked to explain the semen stain, the accused proffered that the victim had taken one of his condoms and poured the seminal fluid into her panties.<sup>83</sup> After the Court found the victim's hearsay statements were erroneously admitted, it found the remaining evidence insufficient corroboration even though they found the appellant's explanation absurd and the evidence as a whole "factually sufficient to sustain a conviction."<sup>84</sup>

This case prompts two observations. First, the Navy Court agreed with the trial judge's determination that the appellant's confessions were voluntary, thus enforcing the conclusion that the corroboration requirement is in addition to and more stringent than the voluntariness requirement. Secondly, the court's basis for finding the semen in the panties insufficient corroboration is not entirely clear. The Court refers at one point to this evidence as, "the NIS special agent's unobjected-to hearsay testimony about her taking the panties on the day in question . . . ."<sup>85</sup> Though it is not entirely clear how testimony about the seizure of evidence is hearsay or why the Court didn't consider "unobjected-to hearsay" admissible, the Court's apparent determination that the evidence was inadmissible would negate the inference that this case could be cited for the rather remarkable proposition that the semen-stained panties were insufficient corroboration. Indeed, based on several of the foregoing decisions, it appears that, in general, appellate courts are much more comfortable enforcing the corroboration rule in cases where they have ruled a significant measure of the government's evidence inadmissible. One may wonder whether the decision here would have been the same had the government presented only the confession and

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<sup>80</sup> Cf. *United States v. Lockhart*, (A.F.C.M.R. 1981) (holding that failure to object on the basis of corroboration waived the issue on appeal).

<sup>81</sup> *United States v. Harjak*, 33 M.J. 577 (N.M.C.M.R. (1991)).

<sup>82</sup> *Id.* at 580.

<sup>83</sup> *Id.* at 585.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

the panties in its case. In fact, this case is perhaps best seen as an indication of the unpredictability brought about by the rather nebulous and enigmatic standards introduced by *Opper* and *Smith*.

## 5. Discussion

Published decisions in which corroboration has been found insufficient are rare. In fact, even among those appearing in this discussion, a distinct majority involve cases where substantial corroborative evidence admitted at trial was subsequently found to be inadmissible, leaving the court to determine whether the remaining remnants were sufficient to sustain the conviction. While logically, sufficient corroborative evidence should be the same regardless of the appellate posture of the case, one can certainly understand an appellate court's hesitancy in affirming a conviction after throwing out a significant portion of the evidence upon which it was based. However, looking at the underlying rationale of these decisions, they do provide meaningful analysis of the contours of the corroboration requirement.

The following major themes emerge from the cases analyzed above: First, it is now well-settled that the evidence required to corroborate a confession be admissible and admitted into evidence. Second, the corroboration requirement continues to be independent of and in addition to the requirement that confessions be voluntary. Third, the concern underlying the *Smith* and *Opper* decisions, that of false confessions be voluntarily made, continues despite some undercurrent of opinion to the contrary. And finally, some vestige of the *corpus delicti* rule in the "essential facts" language of MRE 304(g) seems to run through these cases. This is particularly apparent in cases such as *Egan*, where evidence of drug possession was held insufficient to corroborate a confession to distribution and *Gaines*, where a homicide combined with a tenuous connection to a robbery was insufficient to corroborate a confession to felony murder. These cases seem to keep alive the requirement dating back to the *Daeche* case that the corroborative evidence at least "touch on" the *corpus delicti*.

## F. Corroboration Found Sufficient

Clearly, in a significant majority of corroboration cases decided under the *Opper* rule, the corroboration has been found to be sufficient. The analysis which follows, while it may not be as comprehensive as the previous discussion of cases where corroboration has been found insufficient, will analyze all of the reported Court of Military Appeals and Court of Appeals for the Armed Forces' cases on the issue and those published service court decisions that add significantly to the discussion or mark a possible difference of approach among the service courts.

## 1. Court of Military Appeals/Court of Appeals for the Armed Forces Decisions

### a. *United States v. Seigle*

Interestingly, in its first substantive discussion of the rule adopted by the 1969 Manual, the Court of Military Appeals did not even cite the *Smith* and *Opper* decisions underlying the rule.<sup>86</sup> The facts of that case apparently presented issues the Court felt were sufficiently addressed by the text of the rule itself. In the *Seigle* case, the accused confessed to stealing several phonograph albums and a phonograph player from the Minot AFB Exchange over the course of several months. While several eyewitnesses saw him take albums during the charged time frame, there was no direct evidence that he took the phonograph. The accused, contemporaneous with his confession, turned the phonograph and the box it came in over to the Air Force Office of Special Investigations and the Exchange manager confirmed that the box bore an Exchange stock number and that the player was a type carried by the Exchange. The Court found the totality of the evidence sufficient to corroborate the confession. Specifically, they found, “Evidence that provides the basis for the inference that the phonograph, physically turned in by the appellant, was once a part of the stock of the Base Exchange, alongside appellant’s observed theft of record albums, permit our finding that there was sufficient evidence that the confession was not made up by him with the intent to deceive.”<sup>87</sup> Though *Seigle* was cited without discussion in some subsequent opinions, it seems at odds with subsequent decisions wherein evidence of certain offenses has been held insufficient to corroborate others.

### b. *United States v. White*

*White*<sup>88</sup> was an appeal from a conviction for possession and sale of marijuana, where the bulk of the discussion dealt with the sufficiency of the evidence absent expert testimony to explain the results of the chemical analysis performed on the seized evidence. While the Court held against the accused on this issue, it went on to opine that even without the chemical analysis of the substance, the record contained ample evidence of the accused’s guilt to include his confession which was corroborated by his in-court testimony that he sold the substance as marijuana, the accused’s spontaneous statements during the commission of the offenses that the substance was marijuana and the testimony of the government agents who

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<sup>86</sup> *United States v. Seigle*, 47 C.M.R. 340 (C.M.A. 1973).

<sup>87</sup> *Id.* at 342-43.

<sup>88</sup> *United States v. White*, 9 M.J. 168 (C.M.A. 1980). Though *Opper* was previously cited in *United States v. Pringle*, 3 M.J. 308 (C.M.A. 1977), the citation in that case was with regard to a joint trial/severance issue, not an issue as to the corroboration of a confession.



were familiar with marijuana and testified the substance appeared to be marijuana.<sup>89</sup>

c. *United States v. Yates*

The Court of Military Appeals' next application of the *Smith* and *Opper* rules would prove to be a bit more challenging. In *Yates*,<sup>90</sup> the investigation began when the accused's two-year-old daughter was diagnosed with gonorrhea. Though both the accused and his wife tested negative for the disease, the accused subsequently admitted to having extramarital sex with a "bar girl" on a TDY to the Philippines and further admitted to masturbating in the presence of his daughter and ejaculating on her stomach. At trial, in a prosecution for rape, carnal knowledge, sodomy and indecent acts with a child, the judge suppressed the accused's two confessions for want of corroboration on the basis that the corroborative evidence did not identify the accused as the perpetrator. The Navy-Marine Corps Court reversed and remanded, and the Court of Military Appeals affirmed the Navy Court's decision. In support of its decision, the Court cited the U.S. Supreme Court case of *Wong Sun v. United States*,<sup>91</sup> which held, "Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable."<sup>92</sup> Of note, neither the Navy-Marine Corp Court nor the Court of Military Appeals opined the evidence was sufficient to corroborate the accused's confession; they merely held that the military judge applied an incorrect legal standard and remanded for further action.<sup>93</sup> While Chief Judge Everett, in his concurring opinion, would have remanded with instructions that the evidence was insufficient to corroborate certain of the charged offenses, the majority was comfortable leaving that decision to the military judge.<sup>94</sup> So, while this case may or may not stand for the proposition that a child victim contracting gonorrhea is sufficient to corroborate a confession to a number of sexual acts with the child, it clearly adopts the *Wong Sun* holding, which requires that, in cases of physical injury, there must be at least some independent evidence of the injury itself. In essence, this is a straightforward application of the traditional meaning of the term *corpus delicti*: the "injury against whose occurrence the law is directed."<sup>95</sup> If one accepts that a toddler does not contract gonorrhea in the

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<sup>89</sup> *Id.* at 170.

<sup>90</sup> *United States v. Yates*, 24 M.J. 114 (C.M.A. 1987), *cert. denied*, 484 U.S. 852 (1987).

<sup>91</sup> *Wong Sun v. United States*, 371 U.S. 471 (1968).

<sup>92</sup> *Yates*, 24 M.J. at 116 (citing *Wong Sun*, 371 U.S. at 490, n.15).

<sup>93</sup> *Id.* at 116-17.

<sup>94</sup> *Id.* at 117. Interestingly, after denial of certiorari by the Supreme Court, there is no reported case law indicating how the case was resolved upon remand.

<sup>95</sup> See *Opper v. United States*, 348 U.S. 84, 92 (1954) (quoting *Deache v. United States*, 250 F. 566 (2d Cir. 1918)) and *supra* note 11 discussion.

absence of some sort of sexual abuse, it is clear that while the independent evidence doesn't corroborate all of the elements, it does support the gravamen of at least one of the charged offenses, or in other words the "essential facts" necessary to establish the offense.

d. *United States v. Yeoman*

One of the most often cited cases on the military interpretation of the *Opper* rule is the Court of Military Appeals' decision in *United States v. Yeoman*.<sup>96</sup> The *Yeoman* case was based on a very straightforward fact pattern. The accused admitted to stealing a cassette case and several cassette tapes. He also led his platoon leader to a locker containing a cassette case and several cassettes bearing the accused's fingerprints, whereupon the tapes were retrieved and returned to their owner. The victim was not called as a witness. At issue in the case, was whether the additional corroborative evidence, an "Incident/Complaint Worksheet" was properly admitted as a business record. The worksheet was admitted at trial for the limited purpose of establishing that a larceny was reported. The Court of Military Appeals avoided the evidentiary issue by ruling that the remaining evidence was abundantly sufficient to corroborate the confession, rendering any error harmless.<sup>97</sup> In discussing the evidence necessary to raise an inference of the truthfulness of the confession, the Court stated in an oft-quoted passage, "Moreover, 'the quantum of evidence' needed to raise such an inference is 'slight.'"<sup>98</sup> It is interesting that a case in which the confession was so abundantly corroborated should become a leading case for the proposition of how little is required. Perhaps this decision is best understood in light of the historical application of the rule. In a larceny case, the *corpus delicti* is obviously the spoils of the larceny. Thus, in a very straightforward sense the accused was found in possession of these spoils, thus corroborating his confession to taking them. However, looking at the elements of the offense, absent the Incident/Complaint Worksheet, the only evidence of a taking or of a victim with a greater right than the accused to these spoils is the platoon leader's delivery of the items to the alleged victim after seizing them. Clearly, in a jurisdiction requiring corroboration of each element beyond a reasonable doubt or even by a preponderance of the evidence, this case would fail. However, under MRE 304(g), there is some evidence to corroborate all of the "essential facts" and the corroborative evidence as a whole thus establishes the trustworthiness of the confession. Indeed, such a reading would seem the only way to reconcile the "essential facts" language with the statement that the required quantum of evidence is "slight."

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<sup>96</sup> *United States v. Yeoman*, 25 M.J. 1 (C.M.A. 1987).

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

<sup>98</sup> *Id.* at 4 (citing STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* 139 (2d ed. 1986)).

e. *United States v. Melvin*

The other case often cited regarding the requisite quantum of corroborative evidence is *Melvin*,<sup>99</sup> in which the standard was described as “very slight.”<sup>100</sup> In support of this conclusion, the Court cited portions of the *Smith* and *Opper* holdings, both citations containing language requiring “substantial independent evidence.”<sup>101</sup> Oddly, the Court made no attempt to reconcile its “very slight” with the Supreme Court’s “substantial.” Furthermore, in light of the apparently abundant corroboration, the necessity for so minimizing the standard is not abundantly clear. In the case, the accused admitted to smoking heroin a total of 20 times over the previous four months. He also identified his dealer and the particulars of how he smoked the heroin. He was found in possession of heroin cigarettes and drinking straws with heroin on them, and his dealer was verified to be active in the drug trade.<sup>102</sup> The court found these facts to amply corroborate the confession, however, Chief Judge Everett in a concurring opinion, opined the evidence was sufficient only to corroborate a single use, not the multiple uses to which the accused admitted.<sup>103</sup> Reconciling this holding with that in *Rounds* presents some interesting questions. While at least the two-judge majority in *Melvin* seemed to believe evidence of a one-time drug possession is sufficient to corroborate multiple uses, this holding differs from *Rounds* in that Melvin admitted to using the same drug, from the same source and in the same manner, whereas *Rounds* only admitted to using cocaine on the one occasion in a different city and with different individuals. Additionally, one might question *Egan*’s holding that possession was insufficient to corroborate attempted distribution. Again, the *Melvin* court seemed to focus on the similarity of the many described incidents, which the court found “dovetail[ed]” with the corroborative evidence. So, although this case could be read for the proposition that evidence of a single possession is sufficient to corroborate multiple uses, it may also be read more narrowly as a holding that the particular facts of the case presented, in essence, an ongoing and consistently followed course of conduct. Interestingly, the Court felt compelled to mention that although the case was not decided on the basis of waiver, it very well could have been, based on the lack of objection at trial to the absence of corroboration.<sup>104</sup> While this may have no meaning at all, it might also explain the Court’s decision to resolve the close call regarding multiple uses against the accused.

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<sup>99</sup> *United States v. Melvin*, 26 M.J. 145 (C.M.A. 1988).

<sup>100</sup> *Id.* at 146 (citing *Yeoman*, 25 M.J. at 1).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 147.

<sup>104</sup> *Id.*

f. *United States v. Hughes*

In the *Hughes*<sup>105</sup> case, the accused admitted to using marijuana and the government sought to corroborate his confession with his wife's out-of-court statement that she had seen him use marijuana. The accused's wife refused to testify at trial, citing the spousal privilege, and was accordingly found unavailable. After losing on hearsay and Sixth Amendment challenges, the accused asserted the wife's statement was insufficient because it contained no information to support the wife's conclusion that what she had seen the accused use was marijuana. The Court made short work of the issue by looking to the totality of the statement and the circumstances attendant to its taking. The Court first drew credibility from the fact that when the wife was approached about illegal drug use, she was the first to mention marijuana. Furthermore, the wife described the incident to which she referred, stating that when it occurred she "threw a fit," whereupon the accused stopped using. The Court saw this as strongly supporting an inference that both the wife and husband knew what the substance in question was.<sup>106</sup> This seems to be a straightforward application of the applicable case law. Even though the wife's statement does not corroborate all of the elements, it does corroborate the essential fact of marijuana use even though standing alone it is debatable whether it would prove the offense even by a preponderance of the evidence.

g. *United States v. Maio*

*Maio*<sup>107</sup> is another leading military case on the issue of corroboration. The accused in the case used and possessed placebo methamphetamine with an undercover agent and in the course of that use, admitted to several uses of actual methamphetamine with a friend of his. Later, after rights advisement, the accused admitted to using and possessing the placebo and to the previously admitted uses of amphetamine. At trial, he pled guilty to attempted use and possession and entered conditional guilty pleas to the actual use, preserving the issue of the corroboration of his confession for appellate review. The Air Force Court affirmed and the Court of Military Appeals granted review.<sup>108</sup> The majority opinion found the confession adequately corroborated by the previous spontaneous admission to the undercover agent, the undercover agent's testimony that he observed the accused's putative supplier use methamphetamine on previous occasions, a written statement from the undercover agent that the accused's roommate admitted to using with the accused and the agent's testimony that

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<sup>105</sup> *United States v. Hughes*, 28 M.J. 391 (C.M.A. 1989).

<sup>106</sup> *Id.* at 396.

<sup>107</sup> *United States v. Maio*, 34 M.J. 215 (C.M.A. 1992).

<sup>108</sup> *Id.* at 215.

he observed the accused use the placebo methamphetamine.<sup>109</sup> Judges Cox and Wiss each filed concurring opinions. Judge Cox, in cautioning that the case should not be applied beyond its particular facts, believed the spontaneous admission was sufficient to corroborate for purposes of admissibility, but opined that there would not have been sufficient evidence to sustain a conviction had the case gone to trial on the merits, because, “there is not a scintilla of evidence that the crime in question occurred—apart from appellant’s own words.”<sup>110</sup> In essence, Judge Cox stated that although the admission to the undercover agent, not being an interrogation, did not require corroboration and thus could be used to corroborate the other statement, some further application of the corroboration rule is appropriate in considering the sufficiency of the evidence. By implication, Judge Cox rejects the validity of the evidence of the placebo use and possession as sufficient to corroborate prior uses. Judge Wiss, in a brief concurring opinion, cautions against misapplying the “slight” standard enunciated in *Yeoman* and *Melvin*, writing, “While the *quantity* of the independent evidence need only be ‘slight,’ the *quality* of that evidence is the more critical focus as to the confession’s reliability and, thus, admissibility.”<sup>111</sup> This is the closest thing in the case law to an explanation of the apparent disconnect between the “slight” language of *Yeoman* and *Melvin* and the “substantial evidence” standard enunciated in *Smith* and *Opper*. Judge Wiss’ formulation seems to hold that while the amount of evidence need only be slight, the quality must be substantial in its tendency to probatively corroborate the crime to which the confession was made.

h. *United States v. Cottrill*

*Cottrill*<sup>112</sup> involved an allegation that an active duty father sexually molested his daughter by inserting his finger into her vagina while bathing her. He initially claimed that the insertion was accidental, but later claimed that he did derive sexual gratification from it. Though the bulk of the opinion dealt with the accused’s assertions that his confessions were involuntary and that the evidence was insufficient to establish intent to gratify sexual desires, after disposing of those issues, the Court dealt briefly with whether the confession was adequately corroborated. The corroborative evidence consisted of the testimony of the physician who treated the accused’s daughter. According to the physician, the daughter while being examined stated that her “privates” hurt and that her daddy touched her privates. He further testified that the child had an abnormal hymenal opening.<sup>113</sup> The unanimous Court made short work of affirming

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<sup>109</sup> *Id.* at 218.

<sup>110</sup> *Id.* at 222.

<sup>111</sup> *Id.* at 223.

<sup>112</sup> *United States v. Cottrill*, 45 M.J. 485 (C.A.A.F. 1997).

<sup>113</sup> *Id.* at 489.

the decisions below, holding, “This evidence tends to show that sexual injury was inflicted on appellant’s daughter and supports appellant’s pretrial admissions to the acts causing such injury.”<sup>114</sup> Analyzing this case in the light of those which have gone before, it confirms that where the gravamen of the offense (in this case, sexual injury) has been corroborated, the accused can be convicted even though his confession provides the sole evidence as to other elements of the offense.

i. *United States v. Baldwin*

*Baldwin* resulted in three published decisions. It initially reached the Air Force Court of Criminal Appeals via a government appeal of the trial judge’s ruling granting a motion to suppress the accused’s confession. The Air Force Court originally affirmed the trial judge’s decision,<sup>115</sup> but on *en banc* reconsideration, reversed course, finding the confession adequately corroborated.<sup>116</sup> Finally, the Court of Appeals for the Armed Forces granted review and affirmed the decision of the Air Force Court that the admission was adequately corroborated.<sup>117</sup> This case is best understood beginning with the Air Force Court’s *en banc* rehearing. According to that decision, the accused admitted to molesting his daughter after his wife walked in on him covering their daughter with a blanket and apparently startled him, eliciting a look she had never seen before. Later in the evening, she found the accused in the floor crying whereupon he related to her his own personal history as a victim of child molestation. Thereafter, the accused moved out of the house, into the dormitories and began regularly consulting with a chaplain and a doctor on the base. The accused also apparently admitted to his mother that he had molested his daughter and outlined his plan to consult with a chaplain and counselor and turn himself in. He did turn himself in thereafter and gave a confession in essence mirroring the facts recounted above, adding certain details. These details included his motivation, marital difficulties and becoming aroused upon seeing his daughter’s genitalia; the manner of the molestation, touching his daughter while masturbating and why he stopped, because his wife caught him.<sup>118</sup> The Air Force Court spent considerable effort criticizing the trial judge’s finding that he was entitled to consider the absence of *corpus delicti* as a factor in determining whether the essential facts were sufficiently corroborated. They ultimately concluded the trial judge committed error in that, “[T]he military judge’s ruling was based upon the absence of any evidence that the accused was seen committing the acts or that the child-victim exhibited physical or mental

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

<sup>115</sup> *United States v. Baldwin*, 53 M.J. 676 (A.F.C.C.A. 2000).

<sup>116</sup> *United States v. Baldwin*, 54 M.J. 551 (A.F.C.C.A. 2000).

<sup>117</sup> *United States v. Baldwin*, 54 M.J. 464 (C.A.A.F. 2001).

<sup>118</sup> *Baldwin*, 54 M.J. at 552-53.

injury.”<sup>119</sup> The Court went on to conclude, “The military judge should have concentrated on the requirements of the rule for independent, direct or circumstantial evidence, corroborating the essential facts admitted *in the confession* sufficiently to give rise to an inference of their truth.”<sup>120</sup> Significantly, the words, “in the confession,” do not appear in the rule, raising the question of whether this language represents a not-so-subtle shift in the interpretation of just what the words “essential facts” are meant to modify. While prior case law has seemed to require corroboration of those facts admitted which are essential to the offense charged, this interpretation seems to judge essentiality, not with regard to the offense, but rather with regard to the whole of the admission. The Court’s ultimate conclusions seem to confirm this shift. The Court found the following facts corroborative: (1) the wife’s testimony that the child routinely threw off her covers corroborates the accused’s statement that he became aroused upon seeing her; (2) her testimony about walking in on him corroborates his account of the timing; (3) his reported startled look and flight from the room corroborates his feelings of guilt; and 4) the wife’s testimony that the child thereafter slept with her and that the husband thereafter sought counseling are consistent with his confession.<sup>121</sup> The Court further considered the accused’s confession to his mother to be proper corroboration because, as statements of a party opponent, they were, “statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.”<sup>122</sup> Finally, the court found a stipulation of expected testimony from the accused’s therapist corroborated that the accused saw a chaplain and a therapist and that he had “problems” in his relationship with his daughter.<sup>123</sup> The Court then went on to conclude that “consciousness of guilt evidence” such as the accused’s leaving his daughter’s room, crying, leaving the marital home, seeking therapy, turning himself in and “*voluntarily confessing*” were themselves strong evidence of the truthfulness of the confession, perhaps exempting it from the need for corroboration altogether.<sup>124</sup> So, the Court, while chiding the military judge for considering that the absence of a *corpus delicti* as a factor in his decision, felt comfortable reasoning that the mere act of voluntarily confessing may be a consideration in dispensing with the need for corroboration altogether.

Not surprisingly, the Court of Appeals for the Armed Forces granted review of this decision on two issues: whether the Air Force Court erred by making factual findings in addition to those of the military judge, and whether the court properly used his uncorroborated admission to his mother

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<sup>119</sup> *Id.* at 555.

<sup>120</sup> *Id.* (emphasis added).

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

<sup>122</sup> *Id.* (quoting MCM, *supra* note 27, MIL. R. EVID. 304(g)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 556 (citing dicta in *Smith v. United States*, 348 U.S. 147 (1954)).

to corroborate his confession to authorities.<sup>125</sup> The Court then avoided both of these issues by deciding the facts, as found by the trial judge, were sufficient corroboration. Specifically, the wife finding and startling the accused, her subsequently finding him crying on the floor and his contemporaneous admission of his being a molestation victim, and finally the accused's seeing a chaplain and then a therapist combined to adequately corroborate his confession.<sup>126</sup> The Court did not discuss the Air Force Court's most far-reaching pronouncements, that there may be circumstances where the corroboration requirement can be dispensed with or that the accused's admission to his mother would be sufficient corroboration. Furthermore, the higher court apparently interpreted the phrase, "essential facts" in relation to the offense, not the confession, as the Air Force opinion intimated.

This case is significant in several respects. First, the Court cited to its earlier holding in *Cottrill*, that it is not necessary to corroborate "all the elements of an offense or even the *corpus delicti* of the confessed offense."<sup>127</sup> Interestingly, in *Cottrill* there was arguably *corpus delicti* evidence embodied in the testimony of the physician who described the victim's abnormal hymenal opening. If there is a commonality between these cases, however, it is that circumstantial evidence of abuse, undoubtedly insufficient to support conviction on its own, was held to be sufficient corroboration of a confession bearing several independent indicia of reliability. Second, to the extent the Air Force Court remains of the same mindset, this case, especially its *dicta*, would seem to indicate a hesitancy by the Air Force Court to suppress an otherwise voluntary confession, going so far as to conclude, the plain language of MRE 304(g) notwithstanding, that there may be confessions so reliable they require no corroboration.

j. *United States v. Seay*

In *Seay*<sup>128</sup> the accused admitted that he and an accomplice strangled their victim, PFC Jason Chafin, and left his body in a field. A few days after the murder, after hearing that Chafin had cash on him, they returned to the scene, took the victim's wallet, split the cash and discarded the wallet. Chafin remained missing for four months until hunters happened across his body, precipitating the investigation which eventually produced the accused's confession. While the victim's body provided obvious corroboration for the murder, the issue in the case was whether the confession to the larceny was adequately corroborated. In a three-to-two decision, the Court of Appeals for the Armed Forces found that it was. Specifically, the majority stated, "When a person confesses to participation

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<sup>125</sup> *Baldwin*, 54 M.J. at 465.

<sup>126</sup> *Id.* at 465-66.

<sup>127</sup> *Id.* at 465.

<sup>128</sup> *United States v. Seay*, 60 M.J. 73 (C.A.A.F. 2004).



in the larceny of a wallet, it is reasonable to infer the truth of the confession from the fact that the victim named in the confession knew the Appellant, died as a result of foul play, was found in a concealed place, and did not have a wallet at the time or thereafter.”<sup>129</sup> Judge Erdmann and Judge Baker concurred in part and dissented in part. They dissented specifically from the portion of the case relating to corroboration. Judge Erdmann, joined by Judge Baker, wrote, “Relying on these inferences as independent evidence, the majority opinion stretches the corroboration requirement beyond the breaking point.” The concurrence continued, “Apart from the confession itself, no evidence suggests that Chafin ever possessed a wallet at all, much less that he was carrying one at the time of his murder.” Clearly, the sharply divided Court is an indication that this case resides at the lower limit of sufficiency for corroborative evidence. In fact, given that the court has not decided a close corroboration case since and that two members of the majority have since left the court, while the two concurring judges remain, the extent to which this decision marks a predictable boundary can be questioned. In looking more closely at the decision, it probably raises more questions than it answers. Clearly, as to the larceny, the missing wallet would have to be an “essential fact” and the only evidence corroborating this fact is the absence of a wallet in the vicinity of the corpse. While the concurring judges would hold this insufficient, at least absent evidence the victim carried a wallet, the majority opinion did not specifically delineate whether its decision was predicated on the common sense reality that men (and perhaps especially military men traveling off of a military installation) generally do carry wallets or whether it was intending to substantially relax the corroboration requirement. In reality, the fact lending greatest credence to the accused’s confession is his amply corroborated admission to far more serious misconduct. That the Court did not even entertain this line of reasoning, seems to be an implicit affirmation that the “essential facts” with regard to additional offenses are necessarily those facts which differentiate those offenses from those which are adequately corroborated. In essence, one corroborated confession still cannot be used to bootstrap in one which is inadequately corroborated.

k. *United States v. Arnold*

The Court of Appeals for the Armed Forces’ most recent corroboration case was a unanimous decision based on a much simpler issue. In *Arnold*,<sup>130</sup> the accused confessed to distributing Ecstasy and his confession was corroborated at trial by one of his peers to whom he distributed the drug. The issue on appeal was whether the corroborative testimony was sufficiently independent of the confession. The issue likely

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<sup>129</sup> *Id.* at 80.

<sup>130</sup> *United States v. Arnold*, 61 M.J. 254 (C.A.A.F. 2005).

would not have presented itself except for testimony of record indicating that the corroborating witness was shown the accused's confession the day before trial. Notwithstanding the possible taint of the witness, the court had no difficulty concluding as a matter of fact that the witness was testifying from his own independent recollection, making for an easy decision to affirm the decisions below.<sup>131</sup>

## 2. Air Force Decisions

### a. *United States v. Smith*

In the four years after the incorporation of the *Opper* rule into the Manual for Courts Martial, the service courts saw several cases where confessions were at issue. One of the first, heard by the Air Force Court, was the *Smith* case.<sup>132</sup> Although *Smith* dealt primarily with the sufficiency of *Miranda* warnings provided to the accused prior to his confession, the corroboration issue was addressed briefly at the close of the opinion. *Smith* was accused of and admitted to stealing several M-16 rifles from a loading dock at Clark Air Base, The Republic of the Philippines. The primary corroborative evidence established that the guns were shipped, but while in transit disappeared from the Clark Air Base loading dock. The Court wasted few words affirming the conviction, concluding, "the Government presented substantial independent evidence to establish the trustworthiness of the essential facts set out in the accused's statement, even though such evidence might not have been sufficient under the 1951 Manual rule to establish a corpus delicti."<sup>133</sup> This case established what may be one of the few well-settled precepts in military corroboration jurisprudence; that a confession to larceny is sufficiently corroborated by evidence that the property in question went missing under suspicious circumstances which dovetailed in time and place with the confession.

### b. *United States v. Olesiak*

In *Olesiak*,<sup>134</sup> the Air Force Court reinforced its holding in *Smith*. In this case, instead of pilfered rifles, the stolen property consisted of cassette tapes. Again, the property disappeared off of the back of a loading dock to which the accused had access, and the accused was later found in possession of identical property and eventually confessed to taking the stolen property from the loading dock in question. The Court had little difficulty concluding, "The testimony and documents which proved that two cartons were missing, considered in their entirety, adequately established

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<sup>131</sup> *Id.* at 256-57.

<sup>132</sup> *United States v. Smith*, 41 C.M.R. 930 (A.F.C.M.R. 1969).

<sup>133</sup> *Id.* at 932.

<sup>134</sup> *United States v. Olesiak*, 42 C.M.R. 966 (A.F.C.M.R. 1970).

that an unauthorized taking probably occurred at some point during the shipment.”<sup>135</sup>

c. *United States v. Richards*

Airman Basic Richards was charged with several offenses, but the two to which the corroboration issue pertained were larceny and amphetamine use.<sup>136</sup> In the course of being questioned about the larceny of a television, the accused stated he didn't remember stealing anything because he was high on Lysergic Acid Diethylamide (LSD) at the time. Later, in a written statement, he modified his position, claiming a lack of memory due to the fact he was “under the influence of [speed].”<sup>137</sup> At trial, he disputed the admissibility of this statement on the amphetamine use specification. The government, however, contended that the statement was corroborated by the testimony of an Airman Hopkins, who observed at the time of apprehension that the accused showed several symptoms of recent amphetamine use. Based on the fact that Airman Hopkins had received Security Police training on how to recognize suspected amphetamine users, the court found his opinion sufficient to corroborate the accused's admission.<sup>138</sup> In reaching this conclusion, the Court incorporated a legal precept pre-dating the adoption of the 1969 Manual that, “When a specification alleges the use of a drug on a specific date, there must be some evidence, aside from the accused's confession, that he used the drug on that date.”<sup>139</sup>

d. *United States v. Baran*

*Baran*<sup>140</sup> represents the first in a series of Air Force cases where the Air Force Court has taken an increasingly narrow view of the corroboration rule. The case arose out of a drinking game in the barracks which culminated in rape allegations against several airmen, all of whom apparently had sexual intercourse with another airman whose level of consciousness was at issue. In *Baran*'s case, however, an additional issue was the sufficiency of the evidence purportedly corroborating his admission to having sexual intercourse with the alleged victim. *Baran* gave a detailed confession, and the government was able to corroborate many of the facts contained in it, to include his walking out of the alleged victim's room with a camera, carrying his pants. There was, however, no one else present in the room when the sexual intercourse took place, and the alleged victim, though

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<sup>135</sup> *Id.* at 968.

<sup>136</sup> *United States v. Richards*, 47 C.M.R. 544 (A.F.C.M.R. 1973).

<sup>137</sup> *Id.* at 546.

<sup>138</sup> *Id.* at 548.

<sup>139</sup> *Id.* at 547 (citing *United States v. Afflick*, 40 C. M. R. 174 (C.M.A. 1969)).

<sup>140</sup> *United States v. Baran*, 19 M.J. 595 (A.F.C.M.R. 1984).

she remembered waking up while having sex with another of the airmen, had no recollection of having sex with the accused.<sup>141</sup> The Court found the corroboration of the surrounding circumstances sufficient, holding, “we find sufficient circumstantial evidence from which it can properly be inferred that appellant was being truthful when he said he had sexual intercourse with the victim.”<sup>142</sup> The Court continued, “The fact that there are no witnesses who can provide direct evidence that they saw an unconscious or incapacitated victim being raped does not prevent the government from raising ‘an inference of the truth of the essential facts admitted’ in an accused’s statement.”<sup>143</sup> This particular quotation is interesting in where the Air Force Court chose to end its direct quotation, finishing the statement of the law with its own phrase, “in an accused’s statement.” In so doing, the Court seemed to take the view that corroborating several elements of the statement, whether or not they are essential to proof of the underlying offense, is sufficient to corroborate the entire statement, even if there is no evidence to directly corroborate the accused’s admission to the gravamen of the offense, i.e. sexual intercourse. Interestingly, the Court did not discuss the provision of MRE 304(g) which provides, “If the independent evidence raises an inference of truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by independent evidence.” It is difficult to reconcile the Air Force Court’s contention, that corroborating parts of a confession in effect corroborates the whole, with the Rule’s underlying premise that only those essential facts independently corroborated should be admitted against the accused. One final observation with regard to this case is in order. The case is not binding precedent on the corroboration issue, because it was overturned on other grounds. The Court of Military Appeals reversed and remanded without discussion of the corroboration issue, because the Air Force Court failed to consider the sufficiency of the evidence to refute the defense of mistake of fact as to consent, and the Air Force Court subsequently dismissed the case for want of sufficient evidence.<sup>144</sup> The case is nonetheless notable in marking a line of reasoning to which the Air Force Court would return over the ensuing years.

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<sup>141</sup> *Id.* at 596.

<sup>142</sup> *Id.* at 599.

<sup>143</sup> *Id.*

<sup>144</sup> *See* subsequent proceedings at 22 M.J. 265 (C.M.A. 1986) and 23 M.J. 763 (A.F.C.M.R. 1986).

e. *United States v. Mitchell*

*Mitchell*<sup>145</sup> arose from a “black marketing” scheme. The accused admitted to conspiring with another service member to “black market” vehicles, purchasing seven vehicles in furtherance of the scheme. He further admitted that his co-conspirator would work with a connection to remove the vehicles from the Merchandise Control Office records, which would allow the vehicles to be sold freely. The trial judge found insufficient corroboration of the conspiracy, but allowed the confession as to the black marketing charge even though evidence introduced at trial only implicated the accused as to two of the seven vehicles.<sup>146</sup> The Court affirmed the conviction, while admitting that the available guidance was sparse. Though the Court did not detail its reasoning, it cited the *Melvin*<sup>147</sup> and *Yates*<sup>148</sup> cases. Viewing all of these cases, it seems that though there are cases where corroborating part of a course of conduct is sufficient to corroborate the entire course of conduct, there is little useful guidance regarding what standard to apply.

f. *United States v. Foley*

The corroboration discussion in *Foley*<sup>149</sup> is almost a passing reference in a lengthy opinion dealing with irregularities in the investigation and forwarding of the charges. The corroboration issue related to the accused’s admission to performing oral sex on a female airman (he was also charged with raping her, but was found guilty of the lesser included offense of indecent acts). Though he was charged with sodomy by force, he was found guilty of only consensual sodomy. To corroborate his admission, the “victim” testified that she awoke to find the accused naked in her bed; that he placed her hand on his penis and that he then attempted to have sexual intercourse with her. Though she had no recollection of him performing oral sex on her, she did recall moistness in her vagina.<sup>150</sup> The Court’s holding in its entirety reads, “It is now very clear that not much corroborating information is required, and there is ample corroboration—even of the oral sex that the victim did not recall—to warrant denial of the suppression motion.”<sup>151</sup> Though the Court’s treatment of this as an issue meriting only minimal discussion would seem to indicate the answer, it is not clear whether, absent the “victim’s” perceived moistness, the

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<sup>145</sup> *United States v. Mitchell*, 39 M.J. 854 (A.F.C.M.R. 1989).

<sup>146</sup> *Id.* at 854-55.

<sup>147</sup> See discussion *supra* Part II.F.1.e.

<sup>148</sup> See discussion *supra* Part II.F.1.c.

<sup>149</sup> *United States v. Foley*, 37 M.J. 822 (A.F.C.M.R. 1993), *review denied*, 39 M.J. 340 (CMA 1993).

<sup>150</sup> *Id.* at 834.

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

corroboration still would have been sufficient, as then there would have been no independent evidence of the gravamen of the sodomy offense.

g. *United States v. McCastle*

*McCastle*<sup>152</sup> presents a factual scenario quite similar to that analyzed by the Army Court in *Egan*.<sup>153</sup> Airman First Class McCastle admitted to investigators that he purchased and used crack cocaine and described the location, the dealer and the dealer's vehicle. The corroborative evidence consisted of the testimony of two investigators that the apartment complex where the accused admitted to the purchase was known as a place where crack cocaine was sold and that the description of the dealer and his vehicle matched the description of a well-known, thrice-convicted crack cocaine dealer. Though the bulk of the discussion dealt with the issue of whether McCastle's trial defense counsel was ineffective in foregoing a motion to suppress his confession as the fruit of a command-directed urinalysis, which would render it inadmissible per Air Force Regulation, the Court affirmed on the corroboration issue without significant discussion, finding the corroborative evidence "sufficient to establish the trustworthiness of McCastle's confession . . . ." <sup>154</sup> The Air Force Court did not cite *Smith* or *Oppen*, thus it is not clear whether the language from *Smith*, which the Army Court would later rely on in overturning *Egan* was even considered. Of note, however, the Army Court in *Egan* found familiarity with the local drug scene insufficient to corroborate distribution in a case where the corroboration of use was not challenged.<sup>155</sup> Against that backdrop, a reasonable harmonizing interpretation would be that familiarity (at least as intimate as that indicated in the present case) with the local drug scene may be sufficient to corroborate admissions to possession and use, but not to the additional "essential facts" necessary to prove distribution. It is noteworthy that the case was affirmed by the Court of Appeals for the Armed Forces, which only mentioned the ill-fated corroboration motion in passing.<sup>156</sup>

h. *United States v. Lawrence*

In *Lawrence*,<sup>157</sup> the accused confessed to using cocaine four times over a two-month period. Contemporaneous with his confession, he submitted to a urinalysis which thereafter tested positive for a cocaine metabolite. At trial, he moved to suppress the confession, contending that

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<sup>152</sup> *United States v. McCastle*, 40 M.J. 763 (A.F.C.M.R. 1994).

<sup>153</sup> See discussion *supra* Part II.E.3.f.

<sup>154</sup> *Egan*, 53 M.J. at 765.

<sup>155</sup> See discussion *supra* Part II.E.3.f.

<sup>156</sup> *United States v. McCastle*, 43 M.J. 438 (C.A.A.F. 1996), *cert. denied*, 517 U.S. 1246 (1996).

<sup>157</sup> *United States v. Lawrence*, 43 M.J. 677 (A.F.C.C.A. 1995).

the urinalysis only corroborated a single use. The ultimate holding of the Air Force Court was based on the simple fact that there was more to corroborate the confession than the urinalysis. Testimony in the case established that during the charged timeframe, his duty performance started to decline, he frequently reported late for duty and departed early, his apartment was unfurnished, and he began to have financial problems.<sup>158</sup> While one might argue this evidence is out of proportion to the accused's admission of only four uses, it represents an unremarkable application of the "slight evidence" standard which permeates military corroboration jurisprudence. Had the Court stopped there, the decision would be another in a line of unremarkable corroboration cases. However, the Court went on to comment, without significant discussion in *dicta*, that the urinalysis itself was sufficient as it corroborated what in the Court's view was the essential fact admitted, that the accused was a "recent cocaine user,"<sup>159</sup> which raised the inference that the accused was telling the truth. Though the case was not reviewed by the Court of Appeals for the Armed Forces and has not subsequently been cited, this shift marked another in a line of Air Force cases making successively narrower interpretations of MRE 304(g)'s exclusions by focusing more on the confession than the offenses confessed.

i. *United States v. Cucuzella*

In *Cucuzella*<sup>160</sup> the corroboration issue was secondary to admissibility and sufficiency of evidence issues. Once those were disposed of, the Air Force Court had little difficulty concluding the victim's admissible hearsay statements, even though subsequently recanted, were sufficient to corroborate the accused's admission to a history of sexual abuse of his spouse. Of particular interest to the present discussion, however, was that the Air Force Court, as it did in its *en banc* decision in *Baldwin*, chose to paraphrase MRE 304(g) instead of quoting it, again arguably changing the rule's meaning. Specifically, the Court paraphrased the rule as follows: "To be admitted, an accused's confession must be corroborated by evidence sufficient to justify an inference that the essential facts of *the confession* are true."<sup>161</sup> As in *Baldwin*, the Air Force Court seems to be of the opinion that "essential" should be understood with relation to the confession, not the offense confessed. So understood, it is conceivable that a case could pass muster under the Air Force formulation simply by corroborating the various facts admitted, perhaps even in the absence of evidence directly corroborating the existence of the crime itself. As was the case in *Baldwin*, the Court of Appeals for the Armed Forces granted review, but in this

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<sup>158</sup> *Id.* at 681.

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

<sup>160</sup> *United States v. Cucuzella*, 64 M.J. 580 (A.F.C.C.A. 2007).

<sup>161</sup> *Id.* at 585. *See also* *United States v. Baldwin*, 54 M.J. 551, 555 (A.F.C.C.A. 2000) (*en banc*).

particular case the corroboration issue was not even considered by the Court, once again giving no indication as to whether the Air Force's narrow interpretation of the rule will stand.<sup>162</sup>

### 3. Army Decisions

#### a. *United States v. Johnson*

The Army Court's first two decision following the adoption of the 1969 Manual found corroboration to be insufficient, arguably marking the Army Court, at least initially, as the one most broadly interpreting the *Opper* rule. In *Johnson*,<sup>163</sup> an interesting discussion led the Army Court to an interesting path in ultimately arriving at the conclusion that corroboration was sufficient. The accused was found guilty of several robberies to which he confessed. Though the corroboration issue was not presented to the Court, they saw fit to comment on it on their own motion. Specifically, the Court disagreed with the trial judge's conclusion that the new Manual provision did not require corroboration of the accused's identity, reasoning, "A literal reading of the 'Opper and Smith' rule shows that identity, just as other essential facts, requires corroboration."<sup>164</sup> While at first blush this may seem a remarkable conclusion in light of previous larceny-type cases where the fact that the property went missing under suspicious circumstances has been found adequate, upon further examination the difference is more one of semantics than of substance. Ultimately, the *Johnson* Court affirmed the conviction based on a finding that the accused's identity was sufficiently corroborated, not in the classic sense by eyewitness testimony, but circumstantially by the fact that, "The testimony of the witnesses agrees with the appellant's statement on the time and place of initial contact with the victims, the number of persons involved, location of the robberies, types of weapons used, the property taken from the victims, content of conversations, and other minor details."<sup>165</sup> In essence, the accused's confession and the other testimony dovetailed in so many particulars that the accused's identity as the perpetrator could not *realistically* be disputed.

#### b. *United States v. Schuring*

In *Schuring*,<sup>166</sup> a soldier confessed to strangling a "business woman" at her room outside the gates of Camp Humphries, Republic of Korea. The investigation began when another "business woman" reported

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<sup>162</sup> See *United States v. Cucuzella*, 66 M.J. 57 (C.A.A.F. 2008).

<sup>163</sup> *United States v. Johnson*, 43 M.J. 783 (A.C.M.R. 1971).

<sup>164</sup> *Id.* at 786.

<sup>165</sup> *Id.* at 786-77.

<sup>166</sup> *United States v. Schuring*, 16 M.J. 664 (A.C.M.R. 1983).



to Korean police that the accused told her, “I kill woman.” Apparently, the accused wanted to stay with the second woman to avoid suspicion that might result from his coming onto the installation after curfew, where base authorities were already responding to the murder. The victim was found nude, strangled with her own brassiere and with a fluorescent light bulb inserted into her vagina. Eventually, the accused was interviewed by the Criminal Investigative Division (CID) and confessed. The court found the confessions to the second woman and to the CID to be adequately corroborated by other evidence in the case, specifically that the condition of the body was consistent with the accused’s description, the other evidence as to time and place were consistent with his account, and his pubic hair was found at the scene.<sup>167</sup> Interestingly, other aspects of the confession were actually contradicted by the bulk of evidence, but the court did not find this sufficient to vitiate the overall reliability of the confession as to the essential facts.

c. *United States v. Poduszcak*

*Poduszcak*<sup>168</sup> was a government appeal from a military judge’s suppression of several admissions by the accused. Specifically, the accused, a nurse, admitted to coworkers that he had used Demerol taken from the hospital, some of which he had recorded on patient charts as wasted. In addition, he made a written confession to CID. The contents of this confession are not entirely clear from the record. It appears his admissions to using Demerol were redacted, as they were made inadmissible by an Army drug treatment regulation. The remainder of the confession apparently dealt with the accused’s larceny of Demerol from the hospital by drawing excess pre-operative Demerol for patients going into surgery. The corroborative testimony consisted of witnesses who reviewed the accused’s patient records and concluded they showed an abnormally high incidence of additional pre-operative medication of his patients. While the military judge found all of the admissions insufficiently corroborated, the Army Court reversed, but only as to the CID statement relating to larceny. Though the Court did not discuss its basis for upholding the trial judge’s suppression of the admissions to use, it is reasonable to conclude the court found the corroborative evidence directly related to the “essential fact” of stealing the Demerol, but was unwilling to use it to corroborate the additional admissions that he used the drug. So, even the facts of access and wrongful possession, were not sufficient in the Army Court’s mind to corroborate use.<sup>169</sup>

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<sup>167</sup> *Id.* at 671.

<sup>168</sup> *United States v. Poduszcak*, 20 M.J. 627 (A.C.M.R. 1985).

<sup>169</sup> Interestingly, the Army Court cited the Air Force’s *Baran* decision, but apparently did not go so far as to use admissions as to certain facts to corroborate other crimes for which there was no independent evidence.

d. *United States v. O'Rourke*

The Army adopted the *Yates/Wong Sun* rule in the *O'Rourke* case.<sup>170</sup> In *O'Rourke*, the accused admitted to indecent acts with his six-year-old daughter consisting of digitally penetrating her in the course of bathing her. The corroboration consisted of the victim's out-of-court statements and the testimony of a physician about the victim's "abrasive injury" to her vagina, which was not caused by normal bodily functions.<sup>171</sup> While the Army Court made brief mention of the daughter's statements, it rested its conclusion on the physician's testimony. In so doing, it specifically relied on the *Yates* holding that evidence corroborating an injury which the accused admits to having inflicted is sufficient.<sup>172</sup>

4. Navy/Marine Corps Decisions

a. *United States v. Hise*

One of the Navy Court's first post-*Opper* corroboration cases required them to make a close call. In *Hise*,<sup>173</sup> the accused admitted to engaging in mutual, consensual sodomy with a fellow trainee, but when the trainee became forceful in trying to get the accused to submit to anal sodomy, the accused fought him off and eventually strangled him to death. The accused left the body in a field, but later became concerned about being associated with it and so returned to the scene with razor blades and slashed the wrists of the corpse in order to make the death appear to be a suicide. At trial, the accused was acquitted of murder, but was convicted of consensual sodomy. The Navy Court found that, though the evidence would clearly not have been sufficient under the previous rule, the accused's extremely accurate depiction of the scene where the "victim's" body was found along with testimony corroborating various other details of the accused's confession was sufficient under the new rule.

The Court reasoned that the impetus behind the *Opper* decision was that many crimes, such as consensual sodomy, do not result in a tangible injury, and "in the absence of testimony by an eye witness, the government has an almost impossible burden to corroborate a confession under the 'corpus delicti' rule."<sup>174</sup> Interestingly, the Court cited the Supreme Court's *Smith* decision for the proposition that the corroborating evidence, "is sufficient if it merely fortifies the truth of the confession without

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<sup>170</sup> *United States v. O'Rourke*, 57 M.J. 636 (A. Ct. Crim. App. 2002).

<sup>171</sup> *Id.* at 644.

<sup>172</sup> *Id.* at 641.

<sup>173</sup> *United States v. Hise*, 41 C.M.R. 802 (N.M.C.M.R. 1969), *rev'd*, 42 C.M.R. 195 (C.M.A. 1970) (reversing on other grounds).

<sup>174</sup> *Id.* at 805.

independently establishing the crime charged.”<sup>175</sup> Significantly, the Court seemed to ignore the cardinal holding in *Smith* that where there is no tangible *corpus delicti*, “the corroborative evidence must implicate the accused in order to show that a crime has been committed.”<sup>176</sup> In quoting *Smith*, the Court contrasted it with the *Wong Sun* case,<sup>177</sup> apparently reasoning that, because it is more difficult to corroborate a confession to a crime with no tangible *corpus delicti*, the standard should be relaxed. Reading the *Smith* case as a whole, and especially reading it in concert with *Wong Sun* leads to the exact opposite conclusion. In cases resulting in tangible injury, *Wong Sun* requires only proof that the injury occurred, while in cases with an intangible *corpus delicti*, *Smith* requires that the corroborative evidence tend to show not only that the crime was committed, but also “implicate the accused.” The above should counsel caution in relying on this decision, which is especially difficult to resolve with the Navy Court’s 1991 decision in *Harjak*.<sup>178</sup> Furthermore, because the alleged offense was committed prior to the effective date of the 1969 Manual, the Court of Military Appeals avoided the issue, but reversed and ordered the charge dismissed on the basis of the *ex post facto* application of the rule by the courts below.

b. *United States v. Crider*

*Crider*<sup>179</sup> arose from the stresses of combat in the Vietnam conflict. Crider belonged to a squad assigned to an exposed location under constant fire. After witnessing the death of a friend by sniper fire, he viciously beat and stabbed several civilian prisoners who had been taken into custody for apparently tipping off snipers as to the squad’s location. The accused admitted to his squad-mates to stabbing two of the victims in the neck and bashing in the others’ skulls with a rock. On appeal, the accused asserted that testimony that he stabbed two of the victims was insufficiently corroborated in that there was no independent evidence that the accused was ever in the possession of a knife.<sup>180</sup> The Court found this admission sufficiently corroborated by the abundant evidence of his squad-mates who independently witnessed small vignettes of the crime to include the accused striking one of the victims with a bamboo stick, his raising a blunt object over his head toward one of the victims, his being seen with a grain crusher and the observation of pools of blood and the apparently lifeless bodies of the victims. In the final analysis, the Court concluded, “The mere fact that a knife was not in evidence about the clearing does not rule out the presence

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<sup>175</sup> *Id.* at 806.

<sup>176</sup> *United States v. Smith*, 348 U.S. 147,154 (1954).

<sup>177</sup> *See supra* note 92.

<sup>178</sup> *See supra* note 81 and accompanying text.

<sup>179</sup> *United States v. Crider*, 45 C.M.R. 815 (N.M.C.M.R. 1972).

<sup>180</sup> *Id.* at 822

of a cutting instrument.”<sup>181</sup> While one might argue that failure to rule out a fact is a far cry from establishing it, reading the opinion as a whole, it can be read logically as concluding that where the killing is so abundantly corroborated, every detail as to the manner of the killing does not amount to an “essential fact.”

c. *United States v. Henken*

*Henken*<sup>182</sup> dealt with a straightforward set of facts. The accused admitted to introduction of marijuana onto a military installation with intent to distribute. To corroborate these admissions, the government presented evidence of marijuana—seized on a military installation and connected to the accused—which was packaged for sale. The Court had little difficulty concluding the possession on an installation was sufficient to corroborate the admission as to the introduction and that the packaging was sufficient to corroborate intent to distribute.<sup>183</sup>

d. *United States v. Allen*

*Allen*<sup>184</sup> involved a prosecution for, among other offenses, passing classified information, chiefly messages he had intercepted and photocopied while working in the Naval Telecommunications Command Center at Naval Base Subic Bay, the Republic of the Philippines, to the Philippine government. The evidence corroborating the accused’s confession consisted of a memorandum provided to investigators by a Philippine official containing the classified information, which the accused admitted to providing. At trial, the Philippine official did not testify, creating significant hearsay issues which the Court considered at length. After concluding the evidence was admissible at least for its tendency to show the information contained in it was in the possession of the Philippine government, the evidence was considered sufficient corroboration of the accused’s confession.<sup>185</sup> The Court followed the holding in *Yates*, which applied the Supreme Court’s *Wong Sun* decision for the proposition that the accused’s identity does not need to be corroborated where, “the injury for which the accused confesses responsibility did-in-fact occur, and that some person was criminally culpable.”<sup>186</sup>

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<sup>181</sup> *Id.*

<sup>182</sup> *United States v. Henken*, 13 M.J. 898 (N.M.C.M.R. 1982).

<sup>183</sup> *Id.* at 899.

<sup>184</sup> *United States v. Allen*, 31 M.J. 572, (N.M.C.M.R. 1990).

<sup>185</sup> *Id.* at 633.

<sup>186</sup> *Id.* at 634.

### III. CONCLUSION

In reviewing judicial treatment of the corroboration rule over the last forty years, while some precepts seem well-settled, it is clear that the lower limit described as “slight” or “very slight” evidence is not clearly or predictably defined. From the case law, however, it can be confidently stated that a confession to larceny may be corroborated by evidence that the accused had access to the stolen property and it disappeared under suspicious circumstances dovetailing in time and place with the accused’s confession. It is also now abundantly clear that corroborative evidence must be admissible and admitted into evidence. Additionally, the *Yates/Wong Sun* formulation that a confession to a crime involving physical injury may be corroborated by evidence that the injury complained of in fact occurred seems abundantly established. Finally, a number of cases where a confession was found adequately corroborated as to a lesser offense, but not as to a greater offense where the differentiating element is not corroborated, would seem to stand for the proposition that some vestige of the “elements” analysis remains as embodied in the “essential facts” language of the rule such that while not every element requires corroboration, at least the gravamen of the offense should be. Beyond these issues, however, the following questions remain:

#### A. What Are Essential Facts?

Clearly the line of Air Force cases illustrated by the *Baldwin* decision represents a consistent theme seeking to allow corroboration of an entire confession by corroborating the essential facts of the confession itself, not of the admitted offense. This formulation is troublesome in two respects. First, it seems to contradict the clear implication of MRE 304(g), which states that only those essential facts independently corroborated should be admitted, and second, taken to its logical conclusion, *Baldwin* and its progeny would go against the clear intent of the *Opper* and *Smith* cases and their progeny that the corroboration requirement exist as an additional and more stringent requirement than the requirement that confessions merely be voluntary. Though several of these cases have reached the Court of Appeals for the Armed Forces, the particular issue has evaded comment by the higher court. It seems this formulation has not been adopted by any of the other service courts, representing a possible difference of interpretation among the services as to which, clarifying guidance from the Court of Appeals for the Armed Forces may prove helpful.

## B. When Can a Confession to One Offense Corroborate Another?

The other issue remaining largely unexplored is the question of when an admission to a series of offenses can be corroborated by evidence of only one of those offenses. This would seem to be a question of how much confidence the corroborating evidence lends to the broader admission. In cases where the admitted course of conduct is substantially similar to the corroborated offense, the corroboration has been found sufficient, whereas in cases such as *Rounds* where the additional offense differs in time, place and manner, additional corroboration has been required. Perhaps the well-developed body of law surrounding MRE 404(b) would provide a meaningful touchstone for evaluating these issues. Where evidence of one offense would be admissible as proof of another, it would seem that where that evidence also establishes essential facts as to an admitted offense, corroboration should be sufficient.

## C. Final Thoughts

In the final analysis, one facing a corroboration issue residing near the lower limit faces a task in many respects no less daunting than it was immediately after adoption of the *Opper* rule. Some of this difficulty is unavoidable in the highly fact-specific nature of the ultimate inquiry, while differences between the services and a handful of difficult-to-explain cases, not to mention the apparent conflict between terms such as “substantial,” “slight,” and “very slight,” contribute to the confusion. If the above discussion provides at least enough facts regarding enough cases to allow practitioners to meaningfully analogize future cases and to engage in a more informed decision-making process, then it will have been a success. Should it prompt further clarification from those empowered to do so, all the better.

A QUESTION OF ALLEGIANCE: CHOOSING BETWEEN  
DUELING VERSIONS OF “AIDING THE ENEMY”  
DURING WAR CRIMES PROSECUTION

*MICHAEL J. LEBOWITZ*<sup>\*</sup>

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## I. INTRODUCTION

The system for Guantanamo Bay terrorist prosecutions is often equal parts maligned and misunderstood. The resulting attacks have branded the public perception of modern military commissions in many circles as an ugly stepsister to the more accepted courts-martial process and its vaunted Uniform Code of Military Justice (UCMJ). A constant barrage of litigation against the U.S. military commissions highlighted numerous perceived deficiencies in the way accused enemy combatants were detained and prosecuted.<sup>1</sup>

Congress first responded with the Military Commissions Act of 2006,<sup>2</sup> which sought to codify the war crimes procedure and specifications to be used in prosecutions after the Supreme Court decision in *Hamdan v. Rumsfeld*.<sup>3</sup> When even that “fix” was deemed insufficient, President Obama signed the revamped Military Commissions Act of 2009 (MCA).<sup>4</sup>

The latest act settled many of the inherent issues that previously dogged the process.<sup>5</sup> Critics of the military commissions prosecutions tepidly supported a modified set of rules issued in spring 2010.<sup>6</sup> The 2010 Rules for Military Commissions (RMC) and Manual for Military Commissions (MMC) include a codified list of potential offenses with which to charge alleged “unprivileged enemy belligerents.”<sup>7</sup> The 2010

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<sup>1</sup> See generally *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>2</sup> Military Commissions Act of 2006, 10 U.S.C. § 948 (2006) [hereinafter MCA 2006]; see also U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS (2006) [hereinafter MMC 2006].

<sup>3</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>4</sup> Military Commissions Act of 2009, 10 U.S.C. § 948 (2009) [hereinafter MCA 2009]; See also U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS (2010) [hereinafter MMC 2010].

<sup>5</sup> See Warren Richey, *Obama Endorses Military Commissions for Guantanamo Detainees*, CHRISTIAN SCI. MONITOR, Oct. 29, 2009, <http://www.csmonitor.com/USA/Justice/2009/1029/p02s01-usju.html> (reporting that critics admit that “the new law addresses some of the defects of the military commissions”).

<sup>6</sup> See generally David Frakt, *New Manual for Military Commissions Disregards the Commander-in-Chief, Congressional Intent and the Laws of War*, HUFFINGTON POST (Apr. 29, 2010), [http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c\\_b\\_557720.html](http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c_b_557720.html).

Lieutenant Colonel Frakt (USAFR) is a former lead defense counsel in the military commissions system. He writes,

On the whole, the 2009 MCA is substantially fairer than the 2006 version of the law and the new Manual also contains some significant improvement over the previous version. The standards for admissibility of coerced statements and hearsay evidence, for example, now are much closer to the standards which apply in general courts-martial and federal court. There is, however, some very troubling language in the new Manual relating to the proof required to convict for certain offenses, which undermines the Obama Administration's claims of respect for the law of war and adherence to the rule of law.

<sup>7</sup> MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, R.M.C. 103(30), pt. IV (2010); see also 10 U.S.C. § 948(a)(7) (2009). The manual defines an “unprivileged enemy belligerent”



MMC essentially carried over various Law of War violations and other traditional offenses derived from the UCMJ.<sup>8</sup> But out of all the litigation and tweaking, a peculiar choice of law scenario quietly survived. This scenario seemingly affords military prosecutors the ability to charge accused war criminals with “aiding the enemy” under the UCMJ standards rather than their more complex MMC/MCA counterparts. In addition, the Court of Military Commission Review in a June 2011 ruling accepted the general notion of applying historic aiding the enemy standards to aliens holding no duty to the United States.<sup>9</sup>

Part two of this paper analyzes the difference between the UCMJ and MCA charges of “aiding the enemy.” Part three addresses the recent trend toward applying the treason standard of duty or allegiance to the United States when considering the UCMJ aiding-the-enemy standard. Part four analyzes the distinctions and choices presented to military prosecutors when considering an aiding-the-enemy charge in regard to an accused war criminal.

## II. AIDING THE ENEMY: A CHOICE OF LAW

Article 104 has criminalized “aiding the enemy” since the UCMJ’s inception in 1950.<sup>10</sup> This charge, along with UCMJ Article 106 relating to spies, is unique within the confines of traditional military law because the statutory language specifically authorizes trial via court-martial or military commission.<sup>11</sup> These two articles are also among the few that do not start

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as someone who is not a privileged belligerent and who “(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense . . . .” RMC 103(30).

<sup>8</sup> *Id.* at forward (“Pursuant to 10 U.S.C. § 949a, the M.M.C. is adapted from the Manual for Courts-Martial.”).

<sup>9</sup> *United States v. Hamdan*, No. 09-002 at 52 (C.M.C.R. Jun. 24, 2011) (en banc) (noting that when “the absence of a breach of duty or allegiance is not in the elements and form specifications, the members are not required to assess this element before making their findings, and they are free to find enemy aliens with no such duty guilty of aiding the enemy”), *available at* <http://jnsfp.wordpress.com/2011/06/24/nationalsecuritylaw-us-v-hamdan-cmcr-june-24-2011-affirming-conviction-and-sentence/>; *see also id.* at 56 & n. 130 (recognizing that the appellant had no duty to the United States and that providing “material support for terrorism . . . does not have such an element.”).

<sup>10</sup> The charge has consistently stated the following:

Any person who 1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or 2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.

UCMJ art. 104 (2008); 10 U.S.C. § 904.

<sup>11</sup> UCMJ art. 104 (2008); art. 106, “Spies,” (“Any person who in time of war is found lurking as a spy or acting as a spy . . . shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.”); *see also* Major E. John

with jurisdictional language such as, “Any person subject to this chapter,”<sup>12</sup> “Any member of the armed forces,”<sup>13</sup> or other language requiring specific military status.<sup>14</sup> This logically leads to a conclusion that Congress specifically intended the charge of aiding the enemy to be available to military prosecutors when conducting military commissions proceedings.<sup>15</sup>

Article 104’s recent history only bolsters this conclusion. The UCMJ version of aiding the enemy has only been amended once, in 2006, when Congress bluntly stated, “This section does not apply to a military commission established under chapter 47A of this title.”<sup>16</sup> Thus, the aiding-the-enemy charge as laid out in the new MCA 2006 became the only legally sanctioned method for prosecuting Guantanamo Bay detainees available at the time. That bright-line exclusion of Article 104 should have been the end of it, but a few years later, the approval of MCA 2009 ultimately served to repeal its MCA 2006 predecessor.<sup>17</sup> The MCA 2009 failed to maintain the exclusion of UCMJ Article 104, and thus Congress effectively restored Article 104’s scope back to its historic statutory language.<sup>18</sup> Consequently, the current incarnation of the UCMJ specifically authorizes an aiding-the-enemy-charge via any type of military commission.<sup>19</sup>

Congress also authorized prosecutors a second MMC alternative,<sup>20</sup> a charge called “Wrongfully Aiding the Enemy.”<sup>21</sup> While this version follows the same general statutory guidelines as its UCMJ counterpart, the MCA

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Gregory, *Trying Unlawful Combatants at General Courts-Martial: Amending the UCMJ in Light of the Military Commissions Experience*, 203 MIL. L. REV. 150, 166 n. 70 (2010) (labeling Article 104 as a “possible exception” to the norm that could potentially be used punitively via courts-martial against enemy combatants).

<sup>12</sup> The other exceptions are Article 83, Fraudulent enlistment, appointment or separation, and Article 113, Misbehavior of a sentinel or lookout. The UCMJ, Article 2, defines “subject to this chapter” as essentially those with some military connection, including “persons serving with or accompanying an armed force in the field” during wartime.

<sup>13</sup> See, e.g., Article 85, Desertion, and 86, Absence without leave. UCMJ art. 85, art. 86.

<sup>14</sup> See, e.g., articles dealing with commissioned or non-commissioned officers, such as Article 133, Conduct unbecoming an officer and gentleman, and Article 91, Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer. UCMJ art. 133, art. 91.

<sup>15</sup> 10 U.S.C. § 904 relates to Article 104 of the Manual for Courts-Martial (MCM). This article specifically applies to both courts-martial and military commissions. The MMC also includes a comparable charge, although the MMC version requires the accused to have had an allegiance or duty to the United States at the time of the alleged offense. See also Gregory, *supra* note 11, at 166 n. 70.

<sup>16</sup> 10 U.S.C. § 104 (2006) (as amended by Pub.L. No. 109-366, § 4(a)(2), which inserted that sentence at the end of 10 U.S.C. §104(a)(2)).

<sup>17</sup> See MCA 2009, *supra* note 4.

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

<sup>19</sup> UCMJ art. 104 (2008).

<sup>20</sup> See MCA 2009, *supra* note 4.

<sup>21</sup> MMC 2010, *supra* note 4; see also MMC 2006, *supra* note 2. Both the 2006 and 2010 manuals describe Wrongfully Aiding the Enemy in part as “Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.”

requires one significant additional element absent from UCMJ Article 104. The MCA explicitly mandates that the accused detainee must be “in breach of an allegiance or duty to the United States,” defining that “allegiance or “duty” as “citizenship, resident alien status, or a contractual relationship in or with the United States.”<sup>22</sup> That additional allegiance requirement effectively exempts most Guantanamo Bay detainees from being charged with this crime because most are aliens with little to no relationship with the United States.<sup>23</sup>

Therefore, based solely on the statutory language, military commissions prosecutors seeking to charge an accused terrorist operative with aiding the enemy have the option of avoiding the MCA’s strict allegiance requirement by simply reverting back to the UCMJ.<sup>24</sup> In fact, the UCMJ appears to provide jurisdiction to apply Article 104 to a detainee otherwise chargeable under the overall MCA 2009, stating, “This article denounces offenses by *all persons whether or not otherwise subject to military law*. Offenders may be tried by court-martial or by military commission.”<sup>25</sup> The MCM goes on to define the “enemy” as follows:

“Enemy” includes organized forces of the enemy in time of war, any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations. “Enemy” is not restricted to the enemy government or its armed forces. . . .<sup>26</sup>

As such, UCMJ Article 104 specifically pertains to hostile personnel who may not be considered lawful combatants or who typically do not follow the

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<sup>22</sup> MMC 2010, *supra* note 4, at Part IV, para. (26)(c)(3):

The requirement that conduct be wrongful for this crime necessitates that the accused owe allegiance or some duty to the United States of America. For example, citizenship, resident alien status, or a contractual relationship in or with the United States is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

<sup>23</sup> See generally David Glazier, *A Self-Inflicted Wound: A Half-dozen Years of Turmoil over the Guantanamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008). In his critique of the military commissions system, Glazier argues that in order to commit the crime of aiding the enemy, one must “logically be a citizen or resident of the U.S., or a resident of territory occupied by U.S. military forces who owes a temporary duty of allegiance to the occupier in exchange for its protection.” *Id.* at 154.

<sup>24</sup> See UCMJ art. 21(2008) (explaining the Congressional notice of the law of war: “The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”).

<sup>25</sup> UCMJ art. 104c(1) (2008) (explaining the scope of Article 104) (emphasis added).

<sup>26</sup> UCMJ art. 99 c(1)(b) (2008). This definition of “enemy” is found in Article 99, “Misbehavior before the enemy,” which explicitly limits its application to members of the armed forces. *Id.* at 99a.

law of war, such as al Qaeda personnel and terrorist facilitators, who are captured and ultimately detained by U.S. forces.<sup>27</sup>

### III. SHADOW ELEMENT

Although Article 104 appears to afford military commissions prosecutors an additional choice of law regarding an aiding-the-enemy charge, a peculiar shadow element relating to “allegiance” and “duty” seems to have wormed its way into the legal discourse.<sup>28</sup> During post-9/11 litigation involving the military commissions process, the subject of aiding the enemy has arisen in the context of Guantanamo Bay detainees plucked from the overseas battlefields.<sup>29</sup> Moreover, the government charged Guantanamo Bay detainees Omar Khadr and David Hicks with aiding the enemy before the MCA 2006.<sup>30</sup> Between the federal civil litigation and the Khadr/Hicks charges, “allegiance” was bantered around as somehow being an element to UCMJ Article 104.<sup>31</sup>

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<sup>27</sup> For an analysis on the hostilities and the subsequent presidential authorizations, *see generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. . . . One week later, in response to these “acts of treacherous violence,” Congress passed a resolution authorizing the President to “use all necessary and appropriate force against those nations, organizations or persons, in order to prevent any future acts of international terrorism against the United States.” . . . Soon thereafter, the President ordered United States forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it. (internal citations omitted)

*Id.*

<sup>28</sup> *See* Glazier, *supra* note 23, at 154 (attaching an allegiance requirement to UCMJ Article 104); *see also* Defense Motion to Dismiss Charge 3 for Failure to State an Offense, United States v. Hicks, No. 09-002 (C.M.C.R. Oct. 4, 2004 (arguing that the Australian citizen should not be charged with aiding the enemy because he owed no allegiance or duty to the United States); *see also* Prosecution Response to Defense Motion to Dismiss Charge 3, Hicks, (C.M.C.R. Oct. 18, 2004) (arguing that allegiance is not an element to aiding the enemy), available at <http://www.defense.gov/news/Oct2004/d20041022dismiss.pdf>.

<sup>29</sup> Hicks v. Bush, 2007 WL 902303, at \*1 (D.D.C. 2007); Hamdan, 548 U.S. 557.

<sup>30</sup> Vijay M. Padmanabhan, *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT’L L. 427, 466 n. 153 (2009).

The ten detainees charged were Ali Hamza al-Bahlul (Yemen); Ibrahim al-Qosi (Sudan); David Hicks (Australia); Salim Ahmed Hamdan (Yemen); Omar Khadr (Canada); Ghassan al-Sharbi (Saudi Arabia); Jabran Qahtani (Saudi Arabia); Sufyian Barhoumi (Algeria); Binyam Muhammad (Ethiopia); and Abdul Zahir (Afghanistan), most of whom were charged only with conspiracy based on their involvement with al Qaeda and the Taliban. David Hicks and Omar Khadr were also charged with murder and aiding the enemy based on their involvement in firefights between the Taliban and the U.S. military in the course of the war in Afghanistan.

*Id.*

<sup>31</sup> *Infra* note 34.

This notion seemingly has its roots in confusion over the similarly situated historic treason statute, despite either the lack of case law applying UCMJ Article 104 to alien combatants or its post-World War II predecessor with judicial overlay or additional common law elements.<sup>32</sup> Adding to the historic confusion, aiding-the-enemy cases prosecuted during the Civil War, Philippine Insurrection, and Seminole War were inconsistent in addressing the issue of loyalty, allegiance or treason.<sup>33</sup> In 2004, the defense in the commission case of *United States v. Hicks* sought to dismiss the aiding-the-enemy charge by tying it to the allegiance requirements contained in the treason and aiding-the-enemy language of the Articles of War of 1775.<sup>34</sup> However, the issue was not adjudicated as the government withdrew all charges against Hicks due to unrelated court rulings against the military commissions system. The aiding-the-enemy-charge against Khadr suffered a similar fate, and once the government was allowed to refile charges in that case, prosecutors opted not to include aiding the enemy.<sup>35</sup>

But perhaps the culmination of this shadow element occurred in 2006 when the Supreme Court in *Hamdan v. Rumsfeld* briefly referred to aiding the enemy. In a footnote to the plurality opinion, Justice John Paul Stevens commented that “the Government plainly had available to it the tools . . . it needed to charge” crimes that included aiding the enemy but did not do so.<sup>36</sup> Stevens goes on to state:

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<sup>32</sup> Glazier, *supra* note 23, at 154 (arguing that “commentators implicitly recognize that an individual must have a duty not to aid the enemy in order to be prosecuted, noting that this offense is closely related to treason.”). Among other sources, Glazier cites Winthrop’s classic 1920 treatise on military justice: WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (1920). See also generally Captain Jabez W. Loane IV, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43, (1965) (offering an extensive history of the parallel tracks between treason and aiding the enemy). Loane states that, historically as early as 1691, English jurisprudence viewed aiding the enemy as a “separate offense” and consequently different from treason. *Id.* at 59. Loane, however, does not address applying Article 104 to a non-citizen, although he also recognizes that Article 104 has a “close relationship” to treason and that a treason charge can be levied against resident aliens. *Id.* at 78, 69. A resident alien, although not a citizen, could be considered to have some sort of allegiance to the United States. See Glazier, *supra* note 23, at 154; see also *infra* text accompanying notes 83-93; Convictions under Article 104 have typically been applied to U.S. Prisoners of War who accepted some sort of parole from the enemy during the servicemember’s detention; See, e.g., *United States v. Olson*, 1957 WL 4621 (C.M.A.); *United States v. Batchelor*, 1956 WL 4750 (C.M.A.).

<sup>33</sup> *Hamdan*, CMCR 09-002 at 56, citing G.O. 93, pp. 8-9 (1864) (T. Sanders); G.O. 93, pp. 10-12 (1864) (J. Overstreet); G.O. 93, pp. 3-5 (1864) (F. Norvel); G.O. 112(II), pp. 353-57 (1901); (A. Jiloca), n. 144.

<sup>34</sup> Defense Motion to Dismiss Charge 3 for Failure to State an Offense, *United States v. Hicks*, No. 09-002, at n. 1 (C.M.C.R. Oct. 4, 2004) (“The American offense of ‘aiding the enemy’ has its origins in Articles 27 and 28 of the Articles of War of 1775, predating the American crime of treason . . . .”), available at <http://www.defense.gov/news/Oct2005/d20051006vol9.pdf>.

<sup>35</sup> See Padmanabhan, *supra* note 30, at 483 n. 235 (noting that in most military commission cases, “the only charges that proceeded to trial were for relatively minor offenses of material support for terrorism and conspiracy.”).

<sup>36</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 600 n. 32 (2006).

As Justice Thomas himself observes . . . the crime of aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission pursuant to Article 104 of the UCMJ . . . . Indeed, the Government has charged detainees under this provision when it has seen fit to do so.<sup>37</sup>

Justice Stevens' statement has a few effects. First, it offers Supreme Court validation to using UCMJ Article 104 via a military commission, albeit in dicta.<sup>38</sup> However, it also calls into question the basis of the "allegiance" reference, as well as the degree of such an allegiance. But taking it a step further, after the *Hamdan* ruling, Congress ultimately demonstrated specific intent through its actions, via MCA 2006, MCA 2009 and the MCM 2008, to maintain the historic UCMJ Article 104 jurisdiction over "any person." The clearest evidence of this intent is the post-*Hamdan* MCM, where aiding the enemy once again uniquely applies to "all persons whether or not otherwise subject to military law" with no mention of allegiance or duty.<sup>39</sup> At the same time, Congress included the new charge of "wrongfully aiding the enemy" that currently exists in the 2010 MMC.<sup>40</sup> Thus, Congress ultimately decided to incorporate the allegiance or duty requirement *only* into the military commissions manual, while simultaneously returning explicit language into UCMJ Article 104 permitting its use via court-martial *or* military commission.

#### A. Confusing Treason with Aiding the Enemy

As mentioned above, the history of aiding-the-enemy charges within the U.S. context dates back to 1775.<sup>41</sup> The *Hicks* defense noted that the

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<sup>37</sup> *Id.* (referring to the Hicks case).

<sup>38</sup> *Id.* Justice Thomas, in a dissent joined by Justice Scalia and in part by Justice Alito, argues that *Hamdan* was in fact triable before a military commission for aiding the enemy by supplying "weapons, transportation and other services." *Id.* at 696-97 (Thomas, J., dissenting). Citing *Winthrop*, Thomas states, "the conclusion that such conduct violates the law of war led to the enactment of Article 104 of the UCMJ." *Id.* at 697.

<sup>39</sup> UCMJ art. 104 (2008).

<sup>40</sup> MMC 2010, *supra* note 4, at Part IV, para. (26)(c)(3).

<sup>41</sup> See generally Tara Lee, *American Courts-Martial for Enemy War Crimes*, 33 U. BALT. L. REV. 49 (2003). Lee notes:

Congress authorized specific military jurisdiction over certain crimes unique to time of war—such as aiding the enemy and spying—as early as 1775. The original statutory Code of Articles of War, enacted in that year, provided at Article 27 that "[w]hosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy . . . ." and at Article 28 that "[w]hosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly . . . ." shall each "suffer death, or such other punishment as a court-martial may direct."

*Id.* at 53.

crimes of aiding the enemy and treason were enacted by the first U.S. Congress in 1790.<sup>42</sup> That act, often referred to as relating to “the crime of treason,” stated that “if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort with the United States or elsewhere. . . such person or persons shall be adjudged guilty of treason.”<sup>43</sup> However, the flaw in the *Hicks* argument is that Congress later specifically intended to separate treason from aiding the enemy.<sup>44</sup>

This Congressional intent culminated when Congress included Article 104 within the original UCMJ in 1950.<sup>45</sup> Thus, aiding the enemy under Article 104 is a wholly separate offense, with separate elements, from treason.<sup>46</sup> Moreover, this Congressional action provides evidence that treason is essentially one option for the government to use in levying charges against those who both assist the enemy against the United States and hold an allegiance or duty to the United States such as citizenship.<sup>47</sup> Meanwhile, the Congressional action also demonstrates that the intent was to create a separate military justice option for individuals accused of aiding the enemy.<sup>48</sup> As such, Congress fashioned Article 104 as a means of prosecuting anybody engaged in such action, to include U.S. service members as well as those who hold no significant connection to the United States.

Putting this intent into practice, the federal government opted to indict U.S. citizen Adam Gadahn on charges of treason for his alleged role as an al Qaeda propagandist.<sup>49</sup> During World War II, U.S. citizens also

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<sup>42</sup> Defense Motion to Dismiss Charge 3 for Failure to State an Offense, *United States v. Hicks*, No. 09-002, (C.M.C.R. Oct. 4, 2004), available at <http://www.defense.gov/news/Oct2005/d20051006vol9.pdf>.

<sup>43</sup> 1 Stat. 1121; see also U.S. CONST. art III, § 3 (defining treason as levying war, adhering to the enemy or giving aid and comfort to the enemy).

<sup>44</sup> See Charles Warren, *What is Giving aid and Comfort to the Enemy*, 27 YALE L.J. 331, 332 (1918)(arguing that the early development of the law hints at the historic split between aiding the enemy and treason as those with an allegiance are guilty of treason, while others without a duty conceivably are merely aiding the enemy).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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

<sup>48</sup> See *United States v. Olson*, 22 C.M.R. 250, 257 (1950) (discussing the difference between “the kind of act which ‘aids’ the enemy in treason law . . . and relieving or aiding the enemy in military law”).

<sup>49</sup> First Superseding Indictment at 3-8, *United States v. Adam Gadahn*, No. SA CR 05-254(A) (C.D.Cal. Oct. 11, 2006), available at [http://www.usdoj.gov/opa/documents/adam\\_indictment.pdf](http://www.usdoj.gov/opa/documents/adam_indictment.pdf). Gadahn is alleged to have served as al Qaeda’s English-language spokesman for most of the post-9/11 decade. He allegedly issued numerous videotaped statements spreading the al Qaeda message and touting other provocative missives directed toward American citizens and others. *Id.* The grandson of a Jewish doctor, Gadahn converted to Islam in 1995. Greg Krikorian & H.G. Reza, *O.C. Man Rises in Al Qaeda: “Azzam the American,” or Adam Gadahn, has moved from translator to propagandist*; L.A. TIMES, Oct. 8, 2006, available at 2006 WLNR 17422182. According to the National Counterterrorism Center, as of June 2011, he was still a fugitive. <http://www.nctc.gov/site/profiles/gadahn.html> (last visited Jun. 17, 2011).

were prosecuted on treason charges for their roles in assisting enemy war efforts.<sup>50</sup> Based on U.S. citizenship status, the treason option was available to the government, and, the government used it as a prosecutorial tool.<sup>51</sup> However, David Hicks' Australian citizenship prevented the government from charging treason, with its U.S. allegiance requirement, so prosecutors instead opted for Article 104.<sup>52</sup>

In fact, precedent exists for prosecuting both non-citizens and citizens with aiding the enemy via military commission.<sup>53</sup> During World War II, eight Nazi saboteurs were convicted of aiding the enemy after sneaking into the United States as part of the German war effort.<sup>54</sup> The Supreme Court in a *per curiam* decision deemed that all the charged offenses, to include aiding the enemy, were appropriate when the president authorized a trial by military commission.<sup>55</sup> The specific charge in that case, listed at the time as a violation of Article 81 of the Articles of War, matches the elements for the current UCMJ Article 104.<sup>56</sup>

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<sup>50</sup> World War II treason cases include *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950); *United States v. Burgman*, 87 F.Supp. 568 (D.D.C. 1949); and *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948).

<sup>51</sup> See Kristen Eichensehr, *Treason's Return*, 116 YALE L.J. POCKET PART 229, 230 (2007) ("The World War II propagandist cases involving treason mention 'levying war' only in passing, and instead rest their decisions . . . on the 'aid and comfort' prong.).

<sup>52</sup> Prosecution Response to Defense Motion to Dismiss Charge 3, *United States v. Hicks*, (C.M.C.R. Oct. 18, 2004), available at <http://www.defense.gov/news/Oct2004/d20041022dismiss.pdf>.

<sup>53</sup> *Ex Parte Quirin*, 317 U.S. 1 (1942) (case relating to Nazi saboteurs who were captured and tried via military commission after sneaking into the United States.); see also *In re Territo*, 156 F.2d 142(9th Cir. 1946) (prisoner of war case involving a U.S. national who moved to Italy and ultimately served enemy forces). The court in *Territo* stated,

A neutral, or a citizen of the United States, domiciled in the enemy country, not only in respect to his property, but also as to his capacity to sue, is deemed *as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation*. *Id.* at 145 (internal citations omitted) (emphasis added).

<sup>54</sup> *Quirin*, 317 U.S. 1.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (explaining that Article 81 defines "the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy"). However, David Hicks' defense team argued that the *Quirin* defendants had a duty of allegiance to the United States because the saboteurs had entered U.S. territory. Defense Motion to Dismiss Charge 3 for Failure to State an Offense, *United States v. Hicks*, No. 09-002 (C.M.C.R. Oct. 4, 2004), available at <http://www.defense.gov/news/Oct2005/d20051006vol9.pdf>. In its response, the Government argued that

it can hardly be gleaned from (the trial transcripts) that "allegiance to the United States" was either alleged or a "central element" as claimed by the Defense. In fact, *Quirin* makes clear that an unlawful enemy combatant, neither a citizen nor owing any duty of allegiance to the United States, can be guilty of the offense of Aiding the Enemy.

Prosecution Response to Defense Motion to Dismiss Charge 3, *Hicks*, No. 09-002.



## B. Inherent Allegiance Requirement?

Since the UCMJ was adopted in 1950, Article 104 has been used only rarely against a non-U.S. citizen for allegedly aiding the enemy.<sup>57</sup> Typically, Article 104 related to U.S. service members under prison of war status who assisted their enemy captors.<sup>58</sup> Moreover, at least one recent commentator, citing Winthrop, asserts that applying UCMJ Article 104 to non-citizens is flawed due the assessment that aiding the enemy “is closely related to treason.”<sup>59</sup> The argument that this treason nexus inherently requires a duty or allegiance to the United States.<sup>60</sup>

In addition, official views and commentators’ opinions regarding the shadow element of allegiance are far from unanimous. For example, an official U.S. statement in 1997 to the International Committee of the Red Cross opined that hostile conditions “may be met by bearing arms or by aiding the enemy with arms, ammunition, supplies, money or intelligence information or even by holding unauthorized intercourse with enemy personnel.”<sup>61</sup> The U.S. position in that statement essentially mirrored the elements of UCMJ Article 104 while disregarding the notion of an allegiance or duty. Others argue that even if a duty of allegiance exists, it is merely reciprocal to the duty of protection.<sup>62</sup> That hybrid line of thinking asserts that residents of an occupied nation are obligated to engage only in lawful resistance to the occupying power.<sup>63</sup> Under that lower standard, non-

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<sup>57</sup> Defense Motion to Dismiss Charge 3 for Failure to State an Offense, *Hicks*, No. 09-002, at 2.

<sup>58</sup> See generally *United States v. Batchelor*, 22 C.M.R. 144 (C.M.A. 1956) (upholding conviction of Korea POW for violating Article 104 by “communication with the enemy without proper authority”); *United States v. Garwood*, 20 M.J. 148 (C.M.A. 1985) (affirming conviction of former Vietnam POW who voluntarily did not return to the U.S. until 1979); also see Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and its Significance*, 36 FLA. ST. U. L. REV. 635, 690 (2009) (noting the “numerous cases in which courts approved prosecutions of soldiers that relied on the existence of an enemy even though there was no formal declaration of war” in Korea).

<sup>59</sup> Glazier, *supra* note 23, at 154.

<sup>60</sup> See, e.g., Glazier, *supra* note 23, at 136-147 (discussing the history of military commissions from the Mexican-American War to World War II); Crane, *supra* note 58, at 639 (“[U]nlike previous conflicts, the Korean War, Vietnam War, Persian Gulf Conflict, and the Iraq War all failed to yield a treason prosecution.”).

<sup>61</sup> Sean Riordan, *Military Commissions in America? Domestic Liberty Implications of the Military Commissions Act of 2006*, 23 TOURO L. REV. 575, 599 n. 83 (2007) (internal citations omitted).

<sup>62</sup> David Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121, 151 (2005) (quoting Henry W. Halleck’s 1861 international law treatise). Halleck, an attorney, was also a West Point graduate who later became “General-in-Chief of all the land forces of the United States” in 1862, stated that “the duty of allegiance is reciprocal to the duty of protection.” *Id.* at 149, 151.

<sup>63</sup> See *id.* at 151, which summarizes Halleck’s views as follows:

[O]ccupation essentially created a contract between citizen and occupier. The citizen was required to cease resistance and give obedience to the occupier; in exchange the occupier gave up its belligerent rights to kill and destroy and assumed responsibility for the protection of the population . . . Forceful

citizen al Qaeda and Taliban operatives in post-invasion Iraq and Afghanistan would have at least some minimal duty to the United States and consequently would have violated this duty by engaging in unlawful hostilities.<sup>64</sup>

But the prevailing view on the subject, again, is best illustrated by Congressional actions during both the creation of Article 104 in 1950 and then the legislation contained within MCA 2006 and MCA 2009. The so-called War on Terrorism and its asymmetrical nature have posed many novel challenges (and will continue to do so). As such, the legal system and its players must adapt traditional methods of criminal justice.<sup>65</sup> The MCA 2006 responded to this need by codifying charges specific to prosecutions in military commissions, such as wrongfully aiding the enemy and material support for terrorism. Congress then withdrew that authority but ultimately reversed itself, allowing UCMJ Article 104 to apply in military commissions.<sup>66</sup> These events demonstrate Congressional intent and adaptation in the face of post-9/11 asymmetrical challenges.

In the latest ruling upholding the conviction in *Hamdan*, the Court of Military Commission Review linked aiding the enemy with material support for terrorism under the prism of the “historic underpinnings” of the law of war.<sup>67</sup> However, the en banc panel did not factor Article 104 to its holding because *Hamdan* was not charged with aiding the enemy.<sup>68</sup>

#### IV. MAKING THE CHOICE BETWEEN THE UCMJ AND THE MMC

If Congress asserted itself through MCA 2009 to permit UCMJ Article 104 to apply to military commissions under the Act, then why offer prosecutors a choice? A review of modern official records fails to provide an answer. However, Congress’ inclusion of the “allegiance or duty” language in the military commission version can logically be viewed as a

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resistance to the occupation was permissible only by those who had remained lawfully in arms and had never submitted to the authority of the occupier, or if the occupier failed to live up to its legal obligations to the point that its conduct became “so injurious to the conquered people as to render submission intolerable.”

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

<sup>65</sup> *See, e.g., Boumediene v. Bush*, 579 F.Supp. 2d 191, 193 & 195 (D.D.C. 2008) (reporting the court’s opinion about the proceedings involving native Algerians captured in Bosnia and sent to Guantanamo: “To say the least, this is an unusual case” with a “unique nature . . . and logistical and legal questions” . . . ), *rev’d & remanded*, *Bensayah v. Obama*, 610 F.3d 718, (D.C.Cir. 2010); Martin A. Hewett, *Hearsay at Guantanamo: A Fundamental Value of Determination*, 96 GEO. L.J. 1375, 1409 (2008) (“The challenges posed by the War on Terrorism to traditional definitions of war and crime certainly require new legal approaches to detention and punishment.”)

<sup>66</sup> *See supra* Part II.

<sup>67</sup> *United States v. Hamdan*, No. 09-002 at n. 130 (C.M.C.R. Jun. 24, 2011) (en banc), *available at* <http://jnspl.wordpress.com/2011/06/24/nationalsecuritylaw-us-v-hamdan-cmcr-june-24-2011-affirming-conviction-and-sentence/>.

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

reaction to the shadow element that previously dogged the UCMJ counterpart. By approving two different criminal schemes for aiding the enemy in 2009, Congress directly addressed the issue of allegiance. It codified the choice available to prosecutors: apply the UCMJ version that specifically does not include an allegiance requirement, or elect the military commission rule if circumstances allow.<sup>69</sup>

The forward to the MMC acknowledges that the military commissions rules are “adapted from the Manual for Courts-Martial.”<sup>70</sup> The foreword adds that the MMC applies the procedures and rules from courts-martial unless otherwise noted or “where required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need . . . .”<sup>71</sup> This statement bolsters the conclusion that the MMC version of “wrongful aiding the enemy” was deliberately crafted to deviate from its UCMJ counterpart. Meanwhile, Congress’ self-reversal of its position on UCMJ Article 104 application firmly establishes the thought process and intent for such prosecutorial choice of law.

Accepting that Congress intended to give prosecutors a choice, why would a government attorney elect to use the MMC version in a military commission? One obvious distinction, at least in theory, is punishment. Article 104 authorizes the death penalty, while the MMC limits the sentence to confinement for life.<sup>72</sup> In practice, however, a conviction of violating Article 104 alone appears never to have resulted in a death sentence,<sup>73</sup> and it seems unlikely to ever be the sole reason a court-martial condemns an accused to death.<sup>74</sup> Therefore, for prosecutors, the question will be the basic one of whether the government can prove the required elements, including whether the accused did indeed hold some tangible allegiance to the United States.

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<sup>69</sup> See *supra* text accompanying notes 28-39.

<sup>70</sup> MMC 2010, *supra* note 4 (foreword on unnumbered page).

<sup>71</sup> *Id.*

<sup>72</sup> UCMJ art. 104 (2008); MMC 2010, *supra* note 4, art. 26.

<sup>73</sup> A Westlaw search of both reported and unreported military justice cases containing the term “Article 104” produced 27 cases, of which only 10 actually involved charges of violating Article 104 (although several dealt with related offenses, such as violating Article 134 by attempting to communicate and offering to sell defense information to a foreign nation. *U.S. v. French*, 1958 WL 3270 (A.F.C.M.R. 1958)). Search conducted 27 June 2011 (results on file with the author). None of the courts imposed capital punishment, although an Army National Guard member received a life sentence for Article 104 and related offenses. *United States v. Anderson*, 69 M.J. 378 (C.A.A.F. 2010) (upholding conviction and life imprisonment for Army specialist who violated Articles 80, 104 and 134).

<sup>74</sup> See Ellen Nakashima, *Alleged Leaker Manning Faces 22 New Charges*, WASH. POST, March 3, 2001 at A2 (reporting that prosecutors did not intend to seek the death penalty for the Army private accused of leaking classified information to Wikileaks); see also *Anderson*, 69 M.J.; *U.S. v. Olson*, 1957 WL 4621 (C.M.A. 1957) (affirming a sentence of two years confinement and a dishonorable discharge for three Article 104 offenses).

The next issue is a jurisdictional one—whether the MMC version can apply to a detainee under MCA 2009. Remember, the military commissions system requires in part that the accused be an alien unprivileged enemy belligerent.<sup>75</sup> As such, some MMC language is irrelevant surplusage—for example, the Article 26(c)(3) comment that citizenship creates an “allegiance or some duty to the United States” could never pertain in a military commission.<sup>76</sup> However, the government could base an MMC prosecution for wrongfully aiding the enemy on “resident alien status.”<sup>77</sup> A “green card” holder is, by definition, an alien, so jurisdiction would attach if he or she were also an unprivileged enemy belligerent.<sup>78</sup> As of summer 2010, a small handful of Guantanamo Bay detainees claimed some sort of U.S. residency at one point or another. In those examples, the MMC charge of wrongfully aiding the enemy could apply, although the MMC requires that this status or “relationship existed at a time relevant to the offense alleged.”<sup>79</sup> That requirement would likely preclude charges under the MMC against purported 9/11 mastermind and Pakistani citizen Khalid Sheikh Muhammad because Muhammad’s student visa was long expired.<sup>80</sup>

But the MMC’s third example of an “allegiance or some duty” springs from “a contractual relationship in or with the United States” at a time relevant to the alleged offense.<sup>81</sup> However, the MMC provides no

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<sup>75</sup> MCA 2009, *supra* note 4. Section § 948a defines an “unprivileged enemy belligerent” as someone “other than a privileged belligerent who (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense . . . .” See also MMC 2010, *supra* note 4, at Rule 202, which reads as follows:

“(a) *In general.* Any alien unprivileged enemy belligerent is subject to trial by military commission under chapter 47A of title 10, United States Code.

(b) *Privileged belligerents.* Military commissions under chapter 47A of title 10, United States Code, shall not have jurisdiction over privileged belligerents.”

<sup>76</sup> See Glazier, *supra* note 23, at 154. (Citing Winthrop, Glazier contends that Article 104 could never apply to military commissions because of what he views as a duty of allegiance requirement).

<sup>77</sup> MMC 2010, *supra* note 4, at 26(c)(3).

<sup>78</sup> See *Green Card (Permanent Residence)*, U.S. CUST. & IMMIG. SERV., <http://www.uscis.gov/greencard> (last visited Jun. 29, 2011); 8 U.S.C.A. § 1101(a)(20) (2010) (defining “lawfully admitted for permanent residence” as an immigration status, rather than citizenship); see also *Marquez-Almanzar v. INS*, 418 F.3d 210 (2d Cir. 2005) (holding that a Dominican Republic native born outside the United States to non-citizen parents did not qualify as a U.S. national despite serving in the U.S. Army for eight years, swearing allegiance to the U.S. Constitution, and immersing himself in U.S. society).

<sup>79</sup> MMC 2010, *supra* note 4, at 26(c)(3).

<sup>80</sup> Khalid Sheikh Muhammad received a college degree from North Carolina A&T State University in the 1980s before returning to the Middle East. Muhammad also experienced a brief period in a local North Carolina jail after a car accident in which he was driving with an expired license. Dina Temple-Raston, *Morning Edition: Khalid Sheikh Mohammed’s Isolated U.S. College Days* (NPR radio broadcast Nov. 18, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=12051615>.

<sup>81</sup> MMC 2010, *supra* note 4, at Part IV, para. 26(c)(3).

explanatory details or more specific examples—nothing more than the bare assertion that a contractual relationship suffices. This example does not appear to have a basis in established criminal law or precedent.<sup>82</sup> As a result, the scope and degree of contractual relationship needed to justify charges under the MMC version remain unclear.

For example, a contractual relationship in the United States arguably (although improbably) could be as simple as a pending consumer order paid through a U.S.-based Web site. A more likely example relates to business arrangements, such as forming a corporation. Articles of incorporation are traditionally viewed as licenses with the state, while other fiduciary duties, significant contacts and business contracts also result from the course of business.<sup>83</sup> During World War II era “trading-with-the-enemy” litigation, the U.S. Supreme Court ruled that non-enemy stockholders had a severable interest in corporate assets that were seized by the government in instances where “enemy taint” existed within the

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<sup>82</sup> While it is, of course, difficult to prove a negative, a search of military justice case law shows that military courts distinguish membership in the armed forces (the basis for court-martial jurisdiction in most situations) from a contractual relationship. *See, e.g.,* United States v. New, 55 M.J. 95, 107 (C.A.A.F. 2001) (“[M]ilitary service is a matter of status, like becoming a parent, rather than just a contractual relationship, and that status establishes special duties between the soldier and the Government.”) (internal citations omitted).

The Supreme Court has drawn a similar distinction between civil and criminal jurisdiction for special tribunals, granting Indian tribes “broader . . . tribal powers outside the criminal context.” *Duro v. Reina*, 495 U.S. 676, 687 (1990). The Court said, “As distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation or ‘consensual relationships with the tribe or its members, through *commercial dealing, contracts, leases, or other arrangements.*’” *Id.* at 688 (internal citations omitted) (emphasis added). However, the Court refused to allow such “consensual relationships” to justify criminal prosecution of non-tribal members, even for an offense committed on the tribe’s reservation against a tribal: “The exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties.” *Id.* The Court later upheld a “congressional statute ‘recogniz[ing] and affirm[ing] the ‘inherent’ authority of a tribe to bring a criminal misdemeanor prosecution against an Indian who is not a member of that tribe—authority that this Court previously held a tribe did not possess.” *United States v. Lara*, 541 U.S. 193, 196 (2004) (comparing 25 U.S.C. § 1301(2) with *Duro*). The Court based its decision, however, on a finding that “Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe’s inherent legal authority,” rather than on any contractual relationship. *Id.*

<sup>83</sup> *See generally* Fritz Schulz, Jr., *Co. v. Raimes & Co.*, 166 N.Y.S. 567, 568 (1917) (dealing with “the interesting question of war-time access to U.S. courts by a “corporation organized under the laws of one of the states of this country, but owned principally by alien enemies.”). The court ruled:

So long as a corporation created by any American state still has legal existence, and officers or agents, with authority to do business or bring actions, it cannot be deprived of access to the courts for the protection of its legal rights, though nearly all of its stockholders are alien enemies living in Germany, especially where a majority of its directors, including its managing director, are residents of the United States, and the corporation is therefore under the control of residents.

*Id.*

company.<sup>84</sup> Similarly, the Court held that the United States can pierce the corporate veil of a foreign corporation organized in a friendly or neutral nation and seize assets when “enemy taint” is found among some officers and shareholders.<sup>85</sup> Although these cases are not directly on point, they could reasonably lead to the conclusion that an alien white-collar businessman with corporate ties to the United States has a significant enough duty within the country to justify wrongfully aiding the enemy charges under the MMC.<sup>86</sup>

### A. Three-Part Analysis

Perhaps the best way to determine whether to choose the MMC version over UCMJ Article 104 is to conduct a three-part test. The first step is to assess the detainee’s immigration status. If the detainee is a lawful permanent resident or holds himself out as a resident alien based on the stated belief that his “green card” is still valid, then the government could conceivably prosecute him under the MMC version of aiding the enemy.<sup>87</sup>

The second step looks at where the detainee was seized. If the detainee were seized within the United States after entering on his own documents, then one can surmise that he adopted a duty to the United States based on the immigration paperwork used to gain access to the country.<sup>88</sup>

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<sup>84</sup> *Uebersee Finanz-Korporation, A.G. v. McGrath*, 343 U.S. 205, 211 (1952) (holding that the U.S. Government properly seized securities purportedly owned by a Swiss corporation under the Trading with the Enemy Act of 1917, as amended in 1941, when the evidence established that the corporation’s “enemy taint was all but complete because of the predominant influence and control” of a German national.).

<sup>85</sup> *See Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156, 159 (1952). The Court, however, also ruled that the “rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected.” *Id.* at 160.

<sup>86</sup> *See, e.g., AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:721-35* (reporting the 1818 military trial and execution of two British citizens charged with, among other things, aiding and abetting the enemy (in this case Native American tribes during the Seminole War)); LOUIS FISHER, CONG. RESEARCH SERV., RL 32458, *MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS 8-11* (2004) (discussing the controversy over the trials); *See also United States v. Hamdan*, No. 09-002 at 52-53 (C.M.C.R. Jun. 24, 2011) (en banc) (In citing these controversial cases, the en banc panel stated that it “takes no comfort in the historical context in which these events occurred or the ultimate disposition of these cases. We cite to these events for their historical occurrence as an embryonic effort of the United States to deal with the complexity of fighters in irregular warfare.”).

<sup>87</sup> MMC 2010, *supra* note 4, at Part IV., para. 26(c)(3): (describing “resident alien status” as satisfying the allegiance or duty requirement “so long as the relationship existed at a time relevant to the offense alleged.”).

<sup>88</sup> *See Al-Marri v. Pucciarelli*, 534 F. 3d 213, 219 (4th Cir. 2008); *see also Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005); *Boumediene v. Bush*, 553 U.S. 723, 797-98 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *but see Boumediene* 553 U.S. at 848-49 (Scalia, J., dissenting) (explaining that constitutional rights are derived “from the consent of the governed, . . . in which citizens (not ‘subjects’) are afforded defined protections against the Government”).

Although the detainee in this scenario may have entered the country to commit a perfidious act, he still adopted a duty during immigration intake. Conversely, however, a situation where the detainee actually snuck into the country, as in *Quirin*, would likely not impose jurisdiction under the MMC because the infiltrator arguably made every effort possible to avoid adopting a duty to the United States.<sup>89</sup>

For an accused captured overseas, the third step requires reviewing any substantial connections to the United States that the detainee had during his alleged assistance to the enemy. The “substantial connections” element of this test is valuable because in various other contexts courts have found that overseas aliens held a sufficient nexus to the United States to merit certain Fifth Amendment trial rights.<sup>90</sup> For example, *al-Aqeel v. Paulson* involved a Saudi citizen deemed to have a “sufficient nexus with the United States” based on factors that included frequent travel to the United States, acquiring property in Missouri and being president of an Oregon corporation.<sup>91</sup> In this terrorist financing case, al-Aqeel was permitted to enjoy some additional trial rights based on his substantial U.S. contacts, although the court denied his attempts to gain Fourth Amendment benefits.<sup>92</sup> Because the MMC defines the allegiance or duty requirement as having “some duty to the United States,” applying the substantial connections test may very well be appropriate for an MME wrongfully-aiding-the-enemy charge.

The relationship between an accused and his country of citizenship may impose an additional vicarious duty.<sup>93</sup> This theory is similar to that underlying the obligation to offer only lawful resistance to an occupying force, although that also could conceivably apply to the MMC version.<sup>94</sup> In the Hicks case, the government argued that even if an allegiance requirement existed, then Hicks still owed what was tantamount to a duty based on the mutual defense treaty that Australia shared with the United States.<sup>95</sup> Based on that logic, one could argue that Pakistani nationals may be considered to hold this vicarious duty to the United States based on

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<sup>89</sup> See *Ex Parte Quirin*, 317 U.S. 1, 16 (1942) (holding that the offenses (which were charged under the UCMJ’s predecessor) were complete when the petitioners surreptitiously “entered—or having so entered, they remain upon—our territory in times of war without uniform or other appropriate means of identification”).

<sup>90</sup> See *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 201-202 (D.C. Cir. 2001) (reviewing the long line of cases holding that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”) (internal citations omitted); *Al-Aqeel v. Paulson*, 568 F.Supp. 2d 64 (D.C. 2008).

<sup>91</sup> *Al-Aqeel*, 568 F. Supp. 2d, at 70.

<sup>92</sup> *Id.*

<sup>93</sup> Glazier, *supra* note 23, at 154.

<sup>94</sup> *Id.*

<sup>95</sup> Prosecution Response to Defense Motion to Dismiss Charge 3, *United States v. Hicks*, at 2 (C.M.C.R. Oct. 18, 2004) available at <http://www.defense.gov/news/Oct2004/d20041022dismiss.pdf>; also see *Australia-United States Mutual Defense Treaty*, September 1, 1951.

extensive military aid agreements, direct military/intelligence cooperation, and the notion that their country is regarded as a “vital ally with the U.S. in the war on terrorism.”<sup>96</sup>

In the end, however, UCMJ Article 104 appears to be the clearest of the two versions in cases where the accused holds no significant contacts with the United States under the three-part test. The case of Salim Ahmed Hamdan, convicted of providing material support for terrorism (which requires no duty to the United States), for example, failed the three-part test because he was a Yemeni citizen seized overseas with no connection to the United States. The MMC charge of “aiding the enemy” would not apply to similarly situated detainees because of its allegiance requirement. Instead, a military commissions prosecutor could opt for the UCMJ version of aiding the enemy because Article 104 also has no allegiance element. The Court of Military Commission Review supported this choice of alternatives insofar as the en banc panel failed to apply allegiance as an element to the historic offense of aiding the enemy that provided the basis for Article 104.<sup>97</sup>

## B. Aiding the Enemy Compared to Material Support

Accepting that Congress intended to provide military commissions prosecutors with a choice when it comes to an aiding-the-enemy charge does not end the inquiry. To truly understand the prosecutorial landscape requires examining the difference between an aiding-the-enemy charge and a charge of providing material support for terrorism.<sup>98</sup> Both UCMJ Article 104 and the material-support charge at MMC(25) contain similar elements relating to the aid and support of an enemy.<sup>99</sup> So how do they differ?

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<sup>96</sup> See generally *Pakistan a Vital Ally in anti-Terror War*: Rice, DAWN, March 17, 2005, available at <http://www.dawn.com/2005/03/18/top5.htm>.

<sup>97</sup> *United States v. Hamdan*, No. 09-002 at 56 (C.M.C.R. Jun. 24, 2011) (en banc), available at <http://jnslp.wordpress.com/2011/06/24/nationalsecuritylaw-us-v-hamdan-cmcr-june-24-2011-affirming-conviction-and-sentence/>.

<sup>98</sup> MMC 2010, *supra* note 4, at Part IV, para. 5(25):

Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism . . . , or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such a organization has engaged or engages in terrorism . . . , shall be punished as a military commission under this chapter may direct.

<sup>99</sup> *Id.*; UCMJ art. 104.a (2008):

Any person who—

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.



The primary difference, and consequently the individual utility, is imbedded directly into the titles of these respective articles.<sup>100</sup> The material support charge is limited to “terrorism,” while in the charges of aiding the enemy, terrorism is inconsequential because the assistance only needs to be on behalf of “the enemy.”<sup>101</sup> More specifically, the MMC when describing the elements of the crimes and offenses, requires either assisting in a planned “act of terrorism” or intentionally providing support or resources to “an international terrorist organization engaged in hostilities against the United States.”<sup>102</sup>

In contrast, the charges of aiding the enemy have much wider scope. Certainly, organizations such as al Qaeda and the Taliban qualify as “the enemy.”<sup>103</sup> For a prosecutor, however, the utility is a scope expanded to include virtually anybody operating in hostile opposition to the United States.<sup>104</sup> Arguably, the government could then charge an accused terrorist operative or associate with both offenses. In this way, the accused is faced with the terrorism-specific charge as well as the separate charge that flatly implicates the accused as an affirmed enemy of the United States.

### C. Bypassing Military Commission Process for Court-Martial

Theoretically, when prosecuting alleged war criminals, military trial counsel could bypass a military commission altogether and instead take the accused straight to a court-martial. After all, Article 104 does assert jurisdiction over “any person.”<sup>105</sup> A court-martial could better avoid the inherent politics and delay surrounding the military commissions process.<sup>106</sup> In that way, a prosecutor for a case such as a 9/11 conspirator could seek the death penalty for aiding the enemy, and once that court-martial is complete,

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<sup>100</sup> MMC Part IV, para. 5(26), is titled Wrongfully Aiding the Enemy; UCMJ art. 104 is titled Aiding the enemy; MMC Part IV, para. 5(25), is titled Providing Material Support for Terrorism.

<sup>101</sup> In contrast to MMC Part IV, para. 5(25), neither MMC Part IV, para. 5(26), nor UCMJ art. 104 mentions the term “terrorism.” They instead refer only to “the enemy.”

<sup>102</sup> MMC 2010, *supra* note 4, at Part IV, para. 5(25).

<sup>103</sup> See *supra* text accompanying notes 23-28 for a discussion of “the enemy.”

<sup>104</sup> See, e.g., *United States v. Hamdan*, *supra* note 9 (recognizing that aiding the enemy in general, as well as material support charges can apply to anyone engaged in hostilities, regardless of duty.)

<sup>105</sup> See discussion *supra* Part II.

<sup>106</sup> See Peter Finn, *Administration Halts Prosecution of Alleged USS Cole Bomber*, WASH. POST, Aug. 26, 2010 <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/26/AR2010082606353.html> (reporting that an anonymous military official blamed politics for delaying a military commission where prosecutors claimed they were ready to charge the case.); MANUAL FOR COURTS-MARTIAL, UNITED STATES [HEREINAFTER MCM], R.C.M. 104 (2008) (prohibiting unlawful command influence); Captain Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261, 274-75 (1996) (contrasting the legal effect of comments made by an Army general officer and the Air Force chief of staff); Lieutenant Col Patricia A. Ham, *Still Waters Run Deep? The Year in Unlawful Command Influence ARMY LAW.*, June 2006, at 53, 67-68 (discussing senior officers’ appropriate remarks about high-profile military justice incidents).

an Article III court could theoretically get the next crack at the murder and terrorism charges. However, the negative view is the same logic that led to the creation of military commissions in the first place in terms of evidentiary issues and better protecting classified assets.<sup>107</sup>

Once a potential court martial gets to the referral stage relating to a violation of Article 104, a convening authority is required. The Office of Military Commissions (OMC) has its own appointed convening authority tasked with approving all referrals of charges.<sup>108</sup> But the OMC convening authority is limited to military commissions and would not have jurisdiction to authorize a court martial.<sup>109</sup> Therefore, the convening authority for a Guantanamo Bay detainee would likely be the admiral overseeing Joint Task Force Guantanamo.<sup>110</sup> The convening authority is obligated to avoid any undue influence coming from outside sources and should make his or her decision based on practical and legal considerations.<sup>111</sup>

If the Guantanamo Bay convening authority approves charges against a detainee under Article 104, military trial counsel may seek a judicial opinion. The rationale is that the UCMJ has not been used in such a straight battlefield manner involving an enemy force. The judicial opinion would need to grant additional leeway in regard to the rules of evidence because of the in-depth intelligence equities inherent in a military commission but typically alien to the vast majority of courts-martial. But overall, bypassing a military commission for courts-martial may be tactically noteworthy but would likely remain impractical due to the nature and scope of the evidence involved in such complex cases. Moreover, such a tactic also could be considered improper forum shopping.

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<sup>107</sup> See, e.g. Michael J. Lebowitz, *The Value of Claiming Torture: An Analysis of al Qaeda's Tactical Lawfare Strategy and Efforts to Fight Back*, 43 CASE W. RES. J. INT'L L. 357, 376 (2010)(military commissions in part protect national security assets by permitting unwarned statements into evidence, so long as the statements are untainted).

<sup>108</sup> MMC 2010, *supra* note 4, at rule 504 (defining the convening authority as the Secretary of Defense or, unless limited by superior competent authority, any officer or official of the United States designated by the Secretary of Defense.).

<sup>109</sup> *Id.* at rule 504(a) (authorizing the convening authority to create a military commission.)

<sup>110</sup> UCMJ art. 22(a)(6) (2008) (authorizing "the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States" to convene a general court-martial); see also JOINT TASK FORCE GUANTANAMO, <http://www.jtfgtmo.southcom.mil/> (stating that the a Navy rear admiral commands the task force) (last visited Jul. 1, 2011).

<sup>111</sup> See MCM, *supra* note 106, R.C.M. 104, 406, 407 (discussing the factors the convening authority should consider when disposing of a case).

## V. CONCLUSION

The question as to how an alien enemy operative with no apparent duty to the U.S. can be charged with “aiding the enemy” under UCMJ Article 104 is answered by the actual statutory reading of the law.<sup>112</sup> Moreover, the Congressional timeline in dealing with this issue further adds legitimacy to the notion of an intentional split between historic treason and modern aiding the enemy.<sup>113</sup> The 2011 Court of Military Commission Review decision also offered some general support under military jurisprudence for discounting the gravitation toward the allegiance shadow element. The end result is choice.

Title 10 now offers two different and actionable versions of aiding the enemy from which military prosecutors can choose. Because aiding the enemy is viewed in the specific context of open hostilities, it is not surprising that UCMJ Article 104 and its MME counterpart are unique from the federal criminal law arena. As Jabez W. Loane opined in his 1965 article on the subject, treason exists on a parallel track from aiding the enemy.<sup>114</sup> Treason is available to federal prosecutors because it, by definition, relates to quintessential cases of selling out one’s own country.<sup>115</sup> Aiding the enemy, in contrast, establishes elements similar in scope to the charge of providing material support for terrorism. As such, Article 104 is merely one more tool for consideration in prosecuting accused war criminals, just as MMC’s wrongfully aiding the enemy and material support charges also are included as options. The invisible requirement relating to an allegiance or duty in regard to Article 104 is simply non-existent and not based on anything but the historic treason law that was deliberately kept separate on parallel tracks via Congressional action. Therefore, UCMJ 104 as applied to military commissions is more than a mere loophole, but rather was created and maintained as a choice for military prosecutors to consider.

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<sup>112</sup> *Supra* note 10.

<sup>113</sup> *Supra* note 37.

<sup>114</sup> Loane at 43.

<sup>115</sup> 18 U.S.C. 2381 (Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.).



“LET COBHAM BE HERE”:  
THE INTRODUCTION OF DRUG TESTING REPORTS IN  
COURTS-MARTIAL POST *MELENDEZ-DIAZ*

CAPTAIN DANIEL I. STOVALL\*

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## I. INTRODUCTION

According to historical documents, that is what Sir Walter Raleigh said during his trial for treason, “let Cobham be here, let him speak it. Call my accuser before my face . . . .”<sup>1</sup> Any time the Confrontation Clause of the Sixth Amendment to the United States Constitution is at issue before the United States Supreme Court, Sir Raleigh’s plight seems to get quite a lot of discussion.<sup>2</sup> Sir Raleigh seemed to receive the most discussion in *Crawford v. Washington*, a case in which the respondent argued his Constitutional rights under the Confrontation Clause were violated when the recording of his wife’s interrogation was played to the jury during his trial for assault and attempted murder.<sup>3</sup> So what does Sir Walter Raleigh, a man tried for treason in Great Britain back in 1603, have to do with current Confrontation Clause analysis? If you have sat through a course in evidence law, you probably heard about Sir Raleigh’s trial. The main issue that concerns us is the fact Sir Raleigh was convicted based on testimony from his alleged accomplice, Lord Cobham.<sup>4</sup> The problem was, Lord Cobham did not testify at Sir Raleigh’s trial; instead, the Government used his prior examination before the Privy Council and a letter he drafted as proof against Sir Raleigh.<sup>5</sup> Sir Raleigh argued that Lord Cobham had lied in order to protect himself and that he deserved the opportunity to essentially cross-examine Lord Cobham during his trial.<sup>6</sup> This request was denied and, as a result of Lord Cobham’s assertions, Sir Raleigh was convicted of treason.<sup>7</sup>

When you look back at the Court’s analysis regarding the Confrontation Clause, almost all of the cases deal with the Government introducing at trial a third party’s out-of-court statement against the accused in order to prove some element of the crime. Although the “black letter law” has changed over the course of time regarding the analysis of such testimony, the substance of the holdings has remained the same. The Court seems anxious to avoid a situation like Sir Walter Raleigh found himself in when he was tried in 1603. Essentially, the Court is very concerned with the accused’s right to cross-examine any person that gives testimony against him or her. Although the Court addressed out of court statements by third parties on numerous occasions, they never really tackled other forms of evidence against the accused, such as scientific or forensic reports. All of that changed in 2008 when the case of *Melendez-Diaz v. Massachusetts*<sup>8</sup>

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<sup>1</sup> *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (quoting *Raleigh’s Case*, 2 How. St. Tr. 1, 15-16 (1603)).

<sup>2</sup> See *Melendez-Diaz v. Massachusetts*, 1129 S. Ct. 2527 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004); *Ohio v. Roberts*, 448 U.S. 56 (1980).

<sup>3</sup> *Crawford*, 541 U.S. at 36.

<sup>4</sup> *Id.* at 44.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 129 S. Ct. 2527 (2009).

came before the U.S. Supreme Court. The details of the case will be explored later in this article; but in short, the case dealt with the introduction of certificates detailing the results of a state drug laboratory analysis on a sample of cocaine.<sup>9</sup> In *Melendez-Diaz*, the Supreme Court held that the accused's Sixth Amendment right to confront the witnesses against him were violated by the admission of the drug laboratory certificates without the opportunity to cross-examine the author of the certificates.

Although *Melendez-Diaz* involved a state drug laboratory's reports that were introduced by themselves with no accompanying expert testimony, what does this mean for scientific reports used in military courts-martial? Are those that draft these reports now required, as a result of *Melendez-Diaz*, to testify at trial so that the accused is afforded an opportunity to cross-examine the analyst who authored the report? Although the full extent of the Confrontation Clause's reach is still somewhat ambiguous regarding what exactly is "testimonial evidence," it seems the answer to the above question is "Yes." This article will show that based on the Supreme Court's definition of testimonial evidence in the case of *Melendez-Diaz*, scientific reports such as drug testing analysis will now require the Government to produce at trial the author of the report so that the accused has the opportunity to cross-examine the witness. First, this article will give a brief history of the Confrontation Clause and the development of the case law interpreting this Constitutional provision prior to *Melendez-Diaz*; second, this article will discuss in-depth the Court's first Confrontation Clause decision regarding the introduction of laboratory reports in *Melendez-Diaz* and current military case law involving Confrontation Clause analysis post *Crawford*; and finally, this article will look to the future of Confrontation Clause analysis, including a discussion of the Court's most recent holding in *Bullcoming v. New Mexico*<sup>10</sup> and discuss the impact of *Melendez-Diaz* and *Bullcoming* on the introduction of scientific reports at courts-martial.

## II. A BRIEF HISTORY OF THE CONFRONTATION CLAUSE AND SUPREME COURT CASE LAW

### A. The Confrontation Clause Prior to *Roberts*, *Crawford*, and *Melendez-Diaz*

"The right to confront one's accusers is a concept that dates back to Roman times."<sup>11</sup> Needless to say, this article will not go back that far in describing the history of the Confrontation Clause. Even though Justice Scalia addressed the history of the clause in great detail in the majority opinion of *Crawford*, we will only be hitting the high points.

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<sup>9</sup> *Id.* at 2529.

<sup>10</sup> *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011)

<sup>11</sup> *Crawford*, 541 U.S. at 43.

As most of us probably learned at one point, there is a difference between common law and civil law. Common law is defined as, “The body of law derived from judicial decisions, rather than from statutes or constitutions.”<sup>12</sup> Civil law is the “body of law derived and evolved directly from Roman Law, the primary feature of which is that laws are struck in writing; codified, and not determined, as is common law, by the opinions of judges based on historic customs.”<sup>13</sup> Regarding testimony at criminal trials, the common law tradition in Britain was “one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.”<sup>14</sup> Although Britain usually followed the common law, there were “times when it adopted elements of civil law practice”<sup>15</sup> One of those times occurred during the trial of Sir Walter Raleigh, as discussed in the introduction. Although a “confrontation clause” was not drafted into the original Constitution, it was included in the Sixth Amendment to the Constitution as a result of concerns that American criminal trial practice would adopt the same type of civil law rule allowing the admission of *ex parte* communications that was exploited in the case of Sir Raleigh. Abraham Holmes voiced this concern at the Massachusetts ratifying convention, and the famous Anti-Federalist writer, under the alias Federal Farmer, addressed this issue in one of his letters.<sup>16</sup> The Federal Farmer wrote, “Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken *ex parte*, but very seldom leads to the proper discovery of truth.”<sup>17</sup> The Court, in *California v. Green*, noted that

[T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on “evidence” which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.<sup>18</sup>

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<sup>12</sup> *Black’s Law Dictionary*, “common law” (9th ed. 2009).

<sup>13</sup> Legal Dictionary, <http://duhaime.org/LegalDictionary/C.aspx?lk=mm> (last visited Aug. 1, 2011).

<sup>14</sup> *Crawford*, 541 U.S. at 43 (quoting William Blackstone, 3 Commentaries on the Laws of England 373-374 (1768)).

<sup>15</sup> *Crawford*, 541 U.S. at 43.

<sup>16</sup> *Crawford*, 541 U.S. at 48 (citing 2 J. ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION*, 110-111 (2d ed. 1863); 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, 469, 473 (1971)).

<sup>17</sup> *Crawford*, 541 U.S. at 48 (quoting letter dated Oct. 15, 1787, reprinted in 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, 469, 473 (1971)).

<sup>18</sup> *California v. Green*, 399 U.S. 149, 156 (1970).



As a result of these concerns, Congress drafted the Confrontation Clause as part of the Sixth Amendment when they drew up the Bill of Rights. The Confrontation Clause states, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>19</sup>

Although the list of cases that explore the Confrontation Clause goes on ad nauseam, *Mattox v. United States*,<sup>20</sup> is one of the first cases interpreting the Confrontation Clause which the Supreme Court references on multiple occasions in its more recent rulings. In *Mattox*, the petitioner, Clyde Mattox, was tried in court three times for murder in the first degree. Mattox was convicted in the first trial, but the case was remanded on appeal. The second case resulted in a hung jury. In the third trial, Mattox was convicted once again.<sup>21</sup> During the third trial, the prosecution introduced as its main piece of evidence, transcripts of the testimony of two witnesses from the previous trial who were now deceased.<sup>22</sup> The defense objected to the two transcripts, but was overruled. The evidence was introduced, and the accused was subsequently convicted.<sup>23</sup> Both witnesses “were present and were fully examined and cross-examined on the former trial.”<sup>24</sup> In his appeal, Mr. Mattox argued his constitutional rights under the Confrontation Clause had been violated as a result of the admission of the transcripts at trial. In his opinion, Justice Brown stated:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.<sup>25</sup>

The Supreme Court held that even in light of the concerns over introduction of *ex parte* communications, dying declarations stood out as an exception to the letter of the Confrontation Clause because of their inherent reliability, especially in this case where the deceased witnesses testified under oath and were cross-examined by the defense. “A technical adherence to the letter of

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<sup>19</sup> U.S. Const, amend VI.

<sup>20</sup> 156 U.S. 237 (1895).

<sup>21</sup> *Mattox*, 156 U.S. at 251 (Shiras, J., dissenting).

<sup>22</sup> *Id.* at 240.

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

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

<sup>25</sup> *Id.* at 242, 243.

a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant.”<sup>26</sup> As a result, “[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.”<sup>27</sup>

Moving forward 75 years, *California v. Green*<sup>28</sup> is a case that received considerable discussion by the Supreme Court in *Ohio v. Roberts*,<sup>29</sup> which was the first of four major Confrontation Clause cases that occurred in the last 35 years. *Green* is fairly interesting because it deals with essentially an inverted version of the issue in *Mattox*. As discussed above, *Mattox* involved the introduction of prior testimony from a previous trial into evidence during a subsequent re-trial because the witness who gave the original testimony had since passed away. In *Green*, however, the witness for the state, Melvin Porter, was present at trial, but changed his testimony from a preliminary hearing. The state proceeded to introduce Mr. Porter’s prior testimony from the preliminary hearing over the objection of the defense.<sup>30</sup> The state also introduced testimony of a police officer regarding what Mr. Porter had said during the investigation.<sup>31</sup> On appeal, the California Supreme Court ruled that the introduction of Mr. Porter’s prior testimony violated the accused’s Confrontation Clause rights. The Supreme Court disagreed.

In a six to one decision (Justice Marshall and Justice Blackmun took no part in considering the case),<sup>32</sup> the Supreme Court ruled that admitting prior inconsistent statements of a Government witness did not violate the Confrontation Clause rights of the accused where the Government produced the witness at the present trial and defense was afforded the opportunity to cross-examine him.<sup>33</sup> In reaching this conclusion, the Court looked at prior holdings involving situations where it was held that the accused’s Confrontation Clause rights were not violated because the accused had an opportunity to cross-examine the witness at a prior hearing or trial, or, vice versa, that the accused’s right were violated when the previous statement resulted from a situation where the accused did not have an opportunity to cross-examine.<sup>34</sup> Following this line of thought, Justice White reasoned that

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<sup>26</sup> *Id.* at 244.

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

<sup>28</sup> 399 U.S. 149 (1970).

<sup>29</sup> 448 U.S. 56 (1980).

<sup>30</sup> *Green*, 399 U.S. at 151.

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

<sup>32</sup> *Id.* at 170.

<sup>33</sup> *Id.* at 158-170.

<sup>34</sup> See *Bruton v. U.S.*, 391 U.S. 123 (1968); *Barber v. Page*, 390 U.S. 718 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965); *Mattox v. U.S.*, 156 U.S. 237 (1895). In *Pointer v. Texas*, the Court made the Confrontation Clause applicable to the states through the Fourteenth Amendment.

if a witness's prior testimony is admissible where the accused had an opportunity to cross-examine when the statement was made and the prior statement is subsequently introduced at trial as a result of the witness's absence, then it must follow that there is no Confrontation Clause violation where the Government produces the witness at the subsequent trial as well.<sup>35</sup>

The Court further reasoned that even the statements made by Mr. Porter to a police officer prior to any hearings were admissible at trial because the defense had the opportunity to test the credibility of these prior statements by cross-examining him at trial. "The subsequent opportunity for cross-examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, off-hand remark to a stranger, and the carefully recorded testimony at a prior hearing."<sup>36</sup> Justice White opined in dicta that "Porter's statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable, despite good-faith efforts of the State to produce him."<sup>37</sup>

#### B. *Roberts* and *Crawford*: Cross-Examination Versus Indicia of Reliability

In its next major Confrontation Clause decision, the Supreme Court took a slightly different approach than their previous holdings where the Court's decision hinged on the opportunity for defense to cross-examine a Government witness at the time the statements against the accused were made.

In the late 1970s, the accused, Herschel Roberts, was tried in an Ohio Court of Common Pleas for forgery, receiving stolen property, and possession of heroin.<sup>38</sup> The accused was charged with forging the name of Bernard Isaacs and stealing credit cards belonging to Mr. Isaacs' wife, Amy.<sup>39</sup> At a preliminary hearing, the defense called Bernard Isaacs' daughter, Anita Isaacs, to testify. The daughter testified that she had allowed the accused to use her apartment while she was away; however, she refused to admit that "she had given [the accused] checks and the credit cards without informing him that she did not have permission to use them."<sup>40</sup> The defense did not ask the judge to declare Ms. Isaacs a hostile witness or to place her on cross-examination. At the subsequent trial, the accused testified that Ms. Isaacs had given him both the checks and the credit cards with the understanding that he could use them.<sup>41</sup> Ms. Isaacs failed to appear in court to testify, so the state introduced into evidence the

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<sup>35</sup> *Green*, 399 U.S. at 170.

<sup>36</sup> *Id.* at 168.

<sup>37</sup> *Id.* at 165.

<sup>38</sup> *Roberts*, 448 U.S. at 56.

<sup>39</sup> *Id.* at 56, 58.

<sup>40</sup> *Id.* at 58.

<sup>41</sup> *Id.* at 56.

transcript of her prior testimony from the preliminary hearing in order to rebut the accused's testimony that he had received permission to use the checks and credit cards. In introducing the evidence, the state relied on an Ohio statute which "permits the use of such testimony when the witness 'cannot for any reason be produced at the trial.'"<sup>42</sup> On appeal, the Ohio Supreme Court ruled that the transcript was inadmissible because it violated the accused's Confrontation Clause rights in that the daughter was never cross-examined at the preliminary hearing and was absent at trial.<sup>43</sup> In a six to three opinion by Justice Blackmun, the Supreme Court overturned the Ohio Supreme Court's ruling and held that the introduction of the prior testimony did not violate the accused's Confrontation Clause rights.

In ruling that the prior testimony was inadmissible, the Ohio Court of Appeals focused on whether the state made a "good-faith effort" to produce Anita Isaacs at trial. When the Government first introduced the prior testimony, defense objected, which led to a *voir dire* hearing regarding the admissibility of the transcript.<sup>44</sup> During that hearing, Amy Isaacs testified that her daughter, Anita, had left for Tucson, Arizona shortly after the preliminary hearing and stated that "she knew of no way to reach Anita in case of an emergency."<sup>45</sup> The Ohio Court of Appeals ruled the transcript of the prior testimony inadmissible because the state failed to make a "good-faith effort" to produce Anita Isaacs as a witness at trial.<sup>46</sup> The Ohio Supreme Court affirmed, but on different grounds. In their ruling, they held that the court of appeals had erred in finding the state failed to show a good-faith effort, but that the testimony was still inadmissible because "mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial."<sup>47</sup> The Ohio Supreme Court referenced *California v. Green*, but refused to apply the Court's dicta that cross-examination of the witness at a preliminary hearing renders the testimony admissible in the subsequent trial upon the unavailability of the witness. The state supreme court ruled that "Green 'goes no further than to suggest that cross-examination actually conducted at preliminary hearing may afford adequate confrontation for purposes of a later trial.'"<sup>48</sup>

In his opinion, Justice Blackmun stated that the Confrontation Clause operates "in two separate ways,"<sup>49</sup> thus creating a two-pronged approach when analyzing the admissibility of prior statements against the accused at trial. "In the usual case, (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to

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<sup>42</sup> *Roberts*, 448 U.S. at 56. See also Ohio Rev. Code Ann. § 2945.49 (1975).

<sup>43</sup> *Roberts*, 448 U.S. at 56.

<sup>44</sup> *Id.* at 59.

<sup>45</sup> *Id.* at 60.

<sup>46</sup> *Id.*

<sup>47</sup> *Roberts*, 448 U.S. at 61 (citing *Ohio v. Roberts*, 378 N.E.2d 492, 493 (1978)).

<sup>48</sup> *Roberts*, 448 U.S. at 61 (citing *Ohio v. Roberts*, 378 N.E.2d 492, 497 (1978)).

<sup>49</sup> *Roberts*, 448 U.S. at 64.

use against the defendant.”<sup>50</sup> If a witness is shown to be unavailable, then the second prong comes into play. Under the second prong, the Government may introduce the prior testimony only if the statement “bears adequate ‘indicia of reliability.’”<sup>51</sup> Justice Blackmun stated that evidence falling within a “firmly rooted hearsay exception” automatically satisfies the second prong without needing further analysis.<sup>52</sup> Evidence failing to fall within a firmly rooted hearsay exception must be excluded “absent a showing of particularized guarantees of trustworthiness.”<sup>53</sup> As a result, the Supreme Court moved away from the direction it was headed in *Green* where the Court stated in dicta that cross-examination at a prior hearing was sufficient to satisfy an accused’s rights under the Confrontation Clause. Instead, the Court now looked at the prior testimony’s indicia of reliability. This new approach, however, would later be made an anomaly in Confrontation Clause precedent when the Supreme Court decided *Crawford* in 2004.

On August 5, 1999, Michael Crawford stabbed Kenneth Lee, a man he believed had tried to rape his wife.<sup>54</sup> At trial, Crawford pled not guilty, claiming self defense.<sup>55</sup> According to Crawford and his wife, they went over to Lee’s apartment in order to confront him. “[A] fight ensued in which Lee was stabbed in the torso and [Crawford]’s hand was cut.”<sup>56</sup> Because Crawford claimed self-defense, the main focus of the trial was whether Lee pulled something out of his pocket causing Crawford to think he was under the imminent threat of bodily harm.<sup>57</sup> At the beginning of the investigation, both the accused and his wife, Sylvia Crawford, were interrogated by the police. The accused claimed that Lee reached into his pocket and pulled something out before he stabbed him, which resulted in his hand being cut.<sup>58</sup> Sylvia remembered it differently. In her recorded statement, she stated that Lee did put his hand into his pocket, but the accused stabbed Lee and then his hands came out. She also stated that when she saw Lee’s hands, he was not holding anything.<sup>59</sup> At trial, the accused’s testimony was essentially the same as it was when he was interrogated. The state, in an effort to contradict Crawford’s statement, sought to introduce Sylvia’s recorded statement from her police interrogation.<sup>60</sup> Sylvia did not testify at trial because, like the Military Rules of Evidence, the state of Washington has a marital privilege that bars a spouse from testifying

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 66.

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

<sup>53</sup> *Id.*

<sup>54</sup> *Crawford*, 541 U.S. at 38.

<sup>55</sup> *Id.* at 39.

<sup>56</sup> *Id.*

<sup>57</sup> *Black’s Law Dictionary*, “self-defense” (9th ed. 2009).

<sup>58</sup> *Crawford*, 541 U.S. at 38.

<sup>59</sup> *Id.* at 39.

<sup>60</sup> *Id.* at 40.

without the consent of the other spouse.<sup>61</sup> However, “Washington’s privilege does not extend to a spouse’s out-of-court statements admissible under a hearsay exception.”<sup>62</sup> The judge admitted the previous statement, and Crawford was convicted of assault.<sup>63</sup>

On appeal, the Washington Court of Appeals reversed the ruling of the trial judge. The court used a nine factor test to determine whether the previously recorded statement by Sylvia “bore particularized guarantees of trustworthiness,”<sup>64</sup> and determined that it did not. The State Supreme Court reversed, holding that even though the prior statement did not fall within a “firmly rooted hearsay exception,” it still bore “guarantees of trustworthiness.”<sup>65</sup> The Supreme Court granted certiorari and Justice Scalia delivered an opinion that essentially re-wrote the law regarding Confrontation Clause analysis and overturned to a great extent, the Court’s holding in *Ohio v. Roberts*.

As stated at the beginning of this article, Justice Scalia began his opinion by first digging deep into the history of the Confrontation Clause and how it evolved.<sup>66</sup> What Justice Scalia focused on during his exploration of Confrontation Clause history was the concept of prior opportunity to cross-examine the witness at the time the statement was made. Justice Scalia stated, “[s]ome early cases went so far as to hold that prior testimony was inadmissible in criminal cases *even if* the accused had a previous opportunity to cross-examine . . . . Most courts rejected that view, but only after reaffirming that admissibility depended on a prior opportunity for cross-examination.”<sup>67</sup> As a result, prior opportunity to cross-examine became the linchpin for Justice Scalia when determining whether prior statements by a witness were admissible at trial.

After setting the historical groundwork regarding the prior opportunity to cross-examine, Justice Scalia then discussed what kinds of statements raise Confrontation Clause concerns. The opinion in *Crawford* stated that the Confrontation Clause applies to “[w]itnesses’ against the accused—in other words, those who ‘bear testimony.’”<sup>68</sup> From this Justice Scalia developed the rule that the Confrontation Clause is only concerned with testimonial statements.<sup>69</sup> So the question becomes, what fits within the definition of “testimonial”? Interestingly, it is not exclusive to just

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<sup>61</sup> See Wash. Rev. Code § 5.60.060(1) (1994).

<sup>62</sup> *Crawford*, 541 U.S. at 40. See also *State v. Burden*, 841 P.2d 758, 761 (1992).

<sup>63</sup> *Crawford*, 541 U.S. at 41.

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

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

<sup>66</sup> See generally, Part II.A.

<sup>67</sup> *Crawford*, 541 U.S. at 50. See also *State v. Houser*, 26 Mo. 431, 435-436 (1858); *United States v. Macomb*, 26 F.Cas. 1132, 1133 (No. 15,702) (CC Ill. 1851); *Kendrick v. State*, 29 Tenn. 479, 485-488 (1850); *Bostick v. State*, 22 Tenn. 344, 345-346 (1842); *Commonwealth v. Richards*, 35 Mass. 434, 437 (1837); *State v. Hill*, 20 S.C.L. 607, 608-610 (App.1835).

<sup>68</sup> *Crawford*, 541 U.S. at 51.

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

situations where a person is literally giving a statement, but according to Justice Scalia, quoting *White v. Illinois*, he stated that it could also include “extrajudicial statements . . . contained in formalized testimonial materials, such as *affidavits*, depositions, prior testimony, or confessions.”<sup>70</sup> Further, Justice Scalia indicated that the definition of testimonial also includes “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”<sup>71</sup> This evolving definition of what a testimonial statement is becomes the main focal point in *Melendez-Diaz*. In *Crawford*, the Court held that Sylvia’s prior statements to the police during her interrogation easily fit within the definition of “testimonial,” and thus raised Confrontation Clause issues.

As stated above, if an out of court statement is deemed testimonial, Justice Scalia believed the history behind the Confrontation Clause, in addition to the development of case law in this area, led to the conclusion that the admissibility of such a statement hinged on the opportunity to either cross-examine the witness at the time the statement was made, or at the time of trial. “[T]he common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine.”<sup>72</sup> Further, the Court referenced *Mattox v. United States* and *Green v. California*, stating “[o]ur later cases conform to *Mattox*’s holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine.”<sup>73</sup> So what about the law as established by *Ohio v. Roberts*? Justice Scalia made it fairly clear he did not approve of the Court’s decision in *Roberts*, and he wanted to go in a different direction. He referred to the Court’s decision in the prior case as “amorphous, if not entirely subjective.”<sup>74</sup> As a result, the Court established a completely different rule and treated *Roberts* as an anomaly in the history of Confrontation Clause analysis, to the chagrin of Chief Justice Rehnquist. In his dissent, Chief Justice Rehnquist stated, “We have never drawn a distinction between testimonial and nontestimonial statements.”<sup>75</sup> He voiced his concern regarding the Court’s refusal to follow *stare decisis* and the law as established by *Ohio v. Roberts*, but mainly he seemed concerned about the ambiguity inherent in the Court’s refusal to address

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<sup>70</sup> *Crawford*, 541 U.S. at 52 (emphasis added) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part).

<sup>71</sup> *Crawford*, 541 U.S. at 52 (quoting *Brief for National Association of Criminal Defense Lawyers et al as Amici Curiae* 3).

<sup>72</sup> *Crawford*, 541 U.S. at 54.

<sup>73</sup> *Id.* at 57.

<sup>74</sup> *Id.* at 62. An interesting issue is created by the dichotomy between testimonial and nontestimonial statements. For example, there is no established rule regarding the admissibility of nontestimonial statements as a result of the Court’s ruling in *Crawford*. The question this presents is whether *Ohio v. Roberts* remains the law when it comes to nontestimonial statements.

<sup>75</sup> *Id.* at 71 (Rehnquist, C.J., dissenting).

what fits within the definition of testimonial. “[T]housands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists . . . is covered by the new rule.”<sup>76</sup> Although the Supreme Court would expound on the definition of “testimonial” in *Melendez-Diaz*, sadly Chief Justice Rehnquist would not be a part of that discussion as a result of his passing in 2005.

### III. MELENDEZ-DIAZ AND ITS PROGENY

In *Crawford v. Washington*, the Court ruled that the introduction at trial of a prior testimonial statement violates an accused’s Confrontation Clause rights if the accused did not have the opportunity to cross-examine the individual making the statement at the time the statement was made or at the subsequent trial. *Ohio v. Roberts* was essentially overturned by Justice Scalia’s majority opinion in *Crawford v. Washington*, and the majority opinion left attorneys wondering what exactly fits within the definition of “testimonial.” Thus the stage was set for *Melendez-Diaz*.

#### A. *Melendez-Diaz* and the Court’s Definition of the Word “Testimonial”

In November of 2001, a manager at a Boston-area K-Mart called into the police and reported suspicious activities by one of the store’s employees, Thomas Wright.<sup>77</sup> According to the manager, Wright would leave the store, be picked up by a blue sedan and then return to the store approximately ten minutes later. The manager witnessed this occurrence five or six times over a three-month period in the fall of 2001.<sup>78</sup> On November 15, 2001, when the manager reported his observations to the local police, they reported to the K-Mart store where they observed Ellis Montero and Louis Melendez-Diaz pull into the K-Mart parking lot in a blue sedan and pick up Wright, who got into the back seat of the vehicle.<sup>79</sup> While observing the car, the police saw Wright lean forward and then back. Upon exiting the vehicle, the police stopped Wright as he was walking back towards the K-Mart store.<sup>80</sup> The police officer searched Wright and found four bags on his person, two of which contained a white powder.<sup>81</sup> The police arrested Wright and radioed other officers who subsequently arrested Montero and Melendez-Diaz.

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<sup>76</sup> *Id.*

<sup>77</sup> Brief for Petitioner at 5, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591).

<sup>78</sup> *Commonwealth v. Melendez-Diaz*, 2007 WL 2189152 at 1 (Mass.App.Ct.).

<sup>79</sup> Brief for Petitioner, *supra* note 77, at 5.

<sup>80</sup> *Id.* at 6.

<sup>81</sup> Brief for Petitioner, *supra* note 77, at 5. *See also* Brief for Respondent at 1, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591).



Once they arrived at the police station, during the booking of the three men, officers inspected the cruiser they had used to transport Montero and Melendez-Diaz. In the back seat, police officers found 19 plastic bags containing a dark yellow substance with large clumps.<sup>82</sup> These 19 bags, along with the four bags from Wright's pocket, were submitted to the Massachusetts Department of Public Health's State Laboratory Institute for testing. Two weeks later, two analysts from the laboratory issued three sworn reports, two of which asserted that the four bags found on Wright contained a total of 4.75 grams of cocaine, while the third report asserted that the 19 bags found in the police cruiser contained 22.16 grams of cocaine.<sup>83</sup> Massachusetts charged Melendez-Diaz with distributing cocaine and with trafficking in cocaine in an amount between fourteen and twenty-eight grams.<sup>84</sup>

At trial, the prosecution offered the laboratory reports during a police officer's testimony as proof that the 23 bags recovered contained cocaine. Defense counsel objected to the introduction of the reports, citing *Crawford v. Washington*, however, the trial judge overruled the objection and allowed the introduction of the laboratory reports into evidence.<sup>85</sup> The jury found Melendez-Diaz guilty on both counts and the court sentenced him to three years in prison.<sup>86</sup> The Appeals Court of Massachusetts affirmed the conviction, stating that the trial judge did not err by allowing the introduction into evidence of the laboratory reports. In doing so, the appeals court referenced *Commonwealth v. Verde*, in which the court held that the introduction at trial of certificates of drug analysis did not deny a defendant the right of confrontation, and were thus not subject to the holding of *Crawford v. Washington*.<sup>87</sup> The Supreme Judicial Court of Massachusetts denied review and certiorari was granted by the U.S. Supreme Court in 2008.<sup>88</sup>

In his brief to the Supreme Court, Melendez-Diaz argued that a laboratory report prepared by a state forensic analyst "for use in a criminal prosecution is 'testimonial' evidence and, therefore, subject to the Confrontation Clause."<sup>89</sup> Citing *Crawford v. Washington*, *Mattox v. United States*, and *Davis v. Washington*, Melendez-Diaz stated that state forensic examiners' crime laboratory reports "fall squarely within" the class of testimony described by the court in *Davis* that has the primary purpose of establishing or proving past events "potentially relevant to later criminal

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<sup>82</sup> Brief for Petitioner, *supra* note 77, at 5; Brief for Respondent, *supra* note 81, at 1.

<sup>83</sup> Brief for Petitioner, *supra* note 77, at 7.

<sup>84</sup> Brief for Petitioner, *supra* note 77, at 5. See also Mass. Gen. Laws ch. 94C, §§ 32A & 32E(b)(1).

<sup>85</sup> Brief for Petitioner, *supra* note 77, at 8.

<sup>86</sup> *Id.* at 8, 9.

<sup>87</sup> *Melendez-Diaz*, 2007 WL 2189152 at 4 (citing *Commonwealth v. Verde*, 444 Mass.App.Ct. 279, 282-283 (2005)).

<sup>88</sup> *Melendez-Diaz*, 129 S. Ct. at 2527 (2009).

<sup>89</sup> Brief for Petitioner, *supra* note 77, at 10.

cases.”<sup>90</sup> Melendez-Diaz’s attorney stated, “Forensic examiners . . . create such reports at the behest of police officers . . . . The reports are formal, sworn statements. And prosecutors . . . offer them in lieu of live testimony at trial.”<sup>91</sup> Further, it was argued that it was immaterial whether such reports could be classified under any particular modern hearsay objection, it was still a violation of the Confrontation Clause to admit such reports without the ability of the accused to cross-examine the report’s author. “Forensic reports . . . are expressly prepared for law enforcement to aid in criminal investigations,” unlike shop books, which were not prepared “with an eye toward criminal investigation.”<sup>92</sup> Finally, it was argued that the Confrontation Clause “applies with the same force to statements that are factual in nature as it does to statements of opinion.”<sup>93</sup> Even if these statements are more likely to be reliable or objective, that fact was rejected “as a basis for exempting testimonial hearsay from the adversarial process.”<sup>94</sup>

Just as Melendez-Diaz argued laboratory reports are testimonial, the Commonwealth of Massachusetts argued in its brief that “the vast majority of courts have . . . concluded that laboratory reports, like the drug analysis certificates here, are nontestimonial and, thus, not subject to the Confrontation Clause.”<sup>95</sup> Massachusetts argued that the laboratory reports introduced at trial were different in two significant respects to the type of testimonial statements the Court was concerned about in *Crawford*. First, “they are not accusatory.”<sup>96</sup> Second, they “do not implicate the ‘principal evil’ the Confrontation Clause was designed to avoid: the ‘use of *ex parte* examinations as evidence against the accused.’”<sup>97</sup> Massachusetts argued that hearsay statements made by a witness regarding their subjective observations of past criminal conduct by an accused is what the Court was concerned about, not a laboratory report that “merely reports the results of objective, largely mechanical, scientific testing performed by a state laboratory.”<sup>98</sup> Further, it was argued that admission of a laboratory report, such as the drug analysis certificate in this case, was comparable to the treatment of official and business records, or a coroner’s report, under the common law. Because the Court, in *Crawford*, indicated “these exceptions were established at the time of the founding and were nontestimonial in nature, no confrontation right attached to the admission of these records.”<sup>99</sup>

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<sup>90</sup> Brief for Petitioner, *supra* note 77, at 10 (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

<sup>91</sup> Brief for Petitioner, *supra* note 77, at 10.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 12.

<sup>94</sup> *Id.*

<sup>95</sup> Brief for Respondent, *supra* note 81, at 10.

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

<sup>97</sup> Brief for Respondent, *supra* note 81, at 11 (citing *Crawford*, 541 U.S. at 54, 56).

<sup>98</sup> Brief for Respondent, *supra* note 81, at 11.

<sup>99</sup> Brief for Respondent, *supra* note 81, at 11 (citing *Crawford*, 541 US at 54, 56).

Massachusetts stated that the drug analysis certificates fell within the common law official records exception because they were prepared pursuant to law by a state official. Further, they were like business records in that they were prepared in the ordinary course of the laboratory's business.<sup>100</sup> Massachusetts also compared the laboratory reports to a coroner's report, stating that "[l]ike a coroner's report, which sets forth the coroner's findings about the physical condition of a decedent's body, a drug analysis certificate reports the analyst's findings about the physical state of a chemical substance."<sup>101</sup> Finally, Massachusetts argued that even if the reports were deemed testimonial, no violation of the Confrontation Clause existed because Melendez-Diaz had "multiple opportunities to challenge the validity of the certificates and cross-examine the analysts, but strategically decided not to do so."<sup>102</sup> The Commonwealth argued that compulsory process and other procedures available to the accused under state law were more than adequate in situations where the accused had a genuine desire to challenge the validity of the results.

In a close five-four decision, the Supreme Court ruled in favor of Melendez-Diaz, adopting his argument that scientific analysis reports, such as the one introduced at trial, were testimonial and thus covered by the Confrontation Clause. The Court's ruling can be broken down into six main points. First, an analyst's certificate of analysis was an affidavit "within the core class of testimonial statements covered by the confrontation clause."<sup>103</sup> Second, rejecting one of Massachusetts' arguments, analysts were not removed from coverage of the Confrontation Clause based on a theory they are not an accusatory witness. Third, analysts were not removed from coverage on a theory that they were not a conventional witness. Fourth, analysts were not removed from coverage simply because their testimony consisted of neutral, scientific testing. Fifth, certificates were not akin to official and business records, and thus subject to the Confrontation Clause. And finally, a defendant's ability to use procedures, such as subpoenaing an analyst to testify at trial, did not alleviate the state's obligation to produce the analyst for cross-examination.<sup>104</sup>

In the majority opinion, Justice Scalia reiterated the Confrontation Clause's application to "testimonial" evidence, taking the analysis one step further regarding what exactly constitutes "testimonial." First, Justice Scalia referenced *Crawford* and the class of "testimonial statements covered by the Confrontation Clause."<sup>105</sup> Justice Scalia stated "[t]here is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements' thus described. Our description of that category mentions

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<sup>100</sup> Brief for Respondent, *supra* note 81, at 11.

<sup>101</sup> *Id.* at 12.

<sup>102</sup> *Id.*

<sup>103</sup> *Melendez-Diaz*, 129 S. Ct. at 2527.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2531.

affidavits twice.” Regarding the question of how a scientific report, such as the one used at trial in this case, is an affidavit, Justice Scalia responded that the report was a declaration of fact “written down and sworn to by the declarant before an officer authorized to administer oaths.”<sup>106</sup> Further, the report was a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>107</sup> In this case, the report that was introduced proved that the substance found by the police contained traces of cocaine. Justice Scalia also stated that the report introduced at trial was “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>108</sup>

As a result, the reports, as affidavits, “were testimonial statements and the analysts were ‘witnesses’ for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ‘be confronted with’ the analysts at trial.”<sup>109</sup> At this point in the opinion, Justice Scalia commented in a footnote that the Court’s holding did not mean anyone whose testimony may be relevant to establishing the authenticity of a sample, the accuracy of a testing device, or the chain of custody must be called by the prosecution as a part of their case.<sup>110</sup> Justice Scalia stated,

Contrary to the dissent’s suggestion . . . we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. While the dissent is correct that “[i]t is the obligation of the prosecution to establish the chain of custody,” . . . this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent’s own quotation . . . “gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.” It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.<sup>111</sup>

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<sup>106</sup> *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Black’s Law Dictionary*, 62 (8th ed. 2004)).

<sup>107</sup> *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 124 S. Ct. at 1354).

<sup>108</sup> *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 124 S. Ct. at 1354).

<sup>109</sup> *Melendez-Diaz*, 129 S. Ct. at 2532.

<sup>110</sup> *Id.* at 2532 n.1.

<sup>111</sup> *Id.* (emphasis added).

Although not “everyone who laid hands on the evidence must be called,” Justice Scalia made it clear that any testimony that was introduced must be introduced live, and that an analyst who drafts the report must testify in order to satisfy the Confrontation Clause. The majority opinion then turned to a discussion of the arguments made by both Massachusetts and the dissenting opinion.

The first argument Justice Scalia addressed was the argument that the analysts were not “accusatory” witnesses, and thus not subject to the Confrontation Clause. Justice Scalia responded by stating that the Confrontation Clause guarantees the right by the accused to be confronted with any witnesses “against” him. “To the extent the analysts were witnesses, they certainly provided testimony *against* the accused.”<sup>112</sup> Essentially, the report drafted by the analysts proved a fact necessary for Melendez-Diaz’s conviction—that the substance found contained cocaine. As a result, he should have the ability to confront those witnesses. Justice Scalia did note, however, that this right can be waived, whether by failing to object to the introduction of such evidence, or through states adopting procedural rules governing such objections.<sup>113</sup>

Next, Justice Scalia tackled the argument that the analysts were not “conventional” or ordinary witnesses “of the sort whose *ex parte* testimony was most notoriously used at the trial of Sir Walter Raleigh.”<sup>114</sup> Justice Scalia responded that the case of Sir Raleigh “identifies the core of the right to confrontation,” however, it is not indicative of the limits of the confrontation clause.<sup>115</sup> The dissenting opinion and Massachusetts both argued that the analysts in this case were different in that they were not recalling events in the past, but reporting “near-contemporaneous” observations.<sup>116</sup> In response, Justice Scalia stated that whether testimony is near-contemporaneous or not does not play a role in determining whether the Confrontation Clause applies, and further that the reports in this case were completed nearly a week after the tests were conducted, which he argued was not near-contemporaneous.<sup>117</sup> The dissent also argued that the analysts were not conventional witnesses because they did not observe the crime or any “human action related to it.”<sup>118</sup> Justice Scalia responded by stating that a police officer’s report regarding her investigation of a crime scene would not be admissible absent an opportunity by the accused to examine the officer, and so a report drafted by an analysts should not be any different.<sup>119</sup> Finally, the dissent argued that the analysts were not conventional witnesses because “their statements were not provided in

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<sup>112</sup> *Id.* at 2533.

<sup>113</sup> *Id.* at 2534.

<sup>114</sup> *Id.* at 2534.

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

<sup>116</sup> *Id.* at 2535.

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

<sup>118</sup> *Melendez-Diaz*, 129 S. Ct. at 2559 (Kennedy, J. dissenting).

<sup>119</sup> *Melendez-Diaz*, 129 S. Ct. at 2535.

response to interrogation.”<sup>120</sup> Justice Scalia responded by stating that no legal authority was cited holding that a person who volunteers testimony is not any less a “witness against” the accused than a person providing statements in response to interrogation; furthermore, “the analysts’ affidavits in this case *were* presented in response to a police request.”<sup>121</sup>

The next argument discussed in the majority opinion was the argument that a difference existed between testimony recounting historical facts and testimony that is the result of “neutral, scientific testing.”<sup>122</sup> Related to that argument was the argument that a laboratory professional would not feel any different regarding the results of their test by having to confront the witness.<sup>123</sup> Essentially, it was argued there would be little value resulting from the confrontation of an analyst by the accused. Justice Scalia admits that there may be other ways, even better ways, to challenge the results of a forensic test; however, “the Constitution guarantees one way: confrontation.”<sup>124</sup> Further, the majority opinion argued that forensic evidence, such as laboratory reports, are “not uniquely immune from the risk of manipulation,” citing a study conducted by the National Academy of Sciences.<sup>125</sup> Justice Scalia stated that the Confrontation Clause provides the accused the ability to test the results of a report, similar to cross-examining an expert, and that “an analyst’s lack of proper training or deficiency in judgment may be disclosed in cross-examination.”<sup>126</sup>

As noted earlier, Massachusetts argued in its brief that the scientific reports introduced at trial were “akin to the types of official and business records admissible at common law.”<sup>127</sup> In response, Justice Scalia noted the evidentiary rule allowing the admission of business records at trial, but argued that is not the case “if the regularly conducted business activity is the production of evidence for use at trial.”<sup>128</sup> Further, referencing Federal Rules of Evidence 803(8), Justice Scalia stated analysts’ certificates are akin to police reports generated by law enforcement officials, which are excluded by the rule from qualifying as a business or public record.”<sup>129</sup> Massachusetts also argued that the reports were analogous to a coroner’s report.<sup>130</sup> The Court responded that coroner’s reports have never been accorded “any special status in American practice.”<sup>131</sup> Finally, the dissent

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<sup>120</sup> *Id.* at 2552 (Kennedy, J. dissenting).

<sup>121</sup> *Id.* at 2535.

<sup>122</sup> *Melendez-Diaz*, 129 S. Ct. at 2536 (quoting Brief for Respondent, *supra* note 81, at 29).

<sup>123</sup> *Melendez-Diaz*, 129 S. Ct. at 2549 (Kennedy, J. dissenting); *see also* Brief for Respondent, *supra* note 81, at 31.

<sup>124</sup> *Melendez-Diaz*, 129 S. Ct. at 2536.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 2537.

<sup>127</sup> *Melendez-Diaz*, 129 S. Ct. at 2538 (quoting Brief for Respondent, *supra* note 81, at 35).

<sup>128</sup> *Melendez-Diaz*, 129 S. Ct. at 2538 (citing *Palmer v. Hoffman*, 318 US 109 (1943)).

<sup>129</sup> *Melendez-Diaz*, 129 S. Ct. at 2538.

<sup>130</sup> Brief of Petitioner, *supra* note 77, at 35.

<sup>131</sup> *Melendez-Diaz*, 129 S. Ct. at 2538. *See also* *Crawford*, 541 US at 47 n.2; *Giles v. California*, 128 S.Ct 2678, 2705-2706 (2008) (Breyer, J., dissenting).

referenced a “clerk’s certificate authenticating an official record—or a copy thereof—for use as evidence” as an example of a type of evidence prepared for use at trial, the admission of which was never questioned regarding the Confrontation Clause.<sup>132</sup> Justice Scalia responded that a “clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.”<sup>133</sup>

The final substantive assertion made by Massachusetts in their brief was that the “petitioner had the ability to subpoena the analyst.”<sup>134</sup> The majority responded by stating that neither state procedures that created an opportunity for an accused to subpoena an analyst that had drafted a scientific report, nor the Compulsory Process Clause of the Sixth Amendment were a “substitute for the right of confrontation.”<sup>135</sup> Justice Scalia stated,

Converting the prosecution’s duty under the Confrontation Clause into the defendant’s privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused . . . the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.<sup>136</sup>

As a result, the majority found that the admission of the laboratory reports during Melendez-Diaz’s trial violated his rights under the Confrontation Clause. By doing this, legal practitioners at least now knew a scientific report fits within the definition of “testimonial” for purposes of the Confrontation Clause. The question now became, how would this play out in a practical sense regarding day-to-day trial practice in criminal courts. More specifically regarding our scope here, what impact would the Court’s holding have regarding the use of scientific reports in courts-martial?

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<sup>132</sup> *Melendez-Diaz*, 129 S. Ct. at 2552-53 (Kennedy, J. dissenting).

<sup>133</sup> *Id.* at 2539.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 2540.

<sup>136</sup> *Id.*

## B. *Blazier* and *Nutt*—The Military Courts’ Response to *Melendez-Diaz*

As a result of the Supreme Court’s holding in *Melendez-Diaz*, defense counsel began to object to the introduction of laboratory reports in courts-martial. One such post *Melendez-Diaz* case in which a civilian defense counsel objected to the introduction of an Air Force Drug Testing Result was *United States v. Blazier*.<sup>137</sup> This case is the only post *Melendez-Diaz* case to date regarding the issue of introducing a laboratory report at trial that has been decided by the U.S. Court of Appeals for the Armed Forces (C.A.A.F.).

*United States v. Blazier* originated when Senior Airmen (SrA) Joshua Blazier “tested positive for d-amphetamine, d-methamphetamine, methylenedioxyamphetamine, and methylenedioxymethamphetamine (Amphetamine, Methamphetamine, MDA, and MDMA) at concentrations above the Department of Defense (DoD) cutoff level” in July of 2006.<sup>138</sup> The testing was conducted by the Air Force Institute for Operational Health, Drug Testing Division, also known as the “Brooks Lab.”<sup>139</sup> The Air Force Office of Special Investigations at Luke Air Force Base brought in SrA Blazier for an interview and asked for his consent to provide another sample. SrA Blazier consented and this second sample tested positive for THC, a metabolite of marijuana, at a concentration above the DoD cutoff level.<sup>140</sup> “On August 15, 2006, the military justice paralegal from [SrA Blazier’s] command sent a memorandum to the Brooks Lab requesting” the reports for the two positive samples.<sup>141</sup> In urinalysis cases, the requested report includes: “(a) a cover memorandum describing and summarizing both tests the urine samples were subjected to and the illegal substance discovered; and (b) attached records, including, *inter alia*, raw, computer-generated data; chain-of-custody documents; and occasional handwritten annotations.”<sup>142</sup> The cover memorandum is date stamped at the top of the page, and then states “[t]he specimen was determined to be presumptive positive by the ‘screen’ and the ‘rescreen’ immunoassay procedures. The specimen was then confirmed positive by Gas Chromatography/Mass Spectrometry (GC/MS).”<sup>143</sup> The memorandum then lists the concentrations found in the specimens tested and the DoD cutoff level for each illegal substance found, followed by “the signature of a ‘Results Reporting Assistant, Drug Testing Division.’” At the bottom portion of each memoranda, Dr. Vincent Papa signed the document as the “Laboratory Certifying Official,” verifying the “authenticity of the attached records and

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<sup>137</sup> 68 M.J. 439 (C.A.A.F. 2010).

<sup>138</sup> *Id.* at 440.

<sup>139</sup> *Id.*

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

<sup>141</sup> *Id.*

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

<sup>143</sup> *Id.*



stating they were ‘made and kept in the course of the regular conducted activity’ at Brooks Lab.”<sup>144</sup>

Prior to trial, SrA Blazier’s counsel filed a motion requesting the military judge either (a) keep the Government from admitting the drug testing reports and from calling its expert forensic toxicologist, Dr. Papa, or (b) compel the Government to produce the actual laboratory personnel “who had the most important actions involved in the samples.”<sup>145</sup> The military judge denied the motion, concluding the reports were nontestimonial under *Crawford* and *United States v. Magyari*.<sup>146</sup> In *Magyari*, the accused was found guilty by a special court-martial of wrongful use of methamphetamine.<sup>147</sup> In that opinion, C.A.A.F. ruled that data entries by technicians at the Navy’s drug screening laboratory did not constitute testimonial statements within the scope of the Confrontation Clause.<sup>148</sup> In zeroing in on the third prong of *Crawford*,<sup>149</sup> Judge Baker stated in *Magyari*, “these lab technicians were not engaged in a law enforcement function, a search for evidence in anticipation of prosecution or trial. Rather, their data entries were ‘simply a routine, objective cataloging of an unambiguous factual matter.’”<sup>150</sup> For the same reasons, the military judge in *Blazier* determined that the personnel at the Brooks Lab did not associate the sample they were testing with the accused, and thus were nontestimonial.<sup>151</sup>

When the case went before the Air Force Court of Criminal Appeals (AFCCA), the appellate court took the same approach as the military judge, which was to focus “on the impetus behind the June and July urinalyses and, relatedly, the subjective expectations of those conducting the various tests.”<sup>152</sup> By the time the case had reached C.A.A.F., *Melendez-Diaz* had been decided by the Supreme Court, which forced lower courts to take on new considerations. In the opinion by Judge Ryan, C.A.A.F. ruled that “the drug testing report cover memoranda of August 16 for both the June and July tests are themselves testimonial.”<sup>153</sup> The reasoning behind this being that both of the reports were requested by the Government specifically for use as evidence in a court-martial.<sup>154</sup> The court stated that “[s]imilar to the sworn certificates of analysis in *Melendez-Diaz*, the top portion of the drug testing cover memoranda . . . identify the presence of an illegal drug . . .

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 441.

<sup>146</sup> *Id.* See also *U.S. v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006).

<sup>147</sup> *Magyari*, 63 M.J. at 123.

<sup>148</sup> *Id.* at 126.

<sup>149</sup> “Statements made under circumstances that would cause a reasonable witness to believe they could be used at trial.” (*Crawford*, 541 U.S. at 57).

<sup>150</sup> *Magyari*, 63 M.J. at 126.

<sup>151</sup> *Blazier*, 68 M.J. at 441.

<sup>152</sup> *Id.* at 442.

<sup>153</sup> *Id.*

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

[a]nd the evidentiary purpose of those memoranda was apparent.”<sup>155</sup> The court, however, was unwilling at that time to opine regarding whether the introduction of the second part of the laboratory report, the attached records, violated SrA Brazier’s right to confrontation.

In comparing the current case to *Melendez-Diaz*, Judge Ryan stated, “[h]ere, while Dr. Papa did not personally perform or observe the testing . . . or author the cover memoranda, he was the certifying official for the . . . reports and was recognized as an expert . . . . Neither party has addressed the relevance of these facts to the disposition of this case.”<sup>156</sup> As a result, the court decided to “seek the views” of both parties with regard to whether (a) the Confrontation Clause was satisfied by Dr. Papa’s testimony, or (b) if it did not itself, whether the introduction of the testimonial statements was nevertheless harmless if “he was qualified as, and testified as, an expert under M.R.E. 703.”<sup>157</sup> Although it was held that the cover memoranda were testimonial, this case left the door somewhat open regarding the future of introducing drug reports at trial, and whether calling an expert, such as Dr. Papa, to testify would satisfy the requirements of *Melendez-Diaz*.

In December of 2010, after receiving multiple briefs regarding the two particular issues raised by C.A.A.F. in *Blazier I*,<sup>158</sup> Judge Ryan issued a follow-up opinion regarding the issues presented by Dr. Papa’s testimony as the certifying official and as an expert, his use of the lab reports, and whether his testimony could either be viewed as permissible under the Confrontation Clause or whether it constituted more than harmless error.

Judge Ryan began his opinion by reiterating the court’s conclusion in *Blazier I*, that the top cover portion of the drug testing reports were testimonial.<sup>159</sup> “[W]e are satisfied that the signed, certified cover memoranda—prepared at the request of the Government for use at trial, and which summarized the entirety of the laboratory analysis in the manner that most directly ‘bore witness’ against Appellant—are testimonial under current Supreme Court precedence.”<sup>160</sup> Judge Ryan then went on to observe; however, that there was a distinction between *Blazier* and *Melendez-Diaz*. He stated that in *Melendez-Diaz*, “the certificates were introduced as evidence without more: no one was subject to cross-examination . . . . Here, while Dr. Papa did not personally perform or observe the testing . . . or author the cover memoranda, he was the certifying official.”<sup>161</sup> Further, Judge Ryan noted that Dr. Papa was qualified as an expert under Military Rule of Evidence (M.R.E.) 703 in the “pharmacology area of drug testing

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<sup>155</sup> *Id.* at 443.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 444.

<sup>158</sup> *U.S. v. Blazier*, 69 M.J. 218, 220 (C.A.A.F. 2010).

<sup>159</sup> *Id.* at 221.

<sup>160</sup> *Id.* at 221 n.1. See also *Melendez-Diaz*, 129 S. Ct. at 2532 (2009); *Crawford v. Washington*, 541 U.S. at 51-53 (2004).

<sup>161</sup> *Blazier*, 69 M.J. at 221.

and forensic toxicology.”<sup>162</sup> For C.A.A.F., the first question in the follow-on opinion became whether the cross-examination of Dr. Papa, as the certifying official, satisfied the requirements of the Confrontation Clause.<sup>163</sup>

Regarding whether Dr. Papa’s testimony at trial satisfied the Appellant’s right to confrontation, the court ruled unequivocally “there can be no disagreement about who is the ‘witness the accused has the right to confront. That witness is the declarant.’”<sup>164</sup> As a result, “the right to confrontation is not satisfied by confrontation of a surrogate for the declarant,”<sup>165</sup> in this case, Dr. Papa. Thus the court held that the “cross-examination of Dr. Papa was not sufficient to satisfy the right to confront Jaramillo and Lee”;<sup>166</sup> the two lab technicians who actually conducted the testing. Interestingly enough, the court stated that the “introduction of [Jaramillo and Lee’s] statements as prosecution exhibits violated the Confrontation Clause”;<sup>167</sup> however, later in the opinion the court still refused to fully discuss which documents in the drug testing reports were testimonial,<sup>168</sup> thus yet again leaving practitioners to wonder what exactly fits the definition of testimonial, especially with regard to drug laboratory test results. Judge Ryan then turned to addressing the “altogether different question as to the permissible bases and content of Dr. Papa’s expert opinion testimony.”<sup>169</sup>

M.R.E. 702 states that a qualified expert witness may give testimony in the form of opinion if “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”<sup>170</sup> Further, M.R.E. 703 states that an expert witness may rely on facts or data “perceived or made known to the expert, at or before the hearing.”<sup>171</sup> If the facts or data are of the type an expert would usually rely on, then those facts or data do not have to actually be admissible in order for the expert to testify at trial regarding his opinion or inference reached based upon those facts and data; however, the expert is precluded from discussing on the stand the underlying facts or data relied upon unless “the military judge determines that their probative value in assisting the members to evaluate the expert’s opinion *substantially* outweighs their

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 222.

<sup>164</sup> *Id.*

<sup>165</sup> *Blazier*, 69 M.J. at 223 (citing *U.S. v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009); *State v. Locklear*, 681 S.E.2d 293, 305 (N.C. 2009).

<sup>166</sup> *Blazier*, 69 M.J. at 224.

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

<sup>168</sup> *Id.* at 227 n.1.

<sup>169</sup> *Id.* at 224.

<sup>170</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 702 (2008) [hereinafter MCM].

<sup>171</sup> MCM, *supra* note 170, MIL. R. EVID. 703.

prejudicial effect.”<sup>172</sup> In *Blazier II*, although Dr. Papa was qualified as an expert without an objection from defense counsel, Judge Ryan stated that “the question here is whether and to what extent Dr. Papa’s testimony violated the Confrontation Clause and/or M.R.E. 703 by relaying testimonial hearsay.”<sup>173</sup>

Judge Ryan next looked at the testimony of Dr. Papa and the types of facts and data he relied upon in reaching his conclusion that the Appellant had ingested an illegal substances above the DoD cutoff level. The court stated, “[f]irst, it is well-settled that under both the Confrontation Clause and the rules of evidence, machine-generated data and printouts are not statements and thus not hearsay—machines are not declarants—and such data is therefore not ‘testimonial.’”<sup>174</sup> Second, it is permissible for an expert witness to review and rely upon the work of others, “including laboratory testing conducted by others, so long as they reach their own opinions in conformance with evidentiary rules,” such as M.R.E. 702 and M.R.E. 703.<sup>175</sup> Finally, Judge Ryan stated that although an expert witness may discuss his opinion, which is based on facts and data resulting from testing conducted by others, he cannot “act as a conduit for *repeating* testimonial hearsay.”<sup>176</sup> C.A.A.F. concluded that with regard to the “machine-generated printouts of raw data and calibration charts,” contained in the laboratory reports, Dr. Papa’s testimony explaining and analyzing these documents was permissible and did not violate either the Confrontation Clause or M.R.E. 703.<sup>177</sup> Further, it was permissible under the rules of evidence for Dr. Papa to present ultimate conclusions because they were his own.<sup>178</sup> However, at different points in his testimony, Dr. Papa repeated testimonial hearsay regarding the results reached by the laboratory technicians, plus the cover memoranda containing testimonial statements were admitted into evidence.<sup>179</sup> As a result, the court determined that further analysis should be conducted regarding whether the admission of the testimonial hearsay by Dr. Papa, the repetition of the results reached by the Brooks Lab technicians, and the introduction of the cover memoranda, *in toto*, were harmless error or whether it warranted reversal of Appellant’s conviction.<sup>180</sup> The court

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<sup>172</sup> MCM, *supra* note 170, MIL. R. EVID. 703 (emphasis added).

<sup>173</sup> *Blazier*, 69 M.J. at 224.

<sup>174</sup> *Blazier*, 69 M.J. at 224 (citing *United States v. Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008); *U.S. v. Moon*, 512 F.3d at 362 7th Cir. 2008); *U.S. v. Washington*, 498 F.3d 225, 230-31 (2007); *United States v. Hamilton*, 413 F.3d 1138, 1142-43 (10th Cir. 2005); *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003)).

<sup>175</sup> *Blazier*, 69 M.J. at 224. *See also Moon*, 512 F.3d at 362; *Washington*, 498 F.3d at 228-32.

<sup>176</sup> *Blazier*, 69 M.J. at 225. Judge Ryan went on to quote *U.S. v. Avala*, 601 F.3d 256, 275 (4th Cir. 2010): “[T]he question when applying *Crawford* to expert testimony is ‘whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.’” (quoting *U.S. v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009)).

<sup>177</sup> *Blazier*, 69 M.J. at 225.

<sup>178</sup> *Id.* at 226.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 226-227.

remanded the case back to AFCCA in order to determine whether the above admissions were “harmless beyond a reasonable doubt,” adding in a footnote that AFCCA could also make a determination on whether “other documents within the drug testing reports for the June and July tests . . . were testimonial.”<sup>181</sup>

Although *Blazier II* helped to clarify a way in which the Government can safely avoid violating the Confrontation Clause when presenting a case involving drug laboratory reports, it still failed to fully address which parts of these reports are and are not testimonial. Thus the question still remains: Will C.A.A.F. ever opine completely on each part of the laboratory reports, or will this issue be slowly refined at lower levels of appeal? Another case that was granted review by C.A.A.F. involving similar issues to *Blazier I* and *Blazier II* was *United States v. Nutt*.<sup>182</sup> Like *Blazier*, *Nutt* also involved an Airman who tested positive for an illegal substance as a result of a urinalysis. This case also involved the admission of the drug testing report (DTR) at trial and the testimony of an expert witness. On appeal, the appellant argued that the admission of the report violated his Confrontation Clause rights.<sup>183</sup>

Jerrod Nutt was an active duty firefighter assigned to the 27th Special Operations Civil Engineer Squadron at Cannon Air Force Base.<sup>184</sup> On 17 March 2008, Nutt submitted to a random urinalysis that was sent to the Brooks Lab for forensic testing. The results came back as positive for benzoylecgonine, a metabolite of cocaine, and Nutt (hereinafter “appellant”) was convicted at a Special Courts-Martial of one specification of wrongfully using cocaine.<sup>185</sup> On appeal, appellant argued that his Confrontation Clause rights under the Sixth Amendment were violated as a result of the admission of the drug testing report at trial.<sup>186</sup> The appellant argued that the analyst’s statements in the DTR were testimonial as a result of the Supreme Court’s ruling in *Melendez-Diaz*; however, the Government argued that the contents of the DTR were not testimonial because the Confrontation Clause does not mandate the production of “all participants in the process of scientific testing,” and “the appellant fully exercised any applicable confrontation rights by cross-examining the government’s expert witness.”<sup>187</sup>

In an opinion by Judge Helget, the court held that in light of its own opinion in *Blazier*, C.A.A.F.’s decision in *Magyari*, which was decided prior to *Melendez-Diaz*, and the Fourth Circuit’s decision in *United States v. Washington*,<sup>188</sup>

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<sup>181</sup> *Id.* at 227 n.9.

<sup>182</sup> 2010 WL 2265272 (A.F. Ct. Crim. App), *review granted*, No. 10-0668 (C.A.A.F. 2010).

<sup>183</sup> *U.S. v. Nutt* was decided prior to C.A.A.F.’s opinion in *Blazier II*, but after *Blazier I*.

<sup>184</sup> *Id.* at 1.

<sup>185</sup> *Id.* Nutt was also convicted of one specification of fraudulent enlistment.

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

<sup>187</sup> *Id.*

<sup>188</sup> 498 F.3d 225 (4th Cir. 2007)

[W]e find that the admission of the DTR in this case was not in error. We do not find that *Melendez-Diaz* applies in this situation because the raw data contained in the DTRs are not statements made by the lab technicians and the government called an expert . . . who was subject to extensive cross-examination by the appellant's counsel.<sup>189</sup>

Judge Helget stated that even though C.A.A.F., in *Blazier*, had ruled that the cover page of a DTR is testimonial, the military judge in the present case only committed harmless error by introducing the full DTR into evidence. The opinion stated, “[t]he government provided the testimony of Dr. DT, an expert forensic toxicologist assigned to the [Brooks Lab], who testified under direct and extensive cross-examination about the entire DTR and the results of the test. Under these circumstances, the admission of the cover page was harmless error.”<sup>190</sup>

Although AFCCA reached a somewhat similar conclusion as C.A.A.F. in *Blazier II*, the court's ruling in this case raises several issues. First, the court lumped the whole DTR together and made the blanket statement that *Melendez-Diaz* did not apply “because the raw data contained in the DTRs are not statements made by lab technicians”<sup>191</sup> even though the reports were still the result of a *combination* of analysis and mechanical output.<sup>192</sup> The court failed to distinguish the report in this case from the drug report used at the trial of *Melendez-Diaz*, and the opinion contained no analysis of the different parts of the report to explain how their conclusion complied with the precedence established by the Supreme Court. Second, AFCCA failed to discuss in depth the implications of the fact that out of court “testimony” was introduced at trial without the appellant having the ability to cross-examine the proponent of the testimony. In light of *Melendez-Diaz* and *Blazier I*, this conclusion seems to be in direct opposition to established precedence at the time of the decision. In *Melendez-Diaz*, the Supreme Court stated that the Confrontation Clause provides the accused the ability to attack the results of the report, which is accomplished through the cross-examination of the report's author.<sup>193</sup> In the present case, the court ruled that the ability to cross-examine the expert witness was sufficient. Not only were the cover pages of the DTR admitted at trial in *Nutt* without the opportunity to cross-examine the actual laboratory technicians, the expert witness was allowed to testify “about the

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<sup>189</sup> *Nutt*, 2010 WL 2265272 at 4.

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

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

<sup>192</sup> In *Blazier II*, the court stated in a footnote that of the two DTRs, 87 percent of the first report contained “machine printouts,” and only 59 percent of the second report contained such data. *Blazier*, 69 M.J. at 226 n.6. That leaves up to 41 percent of a DTR that is potentially testimonial.

<sup>193</sup> See *Melendez-Diaz*, 129 S. Ct. at 2527.

entire report and the results of the test.”<sup>194</sup> As a result, non-admissible testimonial evidence was introduced more than once at trial in contravention of the Supreme Court’s ruling in *Melendez-Diaz*, and C.A.A.F.’s ruling in *Blazier I*, in which they stated that at a minimum the cover affidavit to the DTR is testimonial hearsay. Because of the issues presented in *Nutt*, and in light of the similarities of this case to *Blazier*, it will be interesting to see how C.A.A.F. approaches this case, and whether they will delve specifically into the issue of which parts of a DTR are testimonial for purposes of *Melendez-Diaz*, or whether the issue will be remanded back down to the lower courts.

### C. The Future of Confrontation Clause Analysis

The case law leaves us with a somewhat muddled idea of where the courts are going to come out on the issue of the admissibility of scientific reports in courts-martial. Regarding DTRs, based on C.A.A.F.’s ruling in *Blazier II*, any part of the report that is purely a printout of information generated by a machine or computer will be admissible, and an expert will be allowed to “rely on, repeat, or interpret” such data at trial.<sup>195</sup> Furthermore, experts will be permitted to rely on and use to formulate their opinions, any testimonial hearsay such as conclusions reached by the laboratory technicians contained in a DTR. Finally, any testimonial hearsay within a DTR will not be admissible unless the Government produces the technician who drafted the report to testify at trial.<sup>196</sup> One question that still remains is what information from the report can be classified as “testimonial hearsay.” For now, that issue has been referred back to the lower courts for further development. The other issue raised in *Blazier* and other cases is the issue of who is required to testify at trial in order to satisfy the requirements of the Confrontation Clause. Many cases have referenced Justice Scalia’s footnote in *Melendez-Diaz* stating that not everyone whose testimony “may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case.”<sup>197</sup> A recently decided case that addressed this issue, *Bullcoming v. New Mexico*,<sup>198</sup> was granted certiorari by the Supreme Court while this article was being drafted. This case involved a defendant who was convicted of aggravated driving while under the influence of intoxicating liquor.<sup>199</sup>

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<sup>194</sup> *Nutt*, 2010 WL 2265272 at 4 (emphasis added).

<sup>195</sup> *Blazier*, 69 M.J. at 222.

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

<sup>197</sup> *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

<sup>198</sup> 226 P.3d 1 (N.M. 2010), cert. granted 131 S. Ct. 62 (2010), renumbered No. 09-10876, 2011 Term.

<sup>199</sup> *Bullcoming*, 226 P.3d at 1.

In *Bullcoming*, the Government introduced at trial a laboratory report containing the blood alcohol levels of the defendant shortly after his arrest. The technician that prepared the report was not present for trial; however, a qualified analyst “for the New Mexico Department of Health, Scientific Laboratory Division, Toxicology Bureau (SLD), who helps in overseeing the breath and blood alcohol programs throughout the state,”<sup>200</sup> took the stand at trial and testified regarding the report, much like the expert used at trial in *Blazier*. In *Bullcoming*, the Supreme Court of New Mexico ruled,

Although the blood alcohol report was testimonial, we conclude that its admission did not violate the Confrontation Clause, because the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine and, therefore, the live, in court testimony of another qualified analyst was sufficient to satisfy Defendant’s right to confrontation.<sup>201</sup>

In reaching this conclusion, the court stated that the “evidence revealed that [the laboratory technician] simply transcribed the results generated by the gas chromatograph machine. He was not required to interpret the results.”<sup>202</sup> Thus, the court argued that the analyst who prepared the report was not the “accuser” in this instance for purposes of the Confrontation Clause, but instead the accuser was the “gas chromatograph machine . . . [that] detected the presence of alcohol in the Defendant’s blood, assessed Defendant’s BAC, and generated a computer print-out listing the results.”<sup>203</sup> The court stated that the analyst who was present at trial was able to provide live, in-court testimony regarding the process surrounding the test, was a qualified expert on the machine used to test the Defendant’s blood, and was cross-examined regarding the workings of the machine and the results of the test. As a result, the court ruled the analyst’s testimony fulfilled the requirements of the Confrontation Clause. As with *Nutt*, this holding seemed contrary to the Supreme Court’s ruling in *Melendez-Diaz*. Just as in *Bullcoming*, the Government in *Melendez-Diaz* introduced a report containing prima facie evidence necessary to prove an element of the offense.<sup>204</sup> In that case, the report was introduced to show that Melendez-

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<sup>200</sup> *Id.* at 5.

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

<sup>202</sup> *Id.* at 8.

<sup>203</sup> *Id.* at 9. In reaching this conclusion, the Supreme Court of New Mexico relied on *U.S. v. Moon*, 12 F.3d 359, 362 (7th Cir. 2008), *U.S. v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007), and *U.S. v. Hamilton*, 413 F.3d 1138, 1142-43 (10th Cir. 2005). All of these cases, which multiple courts have relied on in reaching similar conclusions (including *Blazier* and *Nutt*), were decided prior to *Melendez-Diaz*.

<sup>204</sup> *Melendez-Diaz*, 129 S. Ct. at 2531.



Diaz possessed cocaine. In *Bullcoming*, the report was introduced to show that the defendant had a blood-alcohol content over the legal limit. The Supreme Court of New Mexico in *Bullcoming* distinguished the report introduced at trial from the report in *Melendez-Diaz* by ruling it was the result of computer-generated printouts, and thus the corresponding testimony of the surrogate state analyst was sufficient to satisfy the requirements of the Confrontation Clause. The U.S. Supreme Court disagreed, and in a five to four opinion, Justice Ginsberg reversed the decision of the New Mexico Supreme Court by ruling that “surrogate testimony of that order does not meet the constitutional requirement” of the Confrontation Clause.<sup>205</sup>

In the Supreme Court’s majority opinion, Justice Ginsberg was joined fully by Justice Scalia, by Justices Sotomayor and Kagan to all but Part IV of the opinion, and by Justice Thomas to all except Part IV and footnote 6. Justice Ginsberg stated,

We granted certiorari to address this question: Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification.<sup>206</sup>

The Supreme Court answered by stating that unless the “witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness,” the introduction of the forensic laboratory report is prohibited.<sup>207</sup> In discussing why the surrogate testimony did not meet the requirements of the Confrontation Clause, the Court stated that the actual technician performing the test certified that he had received *Bullcoming*’s blood, he “checked to make sure that the forensic report number and the sample number ‘correspond[ed],’ and that he performed . . . a particular test, adhering to a precise protocol.”<sup>208</sup> The Court concluded, “[t]hese representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination.” Further, Justice Ginsburg stated, “the comparative reliability of an analyst’s testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar.”<sup>209</sup> Because the technician who actually handled the evidence and performed the testing was not presented at trial, the accused was only afforded the opportunity to cross-examine a surrogate

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<sup>205</sup> *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713 (2011).

<sup>206</sup> *Id.* at 2713.

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

<sup>208</sup> *Id.* at 2714.

<sup>209</sup> *Id.* at 2715.

technician that “could not convey what [the technician who performed the test] knew or observed about the events his certification concerned . . . . Nor could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.”<sup>210</sup> The Supreme Court concluded that that Confrontation Clause “does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.” Instead, the only means of satisfying the requirements of confrontation is through the opportunity to cross-examine the actual witness making the statement, even if the results of the test are raw, machine-generated data.

Although the Supreme Court’s ruling in *Bullcoming* is fairly recent, in light of the case, the Army Court of Criminal Appeals has already addressed the issue of using a surrogate witness’s testimony at trial in order to introduce a drug report. In the unpublished decision of *U.S. v. Harrington*, the Army Court of Criminal Appeals ruled that “the use of a surrogate witness ‘who did not sign the certificate or perform or observe the test’ in question is not a constitutional substitute for the cross-examination of the declarant whose testimonial statement is actually admitted into evidence.”<sup>211</sup> This case could be indicative of a move by military courts to require, as a result of *Bullcoming*, the testimony of the actual technician who performed the test in order to admit the test results. It is still unclear, however, how courts will treat expert witnesses that are used at trial to discuss laboratory results. Justice Sotomayor touched on this issue in her concurring opinion in *Bullcoming* when she stated the Court’s decision did not address whether expert analysts can present an ultimate opinion based upon the reports generated by other analysts in accordance with evidentiary rules such as M.R.E. 703, even if the actual report is inadmissible.<sup>212</sup>

In *Blazier*, the court ruled that expert witnesses could rely on testimonial hearsay “so long as the expert opinion arrived at is the expert’s own.”<sup>213</sup> *Nutt* and the New Mexico Supreme Court’s holding in *Bullcoming* seemed to take that one step further by indicating an expert witness could also potentially discuss the results of laboratory reports generated by other analysts, in accordance with evidentiary rules, if “the military judge determines that their probative value in assisting the members to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”<sup>214</sup> Ultimately, this would allow the Government to proffer inadmissible evidence through the back door by using the cover of an expert witness. Based on the majority opinions in *Melendez-Diaz* and *Bullcoming*, and

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<sup>210</sup> *Id.*

<sup>211</sup> 2011 WL 3299935 at 2 (Army Ct. Crim. App.) (Citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011)).

<sup>212</sup> *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J. concurring).

<sup>213</sup> *Blazier*, 69 M.J. at 222.

<sup>214</sup> *Id.* at 224 (quoting MCM, *supra* note 167 MIL. R. EVID. 703). See also *Bullcoming*, 226 P.3d at 10; *Nutt*, 2010 WL 2265272 at 4.

Justice Scalia's interpretation of the Confrontation Clause in *Crawford v. Washington*, it seems as though the Supreme Court would reject the argument that a drug laboratory report, or any reference thereto, could be admitted without the Government calling the actual analyst who conducted the tests to testify at trial for the following reasons.

When analysts in a drug laboratory conduct tests and draft a subsequent report, even if a machine or computer was used to analyze a specimen, these analysts are providing testimony by operating the equipment, handling the specimen, and then formulating the report. The majority opinion in *Melendez-Diaz* stated, “[t]o the extent the analysts were witnesses . . . they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine.”<sup>215</sup> This principle was reiterated in *Bullcoming*, when the Court stated, “the analysts who write reports that the prosecution introduces must be made available for confrontation.”<sup>216</sup> DoD analysts do the same thing in their DTRs as their civilian counterparts: they provide proof of one of the facts necessary for a drug conviction—that the specimen from the accused contained an illegal substance. In *Melendez-Diaz*, Massachusetts tried to argue the drug reports were the result of “neutral, scientific testing”<sup>217</sup> and thus non-testimonial; however, Justice Scalia rejected this argument, responding that the analysts were still providing testimony against the accused.<sup>218</sup> As a result, these reports contain significant portions that are testimonial and thus require the analyst who put the report together to testify at trial in order to afford the accused his right to confrontation under the Sixth Amendment. Based upon the *Melendez-Diaz* and *Bullcoming* decisions, it would seem that an expert forensic toxicologist will not suffice as the Government's primary witness without also producing the analyst who actually conducted the tests.

Although a drug report that is introduced at a court-martial could potentially be distinguished from the situation in *Melendez-Diaz*, where the state failed to produce both the analysts who authored the report and any reviewing authorities, the Supreme Court would likely rule, based on both *Melendez-Diaz* and *Bullcoming*, that not calling the actual analyst who authored the report still violates an accused's Confrontation Clause rights. Unlike the analyst who actually conducts the test and then authors the report, an expert witness only certifies that, to his or her knowledge, the report and testing were done in accordance with standards. The expert cannot, however, testify as to what was done in this particular instance and whether the tests were performed correctly, or whether the equipment operated properly. Even though it could be argued that technicians at the Brooks Lab cannot remember specific specimens they handled due to the

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<sup>215</sup> *Melendez-Diaz*, 129 S. Ct. at 2533.

<sup>216</sup> *Bullcoming*, 131 S. Ct. at 2715.

<sup>217</sup> *Melendez-Diaz*, 129 S. Ct. at 2536 (quoting Brief for Respondent, *supra* note 81, at 29).

<sup>218</sup> *Melendez-Diaz*, 129 S. Ct. at 2536.

high volume of testing they conduct, the Supreme Court has taken a fairly hard line regarding what is required for purposes of the Confrontation Clause. As the Court stated in *Bullcoming*, “the analysts who write reports that the prosecution introduces must be made available for confrontation.” Even if the expert’s analysis of machine generated data is reliable, she or he is still interpreting the results of testing conducted by somebody else without the accused ever having the opportunity to cross-examine the actual technician who handled the testing samples. The Supreme Court would therefore most likely state that although the testimony of the certifying expert may be beneficial, the Confrontation Clause guarantees the right to cross-examine any witness that “bears testimony against the accused,”<sup>219</sup> and nothing less. As a result, the person that actually handled and tested the specimen and authored the report would need to be called by the Government to testify at trial in order to admit testimonial portions of the drug laboratory report, even if the government intends to have an expert testify regarding those results. The right to confront one’s accuser should not be subverted by allowing an expert witness who was detached from the actual testing process to come in and testify regarding the results of the test.

#### IV. CONCLUSION

As a result of the Supreme Court’s ruling in *Melendez-Diaz*, “testimonial” documents, which includes certain types of scientific reports drafted in potential anticipation of criminal prosecution, require the opportunity for the accused to cross-examine the witness who conducted the analysis in order to admit such a report into evidence; however, there are still ambiguous areas regarding what exactly constitutes “testimonial.” Under military law, what we do know is that regarding the introduction of drug laboratory reports at trial, the cover memorandum is considered testimonial and thus requires the opportunity for confrontation. We also know, as a result of the Supreme Court’s holding in *Bullcoming*, that another analyst who did not perform the actual testing may not be called to testify concerning the results of the test if the original analyst is unavailable and the accused was not afforded a prior opportunity to cross-examine him or her. What we do not know is whether a detached expert witness who was not involved in the actual testing of the specimen can verify the conclusions included in a drug report, even if the drug report itself is inadmissible, or whether a supervisor with a limited connection to the test would suffice for Confrontation Clause purposes. Maybe Justice Kennedy was correct in stating in his dissent in *Bullcoming* that “the persistent ambiguities in the Court’s approach are symptomatic of a rule not amendable to sensible applications.”<sup>215</sup> It is yet to be seen how far the Court’s ruling in *Melendez-*

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<sup>219</sup> *Crawford*, 541 U.S. at 52.

<sup>215</sup> *Bullcoming*, 131 S. Ct. at 2715.

*Diaz* will reach; however, whenever discussing issues such as these we must always keep the plight of Sir Walter Raleigh fresh in our minds. Sir Raleigh's story exemplifies why we work so hard, and go to such great lengths, to maintain a military justice system that is fair and free from corruption.



THE BRADY BUNCH:  
AN EXAMINATION OF DISCLOSURE OBLIGATIONS IN THE  
CIVILIAN FEDERAL AND MILITARY JUSTICE SYSTEMS

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## I. PERFECT STRANGERS

The civilian federal and military justice systems are two separate, distinct systems of justice.<sup>1</sup> By necessity, the military justice system proscribes far more conduct than its civilian counterpart in order to maintain the discipline necessary for an effective fighting force.<sup>2</sup> Each system also utilizes separate rules to guide its administration of justice. Despite these differences, the two systems share the common goal of achieving justice.<sup>3</sup>

In both systems, discovery practice serves as the bedrock of the criminal justice process; it is present from the very beginning and continues throughout the proceedings. Therefore, a comparison between these two systems appropriately begins with an examination of the rules surrounding discovery practice. A comprehensive understanding of discovery is imperative to ensure that the goal of justice is being served.

In each system of justice, complex rules and regulations govern discovery practice. Many of the disclosure obligations are similar in the civilian federal and military justice systems and an examination of those similarities will assist the practitioner by providing guidance, explanation, and persuasive authority. Where the rules and regulations are dissimilar will also help the practitioner understand and appreciate the requirements surrounding discovery.

This article will begin by examining the evolution of the rules concerning discovery in both the civilian federal and the military justice systems. It will then discuss current discovery obligations and remedies for noncompliance. The article will also briefly highlight examples of prosecutorial misconduct resulting from discovery violations. The article will conclude with a discussion of proposed solutions for discovery issues and offer some tips for practitioners to ensure compliance with discovery obligations.

## II. THE FACTS OF LIFE

### A. Civilian Federal Law on Discovery

The development of rules regarding discovery in criminal cases began as a function of common law. Not surprisingly, the United States Supreme Court concluded long ago that basic principles of constitutional due process prohibit prosecutors from obtaining convictions through the

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<sup>1</sup> See *Parker v. Levy*, 417 U.S. 733, 744 (1974).

<sup>2</sup> See *id.* at 749.

<sup>3</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2008) [hereinafter MCM] (“The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”). See also *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1313 (S.D.Fla. 2009) (“A prosecutor has a responsibility to strive for fairness and justice in the criminal justice system.”).

presentation of evidence that is known to be false.<sup>4</sup> The Court soon recognized that due process may likewise be offended where the government's failure to disclose the truth to a fact-finder is less blatant or deliberate.<sup>5</sup> In time, it became apparent that a prosecutor's duty to disclose the true facts of a case should extend not only to evidence that was presented during the actual trial but also to disclosure of evidence to an accused prior to trial in preparation for a defense. For example, in the landmark case of *Brady v. Maryland*,<sup>6</sup> the defendant and his accomplice were convicted of a murder that occurred during a robbery and were sentenced to death.<sup>7</sup> At trial, the defendant admitted that he was responsible for murder but argued that he should not receive the death penalty because it was his accomplice who actually killed the victim and not him.<sup>8</sup> Although the defense was provided several statements of the accomplice prior to trial, the government withheld a statement by the accomplice in which the accomplice admitted that he had done the actual killing and not the defendant.<sup>9</sup> The defense requested a new trial after learning of the prosecution's failure to disclose the accomplice's exculpatory statement post-conviction but the trial court denied the request.<sup>10</sup> On appeal, the Third Circuit concluded that failure to disclose the accomplice's exculpatory statement pretrial violated the defendant's due process rights and remanded the case for retrial on the issue of punishment under Maryland law.<sup>11</sup> The Supreme Court affirmed,<sup>12</sup> holding that constitutional due process requires a prosecutor to disclose evidence that is favorable to a defendant upon request by the defense, "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>13</sup>

Over time, civilian courts have attempted to define, and in many ways expand, the "materiality" requirement announced in *Brady*. Evidence is considered to be material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

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<sup>4</sup> See *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942); see also *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

<sup>5</sup> See *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (recognizing that a due process violation occurs where the government fails to correct false testimony presented to the fact finder when it becomes apparent even if the prosecutor did not initially solicit the false testimony in bad faith).

<sup>6</sup> *Brady v. Maryland*, 373 U.S. 83 (1963) (holding due process violated when the prosecution withheld information requested by the defense that is material to the issue of guilt or sentence).

<sup>7</sup> *Id.* at 84.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 85.

<sup>12</sup> *Id.* at 91.

<sup>13</sup> *Id.* at 87.

would have been different.”<sup>14</sup> Under this “reasonable probability” standard, a defendant is not required to prove that it is more likely than not that presentation of the undisclosed evidence would have resulted in an acquittal.<sup>15</sup> Rather, “[a] ‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’”<sup>16</sup> The terminology used by civilian federal courts to define “material” evidence under this standard tends to vary to some degree.<sup>17</sup> In applying the standard, some civilian federal courts reach opposite conclusions when faced with somewhat similar facts on the issue of materiality.<sup>18</sup> Indeed, some courts have taken the view that a prosecutor should not use “materiality” and thus, the “reasonable probability” standard, as a basis for withholding evidence pretrial but should, instead, disclose any and all information which “tends to negate guilt of the accused or mitigate the offenses charged.”<sup>19</sup>

In spite of the variations in terminology used to define and apply the “reasonable probability standard,” the Supreme Court has continued to expand the requirements of *Brady*. For example, while the literal holding in *Brady* required the defense to make a request before the obligations under *Brady* apply,<sup>20</sup> it is now clear that *Brady* obligations exist without a specific request from the defense when the evidence at issue is “obviously of

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<sup>14</sup> *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

<sup>15</sup> *See* *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

<sup>16</sup> *Id.* at 434 (quoting *Bagley*, 473 U.S. at 678).

<sup>17</sup> *See, e.g.,* *United States v. Jordan*, 316 F.3d 1215, 1252 (11th Cir. 2003) (“Accordingly, under *Brady*, the government need only disclose during pretrial discovery (or later, at the trial) evidence which, in the eyes of a neutral and objective observer, could alter the outcome of the proceedings.”); *United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001) (declining to adopt a rule that would require immediate disclosure of all impeachment or exculpatory information without regard to materiality); *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995) (concluding that the mere possibility that information may help the defense is not enough to establish materiality); *United States v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995) (“[T]he effect that a particular piece of evidence is likely to have had on the outcome of a trial must be determined in light of the full context of the weight and credibility of all evidence actually presented at trial.”); *United States v. Sepulveda*, 15 F.3d 1216, 1220 (1st Cir. 1993) (“This somewhat Delphic ‘undermine confidence’ formula suggests that reversal might be warranted in some cases even if there is less than an even chance that the evidence would produce an acquittal.”); *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (defendant entitled to a new trial if undisclosed evidence would undermine the outcome of the trial).

<sup>18</sup> *Compare* *Silva*, 71 F.3d at 670-71 (finding that the defense did not demonstrate materiality of confidential informant’s identity necessary to require disclosure in order to support a vaguely articulated entrapment defense), *with* *United States v. Pesaturo*, 519 F. Supp. 2d 177 (D. Mass. 2007) (finding that the defense demonstrated materiality of confidential informant’s cooperation agreement requiring disclosure where defendant claimed that he would not have sold drugs in absence of the informant’s coercion).

<sup>19</sup> *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005). *See also* *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1201 (C.D. Cal. 1999).

<sup>20</sup> *See* *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

substantial value to the defense.”<sup>21</sup> Moreover, favorable evidence may be deemed discoverable under *Brady* regardless of whether the evidence is ultimately deemed admissible at trial.<sup>22</sup> Although some courts have recognized that *Brady* does not provide the defense with unfettered discretion to search all government files,<sup>23</sup> the Supreme Court has expressly stated that the prosecution has an affirmative duty to preserve evidence pre-trial that bears an “exculpatory value that was apparent before the evidence was destroyed.”<sup>24</sup>

The requirements of *Brady* have likewise been extended to include disclosure of any evidence which has a tendency to impeach government witnesses.<sup>25</sup> This often overlooked form of *Brady*-derived, favorable evidence is commonly referred to as “*Giglio* material” in practice. As will be discussed later in this article, disclosure of *Giglio* material should be a major concern for prosecutors during pre-trial discovery, as it is extremely likely that such material exists in almost every criminal case prosecuted. Furthermore, a prosecutor’s obligation to provide *Brady* material is a continuing duty in civilian federal courts that “continues throughout the judicial process.”<sup>26</sup>

Additionally, *Brady* requirements have been further expanded to require a prosecutor to learn of favorable evidence known to others acting on behalf of the government during the prosecution, including information that is “known only to police investigators and not to the prosecutor.”<sup>27</sup> As a general rule, a “[p]rosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant.”<sup>28</sup> For example, an Assistant United States Attorney will likely be charged with knowledge of the criminal records of witnesses that are actually in the possession of FBI agents assisting with a prosecution,<sup>29</sup> as well as impeachment evidence against a cooperating witness in a drug case that is in possession of DEA agents involved in the case.<sup>30</sup> Courts have generally refused to charge prosecutors with knowledge of information in possession of government agencies that are not working with the prosecutor’s offices

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<sup>21</sup> *United States v. Agurs*, 427 U.S. 97, 110 (1976); *see also* *United States v. Hanna*, 55 F.3d 1456, 1459 (9th Cir. 1995); *Harm v. State*, 183 S.W.3d 403 (Tex. Crim. App. 2006) (noting that a state prosecutor may not withhold *Brady* evidence even if the defendant has made no request for discovery or for specific evidence).

<sup>22</sup> *See* *Sudikoff*, 36 F. Supp. 2d at 1201.

<sup>23</sup> *See* *United States v. Jordan*, 316 F.3d 1215, 1251 (11th Cir. 2003).

<sup>24</sup> *California v. Trombetta*, 467 U.S. 479, 489 (1984).

<sup>25</sup> *See* *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985).

<sup>26</sup> *See* *Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009).

<sup>27</sup> *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437-38 (2006)).

<sup>28</sup> *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989).

<sup>29</sup> *See* *United States v. Senn*, 129 F.3d 886, 893 (7th Cir. 1997).

<sup>30</sup> *See* *United States v. Cardoso*, 642 F. Supp. 2d 251 (S.D.N.Y. 2009).

jointly in an investigation, such as tax returns in the possession of the Internal Revenue Service,<sup>31</sup> documents in possession of a regulatory agency like the Securities Exchange Commission,<sup>32</sup> or information possessed by the Bureau of Prisons.<sup>33</sup> Note, however, that a prosecutor may be required to turn over favorable evidence from government agencies that he has access to and knowledge of even if the evidence is possessed by an agency that is not involved in the investigation.<sup>34</sup>

Practitioners in civilian federal courts as well as military courts who may be searching for a concise, straightforward rule to determine whether a *Brady* violation has occurred should consult the Supreme Court's decision in *United States v. Strickler*.<sup>35</sup> In this decision, the Supreme Court provides a somewhat user-friendly, three-part test for analyzing *Brady* issues.<sup>36</sup> The defendant in *Strickler* was convicted of capital murder and later sought habeas review in federal court based on the prosecution's discovery violation.<sup>37</sup> At trial, one of the eyewitnesses testified extensively about seeing the defendant and others abduct the victim.<sup>38</sup> The witness testified unequivocally that she observed the abduction, testifying in detail and with marked certainty that she could positively identify both the victim and the defendant.<sup>39</sup> However, post-trial, the defendant learned of a number of documents, including letters from the witness to police and notes of the investigating officer indicating that in the weeks and months following the incident, the witness' memory of the events was very poor.<sup>40</sup> More specifically, some of the documents described the witness as having a "vague memory" or "muddled memories" regarding the issue of identifying the victim and the defendant.<sup>41</sup> The documents further noted that the witness was not able to identify the victim until several days following the incident after spending time looking at photos of the victim with her boyfriend.<sup>42</sup>

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<sup>31</sup> See *United States v. Lochmondy*, 890 F.2d 817, 823-24 (6th Cir. 1989) (no duty to disclose tax returns in the possession of IRS where IRS not jointly involved in the investigation with the U.S. Attorney's Office).

<sup>32</sup> See *United States v. Rigas*, 583 F.3d 108 (2d Cir. 2009) (no duty to disclose information in possession of SEC during proceedings that were not jointly undertaken with the U.S. Attorney's Office).

<sup>33</sup> See *United States v. Merlino*, 349 F.3d 144 (3d Cir. 2003) (no duty to disclose recorded jail phone calls by a witness where BOP not involved in the investigation with the U.S. Attorney's Office).

<sup>34</sup> See *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995) (prosecutor required to turn over prison records for which he had access and knowledge).

<sup>35</sup> *Strickler v. Greene*, 527 U.S. 263 (1999).

<sup>36</sup> *Id.* at 281-82.

<sup>37</sup> *Id.* at 265.

<sup>38</sup> *Id.* at 266.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 273-75.

<sup>41</sup> *Id.* at 273-75.

<sup>42</sup> *Id.*

Although the prosecution failed to disclose the information, the Court determined that the defendant was not entitled to a new trial based upon the discovery violation by the prosecutor.<sup>43</sup> In reaching this conclusion, the Court announced a three-prong test for materiality, stating, “There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must be suppressed by the [prosecution], either willfully or inadvertently; and prejudice must have ensued.”<sup>44</sup> Although the Court noted that the evidence was favorable to the accused and the prosecution failed to disclose the evidence under the first two prongs, the Court concluded that the defendant failed to establish prejudice.<sup>45</sup> In particular, the Court reasoned that there was sufficient evidence to establish guilt aside from the evidence that was not disclosed by the prosecution, including the testimony of two additional eyewitnesses and “considerable forensic and other physical evidence linking petitioner to the crime.”<sup>46</sup>

*Brady* has been further expanded to address the question of whether a prosecutor’s delay in turning over obviously favorable material constitutes a violation of due process. Discoverable material under *Brady* must generally be provided to the defense “‘in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial.’”<sup>47</sup> Although “[t]here is nothing in *Brady* . . . to require that such disclosures be made before trial,”<sup>48</sup> “[t]he trial judge must be given a wide measure of discretion to ensure satisfaction of this standard.”<sup>49</sup> As the United States Court of Appeals for the D.C. Circuit has noted,

[W]e believe that application of a strict rule in this area would inevitably produce some situations in which late disclosure would emasculate the effects of *Brady* or other situations in which premature disclosure would unnecessarily encourage those dangers that militate against extensive discovery in criminal cases, e.g. potential for manufacture of defense evidence or bribing of witnesses. Courts can do little more in determining the proper timing for disclosure than balance in each case the potential dangers

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<sup>43</sup> *Id.* at 296.

<sup>44</sup> *Id.* at 281-82.

<sup>45</sup> *Id.* at 282, 289-97.

<sup>46</sup> *Id.*

<sup>47</sup> *United States v. Rittweger*, 524 F.3d 171, 180 (2d Cir. 2008) (quoting *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007)).

<sup>48</sup> *United States v. McPartlin*, 595 F.2d 1321, 1346 (7th Cir. 1979).

<sup>49</sup> *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976), *cert denied*, 429 U.S. 924 (1976).

of early discovery against the need that Brady purports to serve of avoiding wrongful convictions.<sup>50</sup>

Thus, courts will generally consider the value of the evidence to the defense in determining whether a *Brady* violation occurred due to late disclosure.<sup>51</sup> For example, where the evidence at issue either fails to support or is of little substantive value to the defense theory, no violation may be found.<sup>52</sup> Conversely, late notification of exculpatory evidence regarding a key government witness may constitute a *Brady* violation if the delay is so close to trial that the defense is not afforded an adequate opportunity to incorporate the information into the defense's case.<sup>53</sup>

In addition to the constitutional duty to disclose favorable evidence to a defendant pursuant to *Brady* and its progeny, Congress has implemented a number of rule-based requirements via Rule 16 of the Federal Rules of Criminal Procedure.<sup>54</sup> Rule 16 imposes a number of disclosure requirements on a prosecutor to disclose a variety of items to a defendant pretrial including, but not limited to, statements of the defendant,<sup>55</sup> the defendant's record,<sup>56</sup> information relating to government experts,<sup>57</sup> certain items in possession of the government and other items material to the defense of the case.<sup>58</sup> The requirements of Rule 16 and the requirements imposed under *Brady* should be analyzed separately because each serves a different purpose: *Brady* serves to protect the defendant's fundamental constitutional rights and Rule 16 serves to make the criminal process more fair and efficient.<sup>59</sup> In fact, Rule 16 is broader than constitutional requirements imposed under *Brady* in order to "promote greater pretrial discovery," in the view that "broader discovery will contribute to the fair and efficient administration of justice...by minimizing the undesirable effect of surprise at the trial."<sup>60</sup> In addition to aiding the defense in preparing for trial or moving to suppress evidence, broader discovery under Rule 16 may also promote judicial economy by conserving resources.<sup>61</sup>

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<sup>50</sup> *Id.* at 973-74.

<sup>51</sup> *See id.* at 974.

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

<sup>53</sup> *See* Leka v. Portuondo, 257 F.3d 89, 99 (2d Cir. 2001).

<sup>54</sup> FED. R. CRIM. P. 16

<sup>55</sup> FED. R. CRIM. P. 16(a)(1)(A)-(a)(1)(B).

<sup>56</sup> FED. R. CRIM. P. 16(a)(1)(D).

<sup>57</sup> FED. R. CRIM. P. 16(a)(1)(F)-(a)(1)(G).

<sup>58</sup> FED. R. CRIM. P. 16(a)(1)(E).

<sup>59</sup> *See* United States v. Ghailani, 687 F. Supp. 2d 365, 371 (S.D.N.Y. 2010).

<sup>60</sup> United States v. Scafe, 822 F.2d 928, 936 (10th Cir. 1987), (quoting Committee on the Judiciary note to 1975 Enactment).

<sup>61</sup> *See* United States v. Percevault, 490 F.2d 126, 130 (2d Cir. 1974).

The defense must request disclosure under Rule 16 in order to trigger the rule's mandatory obligations.<sup>62</sup> Rule 16 provides a continuing duty to disclose on the prosecution that continues throughout the trial.<sup>63</sup> As with *Brady*, the appropriate time to provide disclosure is nonspecific and somewhat vaguely defined as being simply "timely."<sup>64</sup> Rule 16 specifically exempts the prosecutor's work product from disclosure.<sup>65</sup> However, prosecutors must remain mindful of the fact that a claim of work product will not eliminate the prosecutor's obligation to turn over otherwise discoverable material under Rule 16. For example, if the prosecutor obtains exculpatory material while preparing for trial, work product is not a basis for failing to abide by the requirements of Rule 16 regarding disclosure.<sup>66</sup> Notably, when the prosecution provides disclosure as required, Rule 16 imposes reciprocal discovery requirements on the defense.<sup>67</sup>

As with any rule of constitutional importance, case law has developed over the years interpreting the provisions of Rule 16. For example, some courts interpret rough agent notes taken during an interview with a defendant as being a "statement" which must be disclosed under Rule 16,<sup>68</sup> while other courts do not mandate disclosure of notes if a summary report of the agent's interview is provided.<sup>69</sup> Although the obligations under *Brady* and Rule 16 should be analyzed separately, there are some concepts that are common to both. For example, under both Rule 16 and *Brady*, the prosecution must disclose information that is "material" to the defense.<sup>70</sup> Materiality under Rule 16 requires "some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant to significantly alter the quantum of proof in his favor."<sup>71</sup> The definition of materiality under Rule 16 is often considered to be broader than the definition of materiality under *Brady*.<sup>72</sup> In addition, as with *Brady*, Rule 16 requires prosecutors to seek discoverable information from law enforcement agencies assisting with an investigation.<sup>73</sup>

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<sup>62</sup> See *United States v. Salerno*, 108 F.3d 730, 743 (7th Cir. 1997).

<sup>63</sup> FED. R. CRIM. P. 16(c).

<sup>64</sup> FED. R. CRIM. P. 16(a)(1)(G).

<sup>65</sup> FED. R. CRIM. P. 16(a)(2).

<sup>66</sup> See, e.g., *United States v. Rudolph*, 224 F.R.D. 503, 511 (N.D. Ala. 2004).

<sup>67</sup> FED. R. CRIM. P. 16(b).

<sup>68</sup> See *United States v. Brown*, 303 F.3d 582, 590 (5th Cir. 2002); *United States v. Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997).

<sup>69</sup> See *United States v. Clark*, 385 F.3d 609, 619 (6th Cir. 2004); *United States v. Almonhandis*, 307 F. Supp. 2d 253, 255 (D. Mass. 2004).

<sup>70</sup> FED. R. CRIM. P. 16(a)(1)(E)(i).

<sup>71</sup> *United States v. Caro*, 597 F.3d 608, 621 (4th Cir. 2010) (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975), *cert denied*, 423 U.S. 836 (1975)).

<sup>72</sup> See *Caro*, 597 F.3d at 620-21; see also *United States v. Conder*, 423 F.2d 904, 911 (6th Cir. 1970) ("We are therefore of the view that the disclosure required by Rule 16 is much broader than that required by the due process standards of *Brady*.").

<sup>73</sup> FED. R. CRIM. P. 16(a)(B)(i) (requiring disclosure of statements that are either within "the government's possession, custody, or control," or that "the attorney for the government knows—or through due diligence could know—that the statement exists."). This provision



Rule 16 specifically authorizes courts to regulate and resolve disclosure issues providing that, “[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.”<sup>74</sup> In practice, this provision of Rule 16 can be very helpful to both prosecutors and defense. Often, prosecutors are faced with competing duties regarding discovery. On the one hand, prosecutors are specifically mandated to turn over favorable evidence to an accused while on the other hand, the prosecutor must be cautious to avoid unintended consequences of disclosure to the public welfare. For example, disclosure in some cases, while mandated by *Brady* and/or Rule 16, may pose a risk of harm to a victim or witnesses, or may compromise national security.<sup>75</sup> This provision of Rule 16 permits prosecutors to make an ex parte, *in camera* submission to the court of any potentially discoverable information so that the court may resolve the discovery issue.<sup>76</sup> The court may either require disclosure or issue a protective order finding that disclosure is not mandated under the circumstances. Since the court is authorized under this rule to “restrict” disclosure,<sup>77</sup> the court may choose to provide limited disclosure to the defendant only. In practice, a court may choose to disclose the information to the defendant with certain restrictions including limitations on who may access the information provided to the defense. Thus, by way of example, a defendant may suggest a protective order limiting disclosure where it seems that a trial judge may be reluctant to allow disclosure of otherwise discoverable information for fear of compromising the security of a witness or a victim.

In addition to the requirements of Rule 16, a civilian practitioner must be aware that most federal district courts have developed local rules addressing various procedural matters, some of which include pretrial discovery.<sup>78</sup> Some of these rules may impose obligations which seem more stringent than the constitutional *Brady-Giglio* requirements or the mandates of Rule 16.<sup>79</sup> For example, the United States District Court for the District of Massachusetts requires prosecutors to provide “Automatic Discovery”<sup>80</sup> of certain listed materials including exculpatory material.<sup>81</sup> Exculpatory material is broadly defined in that District to include any material that casts

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appears to codify the constitutional duty under *Brady* requiring that a “[p]rosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant.” *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989).

<sup>74</sup> Fed. R. Crim P. 16(d)(1).

<sup>75</sup> Memorandum from David Ogden on Guidance for Prosecutors Regarding Criminal Discovery to Department Prosecutors (Jan. 4, 2010), available at <http://www.justice.gov/dag/discovery-guidance.html>.

<sup>76</sup> FED. R. CRIM. P. 16(d)(1).

<sup>77</sup> *Id.*

<sup>78</sup> See, e.g., D. Mass. Local Rule 116.1, 116.2, available at <http://www.mad.uscourts.gov/general/pdf/combined01.pdf>.

<sup>79</sup> See *id.*

<sup>80</sup> D. Mass. Local Rule 116.1(A), available at <http://www.mad.uscourts.gov/general/pdf/combined01.pdf>.

<sup>81</sup> See *id.*

doubt on the defendant's guilt, on the admissibility of evidence, or on the credibility of any government evidence.<sup>82</sup> It also includes material that may diminish the defendant's culpability at sentencing.<sup>83</sup>

## B. Military Law on Discovery

As in the civilian sector, military discovery rules stem from an accused's constitutional right to due process.<sup>84</sup> The military prides itself on its generous provisions for open and early discovery in trials by courts-martial. The Court of Appeals for the Armed Forces (C.A.A.F.) has emphasized that Congress and the President enacted higher standards for discovery in trials by courts-martial.<sup>85</sup> C.A.A.F. has also noted, "The military justice system has been a leader with respect to open discovery. . . ."<sup>86</sup>

Military discovery is designed to be broader than in civilian federal criminal proceedings in an effort to eliminate pretrial "gamesmanship."<sup>87</sup> This liberal approach is evident throughout the military cases that adopt and expand *Brady*. As in the civilian sector, a *Brady* violation occurs if the government suppresses favorable evidence that is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.<sup>88</sup> In the military, however, courts have adopted a "materiality" test that reflects the expansive rights of an accused in a military trial.

A military court will review the concept of materiality at two levels.<sup>89</sup> The first is at the trial level and involves a determination as to whether the information would be "material to the defense" in the preparation of their case.<sup>90</sup> The second analysis is at the appellate level, and involves a determination of whether the evidence is "material either to guilt or to punishment."<sup>91</sup> As in the civilian system, the military recognizes that nondisclosure of evidence will result in a constitutional due process violation if there is a "reasonable probability" sufficient to "undermine confidence in the outcome."<sup>92</sup>

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<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005).

<sup>85</sup> See *United States v. Eshalomi*, 23 M.J. 12, 24 (C.M.A. 1986).

<sup>86</sup> *United States v. Williams*, 50 M.J. 436, 439 (C.A.A.F. 1999); see also *United States v. Enloe*, 35 C.M.R. 228, 230 (C.M.A. 1965) (congressional intent to provide military accused with broader right of discovery than civilian defendants).

<sup>87</sup> See *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004); see also *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004) ("The military justice system provides for broader discovery than required by practice in federal civilian criminal trials.").

<sup>88</sup> See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>89</sup> See *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004).

<sup>90</sup> See *id.*

<sup>91</sup> *Brady*, 373 U.S. at 87; see also *Roberts*, 59 M.J. at 326.

<sup>92</sup> *United States v. Bagley*, 473 U.S. 667, 682 (1985); see also *Roberts*, 59 M.J. at 326.

While the civilian federal courts may vary in their application of “materiality,” the military courts consistently apply a two-step analysis when it reviews disclosure issues.<sup>93</sup> First, the court looks to see whether the information at issue was subject to disclosure and second, if the information was not disclosed, the court examines the effect of that nondisclosure on the accused’s trial.<sup>94</sup> If the information was subject to disclosure but not disclosed, the court will review the materiality of the withheld information by examining “the impact that information would have had on the results of the trial proceedings.”<sup>95</sup>

Military appellate courts have adopted two tests for improperly withheld evidence.<sup>96</sup> If the defense did not make a discovery request or made only a vague, general request for discovery, the accused will only be entitled to relief if he can show a “reasonable probability” of a different outcome at trial, had the information been disclosed.<sup>97</sup> If the defense made a specific request for discovery, however, or if there was prosecutorial misconduct, the application of the “reasonable probability” standard is much more favorable to an accused. Unlike the civilian system, a military court will “give the benefit of any reasonable doubt to the military accused”; that is, if the court has a reasonable doubt as to whether the outcome of the proceeding would have been different, it will grant relief to the military accused.<sup>98</sup> As such, the military prosecutor may face a heavier burden to uphold a conviction if discoverable evidence has been withheld.<sup>99</sup> This incredibly high standard embodied in the second test does not have a civilian counterpart; rather, it is a reflection of the expansive military discovery rights under Article 46, UCMJ.<sup>100</sup>

In addition to exculpatory evidence, the military also recognizes that impeachment evidence is subject to discovery.<sup>101</sup> Impeachment evidence, also known as “*Giglio*” material, includes disclosure of evidence that may affect the credibility of a government witness.<sup>102</sup> As with exculpatory evidence, impeachment evidence “can obviously be material evidence at a criminal trial.”<sup>103</sup> Importantly, information does not have to be admissible at trial in order for it to be discoverable.<sup>104</sup>

Several different situations can result in *Giglio* material that must be disclosed to defense. For example, if a witness is testifying pursuant to a

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<sup>93</sup> See *Roberts*, 59 M.J. at 325.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.* at 326.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.* at 326-27; see also *Strickler v. Greene*, 527 U.S. 263, 290 (1999).

<sup>98</sup> *United States v. Green*, 37 M.J. 88, 90 (C.M.A. 1993).

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

<sup>101</sup> See *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999).

<sup>102</sup> See *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>103</sup> *United States v. Watson*, 31 M.J. 49, 54-55 (C.M.A. 1990).

<sup>104</sup> See *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

grant of immunity, that information must be disclosed to the defense.<sup>105</sup> Knowledge that a witness has a monetary interest in the outcome of a trial is also *Giglio* material and must be disclosed.<sup>106</sup> Similarly, whether a government witness is under investigation for a crime of dishonesty is proper impeachment information and must be disclosed.<sup>107</sup>

In order to be discoverable, the information must be located within the parameters of the files that the prosecution must review for exculpatory material.<sup>108</sup> While the government is required to disclose discoverable information, it is not required to search indefinitely for that information.<sup>109</sup> C.A.A.F., in *United States v. Williams*, noted that the trial counsel has an absolute duty to review his own files, but went on to state that the extent to which he must reach beyond evidence in his immediate custody to files from other agencies requires an individual, case-by-case analysis.<sup>110</sup> This analysis must focus on “the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request.”<sup>111</sup>

To assist with the case-by-case analysis, C.A.A.F. developed a “due diligence” standard.<sup>112</sup> Trial counsel must review the files of other government authorities to determine whether those files contain discoverable information.<sup>113</sup> The court has explained that the “due diligence” requirements include searching the files of law enforcement authorities that have participated in the investigation; the files in a related case maintained by an entity “closely aligned with the prosecution”; and other files specifically identified in a defense request for discovery.<sup>114</sup> Regardless of whether the defense counsel could have discovered the information on his own, the trial counsel has an affirmative duty to exercise due diligence to discover information that is material to the preparation of the defense.<sup>115</sup> Additionally, if relevant files are known to be in the possession of another governmental agency, the prosecution must notify the defense and engage in “good faith efforts” to obtain the material.<sup>116</sup>

While the civilian federal criminal justice system has developed its own set of rules-based requirements relating to discovery, the military

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<sup>105</sup> See *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975) (“As a grant of immunity is a powerful circumstance affecting credibility, the Government must disclose to the defense the fact that a Government witness is to testify under an assurance of immunity.”).

<sup>106</sup> See *United States v. Watson*, 31 M.J. 49, 54-55 (C.M.A. 1990).

<sup>107</sup> See *United States v. Stone*, 40 M.J. 420 (C.M.A. 1994) (fact that government witness was under investigation for travel fraud was relevant to his credibility as a witness).

<sup>108</sup> See *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999).

<sup>109</sup> See *id.*

<sup>110</sup> See *id.* at 441.

<sup>111</sup> *Id.*

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> See *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999).

<sup>115</sup> See MCM, *supra* note 3, R.C.M. 701(a)(2); see also *United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993).

<sup>116</sup> See *Williams*, 50 M.J. 436, 441 (1999).

justice system has likewise established its own set of rules concerning discovery in criminal cases. The foundation for military discovery is Article 46 of the Uniform Code of Military Justice, which provides the trial counsel, the defense counsel, and the court martial with “equal opportunity” to obtain witnesses and evidence.<sup>117</sup> The court has noted that Article 46, UCMJ, may impose a heavier burden on the government to sustain a conviction in a court-martial than is constitutionally required when defense requested discovery is withheld.<sup>118</sup>

The President implemented Article 46 in Rules for Court Martial (R.C.M.) 701.<sup>119</sup> R.C.M. 701 sets forth specific discovery requirements, including required disclosures by both the trial counsel and the defense counsel.<sup>120</sup> While both Federal Rule of Criminal Procedure 16 and R.C.M. 701 are mandatory rules, R.C.M. 701 is truly treated as the practitioner’s guide to discovery in the military criminal justice system. R.C.M. 701(a) describes various duties of trial counsel with respect to disclosing information to the defense. Even in the absence of a defense discovery request, the trial counsel must disclose papers accompanying the charges, the convening orders, and any signed or sworn statements in the possession of the trial counsel as well as the names and addresses of the prosecution’s witnesses, and records of military or civilian convictions of the accused.<sup>121</sup> Other items must be disclosed once there has been a defense request for discovery.<sup>122</sup>

For certain items, the defense is also required to provide discovery to the trial counsel, even in the absence of a request for discovery.<sup>123</sup> In other areas, if the defense requests disclosure from the trial counsel of certain items, the defense must reciprocate.<sup>124</sup> In addition to the required

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<sup>117</sup> See UCMJ art. 46 (2008).

<sup>118</sup> See *Eshalomi*, 23 M.J. at 24.

<sup>119</sup> The President enacted the Rules for Court Martial as authorized by Article 36. See 10 U.S.C. § 836 (2006).

<sup>119</sup> See MCM, *supra* note 3, R.C.M. 701(a)(1), (3), (4).

<sup>120</sup> See MCM, *supra* note 3, R.C.M. 701.

<sup>121</sup> See MCM, *supra* note 3, R.C.M. 701(a)(1), (3), (4).

<sup>122</sup> See MCM, *supra* note 3, R.C.M. 701(a)(2)(A) (“Any books, papers, documents, photographs, tangible objects, buildings, or places . . .”); MCM, *supra* note 3, R.C.M. 701(a)(2)(B) (“Any results or reports of physical or mental examinations, and of scientific tests or experiments . . .”).

<sup>123</sup> See, e.g., MCM, *supra* note 3, R.C.M. 701(b)(1)(A) (“Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case-in-chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.”); MCM, *supra* note 3, R.C.M. 701(b)(2) (“The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused’s mental condition.”).

<sup>124</sup> See, e.g., MCM, *supra* note 3, R.C.M. 701(b)(3) (“If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers,

disclosures under R.C.M. 701, the Military Rules of Evidence also provide required disclosures.<sup>125</sup>

This broad discovery is further reflected in R.C.M. 701(a)(6)(A)-(C), which implements the Supreme Court's holding in *Brady*. R.C.M. 701(a) requires the trial counsel, as soon as practicable, to "disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt of the accused of an offense charged, or reduce the punishment."<sup>126</sup> As in the civilian system, this obligation is independent of any defense discovery request.<sup>127</sup>

The military encourages open and early discovery. The analysis to R.C.M. 701 notes that there are several reasons for providing early discovery, including the likelihood of early decisions regarding the withdrawal of charges, motions, pleas, and composition of courts-martial. The analysis further states that broad discovery "contributes substantially to the truth-finding process and to the efficiency with which it functions."<sup>128</sup>

Although early and open discovery is encouraged, R.C.M. 701 puts a deadline on such discovery. Certain discovery must be accomplished after service of charges, even without a discovery request;<sup>129</sup> other discovery may follow a discovery request.<sup>130</sup> Additionally, some information must be disclosed before arraignment<sup>131</sup> and other information must be disclosed before trial on the merits.<sup>132</sup> For certain items, the defense must provide reciprocal discovery if the Trial Counsel has complied with defense's request for discovery.<sup>133</sup> R.C.M. 701(g) also allows the military judge to specify the time, place, and manner of making discovery.

The Air Force has expanded the requirements set forth in R.C.M. 701. The Air Force implemented the *Air Force Standards of Criminal Justice (Standards)* to guide Air Force military and civilian lawyers,

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documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.").

<sup>125</sup> See MCM, *supra* note 3, MIL. R. EVID. 301 (grants of immunity or leniency); MCM, *supra* note 3, MIL. R. EVID. 304(d)(1) (statements of the accused, whether oral or written); MCM, *supra* note 3, MIL. R. EVID. 311(d)(1) (evidence seized from the accused or property owned by the accused); MCM, *supra* note 3, MIL. R. EVID. 321(c)(1) (evidence of prior identifications of the accused); MCM, *supra* note 3, MIL. R. EVID. 404(b) (evidence of other crimes, wrongs or acts); MCM, *supra* note 3, MIL. R. EVID. 412 (evidence of victim's past sexual behavior); MCM, *supra* note 3, MIL. R. EVID. 413 (evidence of similar crimes of sexual assault); MCM, *supra* note 3, MIL. R. EVID. 414 (evidence of similar crimes of child molestation); MCM, *supra* note 3, MIL. R. EVID. 807 (residual hearsay).

<sup>126</sup> MCM, *supra* note 3, R.C.M. 701(a)(6)(A)-(C).

<sup>127</sup> See *United States v. Agurs*, 427 U.S. 97, 107 (1976).

<sup>128</sup> MCM, *supra* note 3, R.C.M. 701 analysis, app. 21, at A21-33.

<sup>129</sup> See MCM, *supra* note 3, R.C.M. 701(a)(1), (6).

<sup>130</sup> See MCM, *supra* note 3, R.C.M. 701(a)(2), (5), 701(b)(1)(B).

<sup>131</sup> See MCM, *supra* note 3, R.C.M. 701(a)(4).

<sup>132</sup> See MCM, *supra* note 3, R.C.M. 701(a)(3), 701(b)(1)(A), 701(b)(2).

<sup>133</sup> See MCM, *supra* note 3, R.C.M. 701(b)(3), (4).

paralegals, and nonlawyer assistants in the Air Force Judge Advocate General's Corps.<sup>134</sup> The *Standards* are also applicable to those civilian lawyers who practice before Air Force Courts Martial.<sup>135</sup> The *Standards* specifically, and “strongly” encourage early disclosure of discoverable material.<sup>136</sup> Importantly, all parties have a continuing obligation to disclose discoverable evidence, should additional evidence or material previously requested be discovered.<sup>137</sup>

### III. WHO'S THE BOSS?

Civilian federal courts are given authority to remedy discovery violations by the provisions of Rule 16 as well as by the court's inherent supervisory powers to prevent misconduct by prosecutors during the judicial process. Under Federal Rule of Criminal Procedure Rule 16(d), a trial court may address a discovery violation by compelling production or suppressing evidence.<sup>138</sup> A judge is also authorized to grant a continuance,<sup>139</sup> which frequently occurs in practice when there is an unintentional late disclosure of discoverable evidence by the prosecution. This rule also provides the court with broad discretion to fashion an order which addresses the particular violation at issue on a case-by-case basis by providing the court with authority to “enter any other order that is just under the circumstances.”<sup>140</sup>

Prosecutors who willfully abuse the discovery process may face seemingly unimaginable personal consequences as discussed in greater detail later in this article. However, in addition to unpleasant personal scrutiny, willful discovery violations may result in an outright dismissal of the charges. Dismissal is generally considered to be “an extreme measure that is warranted only in those very rare cases where a defendant has suffered substantial prejudice that cannot be cured in any other way.”<sup>141</sup> Charges are unlikely to be dismissed based on a discovery violation unless the court finds that the prosecutor's actions represent “flagrant” misconduct by either an intentional or reckless disregard of mandatory disclosure

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<sup>134</sup> *Air Force Standards for Criminal Justice*, 15 Oct. 2002 [hereinafter *Standards*]. The *Standards* are directly adapted from the *American Bar Association (ABA) Standards for Criminal Justice* and have been adapted to the unique needs and demands of Air Force legal practice. *Standards*, page 1.

<sup>135</sup> *See id.*

<sup>136</sup> *Standards*, Rule 3.2.

<sup>137</sup> *See MCM, supra* note 3, R.C.M. 701(d).

<sup>138</sup> *See* FED. R. CRIM. P. 16(d).

<sup>139</sup> *Id.*

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

<sup>141</sup> *Unites States v. Urciuoli*, 470 F. Supp. 2d 109, 114 (D. R.I. 2007).

obligations.<sup>142</sup> In addition to dismissal, a court may vacate a sentence or reverse a conviction based upon a discovery violation.<sup>143</sup>

In the military, both the trial counsel and the defense counsel must comply with the rules of discovery.<sup>144</sup> If discovery violations occur, R.C.M. 701(g) provides the military judge with broad latitude to address those violations.<sup>145</sup> If either side refuses to disclose requested information, the court may review the evidence *in camera*.<sup>146</sup> Much the same as Federal Rule of Criminal Procedure 16(d), R.C.M. 701(g)(2) then allows the court to “order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate.”<sup>147</sup> As in the civilian system, a military judge may impose a protective order if necessary.<sup>148</sup> Additionally, if it is brought to the attention of the military judge at any time during the court-martial that a party has failed to comply with R.C.M. 701, the military judge may order discovery; grant a continuance; prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; or enter any other order as is just under the circumstances.<sup>149</sup>

When imposing a remedy, it is important that it not be disproportionate to the offense.<sup>150</sup> Additionally, a remedy is not appropriate if less restrictive means could minimize the harm to the government.<sup>151</sup> As such, the ultimate punishment of excluding a defense witness’s testimony should be used only sparingly.<sup>152</sup> The Discussion to R.C.M. 701(g)(3) notes that this remedy should only be used “upon finding that the defense counsel’s failure to comply with this rule was willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony.”<sup>153</sup>

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<sup>142</sup> See *United States v. Fitzgerald*, 615 F. Supp. 2d 1156 (S.D. Ca. 2009).

<sup>143</sup> See *Banks v. Dretke*, 540 U.S. 668, 700-02 (2004) (vacating a death sentence); see also *United States v. Burnside*, 824 F. Supp. 1215, 1272 (N.D. Ill. 1993) (granting a new trial).

<sup>144</sup> See MCM, *supra* note 3, R.C.M. 701; see also *Williams v. Florida*, 399 U.S. 78, 82 (1970) (trial “is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.”).

<sup>145</sup> See MCM, *supra* note 3, R.C.M. 701(g).

<sup>146</sup> See *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

<sup>147</sup> MCM, *supra* note 3, R.C.M. 701(g)(2).

<sup>148</sup> MCM, *supra* note 3, R.C.M. 701(g)(2).

<sup>149</sup> See MCM, *supra* note 3, R.C.M. 701(g)(3)(A)-(D).

<sup>150</sup> See *United States v. Pomarleau*, 57 M.J. 351 (C.A.A.F. 2002).

<sup>151</sup> See *id.* at 362.

<sup>152</sup> See *id.*

<sup>153</sup> See MCM, *supra* note 3, R.C.M. 701(g) discussion; see also *United States v. Chaffin*, NMCCA 200500513, 2007 WL 1702613, at \*4 (N-M. Ct. Crim. App. Feb. 22, 2007) (“[W]e hold the military judge did not abuse his discretion when he excluded defense alibi evidence due to the defense’s failure to provide timely notice of its intent to offer such evidence. The military judge found the defense’s failure to provide timely notice was a willful attempt to gain an unfair tactical advantage, and that finding is amply supported by the record. Further, the military judge correctly applied the law to the facts, balancing the accused’s right to present evidence in his defense against the countervailing public interests.”) (citation omitted).



Importantly, when deciding whether to exclude evidence under this Rule, the court should articulate this balancing test on the record.<sup>154</sup> In *United States v. Pomarleau*, the accused was tried for two specifications of drunk driving and two specifications of involuntary manslaughter, resulting from a vehicle crash.<sup>155</sup> Defense requested the assistance of two experts in accident investigation and reconstruction to rebut the government's assertion that the accused was driving the vehicle.<sup>156</sup> The convening authority denied funding of one expert, but allowed partial funding of the other expert.<sup>157</sup> The trial counsel requested discovery from the defense, including copies of the exhibits to be introduced through their expert witness.<sup>158</sup> Part of the discovery was provided to trial counsel during trial while the trial counsel maintained that other discovery was never provided.<sup>159</sup> To remedy the discovery violation, the trial judge excluded the evidence and prohibited the expert witness from referring to the evidence in his testimony.<sup>160</sup> C.A.A.F. reversed, setting aside the findings and the sentence for a rehearing.<sup>161</sup> In doing so, the court noted that the trial judge excluded the evidence without noting his reasons on the record; thereby rendering it impossible to determine whether a less restrictive option, such as a continuance, could have been a better remedy.<sup>162</sup>

Before imposing sanctions, R.C.M. 701(g) also requires the military judge to evaluate "the defendant's right to compulsory process against the countervailing public interests, including (1) the integrity of the adversary process; (2) the interest in the fair and efficient administration of military justice; and (3) the potential prejudice to the truth-determining function of the trial process."<sup>163</sup>

R.C.M. 701 is strikingly similar to Federal Rule of Criminal Procedure 16. As such, the military practitioner may choose to examine the available civilian remedies to address any issues of non-compliance. Although not binding on military courts, the civilian system may provide persuasive authority on issues surrounding discovery.

In addition to the considerations surrounding R.C.M. 701 and Federal Rule of Criminal Procedure 16, a prosecutor must also be mindful of additional rules that may impose further discovery obligations. One such rule is the Jencks Act.<sup>164</sup>

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<sup>154</sup> See *Pomarleau*, 57 M.J. at 365.

<sup>155</sup> *Id.* at 352.

<sup>156</sup> *Id.* at 354.

<sup>157</sup> *Id.* at 355. The military judge ordered more funding for the approved expert. *Id.*

<sup>158</sup> *Id.* at 356.

<sup>159</sup> *Id.* at 356.

<sup>160</sup> *Id.* at 356.

<sup>161</sup> *Id.* at 365.

<sup>162</sup> *Id.* at 364.

<sup>163</sup> See MCM, *supra* note 3, R.C.M. 701 discussion.

<sup>164</sup> 18 U.S.C. § 3500 (2006).

#### IV. ALL IN THE FAMILY

Although the civilian and military justice systems are guided by separate rules regarding discovery, the Jencks Act is equally applicable to both systems.<sup>165</sup> The Jencks Act requires that the prosecutor disclose pre-trial statements or reports of a government witness, once that witness has testified on direct examination.<sup>166</sup> “Statements” includes both written and oral statements.<sup>167</sup> The statements must also be “of the witness,” which include statements that have been signed or otherwise adopted by the witness.<sup>168</sup> Transcripts of oral statements by a witness must be disclosed if the transcript is “substantially verbatim.”<sup>169</sup>

The civilian justice system has expanded the protections of the Jencks Act through Federal Rule of Criminal Procedure 26.2.<sup>170</sup> While the Jencks Act applies only to government witnesses, Rule 26.2 applies to any party who calls a witness.<sup>171</sup> Similarly, the military has also expanded the protections of the Jencks Act through R.C.M. 914.<sup>172</sup> R.C.M. 914 also requires both sides to produce pre-trial witness statements, upon a motion by the other party.<sup>173</sup> Both Rule 26.2 and R.C.M. 914 exempt the defense from producing prior statements of the defendant or accused.<sup>174</sup>

The purpose of the Jencks Act is to ensure that potential impeachment information is disclosed.<sup>175</sup> Although this rule does not require the statements to be turned over until the witness has testified on direct examination, the prudent trial counsel will comply with the military’s directive of open and early discovery and provide the information prior to the witness’s direct examination. In fact, the discussion to R.C.M. 914 states, “Counsel should anticipate legitimate demands for statements under this and similar rules and avoid delays in the proceedings by voluntary disclosure before arraignment.”<sup>176</sup>

Practitioners should view the requirements of the Jencks Act as a separate discovery requirement that does not abrogate or limit any other discovery obligations imposed by case law or other criminal discovery rules. Indeed, it has been held that if a statement does not qualify as a discoverable statement under the Jencks Act, prosecutors must still disclose statements

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<sup>165</sup> See *United States v. Guthrie*, 25 M.J. 808, 811 (A.C.M.R. 1988); see also 18 U.S.C. § 3500 (2006); FED R. CRIM. P. 26.2.

<sup>166</sup> 18 U.S.C. § 3500 (2006).

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

<sup>168</sup> See MCM, *supra* note 3, R.C.M. 914(a), 914(f)(1).

<sup>169</sup> *Id.*

<sup>170</sup> See FED. R. CRIM. P. 26.2.

<sup>171</sup> See FED. R. CRIM. P. 26.2(a).

<sup>172</sup> MCM, *supra* note 3, R.C.M. 914.

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

<sup>174</sup> See FED. R. CRIM. P. 26.2; MCM, *supra* note 3, R.C.M. 914.

<sup>175</sup> See *United States v. Roxas*, 41 M.J. 727 (N-M. Ct. Crim. App. 1994).

<sup>176</sup> See MCM, *supra* note 3, R.C.M. 914 discussion.

that are exculpatory under the separate requirements of *Brady* and its progeny.<sup>177</sup> Therefore, simply because a statement does not qualify for disclosure under the Jencks Act does not mean that it may be withheld if it is exculpatory or impeachment evidence.

## V. GROWING PAINS

As noted previously, the rules in both the civilian and military justice systems provide trial judges with broad discretion to fashion a remedy for a discovery violation. While prosecutors will likely consider dismissal or suppression of evidence to be a very bad outcome in and of itself, violations of discovery rules may carry professional implications as well. For example, a prosecutor may be subjected to public scrutiny by being referenced in a published appellate decision.<sup>178</sup> Likewise, a trial judge may require a prosecutor to show cause as to why sanctions should not be imposed because of a discovery violation.<sup>179</sup> Moreover, when faced with discovery violations in high-profile cases, the media's appetite for reporting government abuse, whether perceived or real, will not go unsatiated. This point is best illustrated by an examination of three separate cases involving charges against a former United States Senator, a physician, and an Army Ranger.

### A. *United States v. Senator Ted Stevens*

On 29 July 2008, Senator Ted Stevens of Alaska was indicted on seven counts of making false statements by failing to include items of value on his Congressional financial disclosure forms.<sup>180</sup> The government alleged that Senator Stevens engaged in an ongoing effort to conceal his receipt of more than \$250,000 of gifts from VECO Corporation and its Chief Executive Officer, Bill Allen.<sup>181</sup> Each count carried a maximum five-year prison term.<sup>182</sup>

The evidence presented at trial revealed that VECO Corporation, an oil services company, remodeled Senator Stevens' home.<sup>183</sup> Prosecutors alleged that Senator Stevens received more than \$250,000 in gifts and

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<sup>177</sup> See *United States v. Murphy*, 569 F.2d 771, 774 (3d Cir. 1978), *cert. denied*, 435 U.S. 955 (1978).

<sup>178</sup> See *United States v. Ross*, 372 F.3d 1097, 1112 (9th Cir. 2004).

<sup>179</sup> See *United States v. Jones*, 609 F. Supp. 2d 113 (D. Mass. 2009).

<sup>180</sup> Press Release, Dep't of Justice U.S. Senator Indicted on False Statement Charges, (Jul. 29, 2008), <http://www.justice.gov/opa/pr/2008/July/08-crm-668.html>.

<sup>181</sup> *Id.*

<sup>182</sup> Matt Apuzzo & Jesse J. Holland, *Alaska Senator Found Guilty of Corruption, Conviction May End Republican Leader's 40-Year Career*, CHARLESTON GAZETTE (WV), Oct. 28, 2008, <http://www.highbeam.com/doc/1P2-18485352.html>.

<sup>183</sup> See *id.*

services from VECO Corporation.<sup>184</sup> Senator Stevens said he paid \$160,000 for the renovations, believing that covered the costs.<sup>185</sup> The charges centered around whether Senator Stevens knew he was receiving the additional benefit and whether he knowingly failed to disclose the gifts and services on the financial disclosure forms.<sup>186</sup>

The government's star witness was Mr. Allen, the founder and CEO of VECO Corporation.<sup>187</sup> Mr. Allen testified that he never billed Senator Stevens and said that Senator Stevens knew he was getting a special rate.<sup>188</sup> Senator Stevens denied the allegations.<sup>189</sup>

On 1 October 2008, the prosecutors sent the defense a copy of an FBI report of an agent's interview with Mr. Allen, after Mr. Allen had already been on the witness stand.<sup>190</sup> The notes indicated that Mr. Allen told the agent that he believed that Senator Stevens would have paid the bills had they been sent to him, which was inconsistent with the testimony that Mr. Allen gave against Senator Stevens.<sup>191</sup>

The defense moved for a mistrial, arguing that the prosecutors had withheld information they were required to disclose.<sup>192</sup> The judge, although palpably upset with the prosecutors, denied the motion.<sup>193</sup> On 27 October 2008, Senator Stevens was convicted of all seven charges.<sup>194</sup>

In December 2008, FBI agent Chad Joy came forward and accused the prosecution team of committing various forms of misconduct throughout the trial.<sup>195</sup> Agent Joy alleged that another FBI agent involved in the case engaged in an improper relationship with the government's key witness, Mr. Allen.<sup>196</sup> Agent Joy also alleged that the prosecutors, who had been previously admonished for sending a witness home to Alaska, did so intentionally, knowing the witness would have been favorable to the defense.<sup>197</sup> The witness later contacted the defense team and informed them that he'd spent considerably less time working on Senator Stevens' home than VECO's records indicated.<sup>198</sup>

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<sup>184</sup> Justice Department Indicts Sen. Ted Stevens, MSNBC (Jul. 29, 2008), <http://www.msnbc.msn.com/id/25916299/>.

<sup>185</sup> Apuzzo & Holland, *supra* note 182.

<sup>186</sup> Neil A. Lewis, *Judge Berates Prosecutors in Trial of Senator*, N.Y. TIMES (NY), Oct. 3, 2008, at A16.

<sup>187</sup> Apuzzo & Holland, *supra* note 182.

<sup>188</sup> *Id.*

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

<sup>190</sup> Lewis, *supra* note 186.

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

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

<sup>193</sup> Kevin Spak, *Stevens Mistrial Denied*, NEWSER, Sep. 29, 2008.

<sup>194</sup> Apuzzo & Holland, *supra* note 182.

<sup>195</sup> Spak, *supra* note 193.

<sup>196</sup> *See id.*

<sup>197</sup> Nathaniel Burney, *More Allegations of Prosecutorial Misconduct in Sen. Ted Stevens Case*, THE CRIMINAL LAWYER (Feb. 11, 2009), <http://burneylawfirm.com/blog/2009/02/11/more-allegations-of-prosecutorial-misconduct-in-sen-ted-stevens-case/>; *see also* Lewis, *supra* note 186.

<sup>198</sup> Burney, *supra* note 197.

Most importantly, Agent Joy revealed that the prosecutors purposefully withheld exculpatory evidence from the defense.<sup>199</sup> The evidence consisted of recently discovered notes indicating that Mr. Allen's in-court testimony regarding conversations he had about the renovations were markedly different from when he was interviewed nearly five months before the trial.<sup>200</sup> Had this evidence of inconsistency been turned over to the defense, they could have been used to cross-examine Mr. Allen or in closing argument to the jury.<sup>201</sup>

In February 2009, the District Judge held the prosecutors in civil contempt for not handing over documents to Senator Stevens' defense team.<sup>202</sup> The prosecutors complied with the judge's order and turned over the documentation; as such, the civil contempt charges were later lifted.<sup>203</sup>

On 7 April 2009, the District Judge set aside Senator Stevens' conviction.<sup>204</sup> The Judge also appointed an independent attorney to investigate possible prosecutorial misconduct.<sup>205</sup> Attorney General Eric Holder then dismissed the indictment and elected not to proceed with a new trial.<sup>206</sup> The Department of Justice also began its own internal investigation into alleged ethics violations and prosecutorial misconduct.<sup>207</sup>

After more than a year of enduring an investigation into alleged misconduct, one of the prosecutors involved in the case committed suicide.<sup>208</sup> On 15 November 2010, National Public Radio reported that the prosecutors will not face criminal contempt charges.<sup>209</sup> The Department of Justice's internal investigation also cleared the prosecutors of misconduct;

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<sup>199</sup> Neil A. Lewis & David Johnston, *Dismayed Lawyers Lay Out Reasons for Collapse of the Stevens Conviction*, N.Y. TIMES (NY), Apr. 7, 2009, at A20; see also *Sen. Ted Stevens' Conviction Set Aside*, CNN POLITICS.COM (Apr. 7, 2009), <http://www.cnn.com/2009/POLITICS/04/07/ted.stevens/index.html>.

<sup>200</sup> Erika Bolstad, *Justice Department Moves to Void Stevens' Conviction*, MCCLATCHY WASH. BUREAU, Apr. 1, 2009, available at <http://www.mcclatchydc.com/2009/04/01/65240/justice-department-moves-to-void.html>.

<sup>201</sup> See Erika Bolstad & Richard Mauer, *U.S. Attorney General Ends Stevens Prosecution*, ANCHORAGE DAILY NEWS (AK), Apr. 2, 2009, <http://www.adn.com/2009/04/01/v-printer/743906/us-attorney-general-ends-stevens.html>.

<sup>202</sup> Andrew Ramonas, *No Charges for Stevens Prosecutors*, MAIN JUSTICE (Nov. 15, 2010), <http://www.mainjustice.com/2010/11/15/no-charges-for-stevens-prosecutors/>.

<sup>203</sup> Spencer S. Hsu, *Judge Lifts Civil Contempt Findings Against Justice Lawyers in Ted Stevens Case*, WASH. POST, Oct. 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/12/AR2010101206934.html>.

<sup>204</sup> *Sen. Ted Stevens' Conviction Set Aside*, CNN POLITICS.COM (Apr. 7, 2009), <http://www.cnn.com/2009/POLITICS/04/07/ted.stevens/index.html>.

<sup>205</sup> See *id.*

<sup>206</sup> See Bolstad & Mauer, *supra* note 201.

<sup>207</sup> Ramonas, *supra* note 202.

<sup>208</sup> Charlie Savage, *Stevens Case Prosecutor Kills Himself*, N.Y. TIMES (NY), Sept. 28, 2010, at A19.

<sup>209</sup> *Stevens Prosecutors Won't Face Criminal Charges*, NATIONAL PUBLIC RADIO (Nov. 15, 2010), <http://www.npr.org/2010/11/15/131338164/stevens-prosecutors-won-t-face-criminal-charges>; see also Ramonas, *supra* note 202.

however, the prosecutors may still face possible investigation and discipline from their local bar associations.<sup>210</sup>

### B. *United States v. Dr. Ali Shaygan*

On 8 February 2008, Florida physician Dr. Ali Shaygan was charged with multiple counts of dispensing controlled substances and one count of dispensing controlled substances resulting in death.<sup>211</sup> On 26 September 2008, the United States Attorneys filed a Superseding Indictment, which added 115 more counts against Dr. Shaygan, bringing the total number to 141 counts.<sup>212</sup> After a four-week trial, Dr. Shaygan was acquitted of all charges on 12 March 2009.<sup>213</sup>

After the verdict, Dr. Shaygan filed a Motion for Sanction under the Hyde Amendment.<sup>214</sup> The Hyde Amendment provides that attorney's fees and related litigations costs may be awarded to a defendant who "establishes that the position the government took in prosecuting him was vexatious, frivolous, or in bad faith."<sup>215</sup> The district judge granted the Motion and imposed individual sanctions against the two United States Attorneys.<sup>216</sup> The district judge also ordered the United States to pay attorney's fees and costs from the date of the Superseding Indictment in the amount of \$601,795.88.<sup>217</sup>

To support his ruling, the district judge set forth several acts of prosecutorial misconduct that occurred throughout the trial, which led him to believe that the decision to file the Superseding Indictment was done in bad faith.<sup>218</sup> Throughout the trial, the defense requested *Brady* material; however, the district judge found several instances where the prosecutors failed to turn over required *Brady* material.<sup>219</sup> For example, during one interview, a witness disclosed that Dr. Shaygan conducted a very thorough examination of her and that Dr. Shaygan was very interested in her well-being.<sup>220</sup> The prosecutors did not disclose these statements, arguing that they were not *Brady* material.<sup>221</sup> The district judge disagreed and found that these positive statements were very clearly *Brady* material.<sup>222</sup>

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<sup>210</sup> Ramonas, *supra* note 202.

<sup>211</sup> See *United States v. Shaygan*, No. 08-20112-CR (S.D.Fla. Jan. 13, 2009).

<sup>212</sup> *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1298 (S.D.Fla. 2009).

<sup>213</sup> See *id.* at 1291; see also Kevin McCoy & Brad Heath, *Not Guilty, But Stuck with Big Bills, Damaged Career*, USA TODAY, Sept. 28, 2010, at 1A.

<sup>214</sup> *Shaygan*, 661 F. Supp. 2d at 1290.

<sup>215</sup> *Id.* at 1320 (quoting *United States v. Gilbert*, 198 F.3d 1293, 1296 (11th Cir. 1999)).

<sup>216</sup> *Id.* at 1292-93.

<sup>217</sup> *Id.* at 1293; see also McCoy & Heath, *supra* note 213.

<sup>218</sup> *Shaygan*, 661 F. Supp. 2d at 1298.

<sup>219</sup> *Id.* at 1295.

<sup>220</sup> *Id.* at 1296.

<sup>221</sup> *Id.*

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

The prosecutors also disregarded the court's order to produce all reports prior to the beginning of the trial for an *in camera* review.<sup>223</sup> Instead, the prosecutors withheld two DEA reports.<sup>224</sup> The judge found that the reports contained *Brady* material and the failure to turn them over was willful, vexatious and in bad faith.<sup>225</sup>

The prosecutors also violated their discovery obligations when they failed to disclose to the defense that two witnesses were working with the government.<sup>226</sup> The prosecutors had the witnesses secretly tape the interactions with the defense counsel, thereby turning neutral witnesses into confidential informants.<sup>227</sup> In addition to not disclosing this information to the defense, the prosecutors also failed to disclose to the defense the witnesses' recorded statements at the time of their trial testimony, as required by the Jencks Act.<sup>228</sup> The court only became aware of this information when, on cross-examination, one of the confidential informants revealed that he had made a recording of his conversation with the defendant's lead attorney.<sup>229</sup> Even still, the prosecutors did not intend to disclose the recordings, which the judge declared was an "egregious abdication of their ethical obligations."<sup>230</sup>

On 9 April 2009, the district judge publicly reprimanded the United States Attorney and the Shaygan prosecutors in a scathing written opinion.<sup>231</sup> Judge Alan Gold wrote:

I enter a public reprimand against: (1) the United States Attorney and his senior staff members, for failure to exercise proper supervision over AUSA Karen Gilbert, the head of the Narcotics Section of the United States Attorney's Office; (2) AUSA Gilbert and her deputies for acting with gross negligence with regard to the events which ensued; and (3) the two prosecutors assigned in this case, AUSA Sean Paul Cronin and Andrea G. Hoffman. I conclude, without doubt, that AUSA Cronin, with the assistance of AUSA Hoffman, along with DEA Special Agent Christopher Wells, acted vexatiously and in bad faith in prosecuting Dr. Shaygan for events occurring after the original indictment was filed and by knowingly and

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<sup>223</sup> *Id.* at 1291.

<sup>224</sup> *See id.* at 1301 ("I find that the failure to turn over Tucker's DEA-6, as written on December 12, 2008, was willful, vexatious and in bad faith.").

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

<sup>226</sup> *Id.* at 1291.

<sup>227</sup> *See* Susan Hansen, *Prosecutorial Misconduct Forces Serious Review*, BROWARD DAILY BUSINESS REVIEW, May 26, 2010, <http://www.dailybusinessreview.com/PubArticleFriendlyDBR.jsp?id=1202469822300>.

<sup>228</sup> *See Shaygan*, 661 F. Supp. 2d at 1291.

<sup>229</sup> *See id.* at 1310.

<sup>230</sup> *Id.* at 1315.

<sup>231</sup> *See id.* at 1292.

willfully disobeying the orders of this Court. These lawyers are publically reprimanded and shall be sanctioned, as set forth in this Order.<sup>232</sup>

The United States also referred the matter to the Department of Justice's Office of Professional Responsibility for an independent investigation and disciplinary recommendations.<sup>233</sup>

As a result of the case, the prosecutor's supervisor, AUSA Gilbert, resigned as the Chief of the Narcotics section and one of the prosecutors, AUSA Cronin, requested a transfer out of the Criminal Division.<sup>234</sup>

### C. *United States v. 1LT Michael Behenna*

Cases like those against Senator Stevens and Dr. Shaygan drew a tremendous amount of media attention and highlighted problems in the civilian justice system. At first glance, a military practitioner may feel comforted, knowing the military justice system prides itself on broad discovery. Unfortunately, this may lull the military practitioner into a false sense of security. As presented below, the military is not immune to issues surrounding discovery and is not without its own example of a high-profile case involving potential discovery violations.

On 20 March 2009, Army First Lieutenant (1LT) Michael Behenna was sentenced to 25 years in prison for killing an Iraqi detainee.<sup>235</sup> First Lieutenant Behenna was serving in Iraq as an Army Ranger when he took the detainee aside for questioning.<sup>236</sup> The detainee was Ali Mansur, believed to be an Al Qaeda operative who organized an attack on Behenna's platoon in April 2008.<sup>237</sup> That attack killed two U.S. Soldiers from Behenna's platoon.<sup>238</sup> Behenna shot the detainee twice: once in the head and once in the chest.<sup>239</sup>

The trial counsel's theory of the case was that it was premeditated murder, while defense argued that it was self-defense.<sup>240</sup> Trial counsel argued that Behenna believed that the detainee had killed two of his men

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

<sup>233</sup> *Shaygan*, 661 F. Supp. 2d at 1291.

<sup>234</sup> *Id.* at 1292 n.3.

<sup>235</sup> See Mark Schlachtenhaufen, *Clemency Panel Hears from Family of Imprisoned Soldier*, EDMOND SUN, THE (OK), Dec. 6, 2010.

<sup>236</sup> See Mark Schlachtenhaufen, *Officials Seek New Trial for Soldier*, EDMOND SUN, THE (OK), June 3, 2009, <http://www.edmondsun.com/local/x519246267/Officials-seek-new-trial-for-soldier>.

<sup>237</sup> Schlachtenhaufen, *supra* note 238.

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

<sup>239</sup> See Joe Mazingo, *A Killing in the Desert: An Unlikely Witness Provides One Last Hope for Soldier in Murder Case*, L.A. TIMES, Sept. 14, 2009, <http://www.latimes.com/news/nationworld/world/la-fg-iraq-killing14-2009sep14,0,7133244.story>.

<sup>240</sup> Mark Schlachtenhaufen, *March for Freedom on at Capitol*, EDMOND SUN, THE (OK), June 25, 2010, <http://www.edmondsun.com/local/x519247558/March-for-Freedom-on-at-Capitol>.



and he was out for revenge.<sup>241</sup> Defense argued that Behenna had taken the man to question him about his terrorist activities; the detainee moved toward Behenna's weapon and Behenna shot him in self-defense.<sup>242</sup>

The trial counsel retained a bloodstain pattern expert who sat through the testimony of the witnesses.<sup>243</sup> When Behenna took the stand and described the shooting, the government's expert told the trial counsel that that Behenna's version of events was possible and was consistent with the forensic evidence.<sup>244</sup> The expert sent an email to the trial counsel that stated:

On Thursday afternoon when I heard Lt. Michael Behenna testify as to the circumstances of how the two shots were fired I could not believe how close it was to the scenario I had described to you on Wednesday. I am sure that had I testified I would have wanted to give my reenactment so the jury could have had the option of considering how well the defendant's story fit the physical facts. This, of course, would not have been helpful to the prosecution case. However, I feel that it is quite important as possible exculpatory evidence so I hope that, in the interest of justice, you informed Mr. Zimmerman of my findings. It certainly appears like *Brady* material to me.<sup>245</sup>

The expert never testified and his conclusions were not disclosed to the defense until after the trial had concluded.<sup>246</sup>

The defense argued that this information was *Brady* material and should have been disclosed to the defense prior to trial.<sup>247</sup> The defense moved for a mistrial but the trial judge denied the motion, saying the expert's testimony would not have changed the verdict.<sup>248</sup> The case is currently under review before the Army Court of Appeals.<sup>249</sup>

## VI. DIFF'RENT STROKES

In addition to constitutional and rule-based requirements regarding discovery, a number of organizations and government agencies have developed internal policies and procedures affecting pretrial discovery

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<sup>241</sup> Mozingo, *supra* note 239

<sup>242</sup> *See id.*

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

<sup>244</sup> Sean Murphy, *Legal Experts: Toss Soldier's Murder Conviction*, SEATTLE TIMES, June 3, 2009, [http://seattletimes.nwsourc.com/html/nationworld/2009297164\\_apusiraqsoldiercharged.html](http://seattletimes.nwsourc.com/html/nationworld/2009297164_apusiraqsoldiercharged.html).

<sup>245</sup> Mozingo, *supra* note 239.

<sup>246</sup> Murphy, *supra* note 244.

<sup>247</sup> Mozingo, *supra* note 239.

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

<sup>249</sup> Schlachtenhaufen, *supra* note 236.

practice in criminal cases. Although these policies differ in content and application, counsel on either side of a criminal case may benefit from an awareness of the guiding principles developed to manage the inevitable problems associated with pretrial disclosure. Often left with no clear answer as to whether material should be disclosed or withheld under law, practitioners may consult these sources when faced with questionable issues regarding discovery in practice.

Prosecutors, whether military or civilian, should begin by consulting their local bar and employer guidance for rules surrounding discovery. These additional rules may impose more stringent requirements for disclosure than those required by *Brady* and its progeny.<sup>250</sup> Prosecutors may also choose to examine the American Bar Association's Model Rules of Professional Conduct for additional guidance.

Many states have adopted the Model Rules of Professional Conduct, either in whole or in part.<sup>251</sup> Model Rule 3.8(d) describes a prosecutor's obligations regarding discovery and provides that prosecutors shall:

[M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]<sup>252</sup>

As evident in the broad language of Model Rule 3.8(d), a prosecutor's duty to disclose evidence is more expansive than that required in *Brady*. Additionally, the Model Rules make no provision for whether the information is "material" to the defense; rather, it requires disclosure of "all evidence or information" which may negate the guilt or mitigate the offense of the accused.<sup>253</sup>

Additionally, prosecutors in the civilian federal system must follow the rules of their state as well as the local federal court rules in the jurisdiction in which they practice law.<sup>254</sup> Similarly, Air Force prosecutors are required to follow the rules of their state as well as the Air Force Rules of Professional Conduct, which provide the minimum standard of ethical

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<sup>250</sup> See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

<sup>251</sup> See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2087 (2009); see also MODEL RULES OF PROF'L CONDUCT, available at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html) (last visited Dec. 23, 2010).

<sup>252</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8, available at [http://www.abanet.org/cpr/mrpc/rule\\_3\\_8.html](http://www.abanet.org/cpr/mrpc/rule_3_8.html) (last visited Dec. 23, 2010).

<sup>253</sup> *Id.*

<sup>254</sup> 28 U.S.C. § 530B (2010).

conduct required.<sup>255</sup> The Air Force modified ABA Rule 3.8(d) and provides that trial counsel shall: [A]t sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order of the tribunal[.]<sup>256</sup>

Although the Air Force only adopted the Model Rule with regard to sentencing, an Air Force practitioner must comply with Rule for Court Martial 701, which imposes the same broad requirements as the Model Rule. As discussed previously, Rule for Court Martial 701(a)(6) provides:

The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment.<sup>257</sup>

Because of the various rules and requirements surrounding discovery, an Air Force practitioner is encouraged to consult all the sources to ensure proper compliance. Although Rules of Professional Conduct may not be punitive in nature,<sup>258</sup> noncompliance may result in severe administrative consequences, such as censure or disbarment.<sup>259</sup>

Although the Department of Justice has declined to follow ABA Rule 3.8(d),<sup>260</sup> the Department operates under well-established internal policies addressing the pretrial discovery contained in the United States Attorney's Manual that encourages discovery practices that are more liberal than those required by law.<sup>261</sup> The Manual is used by all federal prosecutors throughout the country and "contains general policies and some procedures relevant to the work of United States Attorneys' offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice."<sup>262</sup> With regard to disclosure of material evidence pretrial, the policy states:

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<sup>255</sup> Air Force Rules of Professional Conduct and Standards for Civility, 17 August 2005 [hereinafter *Rules*], available at <http://www.caaflog.com/wp-content/uploads/AirForceRulesofProfessionalConduct.pdf>. The Air Force Rules of Professional Conduct apply to all military and civilian lawyers, paralegals, and nonlawyer assistants in the Air Force Judge Advocate General's Corps. *Rules*, page 3.

<sup>256</sup> *Rules*, R. 3.8(d).

<sup>257</sup> MCM, *supra* note 3, R.C.M. 701(a)(6).

<sup>258</sup> *See, e.g., Rules*, page 3.

<sup>259</sup> *See, e.g., Rules*, page 3.

<sup>260</sup> Joe Palazzolo, *Justice Department Opposes Expanded Brady Rule*, MAIN JUSTICE, October 15, 2009, <http://www.mainjustice.com/2009/10/15/justice-department-opposes-expanded-brady-rule/>.

<sup>261</sup> U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 1-1.100-600 (2009), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title1/1mdoj.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/1mdoj.htm).

<sup>262</sup> *Id.* at § 1-1.100.

[T]his policy encourages prosecutors to err on the side of disclosure in close questions of materiality and identifies standards that favor greater disclosure in advance of trial through the production of exculpatory information that is inconsistent with any element of any charged crime and impeachment information that casts a substantial doubt upon either the accuracy of any evidence the government intends to rely on to prove an element of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence.<sup>263</sup>

The policy also provides prosecutors with guidance on other discovery-related issues such as the timing of disclosure,<sup>264</sup> supervisory approvals when dealing with classified information,<sup>265</sup> training<sup>266</sup> and obtaining potentially discoverable information from law enforcement agencies.<sup>267</sup> While encouraging seemingly more liberal discovery practices, the policy notes that issues such as witness security, preventing obstruction of future crimes and national security may justify limited or restricted disclosure.<sup>268</sup> In these instances, the policy directs, “[w]here it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or the court for inspection *in camera* and, where applicable, seek a protective order from the court.”<sup>269</sup> The policy adopts this approach to dealing with these issues in order to “ensure confidence in fair trials and verdicts.”<sup>270</sup>

The message of the U.S. Attorney’s Manual to prosecutors seems quite clear: if faced with a question of whether to disclose a piece of evidence or not, err on the side of disclosure unless there is a compelling reason to seek *in camera* review. Military and civilian defense counsel may eagerly cite the U.S. Attorney’s Manual’s provisions regarding discovery as persuasive authority in motions to compel where the government declines a request for production. On the other hand, the U.S. Attorney’s Manual does not create substantive rights for the benefit of the criminally accused that are more expansive than provided by existing law.<sup>271</sup> Furthermore, the seemingly blatant discovery violations that occurred in the Stevens and Shaygan cases, noted above, occurred in spite of the policies in place.

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<sup>263</sup> *Id.* at § 9-5-001(F).

<sup>264</sup> *Id.* at § 9-5-001(D).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at § 9-5-001(E).

<sup>267</sup> *Id.* at § 9-5.100.

<sup>268</sup> *Id.* at § 9-5-001(A).

<sup>269</sup> *Id.* at § 9-5-001(F).

<sup>270</sup> *Id.*

<sup>271</sup> See *United States v. Lester*, 992 F.2d 174, 175 (8th Cir. 1993).

The Department of Justice, however, responded to fallout from the Stevens case by establishing more explicit, comprehensive policies regarding pretrial discovery than those contained in the U.S. Attorney's Manual. On January 4, 2010, the Deputy Attorney General of the Department of Justice, David W. Ogden, issued a series of memoranda to all federal prosecutors addressing new department guidance on pretrial discovery. In the memorandum entitled *Issuance of Guidance and Summary of Actions in Response to Report of the Department of Justice Criminal Discovery and Case Management Working Group*, Ogden announced recent efforts by the Department to review and improve pretrial discovery practices in all components.<sup>272</sup> In early fiscal year 2010, Ogden convened a team of "senior level prosecutors" throughout all components of the Department for the purpose of examining Department policies and practices relating to pretrial discovery.<sup>273</sup> Ogden stated, "I called for the review in order to determine whether the Department was well positioned to meet its discovery obligations in future cases."<sup>274</sup> According to Ogden, "[t]he Working Group primarily focused on three areas pertinent to this determination: resources, training and policy guidance."<sup>275</sup>

The Working Group ultimately determined that discovery violations by Department prosecutors are rare in comparison to the number of cases prosecuted.<sup>276</sup> In this regard, Ogden stated, "[t]his conclusion was not surprising and reflects that the vast majority of prosecutors are meeting their discovery obligations."<sup>277</sup> However, certain changes were made within the Department based upon the findings and suggestions of the Working Group.<sup>278</sup> First, Ogden released a comprehensive memorandum entitled *Guidance for Prosecutors Regarding Criminal Discovery* for the purposes of creating "the minimum considerations prosecutors should undertake in every case."<sup>279</sup> Discussed in greater detail later in this article, this memorandum is a must read for both military and civilian criminal practitioners as it definitively establishes the minimum considerations that a prosecutor must undertake regarding a number of very specific details of pretrial discovery. Second, the Department now requires each United States Attorney's Office to name a local discovery coordinator who must attend specialized training in the area of criminal discovery.<sup>280</sup> The coordinator

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<sup>272</sup> Memorandum from David Ogden on Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group (Jan. 4, 2010), *available at* <http://www.justice.gov/dag/dag-memo.pdf>.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

will then return to his local district and act as an advisor with respect to discovery issues and develop an annual training program focusing on discovery obligations for his respective office.<sup>281</sup> Third, Ogden announced a number of Department-wide initiatives regarding discovery including training programs, online resources, and case management solutions.<sup>282</sup>

Through the efforts of the Working Group, a “consensus document” was created setting forth suggested guidelines for prosecutors to follow when making pretrial disclosure in all criminal cases.<sup>283</sup> Outlined in Ogden’s memorandum, entitled *Guidance for Prosecutors Regarding Criminal Discovery*, “[t]he guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department’s pursuit of justice.”<sup>284</sup> Commonly referred to in practice as “The Ogden Memo,” Ogden announced a four-step “methodical approach” to making disclosures that all practitioners, whether prosecution or defense, should consider becoming familiar with and applying in all cases.<sup>285</sup> Similar to the provisions of the U.S. Attorney’s Manual, the contents of the Ogden memo do not confer substantive rights on an accused and does not have the force of law.<sup>286</sup>

The first step of the methodical approach outlined in the Ogden memo is entitled “Gathering and Reviewing Discoverable Information.”<sup>287</sup> During this step, prosecutors are encouraged to gather material from all members of the prosecution team.<sup>288</sup> In order to better define the prosecution team, the Ogden memo suggests a number of factors to consider with respect to each law enforcement agency participating in an investigation, including but not limited to, the role of the agency in the investigation, the prosecutor’s knowledge of discoverable information contained in agency files, and the role of the agency in the decision-making processes in the case.<sup>289</sup> “Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes.”<sup>290</sup>

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> Memorandum from David Ogden on Guidance for Prosecutors Regarding Criminal Discovery to Department Prosecutors (Jan. 4, 2010), available at <http://www.justice.gov/dag/discovery-guidance.html>.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *United States v. Caceres*, 440 U.S. 741, 755 (1979) (declining “to adopt any rigid rule requiring federal courts to exclude any evidence obtained as a result of a violation of these [IRS Regulations].”).

<sup>287</sup> Memorandum from David Ogden on Guidance for Prosecutors Regarding Criminal Discovery to Department Prosecutors (Jan. 4, 2010), available at <http://www.justice.gov/dag/discovery-guidance.html>.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

The Ogden memo provides an excellent, user-friendly list of eight areas that a prosecutor should review for discoverable information in possession of the prosecution team.<sup>291</sup> The list includes specific guidance on making disclosure of material contained in investigative agency files, confidential informant files, evidence gathered during an investigation, information in the files of civil enforcement and regulatory agencies involved in parallel civil proceedings, substantive case-related communications, *Giglio* information and information contained in witness interviews.<sup>292</sup> With regard to *Giglio* information, the guidance establishes a thorough list of potential items of impeachment evidence that should be disclosed for both law enforcement and non-law enforcement witnesses.<sup>293</sup>

While all military practitioners should consider becoming familiar with every suggestion contained in the Ogden memo, the section in the Ogden memo regarding “Information Obtained in Witness Interviews”<sup>294</sup> is particularly helpful for military trial counsel. The Ogden memo strongly suggests that an agent be present for all witness interviews during which the prosecutor is present and memorialize the interview in a report that can be later turned over to the defense if required.<sup>295</sup> However, for trial counsel in a routine case, it is very unlikely in practice that this suggestion can be followed as agents in the military, unlike their civilian counterparts, do not often involve themselves in the trial preparation process. In this regard, the Ogden memo suggests, “[i]f exigent circumstance make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present.”<sup>296</sup> While not stated specifically in the Ogden memo, the implied reason for this suggestion is so that the employee can testify to any future inconsistencies by a witness and prevent trial counsel from becoming a witness. Therefore, particularly in cases where trial counsel has concerns that a witness may be hedging or likely to falsely testify, trial counsel should consider having a paralegal or other employee of the base legal office sit in on the interview.

Additionally, the Ogden memo provides two very good points of guidance regarding witness interviews. First, the memo states:

Some witnesses’ statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

weeks. Material variance in a witness's statements should be memorialized, even if they are within the same interview and they should be provided to the defense as *Giglio* information.<sup>297</sup>

With regard to interviews of witnesses by a prosecutor in preparation for trial, the Ogden memo also states:

Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions [contained previously in the Ogden memo].<sup>298</sup>

As previously stated, it is imperative that prosecutors remember to disclose *Giglio* information. While the rules of evidence in both the military and civilian federal system clearly authorize cross-examination regarding prior inconsistent statements as an authorized form of impeachment, a busy trial counsel faced with the inevitable pressures associated with preparing for a court-martial may forget that inconsistencies by a witness discovered while he is interviewing the witness must be disclosed as *Giglio* information. Though this is important when dealing with any witness, in practice, it will more frequently arise when dealing with confidential informants or victims. For example, a confidential informant may make inconsistent statements during trial preparation about his own culpability, the quantity of narcotics involved in a drug case, or the role of the accused. Likewise, a victim may become inconsistent about his description of events, identification of an accused, or add new details of a crime for the first time. Information of this sort is *Giglio* information and must be disclosed.

The second step outlined in the Ogden memo involves "Conducting the Review."<sup>299</sup> During this step, Ogden encourages prosecutors to not entirely delegate the function of reviewing information to determine if it constitutes discoverable information which must be disclosed to agents or

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<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*



paralegals.<sup>300</sup> Ogden points out that “prosecutors should not delegate the disclosure determination itself.”<sup>301</sup>

The third step of the methodical approach outlined in the Ogden memo deals with “Making the Disclosure.”<sup>302</sup> With regard to making disclosure, Ogden encourages broad and early disclosure of discoverable material.<sup>303</sup> In this regard, Ogden states, “Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor’s good faith determination of the scope of appropriate discovery is in error.”<sup>304</sup> In this regard, civilian federal practice approaches the broad discovery requirements of the military justice system by encouraging open and early discovery.

The final step involves “Making a Record.”<sup>305</sup> Noting that documenting compliance is a very important process of disclosing material to the defense, Ogden states:

Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosure confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps [described in the Ogden memo], and poor records can negate all of the work that went into taking the first three steps.<sup>306</sup>

Just days after issuing memoranda regarding discovery, the Department of Justice announced the appointment and creation of a new, senior-level position within the Department responsible for implementing new department-wide training and resources intended to improve discovery practices within the Department.<sup>307</sup> Known as the National Coordinator of Discovery Initiatives, this position will also act as a liaison between U.S.

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<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> Press Release, U.S. Dep’t of Justice, Andrew Goldsmith Appointed as National Coordinator of Criminal Discovery Initiatives (Jan. 15, 2010), *available at* <http://www.justice.gov/opa/pr/2010/January/10-dag-043.html>.

Attorney's offices and "Main Justice" regarding certain discovery-related matters.<sup>308</sup>

While the Department of Justice has implemented guidance concerning discovery through the Ogden Memo, the Air Force has implemented the *Air Force Standards of Criminal Justice* to guide Air Force practitioners.<sup>309</sup> While the *Standards* are not as comprehensive as the Ogden memo, they emphasize the need to follow the rules surrounding discovery and expand the timelines of discovery by mandating disclosure before the deadlines specified in R.C.M. 701.<sup>310</sup>

## VII. HOME IMPROVEMENT

Although the civilian and military justice systems have very similar rules involving discovery, there is one glaring distinction. Specifically, military law encourages liberal discovery across the board as an absolute binding mandate.<sup>311</sup> In fact, "[m]ilitary law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts."<sup>312</sup> In contrast, civilian courts may vary in their interpretation of certain discovery rules<sup>313</sup> and prosecutors may only be technically bound by internal procedures such as the Ogden Memo or the U.S. Attorney's Manual that do not provide substantive rights to a defendant.<sup>314</sup> Therefore, a military practitioner should generally resolve any questionable issue involving discovery in favor of disclosure directly to defense counsel or through *in camera* inspection by the trial judge.

Perhaps it is the clear mandate of liberal discovery in the military justice system that renders guidance similar to the Ogden Memo or the U.S. Attorney's Manual unnecessary in the military. On the other hand, one may conclude that recent attention to cases involving violations of the criminal discovery rules in both the civilian and military justice systems warrant

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<sup>308</sup> *Id.*

<sup>309</sup> *Standards*, 15 Oct. 2002. The *Standards* are directly adapted from the *American Bar Association (ABA) Standards for Criminal Justice* and have been adapted to the unique needs and demands of Air Force legal practice. *Standards*, page 1.

<sup>310</sup> *Standards*, 11-2.2.

<sup>311</sup> See *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004) ("Discovery in the military justice system . . . is broader than in federal civilian criminal proceedings . . ."); see also *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004) ("The military justice system provides for broader discovery than required by practice in federal civilian criminal trials.").

<sup>312</sup> *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987).

<sup>313</sup> See, e.g., *United States v. Silva*, 71 F.3d 667, 670-71 (C.M.A. 1993) (defense did not demonstrate materiality of confidential informant's identity necessary to require disclosure in order to support a vaguely articulated entrapment defense); but see *United States v. Pesaturo*, 519 F. Supp. 2d 177(D. Mass. 2007) (defense demonstrated materiality of confidential informant's cooperation agreement requiring disclosure where defendant claimed that he would not have sold drugs in absence of the defendant's coercion).

<sup>314</sup> See, e.g., *United States v. Lester*, 992 F.2d 174, 175-76 (8th Cir. 1993) (holding that internal policies of the U.S. Department of Justice do not create enforceable substantive rights for a defendant).

more attention being placed on pretrial discovery from an educational and practical standpoint in the JAG Corps. The JAG Corps should provide more training on disclosure obligations and emphasize the importance of complying with discovery rules during initial JAG training. The military may also consider creating a working group similar to that of the Justice Department to address discovery matters and provide practical guidance for practitioners. The JAG Corps may even consider identifying one person in each office who can receive additional and continuing training on discovery. This person can then serve as a discovery point of contact for all prosecutors in the office.

At a minimum, a review of the cases involving Senator Stevens, Dr. Shaygen and ILT Behenna should serve as eye-opening examples of the potential pitfalls associated with criminal discovery practice. The importance of a clear understanding of the rules cannot be overstated to both trial counsel and defense counsel as the consequences of noncompliance are too costly to ignore.

As discussed previously in this article, both the American Bar Association and the U.S. Department of Justice have created rules and procedures which encourage increased awareness of a prosecutor's disclosure obligations. In many cases, these new rules and procedures may impose more expansive disclosure obligations than imposed by both constitutional and rules-based requirements currently in place regarding disclosure. Although more rules may not deter a prosecutor who is intent on willfully violating a defendant's constitutional rights, it is illogical to presume that every violation of a prosecutor's *Brady-Giglio* obligations is an example of willful prosecutorial misconduct. Clearly, not all violations of disclosure obligations are the result of wayward prosecutors, intent on trampling on the rights of the criminally accused. Instead, violations of disclosure obligations may result in many cases from unintentional prosecutor error.

Even if unintentional, these errors can result in profound consequences for the criminally accused. In fact, unintentional errors regarding discovery obligations pose the greatest risk to an accused's rights. Consequently, both the civilian and military justice systems share an important interest in ensuring that all practitioners develop and apply a keen awareness of the rules regarding pretrial discovery to fully protect the rights of an accused. The continued efforts of the U.S. Department of Justice to increase awareness of discovery obligations, including more training, appointment of discovery coordinators and developing resources such as a discovery-related treatise, provide important examples for how to deal with this problem. Likewise, military justice practitioners should individually obligate themselves to gain a sound understanding of the discovery rules and develop common sense procedures to avoid errors in this area.

Below is a series of practical criminal discovery tips for both military trial counsel and defense counsel. Before discussing these tips, however, one area of the discovery practice applicable to both trial counsel and defense counsel deserves extra emphasis. “*Giglio* material” is an often overlooked area in military discovery practice but can have grave consequences.

#### A. *Giglio* Material

As noted previously, the Supreme Court concluded in *Strickler* that the first step to determining whether a *Brady* violation occurred requires that the evidence at issue be favorable to the accused, either because it is exculpatory, or because it is impeaching.<sup>315</sup> A close examination of cases involving criminal discovery suggests a very slight distinction between exculpatory information and impeachment information in practical application. Exculpatory evidence primarily includes evidence which tends to directly negate an element of the charged offense by its very nature. For example, an accomplice’s statement accepting responsibility for killing a victim tends to directly contradict proof that the accused committed the crime, as was the case in *Brady*.<sup>316</sup> Likewise, evidence that someone other than the accused committed the charged offenses tends to undermine the prosecution’s ability to prove all elements beyond a reasonable doubt.<sup>317</sup>

In contrast, impeachment evidence consists of evidence which tends to impeach or contradict a single government witness.<sup>318</sup> For example, police reports prepared pretrial indicating that a key prosecution witness was unable to identify the defendant as the perpetrator after the crime occurred would be inconsistent with the witness’s trial testimony that the accused committed the charged offenses.<sup>319</sup> The police reports would provide impeachment information for the defense and would therefore be discoverable under *Giglio*.<sup>320</sup> The Supreme Court, however, has expressly refused to recognize a distinction between exculpatory evidence and impeaching evidence.<sup>321</sup> Therefore, failure to disclose impeachment

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<sup>315</sup> *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

<sup>316</sup> *See Brady v. Maryland*, 373 U.S. 83, 84 (1963).

<sup>317</sup> *See Goudy v. Basinger*, 604 F.3d 394, 396 (7th Cir. 2010) (undisclosed police reports indicating that the prosecution’s main witness as the perpetrator and not the defendant); *see also Ganci v. Berry*, 702 F. Supp. 400 (E.D.N.Y. 1988), *aff’d*, *Ganci v. Berry*, 896 F.2d 543 (2d Cir. 1990) (eyewitness’s descriptions identified someone other than the defendant as being the perpetrator).

<sup>318</sup> *See Giglio v. United States*, 405 U.S. 150, 154 (1972); *see also United States v. Bagley*, 473 U.S. 667, 676 (1985).

<sup>319</sup> *See Sherman v. Helling*, 194 F.3d 937, 940 (8th Cir. 1999).

<sup>320</sup> *See id.*

<sup>321</sup> *See Bagley*, 473 U.S. at 676.

evidence will be viewed with no less significance than a failure to disclose exculpatory evidence, and vice versa.<sup>322</sup>

However, the requirement of *Giglio* regarding a prosecutor's obligation to disclose impeachment evidence is frequently overlooked or applied too narrowly. In practice, attorneys tend to speak of "exculpatory material" or "*Brady* material" in formal motions or requests as well as during verbal discussions with opposing counsel. Perhaps this trend is rooted in the fact that the *Brady* opinion is widely cited and rightly viewed as a historical starting point in the development of case law involving disclosure obligations.<sup>323</sup> While defense counsel may be successful in obtaining impeachment information using this language, this approach fails to properly emphasize the importance of the disclosure requirements under *Giglio* in every single case. Consequently, both trial counsel and defense counsel should abandon the broad use of the terms "*Brady* material" and "exculpatory material" in favor of using "*Brady-Giglio* material" in an effort to give greater emphasis to the disclosure obligations under *Giglio*. This approach is frequently used in practice by civilian federal prosecutors, possibly in response to the increased emphasis on all disclosure obligations imposed by the U.S. Attorney's Manual and the recent Ogden Memo.

This proposed change is more than an insignificant play on words for two reasons. First, at the most basic level, using "*Brady-Giglio* material" rather than "*Brady* material" or "exculpatory material" will generally increase awareness of the importance of the requirements of *Giglio* regarding impeachment evidence. While even the newest criminal practitioners may be aware of the well-cited and oft-taught holding in *Brady*, use of *Brady-Giglio* on a regular basis will encourage practitioners to develop a sound grasp of the holding in *Giglio* as well. As noted previously, the Supreme Court sees no distinction in terms of the importance of impeaching material and exculpatory material.<sup>324</sup> Consequently, practitioners should treat the two with an equal level of importance even if that simply starts with changing the way counsel communicate with each other and the court.

Secondly, the requirements of *Giglio* deserve increased emphasis because in a routine, single-defendant criminal case, there is a greater likelihood that a practitioner will encounter impeachment evidence of a witness than exculpatory evidence. A prosecutor will not always possess facially exculpatory evidence such as a statement by an accomplice or a witness accepting responsibility for a crime and exculpating an accused.<sup>325</sup> However, the prosecution must always use witnesses to prove every criminal case. These witnesses quite frequently carry their own baggage into a proceeding, including bias, prior inconsistencies, or grants of

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<sup>322</sup> See *id.*

<sup>323</sup> See *Brady v. Maryland*, 373 U.S. 83, 84 (1963).

<sup>324</sup> See *Bagley*, 473 U.S. at 676.

<sup>325</sup> See *id.*

immunity. Impeachment evidence is often subtle and may not facially exculpate the defendant of all charges, but its importance to both trial counsel and defense counsel in terms of disclosure cannot be overstated. For defense counsel, a thorough understanding of the requirement of *Giglio* is profoundly significant if one intends to gain the full benefit of discovery in order to adequately protect a client's interests by thoroughly preparing for cross-examination of the trial counsel's witnesses. A complete appreciation for the requirements of *Giglio* is equally important to trial counsel, as the trial counsel is charged with an obligation to exercise "due diligence" in obtaining discoverable information, including impeachment evidence, that may be in the possession of outside law enforcement agencies involved in the case. For example, if an investigating law enforcement agency is in possession of impeachment information on a confidential informant who is a testifying witness, the trial counsel is obligated to obtain the information and likely disclose it to defense counsel.<sup>326</sup>

Although the examples of discoverable impeachment evidence can be found in published decisions in both civilian and military courts, the examples are more plentiful in the civilian system. With standing trial courts from 94 federal judicial districts and 13 federal circuit courts of appeal publishing decisions, a military practitioner can gain helpful insight, as well as a bank of persuasive authority, to cite during *Brady-Giglio* challenges in military courts by examining civilian federal cases involving disclosure of impeachment evidence. This is especially true in light of the fact that the Military Rules of Evidence originate from and frequently emulate the Federal Rules of Evidence used in the civilian criminal justice system.<sup>327</sup> Note, however, that military courts operate under a liberal discovery mandate that does not exist in the civilian justice system and, consequently, military courts may be more inclined to err on the side of disclosure than civilian courts.

Moreover, in order to understand disclosure requirements of *Giglio*, one must have a sound understanding of what constitutes impeaching evidence under the Military Rules of Evidence.<sup>328</sup> Nevertheless, this article is not intended as a comprehensive guide to the rules of evidence regarding impeachment. While other well-written resources provide a more complete picture of what the rules regarding impeachment evidence authorize,<sup>329</sup> stated briefly, a witness may be impeached in one of many different ways.

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<sup>326</sup> See *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam) ("Brady suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not the prosecutor.'") (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)); see also *Williams*, 50 M.J. 436, 440-41 (C.A.A.F. 1999).

<sup>327</sup> MCM, *supra* note 3, app. 21.

<sup>328</sup> See, e.g., MCM, *supra* note 3, MIL. R. EVID. 608, 609, 613.

<sup>329</sup> See, e.g., Lieutenant Colonel James Moody and Lieutenant Colonel LeEllen Coacher, *A Primer on Methods of Impeachment*, 45 A.F. L. REV. 161 (1998); see also United States v. Owens, 933 F. Supp. 76 (D. Mass. 1996) for a thorough list of impeachment evidence authorized by the Federal Rules of Evidence.

Some of the most commonly authorized methods of impeachment include cross-examining a witness with evidence of bias,<sup>330</sup> prior misconduct,<sup>331</sup> and prior inconsistent statements.<sup>332</sup> While the examples of discoverable impeachment information are virtually endless, this article will examine some of the more common examples seen in practice.

A witness's potential bias against an accused may provide fertile ground for discoverable impeachment information and is possibly the most common source of discoverable impeachment information. Bias exists in many forms and arises where there is evidence that a witness possesses some underlying motivation to fabricate testimony or exaggerate facts against an accused.<sup>333</sup> In its most basic form, discoverable evidence of bias may include evidence suggesting that the witness simply does not like the accused<sup>334</sup> or is motivated by revenge against the accused.<sup>335</sup>

Also, all promises made by the government to a witness will generally be discoverable *Brady-Giglio* material.<sup>336</sup> While this rule applies to promises made to all witnesses, in practice, discovery issues surrounding promises to witnesses frequently arise in cases involving confidential informants. For example, disclosure may be required of money received by a confidential informant in exchange for testimony as well as the nature of any promises of leniency on pending charges by the government.<sup>337</sup> Secret, undisclosed promises to witnesses are not authorized.<sup>338</sup> The government's agreement to make favorable recommendations at sentencing must also be disclosed.<sup>339</sup> In fact, the government's agreement to assist a witness in seemingly unrelated matters such as forfeiture proceedings should also be disclosed.<sup>340</sup> Therefore, trial counsel should disclose all promises of leniency made to a witness in writing or verbally even where the terms of the promise may have been made to the witness's attorney. Likewise, defense counsel should be diligent in obtaining this information through specific requests during pretrial discovery.

Courts may also require disclosure of promises made to a confidential informant in the past that may be unrelated to the charges pending against the accused.<sup>341</sup> Such evidence may tend to demonstrate bias

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<sup>330</sup> MCM, *supra* note 3, MIL. R. EVID. 608(c).

<sup>331</sup> MCM, *supra* note 3, MIL. R. EVID. 608(b).

<sup>332</sup> MCM, *supra* note 3, MIL. R. EVID. 613.

<sup>333</sup> See *United States v. Abel*, 469 U.S. 45 (1984); see also MCM, *supra* note 3, MIL. R. EVID. 608(c).

<sup>334</sup> See *United States v. Sipe*, 388 F.3d 471, 481-82 (5th Cir. 2004).

<sup>335</sup> See *United States v. Sperling*, 726 F.2d 69, 70-71 (2d Cir. 1984).

<sup>336</sup> See *Banks v. Dretke*, 540 U.S. 668, 699-701 (2004).

<sup>337</sup> See *United States v. Mason*, 293 F.3d 826 (5th Cir. 2002); *Monroe v. Angelone*, 323 F.3d 286, 288 (4th Cir. 2003); *Benn v. Lambert*, 283 F.3d 1040, 1057-58 (9th Cir. 2002).

<sup>338</sup> See *Hayes v. Brown*, 399 F.3d 972, 987-88 (9th Cir. 2005).

<sup>339</sup> See *Braun v. Powell*, 227 F.3d 908, 920 (7th Cir. 2000).

<sup>340</sup> See *United States v. Parness*, 408 F. Supp. 440 (S.D.N.Y. 1975).

<sup>341</sup> See *United v. Mejia*, 82 F.3d 1032, 1036 (11th Cir. 1996) (disclosure required of government's payment of \$16,000 to a confidential informant in past cases); *Wilson v.*

by reflecting an ongoing, historical relationship between law enforcement and the confidential informant in which the confidential informant has come to expect certain benefits from law enforcement in exchange for cooperation.<sup>342</sup> Thus, trial counsel should become informed about the prior relationship between a confidential informant and an investigating law enforcement agency to determine what payments have been made to the informant in the past and what promises have been made in previous cases. When witness security or obstruction of ongoing investigations is an issue, trial counsel should consider seeking an *in camera*, ex parte review of the information so that the court can make the decision as to what should and should not be disclosed.

Furthermore, the prosecution must also disclose benefits provided to witnesses during an investigation or trial preparation including matters as far-ranging as conjugal visits with members of the opposite sex to more mundane benefits such as unsupervised telephone privileges.<sup>343</sup> The government is also required to disclose immunity agreements with witnesses.<sup>344</sup> Trial and defense counsel should also note any close relationships between the investigating officer and a confidential informant that go beyond professional involvement.<sup>345</sup> As a somewhat extreme example of a close relationship, at least one civilian federal court has found a law enforcement officer's romantic involvement with a cooperating witness may be considered *Brady-Giglio* material.<sup>346</sup>

A witness's bias or motivation to lie is often harder to detect as demonstrated by the case of *United States v. Mahoney*.<sup>347</sup> In *Mahoney*, the accused was convicted of wrongful use of cocaine.<sup>348</sup> Trial counsel failed to disclose a letter written by the base staff judge advocate (SJA) to the Numbered Air Force (NAF) SJA in which the base SJA was critical of the government's forensic toxicologist.<sup>349</sup> In the letter, the SJA criticized the government's expert for showing a lack of "enthusiasm or conviction" about the Air Force drug testing program in prior cases.<sup>350</sup> The SJA was also quite critical of the forensic toxicologist's testimony during a prior court-martial

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Beard, 589 F.3d 651, 651-54 (3d Cir. 2009) (officer's history of providing loans to a confidential informant in the past constitutes *Brady-Giglio* material).

<sup>342</sup> See *Beard*, 589 F.3d at 664.

<sup>343</sup> See *United States v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993); *United States v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993); *United States v. Boyd*, 883 F. Supp. 1277 (N.D. Ill. 1993). All three cases arose from the prosecution of the El Rukn crime organization by the U.S. Attorney's Office in Chicago in which various claims of prosecutorial misconduct were alleged including *Brady-Giglio* violations.

<sup>344</sup> See *United States v. Wainwright*, 756 F.2d 1520, 1524 (11th Cir. 1985); *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975).

<sup>345</sup> See *United States v. Arnold*, 117 F.3d 1308, 1315-18 (11th Cir. 1997).

<sup>346</sup> See *id.*

<sup>347</sup> See *United States v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003).

<sup>348</sup> *Id.* at 347.

<sup>349</sup> *Id.* at 347-48.

<sup>350</sup> *Id.* at 347.



in which the toxicologist, “criticized the value of studies normally used by forensic toxicologists to draw conclusions and render opinions based on certain fact scenarios—to the point he could no longer credibly rely on these studies as an expert witness for the Government.”<sup>351</sup> Of particular importance for disclosure purposes, the SJA questioned why the Air Force would continue to employ the forensic toxicologist if his testimony reflected his “honestly held opinion.” The letter was “disseminated widely at the Drug Testing Laboratory and was the subject of formal training for [Drug Testing Laboratory experts]” and the witness was aware of its existence.<sup>352</sup>

The forensic toxicologist testified as an expert at trial and made favorable statements about the Air Force drug testing program including the lab processes commonly used by the Air Force.<sup>353</sup> The defense learned of the SJA’s letter post-conviction and requested its production.<sup>354</sup> The Air Force Court of Criminal Appeals examined the letter *in camera* and ordered the letter sealed. The court determined, *inter alia*, that the SJA’s letter was not discoverable *Brady-Giglio* material.<sup>355</sup> On appeal, the U.S. Court of Appeals for the Armed Forces disagreed.<sup>356</sup> Noting that the letter had been widely disseminated, the court stated that “appropriate Government inquiry of [the forensic toxicologist] should have led to discovery of the letter.”<sup>357</sup> The court reasoned,

[The SJA’s letter] arguably created a significant motive—the desire to receive favorable work evaluations and keep his job—for Dr. Mobley to testify positively about lab procedures and underlying scientific studies in future courts-martial. Cross-examining Dr. Mobley about the letter may have revealed this motive, serving to damage Dr. Mobley’s credibility, and thereby enhance the defense’s case. In short, the letter’s substantial impeachment value undermines confidence in the trial’s outcome.<sup>358</sup>

Thus, the court concluded that the SJA’s letter was discoverable *Brady-Giglio* material and set aside the findings and the sentence.<sup>359</sup>

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<sup>351</sup> *Id.* at 348.

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 347–48.

<sup>354</sup> *Id.* at 347.

<sup>355</sup> *Id.* at 348.

<sup>356</sup> *Id.* at 350.

<sup>357</sup> *Id.* at 348.

<sup>358</sup> *Id.* at 350.

<sup>359</sup> *Id.* at 350.

The court in *Williams* previously emphasized the importance of the prosecutor's burden of exercising "due diligence"<sup>360</sup> to obtain impeaching information from all entities that are "closely aligned with the prosecution,"<sup>361</sup> including the actual witness, as well members of the trial counsel's own office. It is very unlikely, however, that the *Brady-Giglio* material at issue in *Mahoney* was included in the trial counsel's case file as it was a letter between the base SJA and the NAF SJA about the expert witness's performance in unrelated, prior courts-martial. Nevertheless, the court mandated disclosure. Additionally, the court's statement that "appropriate Government inquiry of [the forensic toxicologist] should have led to discovery of the letter" suggests that trial counsel should always inquire of witnesses about potential areas of bias and other impeaching information as part of routine trial preparation.<sup>362</sup>

A witness's prior inconsistent statements may also constitute *Brady-Giglio* material.<sup>363</sup> Prior statements of a witness that are materially inconsistent with either the witness's trial testimony or other pretrial statements must be disclosed.<sup>364</sup> For example, a failure to disclose a cooperating witness's prior misidentification of an accused may constitute a *Brady* violation.<sup>365</sup> Also, in addition to demonstrating bias, information that an informant was paid for his cooperation may also be discoverable as a prior inconsistent statement when the witness testifies at trial that he was never paid by the police.<sup>366</sup> Moreover, trial counsel must disclose statements made by a witness during an Article 32 hearing that are inconsistent with the witness's trial testimony.<sup>367</sup>

Of note, there is no legally defined time limitation on what constitutes a "prior" inconsistent statement in relation to when a trial begins. Witness statements tend to evolve from the initial stage where the witness is interviewed, usually by law enforcement, to the eleventh hour trial-preparation stage when the witness is being interviewed and prepared for testimony by trial counsel. Statements made by witnesses to trial counsel during trial preparation that are materially different from any previous statement the individual has made may be deemed discoverable as prior inconsistent statements. Having another person present and taking notes during trial preparation interviews may be a prudent practice for trial

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<sup>360</sup> *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999) (requiring the prosecution to exercise "due diligence" in obtaining discoverable information from investigating authorities and other entities that are closely aligned with the prosecution).

<sup>361</sup> *Id.*

<sup>362</sup> *Mahoney*, 58 M.J. at 349.

<sup>363</sup> *See United States v. Simmons*, 38 M.J. 376, 377-79 (C.M.A. 1993) (holding that a victim's statement to a polygrapher in a post-polygraph interview that she did not believe she was raped because she enjoyed the sex was deemed discoverable).

<sup>364</sup> *See id.*

<sup>365</sup> *See United States v. Torres*, 569 F. 3d 1277, 1279-81 (10th Cir. 2009).

<sup>366</sup> *See Banks v. Dretke*, 540 U.S. 668, 680 (2004).

<sup>367</sup> *See United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997).

counsel. Ideally, having a law enforcement agent who can memorialize the statements in a report and testify if necessary is ideal, though the time crunch of trial preparation and logistics often prevent this practice. Indeed, some civilian prosecutors make it a standard practice to always assign the task of taking notes during trial preparation interviews to another person, such as a paralegal, so that the prosecutor does not become a witness and her notes do not become discoverable.

Given the broad scope of potential cross examination authorized by M.R.E. 608(b), evidence of prior bad acts by a prosecution witness may also constitute *Brady-Giglio* material.<sup>368</sup> For example, in *United States v. Banks*, the prosecution failed to disclose the fact that the testifying DEA chemist was under internal investigation for misuse of her government travel card at the time she conducted lab tests on the narcotics at issue.<sup>369</sup> The United States Court of Appeals for the Seventh Circuit affirmed the district court's conclusion that this evidence constituted discoverable *Brady-Giglio* material. The *Banks* decision is similar to the approach adopted by the Court of Military Appeals in *United States v. Green*.<sup>370</sup> In *Green*, trial counsel failed to disclose a CID agent's prior history of non-judicial punishment for fraternization, filing a false travel voucher, and larceny.<sup>371</sup> While the court found the error harmless because the CID agent's credibility was not in issue, the information was deemed to be discoverable.<sup>372</sup>

As in other areas involving *Brady-Giglio* material, cases involving confidential informants are typically replete with examples of discoverable information regarding prior bad acts. For example, evidence that confidential informants were stealing narcotics during controlled buys and using drugs while working for law enforcement is discoverable.<sup>373</sup> Similarly, a confidential informant's prior use of aliases and engaging in untruthful conduct such as counterfeiting may constitute discoverable impeachment information.<sup>374</sup> Stated succinctly, if the prosecution or any person or entity "closely aligned with the prosecution,"<sup>375</sup> possesses evidence of prior bad acts by a confidential informant, it is likely discoverable *Brady-Giglio* material.

Prior bad acts by law enforcement officers who testify as witnesses can present unique problems for trial counsel as well.<sup>376</sup> In light of the "due diligence" standard put forth in *Williams*, trial counsel must become aware

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<sup>368</sup> MCM, *supra* note 3, MIL. R. EVID. 608(b).

<sup>369</sup> *United States v. Banks*, 546 F.3d 507 (7th Cir. 2008).

<sup>370</sup> *United States v. Green*, 37 M.J. 88 (C.M.A. 1993).

<sup>371</sup> *Id.* at 89.

<sup>372</sup> *Id.*

<sup>373</sup> *See United States v. Childs*, 447 F.3d 541, 543 (7th Cir. 2006).

<sup>374</sup> *See United States v. Steinberg*, 99 F.3d 1486, 1489-92 (9th Cir. 1996); *United States v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996).

<sup>375</sup> *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999).

<sup>376</sup> *See United States v. Wilson*, 605 F.3d 985 (D.C. Cir. 2010) (discussing pending investigations of misconduct as impeachment material).

of information in a law enforcement officer's background, such as personnel actions or complaints, which negatively impact the officer's credibility even if the information is in possession of a law enforcement agency involved in the investigation and not the trial counsel's office.<sup>377</sup> In fact, an officer's knowledge of his own ongoing criminal conduct at the time of his testimony may be imputed to trial counsel for purposes of disclosure, even if the trial counsel is completely unaware of its existence.<sup>378</sup> To this end, trial counsel will typically receive derogatory data on all military law enforcement agents involved in a case that are likely to be witnesses. On the other hand, this "derog data," through no fault of anyone in particular, may not contain very recent, real-time information as it is usually received some time before the actual trial. Additionally, the "derog data" may not be comprehensive and may not contain certain information about an officer's background constituting *Brady-Giglio* material.

Prudent trial counsel will not simply rely on "derog data" for purposes of making disclosure. Rather, trial counsel should consider personally interviewing law enforcement witnesses pretrial about any derogatory information in the officer's background. Inquiry should be made regarding any personnel actions, investigations or complaints against the officer which negatively impact the officer's credibility in any respect. Trial counsel should also consider preparing a Memorandum of Record for the prosecution file documenting these conversations with law enforcement agents, even when no additional information exists.

Trial counsel must remain mindful, however, that law enforcement officers often work in a hostile environment involving a criminal element of society that does not always observe the truth. Hence, unfounded complaints of wrongdoing against officers can be common. These unfounded or unproven acts of misconduct may not be admissible.<sup>379</sup> On the other hand, because the rules of discovery in the military are focused on "equal access to evidence,"<sup>380</sup> the determination of whether trial counsel must make disclosure of potential *Brady-Giglio* material, "is not focused solely upon evidence known to be admissible at trial."<sup>381</sup> As a result, trial counsel may not withhold potential *Brady-Giglio* material simply because trial counsel unilaterally does not believe the information is admissible at trial.<sup>382</sup> Instead, trial counsel should create a plan of action in dealing with these issues that remains compliant with trial counsel's obligation to proactively disclose *Brady-Giglio* material consistent with the liberal

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<sup>377</sup> *See id.*

<sup>378</sup> *See* *Arnold v. McNeil*, 622 F. Supp. 2d 1294 (M.D. Fla. 2009), *aff'd per curiam*, 595 F.3d 1324 (11th Cir. 2010).

<sup>379</sup> *See* *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001) (defense counsel may not cross-examine a police officer about unproven, pending complaints of wrongdoing).

<sup>380</sup> *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

<sup>381</sup> *Id.*

<sup>382</sup> *See id.* at 326 (noting that "the military judge improperly limited the scope of discovery when he apparently focused on admissibility.").

demands of military law but still preserves the right of the government to seek suppression of wholly irrelevant matters at trial.

Trial counsel should not decide questionable discovery issues alone, but instead, should follow a three-step approach to ensure they are complying with the rules of discovery. First, and foremost, trial counsel should discuss the matter with a supervisor. Internal practices and policies of an office tend to vary from base to base and it is never a good idea for trial counsel to gain a reputation for keeping his or her supervisors uninformed about potentially volatile issues in a case. Secondly, trial counsel should become intimately familiar with the provisions of Rule 701(g)(2) regarding the trial court's discretion to resolve disclosure issues through ex parte *in camera* submissions of possible *Brady-Giglio* material. While the defense may also request ex parte *in camera* review of derogatory information,<sup>383</sup> nothing precludes trial counsel from being proactive and seeking the court's input on questionable discovery issues.<sup>384</sup> This approach will ensure that trial counsel can never be accused of failing to uphold the liberal mandate regarding discovery in the military system. Furthermore, the authors propose that a trial judge may be more willing to limit or restrict disclosure, rather than make full, unencumbered disclosure, if trial counsel takes an open, upfront approach that shows a willingness to not engage in "gamesmanship." Third, if the trial court orders disclosure of the information, trial counsel should file a motion to suppress at the first available opportunity. Although certain areas of the military justice system seem to liberally favor the defense, trial counsel may still zealously represent the interests of the United States by seeking to exclude wholly irrelevant evidence from the truth-seeking function of the trial process.

As with all other impeaching information, a prior finding of incredibility in an official proceeding can potentially have a devastating impact on the credibility of a law enforcement witness, even if the finding was made in a prior matter completely unrelated to the case at issue.<sup>385</sup> Unlike ordinary lay witnesses, law enforcement witnesses often have a history of testifying before various tribunals due to the nature of their employment. The same is true in practice of certain experts, such as forensic toxicologists. While civilian courts are somewhat divided on the issue, there is authority for the position that defense counsel may cross-

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<sup>383</sup> See *id.* at 325.

<sup>384</sup> See *Wiggins v. United States*, No. 10-1033, 2010 WL 2546072 (D. N.J. June 21, 2010). Prosecution sought ex parte *in camera* review of potentially impeaching information against one of its witnesses under provisions of Federal Rule of Criminal Procedure 16, which mirrors R.C.M. 701(g)(2). *Id.*

<sup>385</sup> See *United States v. Dawson*, 425 F.3d 389, 396 (7th Cir. 2005) (cross-examination of a law enforcement officer about a judge's prior finding that the officer was not credible in a prior unrelated proceeding deemed permissible impeachment under Federal Rule of Evidence 608(b)).

examine a law enforcement witness about a prior finding of incredibility.<sup>386</sup> Therefore, such a finding should be disclosed to the defense.

Where a military law enforcement agent is a key witness, defense counsel may consider inquiring of other defense counsel from prior bases where the officer has worked regarding any prior findings of incredibility. Prudent defense counsel should obtain transcripts if possible where a prior finding of incredibility exists in preparation for cross-examination. The possible use of prior findings of incredibility for impeachment purposes also highlights the importance of military defense counsel developing relationships with local, state, and federal public defenders in their geographic area. When faced with an unknown civilian law enforcement officer as a key government witness, defense counsel may call upon these resources for potentially valuable cross-examination material regarding prior findings of incredibility or other authorized areas of impeachment as local practitioners may have encountered the specific officer previously.

Note, however, that the issue of prior findings of incredibility may be used by trial counsel as well where the defense calls an expert witness who routinely testifies in court.<sup>387</sup> As a result, trial counsel should also diligently inquire into the background of defense experts for possible impeachment evidence using all available resources. Particularly in cases involving child pornography or computer crimes where experts are frequently used in the civilian system, the prosecutors in the local United States Attorney's Office may be a great source of background information about the defense's expert witness.

Three additional areas of potentially impeaching information may lead to discovery disputes. First, the prosecution may be required to disclose information which calls into question a witness's general capacity to observe certain relevant events. Hence, trial counsel should disclose evidence that the prosecution's witnesses were high on drugs<sup>388</sup> or mentally unstable at relevant times.<sup>389</sup> Likewise, evidence that tends to impeach a witness's statement that he was physically located in a position to observe key events is *Brady-Giglio* material.<sup>390</sup> Third, the prosecution must disclose

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<sup>386</sup> See *id.*; see also *United States v. Whitmore*, 359 F.3d 609, 619-22 (D.C. Cir. 2004) (cross-examination on prior finding of incredibility permissible), *but see Zuluaga v. Spencer*, 585 F.3d 27 (1st Cir. 2009); *United States v. Cruz*, 894 F.2d 41, 43 (2d Cir. 1990) (defense not permitted to cross examine informant regarding prior finding of incredibility in an unrelated proceeding).

<sup>387</sup> See *United States v. Terry*, 702 F.3d 299, 316 (2d Cir. 1983) (prosecutor permitted to cross-examine defense experts about prior cases in which the expert's testimony was deemed untruthful).

<sup>388</sup> See *Williams v. Whitley*, 940 F.2d 132, 134-36 (5th Cir. 1991) (eyewitness used methadone within two hours prior to the crime); *Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002) (informant's use of drugs during trial proper impeachment).

<sup>389</sup> See *King v. Ponte*, 717 F.2d 635 (1st Cir. 1983).

<sup>390</sup> See *Ballinger v. Kerby*, 3 F.3d 1371 (10th Cir. 1993).

evidence from other witnesses that is inconsistent with the testimony of a government witness.<sup>391</sup>

## B. Tips for Prosecutors

### 1. Document Compliance

Fortunately, the criminal justice system affords all defendants a presumption of innocence and no defendant or accused is obligated to present evidence to disprove guilt. The same is not always true of a prosecutor who has been accused of violating a discovery rule. In short, trial counsel must be prepared to defend himself from allegations of discovery violations by the defense. Perhaps the best way for a prosecutor to prepare for such a defense is to methodically document compliance with the discovery rules in every case. At the most basic level, trial counsel must document compliance with the discovery rules by maintaining copies of all correspondence with defense counsel, including disputed items. Trial counsel should also document impeachment evidence obtained from witnesses during trial preparation and should document the advice of supervisory attorneys regarding questionable discovery issues through Memoranda of Record.

Most importantly, trial counsel should develop a discovery control system. The discovery control system should consist of a file marked as “discovery control” and should serve as a quick reference resource for every piece of discovery that has been turned over to the defense. The discovery control file should contain a copy of all discovery sent to the defense as well as a meticulously drafted certificate of service which itemizes each disclosure. To create a discovery control copy, trial counsel should make two copies of all discovery material: one to be sent to the defense and one to be maintained by trial counsel as a discovery control copy. Trial counsel should affix identical page numbers to both the copies.

Trial counsel should likewise be very meticulous in documenting what exactly is turned over to defense counsel on certificates of service. The certificates of service should not merely be a recitation of the contents. Instead, the certificates of service should include the date of disclosure as well as a brief description of all documentary and non-documentary evidence, including such information as the total number of pages, the total number of photographs and a brief description of what is contained on any compact discs. Each certificate of service should be attached to the top of the discovery control copy and placed in the discovery control file. Since trial counsel’s discovery obligation is a continuing duty, future disclosures to the defense should be handled in the same manner.

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<sup>391</sup> See *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001) (evidence that eyewitnesses contradicted prosecution witness’s version of events deemed discoverable *Brady-Giglio* material).

For example, in a hypothetical case, trial counsel has provided discoverable documents consisting of AFOSI reports and witness statements to defense counsel on 21 February 2011 and 15 March 2011. During both disclosures, trial counsel created two copies: one for the defense and one for the discovery control file. Identical numbers have been affixed to each copy. Trial Counsel attached a detailed certificate of service to top of both copies. Going into trial, the discovery control file now contains two discovery control copies, one for each disclosure, with detailed certificates of service attached to each. In the middle of trial, the defense claims that the prosecutor failed to turn over a witness statement. After requesting a brief moment to respond from the trial judge, trial counsel grabs his discovery control file, references the detailed certificates of service and determines that disclosure of the witness statement was made on 21 February 2011. Trial Counsel then obtains the discovery control copy for the 21 February 2011 disclosure and determines that disclosure of the witness statement occurred on page 23 of the 54 pages of documents disclosed to the defense on that date. Therefore, trial counsel may articulately respond, “Your honor, I provided the defense the witness statement on 21 February 2011. On that date, I provided the defense with 54 pages of discovery. The witness’s statement is contained in page 23.”

In addition to a discovery control system, trial counsel should endeavor to document and disclose impeachment information obtained from witnesses during trial preparation by trial counsel or other members of the prosecution team. Where, for example, AFOSI has conducted multiple interviews of a witness, inconsistencies may be evidenced in sworn witness statements. However, in preparation for trial, trial counsel is often faced with interviewing witnesses without an agent present and without always obtaining a sworn statement from the witness. While trial counsel should always assert work-product privilege regarding his own notes taken during a trial preparation interview, *Brady* and *Giglio* demand that inconsistencies or admissions of untruthfulness affecting the witness’s credibility must be disclosed to the defense regardless of when the prosecutor obtains the information. In order to meet this requirement, trial counsel may document and disclose this information to the defense via letter or email and maintain a copy for the discovery control file.

For example, in a hypothetical scenario, trial counsel is interviewing a victim of sexual assault in preparation for trial the following day. The victim has previously provided two written, sworn statements to AFOSI in which she states both that she was completely sober on the evening of the assault and that the alleged rapist identically matched the description of the accused. During trial preparation the night before trial is to begin, the victim states, for the first time, that she drank a six-pack of beer prior to the assault and the offender was slightly shorter than the accused. To comply with the discovery rules, trial counsel should send an email to defense counsel summarizing the witness’s inconsistent statements after the



interview noting the date, time and location of the interview. Trial counsel should also print a copy of the email for the discovery control file.

## 2. Ensure Compliance by All Law Enforcement Agencies

Trial counsel is directly responsible for disclosure of *Brady-Giglio* material that is in possession of law enforcement agencies or other entities “closely aligned with the prosecution.”<sup>392</sup> The fact that trial counsel is subjectively unaware of the existence of the information is irrelevant.<sup>393</sup> Law enforcement agencies may resist turning over files, in particular confidential informant files, to anyone, including trial counsel. Trial counsel cannot allow a law enforcement officer to determine what is discoverable and what is not; the burden is on trial counsel to not only disclose the information but to seek it out. Trial counsel should remember that if a worst-case scenario such as what happened in the Senator Stevens or Dr. Shaygan cases occurs, trial counsel’s name will likely be cited in the published opinion on the matter more than anyone else involved. When issues arise that cannot be resolved, seek supervisory intervention.

## 3. Do Not Go It Alone on Difficult Discovery Matters or Ethical Issues

A review of cases from the civilian justice system reveals that egregious *Brady* violations can result in referral to either the prosecutor’s state bar or, for civilian federal prosecutors, referral to the Department of Justice’s Office of Professional Responsibility.<sup>394</sup> To avoid allegations of ethical impropriety regarding the discovery process, trial counsel should always seek the advice of a more experienced supervisory attorney when faced with a questionable discovery issue or ethical question of any kind. Supervisory attorneys often have more litigation experience and are better able to foresee problem areas in the discovery process than a newly assigned trial counsel. For example, if trial counsel receives a witness statement prior to trial that is definitely impeaching information but also has the potential to damage national security, trial counsel should immediately seek the advice of supervisors before deciding whether to disclose the information to the defense. Going it alone on ethical questions is never a good idea.

Because of the potential consequences of a discovery violation together with the legal mandate of liberal discovery in the military justice system, some practitioners may rightfully conclude that open discovery is

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<sup>392</sup> United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999).

<sup>393</sup> See *id.*; see also Youngblood v. West Virginia, 547 U.S. 867, 869-70, (“Brady suppression occurs when the government fails to turn over even evidence that is ‘known only to police investigators and not to the prosecutor . . . .’”) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438).

<sup>394</sup> See *United States v. Jones*, 609 F. Supp. 2d 113 (D. Mass. 2009).

the best policy.<sup>395</sup> However, as an advocate for the government, trial counsel remains obligated to diligently represent the interests of his client and ensure that victims of crime are not subjected to future harm, national security is not damaged, and ongoing investigations remain unhindered. Where these issues are legitimate concerns, a prosecutor is not without legal options to both ensure compliance with the discovery rules and prevent future harm. Trial counsel should consider asking for, at a minimum, limited or restricted disclosure after an *ex parte in camera* review under 701(g)(2). Although the authors do not advocate overburdening courts by placing every piece of potentially discoverable evidence before a trial judge, when seriously in doubt, trial counsel should utilize 701(g)(2) and proactively seek *in camera* review of the potential *Brady-Giglio* material. This approach will ensure that trial counsel does everything authorized by the rules to ensure compliance with his disclosure obligations while protecting witnesses, national security, and ongoing investigations.

#### 4. Do Not Withhold Evidence Based on a Lack of Prejudice to the Defense

A review of cases reveals numerous instances where courts found that information should have been disclosed as *Brady-Giglio* material but, in the end, concluded that there was no harm to the accused for various reasons.<sup>396</sup> It is simply unwise, however, for a prosecutor to withhold an otherwise discoverable piece of evidence due to the prosecutor's unilateral, pretrial belief that failure to disclose the piece of evidence will not be deemed prejudicial. Given the fast-paced, unpredictable nature of a jury trial, it is unlikely the wisdom of Confucius or the prophetic powers of Nostradamus could even determine conclusively whether the *lack of* a piece of evidence will be prejudicial or non-prejudicial to an accused, even in a case of minimal complexity. Indeed, some courts have specifically noted that prosecutors should not choose to withhold evidence pretrial based on presumptions that the decision will be viewed favorably at a later time but should, instead, disclose evidence even if it is even "*potentially* exculpatory or otherwise favorable."<sup>397</sup> Additionally, even if a nondisclosure does not result in a conviction being set aside, a prosecutor still risks other consequences, such as referral to his state bar for investigation.

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<sup>395</sup> See Captain Christopher M. Schumann, *Why Can't We All Just Get Along?*, THE REPORTER, Sept. 2004, at 20.

<sup>396</sup> See, e.g., *United States v. Santos*, 59 M.J. 317 (C.A.A.F. 2004); *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004).

<sup>397</sup> *United States v. Safavian*, 233 F.R.D. 12, 16 (D. D.C. 2005).

## C. Tips for Defense Counsel

### 1. Prepare Thorough Discovery Requests

Although the prosecution is required to disclose certain evidence even in the absence of a defense discovery request, the standard used to determine whether a discovery violation has occurred differs depending on whether there was a specific defense discovery request.<sup>398</sup> When there is a specific defense request for discovery, courts will apply a lower standard of materiality than if there is no specific request for discovery.<sup>399</sup> In cases where the defense has made a specific request for discovery, “the failure to make any response is seldom, if ever, excusable.”<sup>400</sup> Further, as discussed previously, a military accused is entitled to an even higher standard of review when requested evidence is not disclosed and a military court will grant relief to an accused if there is any reasonable doubt that the outcome of the proceeding would have been different.<sup>401</sup> As such, it is important for defense to prepare thorough discovery requests to ensure that they have requested all relevant evidence.

Although the Department of Justice issued the “Ogden Memo” to assist federal prosecutors in the field, defense counsel, be they federal or military, can also benefit from the Ogden Memo and use it to assist in developing comprehensive discovery requests.<sup>402</sup> The Ogden Memo lists several items a prosecutor should review, but a specific defense request for the same information will hopefully ensure that the prosecutor does not overlook any important information. For example, defense counsel should request all the discoverable information relating to confidential informants, including immunity agreements and payment information. Defense should also request substantive case-related communications, whether those communications are in emails, memoranda, reports, or notes.

Defense should also request complete *Giglio* information on all testifying witnesses, whether those witnesses are law enforcement witnesses or not. The Ogden Memo includes several examples of *Giglio* information, and all items should be specifically requested by the defense. Those items include: prior inconsistent statements; statements reflecting witness statement variations; any benefits provided to the witness, such as dropped or reduced charges, immunity, expectations of downward departures or motions for reduction of sentence, assistance in a state or local criminal proceeding, considerations regarding forfeiture of assets, stays of deportation or other immigration status considerations, S-Visas, monetary

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<sup>398</sup> See *United States v. Agurs*, 427 U.S. 97 (1976); see also *United States v. Green*, 37 M.J. 88, 90 (C.M.A. 1993).

<sup>399</sup> See *Agurs*, 427 U.S. at 106.

<sup>400</sup> *Id.*

<sup>401</sup> See *Green*, 37 M.J. at 90.

<sup>402</sup> Ogden, *supra* note 75.

benefits, non-prosecution agreements, letters to other law enforcement officials on behalf of the witness, relocation assistance, and consideration or benefits to other parties; conditions affecting the witness's bias, such as animosity toward the defendant, animosity toward a group of which the defendant is affiliated, a relationship with a victim, or known but uncharged criminal conduct; prior acts under Federal Rule or Military Rule of Evidence 608; prior convictions under Federal Rule or Military Rule of Evidence 609; and known substance abuse or mental health issues that could affect the witness's ability to perceive and recall events.<sup>403</sup> In fact, both trial counsel and defense counsel can benefit from creating a discovery checklist based on the items contained in the Ogden Memo, together with items required to be disclosed as outlined in published military cases.

Should prosecutors be reluctant to provide any of the requested information, defense counsel can use the Ogden Memo to argue for its production. Although the Ogden Memo is not binding authority, the United States Deputy Attorney General issued the guidance based on the findings of a working group consisting of the most experienced federal prosecutors in the country.<sup>404</sup> For example, if a prosecutor refuses to produce information relating to a witness's expectations regarding reduced charges, defense counsel can argue the rules surrounding discovery. Additionally, defense counsel can quote the Ogden Memo as persuasive authority and argue that even the most experienced federal prosecutors in the country agree that this is likely discoverable material.

## 2. Do Your Own Homework

Although a prosecutor has an obligation to disclose exculpatory and impeachment evidence, a prudent defense counsel will also take it upon himself to look for this evidence independently. Often, a prosecutor may not know that certain evidence exists. Although ignorance does not abrogate a prosecutor's discovery obligations, a defense counsel should seek out all information that may assist his client. Diligent work by a defense counsel may result in relief for his client.

For example, in *United States v. Roberts*, the defense counsel interviewed the lead AFOSI agent.<sup>405</sup> During the interview, the defense learned that the agent had previously been disciplined, but the agent

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<sup>403</sup> See *id.*

<sup>404</sup> See *id.* "This guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group sought comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility." *Id.*

<sup>405</sup> *United States v. Roberts*, 59 M.J. 323, 324 (C.A.A.F. 2004).

provided no further information.<sup>406</sup> The prosecutors refused to disclose the information and the defense made a motion to compel discovery.<sup>407</sup> The military judge reviewed the files, which revealed that the agent was previously under investigation and had lied to investigators.<sup>408</sup> The military judge erroneously believed that information did not constitute impeachment evidence and denied the defense motion.<sup>409</sup>

C.A.A.F., however, disagreed with the military judge's findings.<sup>410</sup> The court held that the information was material to the defense's preparation of the case because the information was relevant to the agent's credibility.<sup>411</sup> It also pointed out that the military judge improperly limited the scope of discovery to whether the information would be admissible at trial.<sup>412</sup> Although the military judge erred by denying the defense motion, C.A.A.F. found it to be harmless error.<sup>413</sup> The court reasoned that the error was harmless because the agent was not the "linchpin" in the government's case and there were nine other witnesses who testified against the accused.<sup>414</sup>

Although C.A.A.F., in *Roberts*, did not overturn the conviction, defense counsel can use this opinion to his advantage at the trial level. Defense counsel must argue for production of evidence whether it is exculpatory or impeachment evidence. Additionally, defense counsel must ensure the trial judge understands that evidence does not need to be admissible in order to be discoverable.

### 3. Document and Know Your Remedies

In much the same way that a prosecutor should document compliance with discovery, a defense counsel must also keep meticulous records of correspondence with trial counsel. Defense counsel should create and maintain their own discovery control file and include copies of all evidence, documents, and emails received. Defense should also document phone conversations with trial counsel regarding discovery and keep copies of all email communication with trial counsel.

If defense counsel do not receive discovery in a timely or complete manner, they should consider filing a motion to request appropriate relief. They should include all documentation they have gathered to support their position and request relief commensurate with the perceived discovery violation. The military judge has broad discretion to order relief and may

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<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at 325.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 326.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* at 327.

<sup>414</sup> *Id.*

impose remedies ranging from an order to produce discovery to a complete dismissal of charges.<sup>415</sup>

#### D. The Way Forward

A comparison between the civilian federal and military justice systems regarding criminal discovery practices should never be viewed as a mere academic exercise by military or civilian practitioners. As a military attorney, it is very easy to become comfortably limited to researching and resolving legal issues based solely on what military appellate courts hold and ignore the persuasive value of civilian federal court decisions. However, after just a cursory review of civilian federal case law, a military attorney will quickly learn that civilian federal courts address discovery disputes far more frequently than military courts. Although this may simply be a product of the larger number of sitting civilian federal courts operating caseloads on a daily basis, it may likewise be an indication that criminal discovery violations are occurring on a far greater scale than is presently realized.

Becoming familiar with developments in criminal discovery case law from civilian federal courts can benefit military attorneys by providing a wealth of persuasive authority when dealing with any potential discovery dispute. When faced with a questionable discovery issue, it is very likely that a civilian federal court has addressed the issue. With this persuasive authority in hand, a military attorney may be better prepared to articulate his position to a military judge in a more effective manner.

The benefits of a comparison between the two systems can be equally beneficial to civilian attorneys as well. In civilian practice, the dealings of military appellate courts are viewed in many ways as foreign, seldom-cited territory. However, in the wake of *U.S. v. Stevens* and *U.S. v. Shaygen*, criminal discovery practices, especially in the civilian system, have come under a tremendous amount of scrutiny and many believe that the system is fundamentally broken. Indeed, retired Supreme Court Justice John Paul Stevens recently encouraged Congress to pass stricter laws authorizing a right of action by victims of prosecutorial misconduct against a prosecutor in order to deter future violations.<sup>416</sup>

Unlike the civilian system, the military justice system has long been touted as the leader in liberal criminal discovery practices. This liberal approach is the very reason that civilian defense attorneys can also benefit from the guidance of the military courts. Grounded in fairness and a desire to avoid “gamesmanship,” it has long been the practice of the military

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<sup>415</sup> See MCM, *supra* note 3, R.C.M. 701(g)(3).

<sup>416</sup> See Jess Bravin, *Stevens Urges Congress to Crack Down on Prosecutorial Misconduct*, WALL ST. J. L. BLOG (May 3, 2011, 7:05 PM), <http://blogs.wsj.com/law/2011/05/03/stevens-urges-congress-to-crack-down-on-prosecutorial-misconduct/>.

justice system to afford liberal, unencumbered discovery to the criminally accused and this approach can be cited as persuasive authority for the civilian defense attorney. In this respect, perhaps it is the practices of the military justice system that will resolve the ongoing debate over how to fix a criminal discovery process in civilian federal courts that many perceive as broken. While questions such as whether a prosecutor can be found personally liable for violating the rules of discovery have presently been answered generally in the negative,<sup>417</sup> nothing prevents a civilian attorney from arguing that the best way to fix the broken system of criminal discovery is to adopt the standards of military courts and encourage more open, liberal discovery in criminal cases. In the end, both the civilian federal and military justice systems can provide valuable information and guidance to the other so that the ultimate goal of justice is achieved.

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<sup>417</sup> See *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (holding that a local district attorney cannot be found personally liable for failing to properly train subordinate prosecutors in proper Brady disclosure practices based upon proof of single violation).





THIS COURT-MARTIAL HEREBY (ARBITRARILY) SENTENCES  
YOU: PROBLEMS WITH COURT MEMBER SENTENCING IN THE  
MILITARY AND PROPOSED SOLUTIONS

*CAPTAIN MEGAN N. SCHMID\**

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## I. THE RISKS OF ARBITRARY SENTENCING BY COURT MEMBERS

The military has stood surprisingly still in a time when the federal government and many state governments have recognized the problems inherent in unbridled sentencing discretion and undertaken reform efforts through sentencing guidelines and presumptive sentencing schemes.<sup>1</sup> In contrast, the military allows court members, similar to civilian juries, to sentence defendants in non-capital cases with virtually no guidance about how to formulate an appropriate sentence.<sup>2</sup> Perhaps most striking about this lack of guidance is that it sharply contrasts the “decades of efforts to control arbitrary behavior by jurors in capital cases.”<sup>3</sup>

Today, only six of the fifty states utilize jury sentencing in non-capital cases: Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia.<sup>4</sup> Kentucky’s sentencing statute allows juries to impose sentences; however, this statute is interpreted as creating non-binding jury sentences.<sup>5</sup> In Oklahoma, if the jury does not agree on a sentence, the judge creates the sentence.<sup>6</sup> Remarkably, jury sentencing in non-capital cases has received

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<sup>1</sup> See Nancy J. King, *Capital Jury: How Different is Death? Jury Sentencing in Capital and Noncapital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 196 (2004) (noting trend in many jurisdictions to limit judicial discretion in sentencing through sentencing guidelines and presumptive sentencing schemes).

<sup>2</sup> See Colonel James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 111 (2000) (explaining limited instructions given to court members). Colonel Young stated that during his service as a staff judge advocate and military judge, court members expressed concerns about their ability to perform the sentencing role. See *id.* at 111, n.112 (describing complaints from court members about lack of guidance for determining appropriate sentences).

<sup>3</sup> See King, *supra* note 1, at 196 (contrasting sentencing reform in capital cases with lack of similar reform in non-capital cases).

<sup>4</sup> See ARK. CODE ANN. § 5-4-103(a) (1987) (“If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding as authorized by this chapter.”); KY. REV. STAT. ANN. § 532.055(2) (West 2008) (“Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury.”); MO. REV. STAT. § 557.036 (2003) (If the jury at the first stage of a trial finds the defendant guilty of the submitted offense, the second stage of the trial shall proceed . . . . The jury shall assess and declare the punishment as authorized by statute.”); OKLA. STAT. ANN. tit. 22, § 926.1 (West 2003) (“In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law . . . .”); TEX. CODE CRIM. PROC. ANN. § 37.07(2)(b) (Vernon 2007) (“[W]here the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury . . . .”); VA. CODE ANN. § 19.2-295 (2009) (“Within the limits prescribed by law, the term of confinement in the state correctional facility or in jail and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury . . . .”).

<sup>5</sup> See *Murphy v. Commonwealth*, 50 S.W. 3d 173, 178 (Ky. 2001) (stating jury sentence recommendation has no mandatory effect).

<sup>6</sup> See OKLA. STAT. ANN. tit. 22, § 927.1 (West 2003) (designating judge as sentencing authority when jury fails to agree on punishment).

only limited consideration despite the fact that each year the number of defendants sentenced by juries in non-capital cases greatly exceeds the number of defendants sentenced by juries in capital cases.<sup>7</sup>

In the military, sentencing by court members occurs when the accused elects to be tried by court members instead of a military judge.<sup>8</sup> The panel has the discretion to impose any sentence they determine is appropriate including the maximum punishment authorized by the Manual for Courts-Martial (MCM), any lesser punishment, or no punishment.<sup>9</sup> Scholars have described many shortcomings of the court member sentencing process, which can produce arbitrary results: sentence disparity, unlawful command influence, and forum shopping.<sup>10</sup> These problems can cause military members and the public to distrust the fairness of the military justice system.<sup>11</sup> Accordingly, this article argues that sentencing by military court members, in general and special courts-martial, is so fraught with

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<sup>7</sup> See King, *supra* note 1, at 195 (noting lack of scholarship on jury sentencing). Each year, juries sentence about 4,000 defendants in felony non-capital cases. See Nancy J. King and Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 887 n.4 (2004) (estimating number of felony sentences imposed by juries annually). Per the Bureau of Justice Statistics, an estimated 3,200 defendants were convicted of murder and nonnegligent homicide (capital and non-capital) nationwide in 2003, but only about 4% of these were sentenced to death. See King, *supra* note 1, at 195 n.2 (comparing jury sentencing statistics). Jury sentencing in non-capital cases in Texas is so common that “[t]he number of felons sentenced by juries in Texas alone exceeds the number of federal defendants convicted annually by jury, for misdemeanors or felonies, in all districts combined.” See King & Noble, *supra*, at 887 (relating extent of jury sentencing).

<sup>8</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULES FOR COURTS-MARTIAL (R.C.M.) 1006 & 1007 [hereinafter MCM]. The court members comprise what is called the “panel” and the term “jury” is not used in the military. See Young, *supra* note 2, at 94 (explaining military justice terms). Additionally, a panel is not a representative cross-section of the military community. See *United States v. Lewis*, 46 M.J. 338, 341 (C.A.A.F. 1997) (“In courts-martial, an accused is not entitled to a panel that represents a cross-section of the eligible military population.”).

<sup>9</sup> See MCM, *supra* note 8, R.C.M. 1002 (describing authorized sentences).

<sup>10</sup> See Marlene Higgins, Note, *The Air Force Academy Scandal: Will the “Agenda for Change” Counteract the Academy’s Legal and Social Deterrents to Reporting Sexual Harassment and Assault?*, 26 WOMEN’S RIGHTS L. REP. 121, 126 n.75 (2005) (citing cases of unlawful command influence in court-martial sentencing); Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 186-87 (2000) (concluding that military sentencing data indicates high degree of disparity); James K. Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1, 29-30 (1994) (contending the option between sentencing by military judge or court members causes forum shopping). Article 66(c) of the Uniform Code of Military Justice provides a unique safeguard by providing a reviewing court, the court of criminal appeals, broad authority to adjust courts-martial sentences. Recently, one scholar argued that this extensive authority to determine sentence appropriateness is almost too great. See Lieutenant Colonel Jeremy Stone Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. L. REV. 79, 132-33 (2010).

<sup>11</sup> See Higgins, *supra* note 10, at 124-25 (2005) (explaining how potential biases in military justice system may deter victims from reporting); Lovejoy, *supra* note 10, at 56-57 (explaining how public perception of military justice system is influenced by court member sentencing).

problems that reform is needed and proposes three alternatives to prevent prejudicial arbitrariness in court-martial sentencing.

Part II summarizes the history of military court-martial sentencing and today's system for forum selection, sentencing discretion, and the official reasons for court-martial sentencing.<sup>12</sup> Part III critiques the court-martial system by analyzing the impact of court member sentencing on the accused and the government.<sup>13</sup> Part IV presents and evaluates three proposals to resolve the problems associated with court member sentencing: creating sentencing guidelines, allowing waiver of court member sentencing, and eliminating court member sentencing entirely.<sup>14</sup> Finally, Part V recommends putting an end to arbitrary court-martial sentences by combining the first and third alternatives: abolishing court member sentencing, and investing all sentencing authority in legally-trained military judges but constraining their discretion through sentencing guidelines.<sup>15</sup>

## II. THE EVOLUTION OF COURT-MARTIAL SENTENCING

The sentencing procedures for military courts-martial are governed by the Uniform Code of Military Justice (UCMJ) and the MCM.<sup>16</sup> The military justice system has undergone a series of changes through legislative acts and military appellate court decisions over the years which have formed today's sentencing procedures.<sup>17</sup> Currently, an accused's choice of forum for trial determines the sentencing authority.<sup>18</sup> Many factors influence this decision including anticipated leniency and the discretion and information available to the sentencing authority.<sup>19</sup>

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<sup>12</sup> For a historical and current overview of court-martial sentencing, see *infra* notes 20-55 and accompanying text.

<sup>13</sup> For a discussion of the shortcomings of court-member sentencing, see *infra* notes 56-117 and accompanying text.

<sup>14</sup> For an analysis of proposed alternatives to court-member sentencing, see *infra* notes 118-84 and accompanying text.

<sup>15</sup> For an explanation of the approach this author recommends, see *infra* notes 185-98 and accompanying text.

<sup>16</sup> For a brief summary of the adoption of the UCMJ and MCM, see *infra* notes 20-25 and accompanying text.

<sup>17</sup> See Part II.A. For a history of the development of the military justice system see Colonel Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment – A Short History of Military Justice*, 11 A.F. L. REV. 212 (1969) and Library of Congress, *Uniform Code of Military Justice Legislative History*, available at [http://www.loc.gov/rr/frd/Military\\_Law/UCMJ\\_LHP.html](http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html) (last visited Mar. 28, 2011).

<sup>18</sup> See MCM, *supra* note 8, R.C.M. 903 (detailing procedure for military judge to ascertain choice of forum).

<sup>19</sup> See Part II.B.

## A. History of Sentencing in the Military Justice System

The first military code in the United States was the Articles of War of 1775.<sup>20</sup> After World War II, criticism of military justice and demand for a uniform system among the three branches led to the formation of a committee to draft the UCMJ.<sup>21</sup> The Military Justice Act of 1950<sup>22</sup> enacted the UCMJ, which was implemented by the 1951 MCM.<sup>23</sup> The UCMJ provides substantive and procedural law for the military justice system.<sup>24</sup> Although an accused is tried before a court-martial in his or her respective branch of service, the procedures are the same among all services.<sup>25</sup> The MCM is issued through Executive Order and contains the Rules for Courts-Martial (R.C.M.), Military Rules of Evidence, and punitive articles.

Originally, uniformity in sentences was a goal included in the MCM.<sup>26</sup> In the 1969 Manual, however, uniformity was eliminated as a sentencing goal based on the 1959 Court of Military Appeals decision in *United States v. Mamaluy*.<sup>27</sup> The *Mamaluy* case involved nine specifications including various types of offenses.<sup>28</sup> The court explained that it would be impossible for the court members to find a similar case combining the same or similar nine offenses.<sup>29</sup> Thus, the court stated that panel members do not have the needed information in order to formulate uniform sentences.<sup>30</sup> Additionally, the court referred the military's old "rule of law that the sentences in other cases cannot be given to court-martial members for comparative purposes."<sup>31</sup>

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<sup>20</sup> See Rollman, *supra* note 17, at 215 (describing Articles of War of 1775).

<sup>21</sup> See Library of Congress, *The Uniform Code of Military Justice* at 1, available at [http://www.loc.gov/r/r/frd/Military\\_Law/pdf/UCMJ\\_summary.pdf](http://www.loc.gov/r/r/frd/Military_Law/pdf/UCMJ_summary.pdf) (last visited Mar. 28, 2011) (providing legislative summary of UCMJ).

<sup>22</sup> See The Military Justice Act of 1950, Pub. L. No. 81-506, 64 Stat. 107 (implementing 1950 UCMJ).

<sup>23</sup> See Rollman, *supra* note 17, at 220 (explaining legislative development of military justice system).

<sup>24</sup> See Library of Congress, *supra* note 21, at 2 (describing purpose of UCMJ).

<sup>25</sup> See *id.* (noting uniformity in court-martial procedure among service branches).

<sup>26</sup> See Immel, *supra* note 10, at 164 (reviewing the history of military sentencing). "The 1949 version of the Manual for Courts-Martial directed [court] members to consider the accused's background, uniformity in sentencing, general deterrence, and discipline." *Id.*

<sup>27</sup> See *id.* at 166 (linking abandonment of uniformity in sentencing with the Court of Appeals decision in *United States v. Mamaluy*).

<sup>28</sup> See *United States v. Mamaluy*, 27 C.M.R. 176, 180 (C.M.A. 1959) (noting multiple specifications).

<sup>29</sup> See *id.* (rejecting uniformity of sentences requirement). Moreover, the court noted that military courts lack the continuity needed for them to fashion uniform sentences because military courts are specifically convened for each court-martial. See *id.*

<sup>30</sup> See *id.* at 180. In a court-martial, all offenses are combined and the accused receives one sentence. See Young, *supra* note 2, at 110 (describing military's unitary system of sentencing).

<sup>31</sup> *Id.* at 180.

In 1957, the Court of Military Appeals also put an end to the practice of allowing panel members to consult the MCM in their sentencing deliberations.<sup>32</sup> In *United States v. Rinehart*, the prosecution referenced two paragraphs of the MCM in closing argument at sentencing.<sup>33</sup> The court members then “discovered” these paragraphs in the MCM during their deliberations, despite having been fully informed of the law by the law officer (the predecessor to military judge).<sup>34</sup> The court concluded that allowing members to search the MCM was prohibited because: (1) several passages of the MCM have been invalidated since it was written, (2) the law officer (military judge) is the only appropriate source of law, and (3) the majority of court members have no legal training.<sup>35</sup> Hence, members are not instructed to seek uniformity nor are they permitted to use the MCM as a reference should they attempt to do so.<sup>36</sup>

## B. Sentencing in the Military Today

Today, an accused’s decision about the composition of the court-martial determines the sentencing authority.<sup>37</sup> The accused’s options include: (1) trial by members on both the merits and sentencing; (2) trial by military judge on both the merits and sentencing; (3) guilty plea before a military judge and sentencing by members; or (4) guilty plea and sentencing before a military judge.<sup>38</sup> Thus, a member’s choice of forum for the trial on the merits determines who serves as the sentencing authority, court members or military judge.<sup>39</sup> Additionally, if the accused is an enlisted member, he or she may request that enlisted members serve on the panel, in which case at least one-third of the panel must be enlisted.<sup>40</sup>

Notably, the majority of courts-martial are tried by military judge alone.<sup>41</sup> If the defense has a technical legal argument they want to make in findings, the accused might choose a judge over members for the trial

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<sup>32</sup> See *United States v. Rinehart*, 24 C.M.R. 212, 216 (C.M.A. 1957) (holding that court members are not permitted to “rummage through a treatise on military law, such as the Manual [for Courts-Martial].”).

<sup>33</sup> See *id.* at 213-14 (relating trial counsel’s statements).

<sup>34</sup> See *id.* at 216 (describing court members actions).

<sup>35</sup> See *id.* at 216-17 (providing rationale for holding).

<sup>36</sup> For an explanation of the elimination of uniformity as a sentencing goal, see *supra* notes 26-31 and accompanying text.

<sup>37</sup> See MCM, *supra* note 8, R.C.M. 903 (detailing procedure for choice of forum).

<sup>38</sup> See Lovejoy, *supra* note 10, at 7 (describing forum choices available in courts-martial).

<sup>39</sup> See MCM, *supra* note 8, R.C.M. 1006 & 1007 (outlining procedure for sentence deliberations and sentence announcement).

<sup>40</sup> See MCM, *supra* note 8, R.C.M. 503(a)(2) (explaining process for detailing members to courts-martial).

<sup>41</sup> See Lovejoy, *supra* note 10, at 28-29 (noting trend for selection of trial by military judge alone). Major Lovejoy concludes that because two-thirds of courts-martial are tried by military judge alone, the ability to choose sentencing by court members is not that important to military members. See *id.*

forum. The defense might believe a judge will appreciate the legal argument whereas members may see it as a weak loophole. Although the defense may think that the judge is a harsher sentencing authority, they may risk the higher sentence for the benefit of an audience more receptive to their technical legal argument.

Often, an accused will choose the forum he or she perceives as the most lenient.<sup>42</sup> This choice reflects the belief among military practitioners that “if convicted by members, the accused often stands a greater risk of being punished severely by the same members during sentencing.”<sup>43</sup> Hence, an important consideration is that a court-martial has a broader range of sentencing options than is available in civilian systems, including reprimand, forfeiture of pay and allowances, fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, punitive separation, and death (for specific offenses).<sup>44</sup> Additionally, the sentencing authority in a court-martial exercises wide discretion in selecting the sentence.<sup>45</sup> The judge or panel is authorized to adjudge any sentence ranging from the maximum punishment to no punishment (except when a mandatory minimum sentence is required by the UCMJ).<sup>46</sup>

Despite granting court members this vast discretion, the court gives the panel very few instructions on sentencing.<sup>47</sup> The panel is instructed that the five reasons for sentencing are rehabilitation, punishment, protection of society, preservation of good order and discipline, and deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses.<sup>48</sup> After articulating these purposes, however, the military judge informs the panel that “[t]he weight to be given any or all of these reasons, along with all other sentencing matters

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<sup>42</sup> See *id.* at 28 (providing rationale for court-martial forum choices).

<sup>43</sup> *Id.* at 8. Defense counsel also noted that the accused stands a greater chance of receiving a lenient sentence from court members than from a military judge. See *id.* (summarizing comments from survey of military defense counsel).

<sup>44</sup> See MCM, *supra* note 8, R.C.M. 1003 (providing authorized punishments).

<sup>45</sup> See Young, *supra* note 2, at 111 (explaining “unfettered discretion” of court-martial sentencing authority).

<sup>46</sup> See MCM, *supra* note 8, R.C.M. 1002 (describing sentence determination).

<sup>47</sup> See MCM, *supra* note 8, R.C.M. 1005(e) (listing statements required in sentencing instructions). The military judge is required to inform the panel of the maximum authorized punishment and any mandatory minimum punishment, the effect that certain sentences will have on the accused’s entitlement to pay and allowances, and the procedures for deliberation and voting. See *id.* The judge must also inform the members that they are solely responsible for selecting an appropriate sentence, an instruction aimed at preventing unlawful command influence, which is discussed in *infra* notes 102-03 and accompanying text. See *id.* Finally, the judge directs the members to consider all factors in aggravation, extenuation, and mitigation. See *id.*

<sup>48</sup> See U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK, 60-61 (2010) [hereinafter BENCHBOOK] (providing sample instructions for courts members). Despite providing these sentencing goals in the instructions to members, the MCM and Benchbook do not provide any guidance on how to apply them. See Immel, *supra* note 10, at 195 (criticizing lack of guidance).

in this case, rests solely within [the panel's] discretion."<sup>49</sup> To make matters even more challenging, the members are only instructed on the maximum punishment for all of the offenses as a cumulative whole. Members never know that one offense carries a greater or lesser maximum than another. Thus, with little guidance and a wide range of sentencing options at hand, the court members are left to the "daunting task" of formulating an individualized sentence for a collection of potentially unrelated offenses.<sup>50</sup>

Unlike the federal system and many state systems, the military does not use presentencing reports and requires the presentation of only a limited amount of information before the panel begins sentence deliberations.<sup>51</sup> Finally, as previously discussed, the military does not permit court members to receive information on sentences from other cases for comparison purposes.<sup>52</sup> If, however, the defense first introduces comparative information from another trial, trial counsel may be able to add additional comparative information in rebuttal.<sup>53</sup> The military judge, on the other hand, has the benefit of substantial military justice experience and more likely knows the types of sentences typically imposed for various offenses.<sup>54</sup> Considering their relative inexperience and lack of legal training, it should come as no surprise that court members complain that they are not equipped to adjudge a fair sentence.<sup>55</sup>

### III. THE SHORTCOMINGS OF COURT MEMBER SENTENCING

Court member sentencing is criticized for many of the same reasons that jury sentencing is including, sentence disparity, compromise verdicts, forum shopping, and public confidence in the system.<sup>56</sup> However, unique aspects of the military raise concerns specific to the military such as the selection process for court members, the administrative burden of that selection process, unlawful command influence, and evidentiary safeguards.<sup>57</sup> Likewise, arguments in favor of court member sentencing

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<sup>49</sup> BENCHBOOK, *supra* note 48, at 61.

<sup>50</sup> Young, *supra* note 2, at 110-11.

<sup>51</sup> See Lovejoy, *supra* note 10, at 10 (noting disparity between military and federal/state presentencing procedures). The only evidence that the prosecution must provide is the accused's pay and service data along with the duration and nature of pretrial restraint, if any. See MCM, *supra* note 8, R.C.M. 1001(b)(1) (listing matters for presentation by prosecution).

<sup>52</sup> See *supra* notes 19-23 and accompanying text.

<sup>53</sup> See *United States v. Grill*, 48 M.J. 131, 133 (C.A.A.F. 1998).

<sup>54</sup> Major General Jack L. Rives & Major Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 224 (2002) (describing military judges).

<sup>55</sup> See Young, *supra* note 2, at 111 n.112, 114 (describing feedback from court members on their abilities to sentence). Given the lack of information and guidance provided to court members, "[n]o wonder [they] readily admit they are uncomfortable with the sentencing function." *Id.* at 114.

<sup>56</sup> See Parts III.A and III.B.

<sup>57</sup> See Parts III.A and III.B.



mirror those of jury sentencing, specifically, the value of participation by community members.<sup>58</sup> A contention unique to the military context is that court member sentencing provides a forum for training future leaders.<sup>59</sup> Finally, the Sixth Amendment right to a public trial by an impartial jury is also an argument in favor of court member sentencing.<sup>60</sup>

#### A. Rolling the Dice: Effect on the Accused

One of the most frequently criticized aspects of the military justice system is the convening authority's selection of a court-martial.<sup>61</sup> The court members are selected by the same officer who decided to refer the case for trial by court-martial.<sup>62</sup> The convening authority is tasked with choosing members who, in his or her opinion, are best qualified to serve on a court-martial.<sup>63</sup> The UCMJ states that age, education, training, experience, length of service, and judicial temperament are reasons for qualification.<sup>64</sup> One scholar contends that these criteria are inherently subjective and the system fails to account for the fact that the convening authority may not know the members in his or her command well enough to apply them.<sup>65</sup> Thus, he recommends changing to random selection of court members to eliminate the perception of unfairness and judge-only sentencing to ensure the sentencing authority is qualified to impose a fair sentence.<sup>66</sup>

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<sup>58</sup> For a discussion of value of community involvement in sentencing, see *infra* note 79-83 and accompanying text.

<sup>59</sup> For an overview of the military-specific argument about court member sentencing as training, see *infra* notes 76-78 and accompanying text.

<sup>60</sup> For a brief summary of the constitutional argument about jury sentencing, see *infra* notes 84-87 and accompanying text.

<sup>61</sup> See Dwight H. Sullivan, *Playing the Numbers: Courts-Martial Panel Size and the Military Death Penalty*, 1 MIL. L. REV. 1, 15 n.68 (1999) (citing articles that are critical of court-member selection process); see also Young, *supra* note 2, at 91 (noting criticism of court-member selection is long-standing). The method for selecting members to serve on courts-martial has previously come under scrutiny during periods of conflict when political, media, and public attention is centered on the military. See Young, *supra*.

<sup>62</sup> See Young, *supra* note 2, at 94 (stating that court-members are selected by convening authority).

<sup>63</sup> See Rives & Ehlenbeck, *supra* note 54, at 225 (describing convening authority's responsibility for court-member selection).

<sup>64</sup> See UCMJ, art. 25(d)(2) (2008). (listing factors for convening authority to consider).

<sup>65</sup> See Young, *supra* note 2, at 103-05 (describing subjectivity of selection criteria and incongruity between criteria and reality). Colonel Young points out, for example, that the UCMJ and MCM do not indicate whether the reference to age implies that an older member is more qualified than a younger one. See *id.* at 103 (criticizing lack of guidance). Additionally, a general court-martial convening authority may command several installations throughout the world and is not capable of knowing all potential members on a personal level. See *id.* at 104-05 (noting difficulty of applying criteria).

<sup>66</sup> See *id.* at 107-08 (proposing alternative approach to court-member selection).

Another criticism of the current system is that court-martial sentencing results in striking sentence disparity among factually similar cases.<sup>67</sup> Likewise, studies of non-military criminal justice systems demonstrate that juries sometimes impose more severe and more variable sentences than judges.<sup>68</sup> In addition to the statistical disparity, military members view court-martial panels as less consistent than military judges.<sup>69</sup> A survey of various convening authorities, military judges, prosecution and defense counsel, and military prisoners revealed the commonly held belief that judges are less likely to impose disparate sentences.<sup>70</sup>

Yet another objection to court-member sentencing is that the panel may be tempted to make compromise verdicts.<sup>71</sup> In a compromise verdict the jury resolves uncertainty about guilt by agreeing to impose a lighter sentence.<sup>72</sup> However, the extent to which actual sentencing juries make compromise verdicts has little supporting evidence because the only studies are based upon mock civilian juries.<sup>73</sup> Furthermore, these studies focused on individual decision-making and do not reflect the reality that jury decisions are made as a group.<sup>74</sup> Still, the very fact that a risk of compromise verdicts may exist in a system based on the standard of proof beyond a reasonable doubt should cause us to pause.<sup>75</sup>

Some commanders view court member participation in sentencing as a valuable avenue for training future military leaders.<sup>76</sup> Their argument is that members develop respect for and understanding of the military justice

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<sup>67</sup> See, e.g., Scott Sylkatis, *Sentencing Disparity in Desertion and Absent Without Leave Trials: Advocating a Return of "Uniform" to the Uniform Code of Military Justice*, 25 QUINNIPIAC L. REV. 401, 407-09 (2006) (finding sentencing disparity in cases involving specific articles). Sylkatis examined sentences in cases involving Article 85 desertion and Article 86 absence without leave and found a high disparity among sentences. See *id.*

<sup>68</sup> See, e.g., Nancy J. King and Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331, 331 (2005) (stating for most offenses studied jury sentences were more severe and more varied than judges' sentences); Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U.J. URB. & CONTEMP. L. 3, 37 (1994) (concluding that "juries imposed longer and more variable prison terms than judges.").

<sup>69</sup> See Young, *supra* note 2, at 112 (noting survey participants believed judges were more likely to sentence consistently in similar cases than court members).

<sup>70</sup> See Lovejoy, *supra* note 10, at 27 n.167, 30 n.180 (reporting results of survey).

<sup>71</sup> See Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1797 (1999) (describing compromise verdicts as one source of criticism about sentencing juries).

<sup>72</sup> See *id.* at 1797 (explaining compromise verdicts).

<sup>73</sup> See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 989 (2003) (describing shortcomings of mock jury studies).

<sup>74</sup> See Lanni, *supra* note 71, at 1797 (cautioning against drawing conclusions from mock jury studies on compromise verdicts).

<sup>75</sup> See Lovejoy, *supra* note 10, at 50 (arguing that the risk of compromise verdicts alone is enough to eliminate practices that allow them).

<sup>76</sup> See *id.* at 39-40 (noting commanders believe court members benefit from experiencing fairness of military justice system).

system by participating in a court-martial.<sup>77</sup> One must question, however, whether training members at the expense of the accused is fundamentally unfair.<sup>78</sup> While members might learn to “appreciate” the system, they do not learn how to review mitigation and aggravation evidence before dispensing punishment. Arguably, members can gain appreciation for the military justice system by participating in the merits portion of the trial without performing the sentencing function.

Proponents of jury sentencing also contend that jury members are better able to express the community’s outrage at an offender’s violation of its norms.<sup>79</sup> However, judge-imposed sentences can reflect the community sentiment because, to the extent permitted under R.C.M. 1001, sentencing witnesses express that sentiment to military judges, who will grow more familiar with it over time.<sup>80</sup> Yet another argument made for jury sentencing is that judges and politicians are influenced by politics, but a jury does not face similar election pressures.<sup>81</sup> This argument carries little to no weight in the military context because military judges are not elected and they report through a separate chain of command from the convening authority.<sup>82</sup> Also, the only politicians that play a role in military justice are members of the legislature. Given that the last major amendment to the UCMJ was in 1983, one can hardly claim that Congress’s approach to military justice is considerably affected by the politics of elections.<sup>83</sup>

Lastly, whether the Sixth Amendment’s guarantee of a right to a public trial by an impartial jury includes the merits phase of the trial and the sentencing phase, or simply the former, is subject to debate.<sup>84</sup> The Supreme Court’s recent decisions in this area have muddied the issue.<sup>85</sup> The one clear takeaway is that legislatures cannot deprive the defendant of the Sixth

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<sup>77</sup> See ADVISORY COMM’N REPORT, MILITARY JUSTICE ACT OF 1983 5 (1984), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/ACR-1983-L.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-L.pdf) (presenting arguments for retaining court member sentencing). Similarly, deliberative democracy theory extols the benefits of jury participation as advancing the common interest, legitimizing the result, and revitalizing participation in the political process. See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 341-42 (2003) (applying deliberative democracy theory to jury sentencing).

<sup>78</sup> See Lovejoy, *supra* note 10, at 40 (stating that training junior leaders through courts-martial is “grossly unfair to the accused”).

<sup>79</sup> See Lanni, *supra* note 71, at 1782 (contending juries are better situated than judges or politicians to sentence).

<sup>80</sup> See Lovejoy, *supra* note 10, at 38-39 (responding to argument that court members are needed to provide community input in sentencing).

<sup>81</sup> See *id.* (stating juries are free from extrinsic concerns).

<sup>82</sup> See Rives & Ehlenbeck, *supra* note 54, at 226 (describing reporting structure for military judges).

<sup>83</sup> See The Library of Congress, *The Military Justice Act of 1983*, [http://www.loc.gov/rr/frd/Military\\_Law/MJ\\_act-1983.html](http://www.loc.gov/rr/frd/Military_Law/MJ_act-1983.html) (last visited Mar. 28, 2011) (providing materials related to last major amendment to UCMJ).

<sup>84</sup> See U.S. CONST. amend. XIV.

<sup>85</sup> See Hoffman, *supra* note 73, at 976-81 (describing recent Supreme Court case law on sentencing factors).

Amendment right to a jury trial by classifying elements as sentencing factors.<sup>86</sup> Whether this means the Court will ultimately rule that jury sentencing is constitutionally required is difficult to predict and unless (or until) it does so, the constitutional argument for court member sentencing is not conclusive.<sup>87</sup>

## B. The Dangers of Member Sentencing: Implications for the Government

Opponents of court member sentencing cite forum shopping as one disadvantage to the government.<sup>88</sup> As previously described, the majority of cases are tried by judge alone.<sup>89</sup> The defense may choose a judge for the trial portion with the plan of making a technical legal argument they expect the judge will more likely appreciate than a panel. On the other hand, the accused might elect trial by a panel members with the assumption that members will sentence more leniently than a judge. Opponents of court member sentencing argue that this forum option may lead judges to sentence more leniently than appropriate in order to encourage future accused to choose judge-only sentencing.<sup>90</sup> In contrast, supporters contend that the statutory right to choose member sentencing is too valuable to take away.<sup>91</sup> Presumably the accused makes the choice between forums as part of his or her trial strategy based on the advice of defense counsel.<sup>92</sup> Still, even if the forum option is a right of the accused it is at most a statutory one, not a constitutional one.<sup>93</sup>

Critics also point to the administrative burden of member sentencing.<sup>94</sup> In order to staff a panel, commanders must take members away from their regular duties and training.<sup>95</sup> The response to this argument is that the court members are already present for the guilt phase of the trial

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<sup>86</sup> See *id.* at 982.

<sup>87</sup> See *id.* at 982-83.

<sup>88</sup> See Lovejoy, *supra* note 10, at 29-30 (stating that the choice between judge alone and court member sentencing leads to forum shopping).

<sup>89</sup> For an analysis of the accused's forum choice, see *supra* notes 41-46 and accompanying text; see also ADVISORY COMM'N REPORT, *supra* note 77, at 14 (noting forum option enables forum shopping).

<sup>90</sup> See ADVISORY COMM'N REPORT, *supra* note 77, at 23 (presenting arguments against member sentencing).

<sup>91</sup> See *id.* at 5 (describing right to choose court member sentencing).

<sup>92</sup> See *id.* at 22 (concluding choice of forum is "not a mere 'gamble'").

<sup>93</sup> See *id.* at 15 (stating forum option "is not required by . . . constitutional law or military due process").

<sup>94</sup> See Lovejoy, *supra* note 10, at 29 (describing administrative burden of arranging members for courts-martial); see also ADVISORY COMM'N REPORT, *supra* note 77, at 5 (noting judge-alone sentencing reduces burden of serving on courts-martial).

<sup>95</sup> See Lovejoy, *supra* note 10, at 29 (explaining that member participation in courts-martial disrupts training). There is also the administrative burden of identifying and organizing members for participation. See *id.* noting burdens).

and sentencing usually takes only a few more hours.<sup>96</sup> One scholar predicts that “[i]nitially, adopting judge-only sentencing may lead to more contested trials than is presently the case.”<sup>97</sup> This change is predicted because military judges do not have much of a track record in sentencing contested cases and the defense may pursue a trial in the hopes of obtaining a better sentence than is offered in a plea bargain. “This issue should disappear once military judges start sentencing in cases litigated before court members and defense counsel and accused are convinced that military judges will reward them for pleading guilty.”<sup>98</sup>

The government also risks losing the confidence of military members and the American public when courts-martial produce arbitrary sentences.<sup>99</sup> Some military members believe that judicial sentencing is more predictable than member sentencing.<sup>100</sup> Studies of court-martial sentences revealed great sentencing disparity exists among individuals convicted of similar crimes.<sup>101</sup> While these studies did not compare member and judge sentencing, a study of civilian systems revealed greater sentence disparities in cases with jury sentencing than in those with judge sentencing.<sup>102</sup> The authors concluded that the variance likely results from jurors, unlike judges, lacking information about sentencing in similar cases.<sup>103</sup> Notably, sentencing court-martial panels also lack information about sentencing in similar cases.<sup>104</sup> Thus, court members might also sentence with more disparity than military judges.

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<sup>96</sup> See ADVISORY COMM’N REPORT, *supra* note 77, at 22 (asserting sentencing phase takes insignificant amount of time).

<sup>97</sup> Young, *supra* note 2, at 112-13 (describing potential impact of changing to military judge-only sentencing).

<sup>98</sup> *Id.* (suggesting impact of changing to judge-only sentencing will be temporary).

<sup>99</sup> The importance of military members’ confidence in the military justice system is obvious. The public’s perception of the system also matters as recognized by the Military Court of Appeals. See Captain Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261, 265 (citing military cases emphasizing importance of public confidence in judicial system).

<sup>100</sup> See Lovejoy, *supra* note 10, at 31 (reporting surveyed military members perceive member sentencing as more unpredictable than judge sentencing).

<sup>101</sup> See Immel, *supra* note 10, at 186-87 (concluding from statistical analysis of courts-martial sentencing data that “the military suffers from a high degree of sentence disparity); Sylkatis, *supra* note 67, at 409 (concluding from analysis of sentences for specific articles that sentencing disparity exists).

<sup>102</sup> See King & Noble, *supra* note 68, at 354 (finding greater sentence disparity in cases with jury sentencing than those with judge sentencing). In both Arkansas and Virginia, sentences imposed by judges after bench trial or plea were more consistent than those imposed by juries. See *id.* (explaining results of statistical analysis).

<sup>103</sup> See *id.* at 360-61 (stating that lack of information may explain disparity among jury sentences).

<sup>104</sup> See *supra* notes 29-33 and accompanying text.

Another disadvantage of member sentencing is that it requires protection against unlawful command influence on the court members by convening authorities and commanders.<sup>105</sup> Unlawful command influence occurs when superior officers influence the findings or sentence of a court-martial.<sup>106</sup> Many members of the military and the public distrust the military justice system because they “believe courts-martial are routinely rigged, although little evidence exists to suggest it.”<sup>107</sup> Still, this skepticism is understandable because instances of unlawful command influence do occur.<sup>108</sup> For example, in a recent case, a commander ordered a senior enlisted member to not testify on behalf of the accused in the sentencing phase of the trial.<sup>109</sup> In another case, trial counsel implied to court members that unnamed commanders preferred the sentence he was proposing.<sup>110</sup> Certainly the risk of unlawful command influence also exists with military judges. However, the risk is arguably less because military judges have a separate reporting chain (and assignment system) from the convening authority whereas court members do not.<sup>111</sup>

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<sup>105</sup> See Lovejoy, *supra* note 10, at 32 (noting member sentencing requires protecting the panel from unlawful command influence).

<sup>106</sup> See UCMJ, Art 37(a) (2008) (prohibiting unlawful influencing of court action). Article 37(a) states:

No authority convening a . . . court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

<sup>107</sup> Young, *supra* note 2, at 125 (noting suspicion of military justice system).

<sup>108</sup> See Higgins, *supra* note 10, at 127 (contending that cases of unlawful command influence occur so often that military courts have developed two tests for it). The Court of Military Appeals has tests for both actual and apparent unlawful command influence. See *United States v. Allen*, 31 M.J. 572, 589-90 (N.M.C.M.R. 1990) (describing both tests).

<sup>109</sup> See *United States v. Gore*, 60 M.J. 178, 178-79 (C.A.A.F. 2004) (summarizing postural background of case). The Court of Appeals for the Armed Forces affirmed the dismissal of the charges with prejudice by the military judge. See *id.* at 187 (holding that dismissal of charges with prejudice was not an abuse of discretion). However, courts rarely dismiss charges with prejudice due to unlawful command influence. See Lieutenant Colonel Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, 2005 ARMY LAW. 1, n.5 (explaining rehearing is usually ordered in cases of unlawful command influence).

<sup>110</sup> See *United States v. Mallett*, 61 M.J. 761, 764-65 (A.F. Ct. Crim. App. 2005) (holding trial counsel’s comments violated Art. 37, unlawful command influence). The appeals court concluded the military judge’s curative instruction was insufficient to render the comments harmless. See *id.* (concluding that impact of unlawful command influence was not erased).

<sup>111</sup> See Rives & Ehlenbeck, *supra* note 54, at 226 (explaining chain of command for military judges).

Finally, court member sentencing requires evidentiary safeguards to ensure members are not exposed to information which they might use improperly.<sup>112</sup> The Court of Military Appeals recognized that rules for sentencing procedure are narrower than those of the federal district courts and attributed this difference to the involvement of court members.<sup>113</sup> The military judge is responsible for ensuring court members are not improperly influenced by evidence that arouses hostility or prejudice.<sup>114</sup> In contrast to court members, military judges are trained in the law. They are able to rule on the admissibility of evidence and disregard inadmissible evidence when crafting their decisions.<sup>115</sup> Also, unlike court members, military judges are trusted in their ability to navigate relevant, albeit prejudicial, evidence.<sup>116</sup> “Military and civilian judges are routinely tasked with hearing facts for limited purposes, which they later disregard if consideration would be improper.”<sup>117</sup>

#### IV. PROPOSALS FOR A NEW APPROACH TO COURT-MARTIAL SENTENCING

Scholars have proposed several solutions to the problems arising from the current procedures for court-martial sentencing. Some commentators recommend limiting the sentencing authority’s discretion by implementing sentencing guidelines akin to those used in the federal system.<sup>118</sup> Another approach is to permit the accused to waive court member sentencing, a method used in some jury sentencing states.<sup>119</sup> Finally, some argue that the only approach to eliminate the problems created by court member sentencing is to remove members from the sentencing process altogether.<sup>120</sup>

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<sup>112</sup> See Lovejoy, *supra* note 10, at 34-35 (stating that court member involvement necessitates Military Rules of Evidence to protect against improper influence from inadmissible evidence).

<sup>113</sup> See *United States v. Boles*, 11 M.J. 195, 198 (C.M.A. 1981) (contending that court members necessitate procedural protections).

<sup>114</sup> See *id.* at 201 (describing role of military judge to ensure integrity in system).

<sup>115</sup> See Lovejoy, *supra* note 10, at 34-35 (arguing military judges are able to rule on evidence and render proper decisions).

<sup>116</sup> See, e.g., *United States v. Howard*, 50 M.J. 469, 470-71 (C.A.A.F. 1999) (holding a military judge properly determined he was not required to recuse himself after considering evidence from previous courts-martial); *United States v. Oakley*, 33 M.J. 27, 34-35 (C.M.A. 1991) (holding military judge properly determined recusal was not required after presiding over trials of two coconspirators).

<sup>117</sup> *Howard*, 50 M.J. at 471.

<sup>118</sup> See *infra* notes 119-40 and accompanying text; see e.g. *Immel, supra* note 10, at 198 (proposing the adoption of military sentencing guidelines); *Sylkatis, supra* note 67, at 411 (contending adoption of sentencing guidelines would lead to more uniform sentences).

<sup>119</sup> See *infra* notes 144-64 and accompanying text; see e.g. *Hoffman, supra* note 73, at 1006 (describing partial waiver procedures in some states with jury sentencing); *Iontcheva, supra* note 77, at 376 n.330 (noting states that permit waiver of jury sentencing).

<sup>120</sup> See *infra* notes 165-84 and accompanying text; see e.g. Lovejoy, *supra* note 10, at 65 (arguing removing court members from sentencing is most effective way to prevent improper

## A. Creating Military Sentencing Guidelines

One approach to counter the disadvantages of the current court-martial sentencing procedures is to create military sentencing guidelines. Currently, military court members with no legal training have vast discretion in formulating court-martial sentences.<sup>121</sup> This discretion rightfully causes concern about the appropriateness of court-martial sentences when the process results in sentencing disparity.<sup>122</sup> As one scholar in favor of jury sentencing conceded, “[e]ven the most dedicated supporters of jury sentencing should not be comfortable with jurors having unlimited discretion in the fashion of federal judges before the Guidelines.”<sup>123</sup> Constraining the panel’s discretion with sentencing guidelines would also address two other often cited shortcomings of jury sentencing—sentence variability and excessive harshness.<sup>124</sup>

Congress created the United States Sentencing Commission and tasked it with creating the federal sentencing guidelines to reduce sentence disparity among federal judges.<sup>125</sup> Although the Supreme Court made the sentencing guidelines effectively advisory in *United States v. Booker*, the sentencing court is still required to consider the guidelines.<sup>126</sup> Similarly, thirty-three states use sentencing guidelines to limit the sentencing authority’s discretion.<sup>127</sup> Thus, implementing military sentencing guidelines would bring the military into line with the federal system and several state

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sentences); Young, *supra* note 2, at 108 (proposing military judges perform sentencing function to eliminate perceptions of unfairness).

<sup>121</sup> See Young, *supra* note 2, at 111 (noting the wide discretion granted to courts-martial sentencing authority).

<sup>122</sup> See Immel, *supra* note 10, at 196 (discussing whether sentencing disparity is justified). Major Immel concludes that the sentences needed to maintain good order and discipline or effectiveness in various units and duty stations may vary despite the similarity of individual cases. See *id.* at 196-97 (presenting examples of hypothetical crimes in differing units). Such disparity is less justified, however, when the crime is unrelated to these military purposes. See *id.* at 197. For example, two individuals in distinctly different units who commit similar sexual assaults should receive similar sentences. See *id.*

<sup>123</sup> Hoffman, *supra* note 73, at 1003.

<sup>124</sup> See Hoffman, *supra* note 73, at 1003 (noting common criticisms of jury sentencing).

<sup>125</sup> See Immel, *supra* note 10, at 160-61 (summarizing origins of federal sentencing guidelines). Notably, the sentencing goals of the federal and military systems are quite similar because both seek “just punishment, deterrence, incapacitation, and rehabilitation.” See *id.* at 161. The military also has the purpose of maintaining good order and discipline. See BENCHBOOK, *supra* note 49, at 60-61 (providing sample jury instructions on purposes of sentencing).

<sup>126</sup> See *United States v. Booker*, 543 U.S. 220, 245-46 (2005) (holding that portions of the federal sentencing statute which make the guidelines mandatory are severed).

<sup>127</sup> See Immel, *supra* note 10, at 161 n.13 (listing states that use sentencing guidelines).



systems while preserving the rule that the sentencing authority not compare sentences from other cases.<sup>128</sup>

Also particularly relevant to the debate about court member sentencing are the practices of states with jury sentencing. Five states with jury sentencing in non-capital cases use legislatively defined ranges to constrain the jury's discretion.<sup>129</sup> States with jury sentencing do not allow their juries to review sentencing guidelines or sentencing statistics, thus preventing the temptation to craft a sentence comparable to those given by other juries for like offenses.<sup>130</sup> For example, in Virginia the jury is not given the sentencing guidelines to review; however, the judge considers the guidelines in determining whether to uphold the jury's sentence.<sup>131</sup> In contrast, the military judge has no authority to modify the sentence imposed by the court members.<sup>132</sup> The convening authority and the appellate courts, however, can modify a guilty finding or sentence in favor of the accused.<sup>133</sup>

Sentencing guidelines are not always well-received for many reasons. First, when the legislature delegates the drafting of sentencing guidelines to an agency or commission, the democratic representation of the legislature is arguably lost.<sup>134</sup> Nonetheless, the Supreme Court approved Congress' delegation of authority to the United States Sentencing Commission to create the federal sentencing guidelines.<sup>135</sup> Secondly, critics argue that sentencing guidelines inhibit the individualization needed in sentencing.<sup>136</sup> It is difficult to anticipate and capture the unique

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<sup>128</sup> See Sylkatis, *supra* note 67, at 413 (citing *United States v. Mamaluy*, 27 C.M.R. 176, 180 (C.M.A. 1959)).

<sup>129</sup> See Hoffman, *supra* note 73, at 1003-04, n. 186 (detailing nonfelony classifications in states with sentencing guidelines and jury sentencing). Hoffman notes that the ranges within some classifications are wide, such as a first degree felony that ranges from five to ninety-nine years. See *id.* (citing TEX. PENAL CODE ANN. § 12.32). See also VA. CODE ANN. § 18.2-10 (Michie Supp. 2002) (providing sentencing range for class two felonies as twenty years to life imprisonment).

<sup>130</sup> See Iontcheva, *supra* note 77, at 355 (describing information available to sentencing juries). The sentencing jury is provided only the maximum and minimum sentences available and must reach a unanimous verdict. See *id.*

<sup>131</sup> See Rives & Ehlenbeck, *supra* note 54, at 229 (describing discretionary sentencing guidelines used in Virginia). In Virginia the jury's sentence is advisory only but is usually given considerable deference by the judge in formulating the final sentence. See Iontcheva, *supra* note 77, at 374 (explaining the advisory role of sentencing juries in Virginia). Still, neither the judge nor the jury can depart below the mandatory minimum sentence required by law for certain offenses. See Rives & Ehlenbeck, *supra*, at 229.

<sup>132</sup> See Rives & Ehlenbeck, *supra* note 54, at 229 (noting military judge has no authority to modify sentence imposed by panel).

<sup>133</sup> See *id.* (noting the ability of convening authority to modify results of trial).

<sup>134</sup> See Iontcheva, *supra* note 77, at 350 (arguing against delegating authority to draft sentencing guidelines).

<sup>135</sup> See *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (holding that Sentencing Reform Act satisfies the "intelligible principle" standard for legislative delegation of authority).

<sup>136</sup> See Iontcheva, *supra* note 77, at 351 (contending that sentencing guidelines "are an inadequate substitute for individualized moral judgment).

circumstances of every potential offense in guidelines.<sup>137</sup> While the military generally takes an individualized approach to sentencing, allowing members to know in advance the severity range of the sentence may prevent disparity from occurring.<sup>138</sup> Moreover, flexibility in sentencing guidelines can allow for the requisite individualization of sentences.<sup>139</sup>

Congress could customize the military sentencing guidelines in several ways. For instance, one scholar recommended that military sentencing guidelines apply only to general courts-martial, not summary or special courts-martial, and affect only length of confinement.<sup>140</sup> Such limits would reduce the impact of the guidelines because summary and special courts-martial are more frequent than general courts-martial.<sup>141</sup> Limiting the reach of military sentencing guidelines to confinement would leave many decisions to the panel such as punitive discharge, fines, forfeitures, and reductions in rank.<sup>142</sup> Another approach is to implement sentencing guidelines for only particular offenses.<sup>143</sup> This approach would allow Congress to select articles from the UCMJ that it determines are worthy of uniform treatment.

## B. Allowing Waiver of Court Member Sentencing

Another possible solution is to permit the accused to waive court member sentencing similar to the practice in some jury sentencing states. Under the current system, an accused who is concerned that a panel will impose a harsher sentence than a judge must choose whether to forgo his right to a jury trial on the merits.<sup>144</sup> The difficulty of this choice is not merely hypothetical. In *United States v. Sherrod*, the appellant's challenge for cause against the military judge was denied.<sup>145</sup> Nevertheless, the appellant felt compelled to choose trial by that same judge in order to avoid

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<sup>137</sup> See *id.*, at 344-45 (contending that sentencing requires consideration of many factors making it better suited to careful deliberation rather than "rigid categories of guidelines.").

<sup>138</sup> See, e.g., Sylkatis, *supra* note 67, at 413 (arguing that sentencing guidelines may prevent offenses).

<sup>139</sup> See, e.g., Immel, *supra* note 10, at 180 (quoting charter of United States Sentencing Commission to "[a]void[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted . . .").

<sup>140</sup> See Immel, *supra* note 10, at 200-01 (describing proposed plan for implementing military sentencing guidelines). Summary and special courts-martial are the lowest levels of proceedings against military members and involve relatively limited punishments. See Greg McCormack, *The Difference Between Levels of Courts-Martial*, available at <http://www.militarylawyers.org/court-martial-levels-difference.htm> (last visited Mar. 28, 2011).

<sup>141</sup> See Immel, *supra* note 10, at 200 (asserting that special courts-martial exceed general courts-martial).

<sup>142</sup> See *id.* at 201 (listing forms of punishment available in addition to confinement).

<sup>143</sup> See, e.g., Sylkatis, *supra* note 67, at 411-13 (proposing sentencing guidelines for articles covering desertion and absence without leave).

<sup>144</sup> See *United States v. Sherrod*, 26 M.J. 30, 31 (C.M.A. 1988).

<sup>145</sup> See *id.* at 31 (summarizing procedural background of case).

a severe sentence by court members.<sup>146</sup> Despite any concerns an accused might have about sentencing by court members, the military judge has the discretion of whether to approve a request for trial by judge alone.<sup>147</sup> Thus, in *Sherrod*, the military judge was able to deny the appellant's request for judge-alone trial.<sup>148</sup>

To protect the accused from this dilemma, Congress could change the MCM to allow the accused to elect trial by court members but then waive sentencing by the panel. This approach is similar to the waiver procedures used in jury sentencing states.<sup>149</sup> The six jury sentencing states use various methods to allow a defendant to waive jury sentencing. The procedures depend on the timing of the waiver and who, if anyone must consent to the waiver.<sup>150</sup>

Arkansas allows the defendant to waive jury sentencing either before or after the guilt phase of the trial.<sup>151</sup> If waived before the guilt phase, the prosecution must consent.<sup>152</sup> If waived after the jury finds the defendant guilty, both the court and the prosecution must consent.<sup>153</sup> In contrast, Oklahoma and Virginia require the consent of the court and the prosecution regardless of when the request is made.<sup>154</sup> Missouri uses a bifurcated trial and allows the defendant to waive the second stage of trial, jury sentencing, by submitting a written request before voir dire.<sup>155</sup> In

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<sup>146</sup> See *id.* (noting appellant's reason for choosing trial by military judge). The court remarked "[t]he appellant's instincts seem to have been valid since the members of this general court-martial sentenced him to the literal maximum punishment allowed by law: dishonorable discharge, confinement for 29 years, total forfeitures, and reduction to Private E-1." *Id.* at 31, n3. The appellate court subsequently reduced the confinement to twenty years. See *id.*

<sup>147</sup> See MCM, *supra* note 8, R.C.M. 903(c)(2)(B) ("[u]pon receipt of a timely request for trial by military judge alone the military judge shall . . . [a]pprove or disapprove the request, in the military judge's discretion.").

<sup>148</sup> See *Sherrod*, 26 M.J. at 31 (observing that military judge denied appellant's request). The Court of Military Appeals reversed holding that because the trial judge was disqualified all of his subsequent actions were void, including his denial of the appellant's request for trial by judge alone. See *id.* at 33.

<sup>149</sup> See *e.g.* Hoffman, *supra* note 73, at 1006 (describing partial waiver procedures).

<sup>150</sup> See *id.* (surveying waiver procedures in five jury sentencing states); see also Iontcheva, *supra* note 77, at 376-77 (stating that two states allow unconditional waivers and citing case law in three other states addressing waiver of jury sentencing).

<sup>151</sup> See ARK. CODE ANN. §§ 5-4-103(b)(4), 16-97-101(5) (1987) (providing requirements for waiver of jury sentencing).

<sup>152</sup> See ARK. CODE ANN. § 5-4-103(b)(4) (1987) (providing that court may determine the punishment if prosecution and defense agree).

<sup>153</sup> See ARK. CODE ANN. § 16-97-101(5) (1987) (providing that after jury finding of guilt defendant may waive jury sentencing if prosecution agrees and court consents).

<sup>154</sup> See VA. CODE ANN. § 19.2-257 (2009) (stating that trial may proceed without jury at defendant's request and with consent of prosecution and court); *Case v. Oklahoma*, 555 P.2d 619, 625 (Okla. Crim. App. 1976) (holding that court and prosecutor must consent to defendant's waiver of jury).

<sup>155</sup> See MO. REV. STAT. § 557.036(4)(1) (2003) (providing waiver procedures for court to assess punishment after jury finding of guilty).

Kentucky, the defendant may not waive jury sentencing without the consent of the prosecution.<sup>156</sup> Finally, in Texas, the defendant is sentenced by the court unless he or she requests jury sentencing before the trial begins.<sup>157</sup> The defendant may also change the sentencing authority choice after a finding of guilty, but only with the consent of the prosecutor.<sup>158</sup> Thus, Congress could pattern military procedures to waive court member sentencing after one of these state systems or it could develop an entirely new procedure specifically designed for the military justice system.

Despite the benefits to an accused, critics of waivers contend that allowing defendants to forgo jury sentencing could effectively eliminate the practice entirely.<sup>159</sup> However, the impact that a waiver procedure may have on the frequency of court member sentencing is not the appropriate focus. In the military, the ability to elect sentencing by court members is considered a right.<sup>160</sup> The primary concern should be protecting the rights of the accused. Thus, the accused should have the choice of whether to exercise or forgo that right regardless of the potential impact on the practice of court member sentencing.

Additional objections lodged against jury sentencing waivers are that it prevents the community from participating in sentencing and permits defendants to forum shop.<sup>161</sup> The first of these arguments requires acceptance of the premise that sentencing is more appropriately performed by community members than by judges.<sup>162</sup> Even conceding that point, the defendant's rights to a fair trial must override the interests of the community in participating in sentencing.<sup>163</sup> As to the second argument, the option between judicial and court member sentencing allegedly causes forum shopping already.<sup>164</sup> Once again, the decision comes down to whether the

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<sup>156</sup> See *Commonwealth v. Collins*, 933 S.W.2d 811, 819 (Ky. 1996) (holding that prosecution is entitled to have jury assess punishment after guilty finding).

<sup>157</sup> See TEX. CODE CRIM. PROC. ANN. art. 37.07 § 2(b) (Vernon 2007) (stating that court shall assess punishment unless defendant requests jury sentencing before commencement of voir dire).

<sup>158</sup> See *id.* (stating that prosecutor must consent to change in sentencing authority after guilty finding is rendered).

<sup>159</sup> See Hoffman, *supra* note 73, at 1007 (expressing concern that partial waivers might be fatal to jury sentencing).

<sup>160</sup> For an analysis of the accused's right of forum choice, see *supra* notes 88-93 and accompanying text.

<sup>161</sup> See Iontcheva, *supra* note 77, at 376 (presenting arguments against defendants to waive jury sentencing).

<sup>162</sup> See generally *id.* (contending that jury sentencing is conducive to deliberative democratic approach). Iontcheva argues that "[t]he American jury is the quintessential deliberative democratic body." *Id.* at 346.

<sup>163</sup> Cf. *id.* at 376-77 (noting tension between defendant's rights and jury autonomy). One solution is to allow jury waivers with the consent of the prosecution and to permit the judge to adjust an excessively harsh or weak sentence. See *id.* at 377.

<sup>164</sup> See Lovejoy, *supra* note 10, at 29-30 (contending that option between sentencing by military judge or court members causes forum shopping); see also ADVISORY COMM'N

accused's rights should prevail. In this situation, individual rights must be paramount because of the potential impact of the court-martial on the accused's life and liberty.

### C. Implementing Military Judge-Only Sentencing

While the problems with court member sentencing could be addressed through various efforts to limit the panel's discretion, the better solution is to abolish the panel's role entirely and make military judges solely responsible for sentencing.<sup>165</sup> Eliminating court member sentencing would address many of the previously cited disadvantages to the accused and the government.<sup>166</sup> First, it will allow an accused to choose a trial forum based on "the more important and constitutionally protected issue of guilt or innocence" rather than fears about an unduly harsh sentence by court members.<sup>167</sup> Second, with judge-only sentencing, court-martial sentences are more likely to be consistent.<sup>168</sup> Military judges are more likely to focus on disparity between similar cases than members and will "develop an expertise which works to promote uniformity with respect to their cases."<sup>169</sup>

Judge-only sentencing has many advantages attributable to the judges' unique position as compared to court members. Sentencing by military judges provides the greatest protection against unlawful command influence because the military judges report to a chain of command that is entirely independent from the convening authority and commanders who refer cases to trial.<sup>170</sup> A military judge has less reason than court members to be concerned with how others will respond to their sentencing decisions.<sup>171</sup> Moreover, unlike court members, independent judges do not have to participate in group decision-making, a potentially lengthy and cumbersome process.<sup>172</sup> Judge-only sentencing would also improve the

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REPORT, *supra* note 77, at 14 (noting that ability of accused to elect court members or military judge enables forum shopping).

<sup>165</sup> See Lovejoy, *supra* note 10, at 3 (stating that removing court members from the sentencing role entirely is more effective than "piecemeal changes" to procedural rules governing court member participation).

<sup>166</sup> For arguments that court member sentencing has disadvantages for the accused and the government, see *supra* Parts III.A and III.B.

<sup>167</sup> Lovejoy, *supra* note 10, at 57 (arguing for military judge-only sentencing).

<sup>168</sup> See *id.* at 57-58 (contending that judge-only sentencing will produce more consistent results).

<sup>169</sup> ADVISORY COMM'N REPORT, *supra* note 77, at 5 (describing ability of military judges' to ensure uniformity in sentencing).

<sup>170</sup> See Rives & Ehlenbeck, *supra* note 54, at 226 (explaining military judges' separate chain of command from convening authorities).

<sup>171</sup> See ADVISORY COMM'N REPORT, *supra* note 77, at 6 (suggesting that military judges are less likely than court members to be influenced by what others think of their sentence).

<sup>172</sup> Cf. Iontcheva, *supra* note 77, at 341-43 (contending that deliberation in group decision-making has distinct advantages). Sentence deliberation by a jury is argued to form more

public's perception of the military justice system's fairness because most civilian systems also use trained, independent judges.<sup>173</sup>

Additionally, certain benefits arise from the qualifications of military judges over the average military member. Judges are more efficient at sentencing due to experience and knowledge of military law.<sup>174</sup> Military judges are arguably better equipped to disregard overly prejudicial information than are panel members.<sup>175</sup> Trained in procedural and evidentiary rules, the military judge is trusted to sort through evidence and disregard inflammatory information.<sup>176</sup>

As with the other proposed solutions, proponents of jury sentencing raise a variety of challenges to the proposal of eliminating jury participation in sentencing. For example, one commentator argues that giving the public a role in sentencing educates them about the law and increases the perceived legitimacy of the legal institution.<sup>177</sup> Similar arguments are made in the military context.<sup>178</sup> The Advisory Commission formed as a result of the 1983 Military Justice Act concluded that a change to judge-only sentencing was not necessary.<sup>179</sup> In its recommendation to Congress, the Commission specifically noted the benefits of military member participation in court-martial sentencing as "foster[ing an] understanding of military justice by all service members and belief in the fairness of the system."<sup>180</sup>

While these are persuasive arguments standing alone, they must be considered in context. In the twenty-eight years since the Commission conducted its assessment the military has undergone considerable change.<sup>181</sup> Although the overarching purpose of military justice has not changed, that reason alone does not justify stagnation of sentencing procedures. While the military has undergone change, the position of the military judge has also developed. The status of the military judge has increased among all stakeholders in the military justice system: Congress, the President, military

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informed decisions, legitimate the sentencing outcome, and improve the political system by involving the community. See *id.* (outlining advantages to jury sentencing deliberations).

<sup>173</sup> See Young, *supra* note 2, at 110 (contending that judge-only sentencing would improve public perception of court-martial fairness). "Civilians are used to having trained, professional, independent judges impose sentences." *Id.*

<sup>174</sup> See ADVISORY COMM'N REPORT, *supra* note 77, at 5 (presenting advantages of judge-only sentencing). "It is recognized that military judges are professional sentencers who are better qualified by reason of education, training, experience, and knowledge to adjudge appropriate sentences." *Id.* at 24.

<sup>175</sup> See, e.g., ADVISORY COMM'N REPORT, *supra* note 77, at 5 (noting that military members might be more likely to be influenced by "volatile information" than judges).

<sup>176</sup> See *supra* notes 112-17 and accompanying text.

<sup>177</sup> See Iontcheva, *supra* note 77, at 345, 348-49 (describing valuable outcomes of public participation in sentencing).

<sup>178</sup> See *supra* notes 77-78 and accompanying text.

<sup>179</sup> See ADVISORY COMM'N REPORT, *supra* note 77, at 6 (concluding "[t]he present procedure . . . has served the military justice system well and no compelling reason exists for change.").

<sup>180</sup> *Id.* (recommending that member participation in courts-martial remain unchanged).

<sup>181</sup> For example, the military has fought in numerous conflicts and has become more diverse and technologically advanced than it was in 1983.

appellate courts, and most importantly, the “vast majority of [military members] who prefer to be tried and sentenced by a military judge.”<sup>182</sup> Simultaneously, the focus of sentencing in the military has become more individualized.<sup>183</sup> Individualization of sentences requires more information about the offense and the accused, information which military judges are experienced and trained to try to navigate whereas court members are not.<sup>184</sup>

## V. THE ROAD AHEAD: PUTTING UNIFORMITY BACK INTO THE SENTENCING OF MEMBERS OF THE UNIFORMED SERVICES

The uncontrolled sentencing discretion of court members and the inability of the military judge to alter a sentence imposed by those members may help encourage guilty pleas and bench trials.<sup>185</sup> One scholar contends that jury discretion in sentencing allows prosecutors to credibly claim that a jury sentence is more unpredictable than one imposed by a judge or included as part of a plea bargain.<sup>186</sup> For prosecutors, legislators, and judges “[t]he unpredictability of jury sentencing is a blessing, not a curse; the more freakish, the better.”<sup>187</sup> Likewise, participants in the military justice system have little incentive to demand change in the “wild-card aspect” of court member sentencing because this unpredictability sometimes leads to faster and easier disposition of cases.<sup>188</sup> Even proponents of jury sentencing agree that jurors must be provided with more information, such as sentencing statistics and guidelines, in order to prevent unwarranted sentence disparities.<sup>189</sup>

Thus far, the military has rejected the former approach—providing information about sentencing outcomes of similar cases to court members is not permitted.<sup>190</sup> Allowing the accused to waive court member sentencing is only a partial solution.<sup>191</sup> Although it might be possible to reduce the risks of arbitrary sentencing by court members through procedural remedies such

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<sup>182</sup> See Lovejoy, *supra* note 10, at 65 (contending that stature of military judges has increased over time).

<sup>183</sup> See *id.* (noting trend towards individualization in court-martial sentencing); see also Young, *supra* note 2, at 110 (stating that military uses individualized approach to sentencing).

<sup>184</sup> See Lovejoy, *supra* note 10, at 65 (reasoning that as sentencing information increases, risk that court members will be unduly prejudiced by that information also increases).

<sup>185</sup> See King, *supra* note 1, at 198 (explaining how unpredictability in jury sentencing increases guilty pleas and bench trials).

<sup>186</sup> See *id.* (arguing that uncertainty generated by jury discretion in sentencing leads to more plea bargains).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See Iontcheva, *supra* note 77, at 359 (conceding that structural devices are needed to prevent disparate results by sentencing juries).

<sup>190</sup> See *supra* notes 29-33 and accompanying text.

<sup>191</sup> In cases where the accused does not waive sentencing by court members, the earlier cited disadvantages will still exist.

as sentencing guidelines, the more effective solution is to abolish court member sentencing entirely.<sup>192</sup>

Eliminating court members from sentencing will remedy many of the earlier cited disadvantages: concerns about fairness in the court member selection process, unlawful command influence, sentence disparity, compromise verdicts, and forum shopping.<sup>193</sup> With members no longer responsible for sentencing, concerns about court members trying to satisfy their commanders through their sentence decisions are gone.<sup>194</sup> Also, the government will know that forum selection is no longer driven by the accused's concerns about sentencing fairness.<sup>195</sup> Members will still learn about the military justice system through participation in the guilt phase of the trial.<sup>196</sup>

On the other hand, a change to judge-only sentencing would leave a significant disadvantage intact. For example, giving military judges unfettered sentencing discretion does not guarantee that they will sentence more uniformly than court members. Thus, even the discretion of military judges needs some constraint. Sentencing guidelines can provide this constraint by giving judges a range for an appropriate sentence. Additionally, the convening authority and the appellate courts could retain the discretion to modify the sentence after trial.<sup>197</sup>

Twenty-eight years have passed since Congress requested an advisory commission review and provide recommendations to improve the military justice system.<sup>198</sup> The time has come for Congress to initiate another broad review to ensure that the system, and its sentencing procedures, is best designed to ensure an effective, disciplined fighting force. Just as the military continually improves its capabilities and personnel readiness, the military justice system needs to continually improve its ability to support the mission.

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<sup>192</sup> See Lovejoy, *supra* note 10, at 3 (contending that abolishing court member sentencing is most effective and efficient solution to problems created by their participation).

<sup>193</sup> See Parts III.A and III.B.

<sup>194</sup> See *supra* notes 102-04 and accompanying text; see also Lovejoy, *supra* note 10, at 62-63 (contending that military judges are "better insulated from the influence of command").

<sup>195</sup> See Lovejoy, *supra* note 10, at 60 (reasoning that judge-only sentencing will eliminate forum shopping based on undue sentencing concerns).

<sup>196</sup> See *supra* notes 77-78 and accompanying text.

<sup>197</sup> See *supra* note 133 and accompanying text.

<sup>198</sup> See generally ADVISORY COMM'N REPORT, *supra* note 77, at v (explaining background for formation of 1983 Advisory Commission on matters related to military justice).



NEITHER A MODEL OF CLARITY NOR A MODEL STATUTE:  
AN ANALYSIS OF THE HISTORY, CHALLENGES, AND SUGGESTED  
CHANGES TO THE “NEW” ARTICLE 120

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## I. INTRODUCTION

Consider the following scenario: John is 21 years old and enlisted in the military after three years of post-high school unemployment. Sarah is 18 and enlisted immediately after graduating from high school to earn money for college. Both are assigned to the same unit. Both live in the same dormitory-style barracks on a base in the U.S. The base and the nearby small town lack many outlets for entertainment. Most young servicemembers assigned to the base spend their free time drinking while watching movies or playing video games in their barracks rooms.

John, Sarah, and a group of their friends often hang out in the barracks on weekends. One Saturday night, a group has been drinking for several hours in John's room. Their friends depart, leaving John and Sarah alone together for the first time. Both are drunk, but Sarah is almost incoherent after consuming nearly half of a bottle of vodka herself. She lies down on John's bed. John follows shortly after.

The next day, something is wrong. Sarah texts her friend that she cannot remember what happened, but that she thinks she might have been raped. She cannot remember the details, but does recall brief images from last night: images of John on top of her or him having sex with her. She woke up in the morning unsure of what to do or whom to contact. Her friend suggests talking to the sexual assault response coordinator on base. Sarah does, and feels she remembers enough to conclude that she did not consent to sex with John. She reports the incident.

A criminal investigation is initiated. Sarah provides a statement to investigators, and John is questioned under rights advisement. There are no other witnesses to the incident in question, although several servicemembers tell investigators that both John and Sarah had been drinking heavily. The investigators present their findings to John and Sarah's chain of command. After several previous instances involving allegations of sexual misconduct in the unit that went unpunished for various reasons, the commander feels pressure from his superiors to correct a perceived climate of tolerance of such behavior within his command.

The commander brings criminal charges against John and the case is referred to a court-martial. The charges allege that John either had sex with Sarah by force or threat of harm, or while she was unable to consent because she was severely intoxicated. Prior to trial, John provides notice that he intends to claim that either Sarah agreed to the sex, or that even if she did not, he incorrectly but reasonably believed that she had. No other witnesses or evidence corroborates either party's story: the trial will turn on the court's assessment of the credibility of either Sarah's or John's version of events.

A story such as this, while truncated, is not unfamiliar to many in the United States military.<sup>1</sup> Sexual assault is a particularly malicious and tragic crime, intentionally inflicted on a victim who often suffers lasting physical and psychological wounds.<sup>2</sup> As Justice White observed in *Coker v. Georgia*, “[s]hort of homicide, [rape] is the “ultimate violation of self.””<sup>3</sup>

Given the severity of this crime, the role of the military institution in American society, and the complexity of gender relationships in the U.S. military, efforts to combat military sexual assault must include comprehensive education of military members and robust services and support to victims. However, the most important tool available to a commander to respond to military sexual assault is Article 120 of the Uniform Code of Military Justice (UCMJ),<sup>4</sup> which defines and prescribes punishment of unlawful sexual conduct.

This article proposes that revisions to Article 120 enacted by Congress in 2007,<sup>5</sup> while well-intentioned and largely effective, require further refinement to clarify the application of the concept of consent in military sexual assault investigations and prosecutions. To support that conclusion, we will first provide context regarding the history of U.S. military sexual assault in Part II. Part III will then examine the legislative history and development of the 2007 amendments to Article 120. Next, Part IV will analyze legal challenges to the new legislative scheme, and identify areas that require further interpretation and refinement. Finally, Part V focuses on two of the most important areas in need of additional interpretations. Part VI concludes.

## II. SEXUAL ASSAULT IN THE U.S. MILITARY

Following is an overview of the circumstances and legal landscape that led to the 2007 amendments. First, a review of the role of women in the military will provide a background in which the crime of sexual assault occurs, as the vast majority of victims are female.<sup>6</sup> Next, we will examine available statistics on the frequency of sexual assault, which may explain why Congress perceived the need to enact the 2007 amendments. Finally, we will analyze information regarding the effect of sexual assault on

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<sup>1</sup> See, e.g., MIC HUNTER, HONOR BETRAYED: SEXUAL ABUSE IN AMERICA’S MILITARY 165-166 (2007) (noting that an Army criminal investigator referred to such scenarios as “very typical.”).

<sup>2</sup> Throughout this article, the term “sexual assault” will be used when discussing unlawful sexual contact, as defined in Department of Defense (DoD) Directive 6495.01. See *infra*, Part II.B.

<sup>3</sup> *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

<sup>4</sup> 10 U.S.C. § 920 (2011).

<sup>5</sup> See Pub. L. No. 109-163, § 552(a)(1).

<sup>6</sup> See OFFICE OF THE SECRETARY OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, FISCAL YEAR 2009 DEPARTMENT OF DEFENSE REPORT ON SEXUAL ASSAULT IN THE MILITARY, 68 (March 2010) [hereinafter SAPRO FY09 REPORT]), available at [http://www.sapr.mil/media/pdf/reports/fy09\\_annual\\_report.pdf](http://www.sapr.mil/media/pdf/reports/fy09_annual_report.pdf).

military society and effectiveness as an additional reason for changing the criminal legislative scheme in an effort to more effectively address the problem.

#### A. Women in the Military

An analysis of military sexual assault and associated military justice responses should start with understanding the gender demographics of the U.S. military. The active-duty military population in the Department of Defense totals approximately 1.4 million members,<sup>7</sup> of which 14 percent are women.<sup>8</sup> Despite this relatively small proportion as compared to the general U.S. population, the numbers of women in the military have consistently increased over the last 40 years. After World War II, legal limitations on the roles of women in the military returned after years of women filling crucial roles supporting the war effort.<sup>9</sup> In the 1950s and 1960s, women comprised just over one percent of the active duty population, eventually reaching two percent by the end of Vietnam.<sup>10</sup> The end of mandatory conscription in 1973 required a diversification and increase in the roles of female servicemembers in the all-volunteer force, as the military faced a shortage of qualified men to fill previously male-only positions.<sup>11</sup> However, despite the slow but steady increase in their numbers, by 2003 women were still prohibited from working in 30 percent of available positions in the U.S. Army.<sup>12</sup>

As a result of the historical overrepresentation of men in its ranks, the U.S. military may be, according to one sociologist, “the most prototypically masculine of all social institutions.”<sup>13</sup> However, this male dominance does not necessarily directly correlate with a prevalence for sexual assault. One author has postulated that the “inherent implication of inequality” due to grossly unequal representation of the sexes in the military population, could provide some explanation for the “disproportionate rates of unwanted sexual behavior experienced by women in the military” as compared to civilian society.<sup>14</sup> While this imbalance and women’s inability to participate fully in all military occupational fields likely contributes to a culture that may increase their experience of unwanted sexual conduct, a

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<sup>7</sup> See Armed Forces Strength Figures for April 30, 2011, available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/ms0.pdf>.

<sup>8</sup> See Department of Defense Female Active Duty Military Personnel by Rank/Grade, Sept. 30, 2010, available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1009f.pdf>.

<sup>9</sup> See David R. Segal & Mady Wechsler Segal, Population Reference Bureau, *America's Military Population*, POPULATION BULL., Dec. 2004, at 27.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> Jessica L. Cornett, Note, *The U.S. Military Responds to Rape: Will Recent Changes be Enough?*, 29 WOMEN'S RTS. L. REP. 99, 100 (2008).

<sup>14</sup> *Id.* at 102-103.

more complete explanation of the reasons for military sexual assault should consider a broader range of factors.<sup>15</sup>

## B. Statistics on Instances of Military Sexual Assault

Whatever the institutional reasons that may contribute to the problem, military sexual assaults are clearly numerous. Prior to 2004, neither the Department of Defense (DoD) nor any of the service branches routinely compiled statistics on sexual assault. A 1995 survey of military members provides one source of pre-2004 information. Conducted after several high-profile military sexual assault and sexual harassment controversies,<sup>16</sup> this survey found that 78 percent of female servicemembers experienced unwanted sexual behavior in the military.<sup>17</sup> However, the accuracy of such surveys, while documenting an unacceptably high rate of unwanted conduct in the DoD, may be skewed by the lack of a uniform definition of “unwanted sexual behavior.”

Recognizing both the problem of military sexual assault and the lack of consistent data regarding it, in 2004 Congress passed legislation that required the Secretary of Defense to submit annual public reports of sexual assaults involving members of the armed forces.<sup>18</sup> The law ordered DoD to create a uniform definition of sexual assault.<sup>19</sup> It required a report on the number of sexual assaults committed by and against members of the armed forces that were reported to military officials.<sup>20</sup> DoD also must provide a “synopsis of and the disciplinary action taken in” each substantiated case of sexual assault.<sup>21</sup>

In compliance with the 2004 law, DoD provided a definition of sexual assault in a 2005 directive:

[I]ntentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (to

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<sup>15</sup> See, e.g., HUNTER, *supra* note 1, at 33-149 (discussing, among other topics, “the code of hyper masculinity,” hazing, prostitution, and homophobia as possible attributing factors to military sexual assault).

<sup>16</sup> See *id.* at 185-187 (listing scandals of military sexual abuse and assault, including incidents at the Army’s Aberdeen Proving Ground, the Navy’s 1991 Tailhook Convention, and the U.S. Air Force Academy).

<sup>17</sup> See Cornett, 29 WOMEN’S RTS. L. REP, *supra* note 13, at 105.

<sup>18</sup> See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1920, § 577(f) (2004) [hereinafter 2005 NDAA].

<sup>19</sup> See *id.*, 375, § 577(a)(3).

<sup>20</sup> See *id.*, 375, § 577(f)(2).

<sup>21</sup> *Id.*, 375, § 577(f)(2)(B).

include unwanted and inappropriate sexual contact), or attempts to commit these acts.<sup>22</sup>

This roughly matched several criminal offenses defined by Article 120 and Article 125<sup>23</sup> of the UCMJ at that time, as well as Article 80<sup>24</sup> (attempts) and Article 128<sup>25</sup> (assault).

Annually since 2005, DoD has complied with the law by publishing the required reports, including analysis of the data and observations regarding trends. For example, in fiscal year 2009, DoD reported 3230 incidents of sexual assault involving military members, representing an 11 percent increase from 2008 and a 20 percent increase from 2007.<sup>26</sup> Furthermore, as a proportion of the total active-duty population, the frequency of reported sexual assaults by servicemembers shows a similar increase over the same time period, from 1.6 reports per thousand servicemembers in 2007 to 2.0 reports per thousand in 2009.

According to the 2009 report, this increase may be attributed, in part, to DoD policies promulgated in 2005 that encourage victims of alleged sexual assaults to report those incidents. These policies include enhanced victims' services and available confidential reporting procedures.<sup>27</sup> Despite these new policies, the report also notes that separate DoD studies indicate that only "20 percent of servicemembers who experience unwanted sexual contact report the matter to a military authority."<sup>28</sup> Therefore, this trend of underreporting likely indicates that the real number of sexual assaults is much higher.

Finally, the 2009 report also includes demographic and geographic data of instances of sexual assault that provide a more detailed picture of the military sexual assault problem. In 2009, 91 percent of victims of sexual assault reported to authorities were female.<sup>29</sup> Furthermore, 279 reports alleged sexual assaults in "combat areas of interest," primarily those countries in and around the Iraq and Afghanistan theaters.<sup>30</sup> This represented a 16 percent increase from the number reported in 2008.<sup>31</sup>

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<sup>22</sup> U.S. DEPARTMENT OF DEFENSE, DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM, Encl 2, para. 1.13 (2008), available at <http://www.dtic.mil/whs/directives/cores/pdf/649501p.pdf>.

<sup>23</sup> See 10 U.S.C. § 925 (2011).

<sup>24</sup> See 10 U.S.C. § 880 (2011).

<sup>25</sup> See 10 U.S.C. § 928 (2011).

<sup>26</sup> See SAPRO FY09 REPORT, *supra* note 6, at 58-59.

<sup>27</sup> See *id.*

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

<sup>29</sup> See *id.* at 69.

<sup>30</sup> *Id.* at 76.

<sup>31</sup> See *id.*

Although the number of servicemembers deployed to these combat areas varies constantly, at the end of 2008 the total was approximately 294,000.<sup>32</sup> Therefore, the rate of sexual assaults per thousand servicemembers in these locations is approximately 0.94, less than half of the 2.0 rate per thousand reported for the overall DoD. This lower rate is likely due to the “arduous conditions” that make “data collection very difficult” in theater,<sup>33</sup> and is at odds with well-documented reports of sexual assaults in Iraq and Afghanistan.<sup>34</sup>

### C. Effects of Sexual Assault in the Military

*“The Department has a no-tolerance policy toward sexual assault. This type of act not only does unconscionable harm to the victim; it destabilizes the workplace and threatens national security.”*

- Secretary of Defense Robert Gates, March 2010<sup>35</sup>

*“The Department does not tolerate sexual assault of any kind. Such acts are an affront to the institutional values of the Armed Forces of the United States of America. Sexual assault harms individuals, undermines military readiness, and weakens communities.”*

- Secretary of Defense Donald Rumsfeld, May 2005<sup>36</sup>

Sexual assault causes numerous effects, which can be classified in two ways. Obviously the victim suffers direct psychological and physiological harm, as well as indirect harm based on her perception of the military’s response to the incident if she reported it. Sexual assault also threatens the military’s fundamental principles of trust, honor, and respect, if the response fails to reflect prompt and thorough investigation, and fair disposition (including adjudication) of such allegations.

Unlike physical injuries, time alone does not heal the psychological effects of sexual assault on victims. In fact, a 2005 study of veterans of the 1991 Gulf War found that “high combat exposure and sexual harassment/assault” most commonly triggered the Post-Traumatic Stress Disorder diagnosed among the participants<sup>37</sup> Furthermore, military sexual assaults result in direct and indirect fiscal costs to DoD, in terms of

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<sup>32</sup> See CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS NO. R40682, TROOP LEVELS IN THE AFGHAN AND IRAQ WARS, FY2001-FY2012: COST AND OTHER POTENTIAL ISSUES, (July 2, 2009), at 6, available at <http://www.fas.org/sgp/crs/natsec/R40682.pdf>.

<sup>33</sup> SAPRO FY09 REPORT, *supra* note 6, at 76.

<sup>34</sup> See, e.g., Sara Corbett, *The Women’s War*, N.Y. TIMES MAGAZINE, Mar. 18, 2007.

<sup>35</sup> SAPRO FY09 REPORT, *supra* note 6, at i.

<sup>36</sup> Memorandum from Sec’y of Def. to Secretaries of Military Departments, et al, (May 3, 2005) (on file with author) [hereinafter Rumsfeld Memo].

<sup>37</sup> *Id.* at 182.

personnel retention, recruiting, and long term medical treatment. While difficult to estimate, these costs are likely quite large.<sup>38</sup>

Sexual assaults also seriously and negatively impact military effectiveness and unit cohesion. For example, the effective operation of a military unit requires trust between fellow servicemembers and also up and down the command and leadership chain. Sexual assault necessarily damages this fragile and critical state of trust, particularly in cases involving one member alleging an offense committed against them by a fellow member, and where such matters inevitably occupy the attention of all members of the unit.

Furthermore, an allegation of sexual assault will often affect a unit even more directly. For example, the military will not normally permit an accused servicemember to change duty stations or deploy during the investigation and adjudication of allegations against them.<sup>39</sup> Likewise, receiving medical treatment and other support services, as well as the necessity of participation with investigators and attorneys, will nearly always preclude a victim's effective contribution to the mission of their unit.<sup>40</sup> Furthermore, investigation and adjudication may also involve and require the additional participation of other unit members, thereby magnifying the impact.

These negative individual and group effects caused by incidents of military sexual assault likely persuaded Congress to consider changes intended to combat the problem. Modifying the existing legal framework in order to enable more effective criminal prosecution of military sexual assault would advance both military needs and the rule of law—foundations of the military justice system. Improving punishment of sexual misconduct would further military necessity by reducing negative group effects of sexual assault.

However, any change in the legislative scheme that criminalizes sexual assault in order to further the rule of law must be balanced against equally important considerations to protect and preserve the rights of the accused. According to one author, provisions such as the recent changes in military sexual assault prosecution place “little to no value upon the substantive or procedural rights of an accused, or to the fundamental fairness implicit in the guarantees of due process.”<sup>41</sup> Thus, according to these authors, while society does have a military necessity interest in the immediate response to a sexual assault victim, there is an equal rule of law

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<sup>38</sup> See TERRI T.S. NELSON, FOR LOVE OF COUNTRY: CONFRONTING RAPE AND SEXUAL HARASSMENT IN THE U.S. MILITARY, 189-213 (2001).

<sup>39</sup> See Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put it Back on Target*, ARMY LAW., Aug. 2007, at 14.

<sup>40</sup> See *id.*

<sup>41</sup> Lieutenant Keith B. Lofland, *The Neglected Debate Over Sexual Assault Policy in the Department of Defense*, 55 NAVAL L. REV. 311, 313 (2008).



interest in ensuring that any prosecution of the accused is a fair process.<sup>42</sup> A proper examination of recent Congressional responses to the problem of military sexual assault must include an assessment of these competing interests.

### III. CONGRESSIONAL RESPONSE: THE “NEW” ARTICLE 120

Beginning with the 2004 legislation requiring annual reports detailing the instances of military sexual assault, Congress began to address the problem it perceived. The statistics denoting the pervasiveness of military sexual assault discussed *supra*, in addition to several cases of military sexual abuse highlighted in the media, certainly contributed to Congress’ agenda to consider structural reforms within the military justice system in order to better combat the problem.

Additionally, some military courts noted the limited nature of the pre-2007 Article 120, particularly that it did not “reflect the more recent trend for rape statutes to recognize gradations in the offense based on context.”<sup>43</sup> Overall, a review of the legislative history of the amended Article 120 sets the stage for a proper analysis of recent judicial interpretations and proposals for modification to the statute.

#### A. Congressional Request for Options

President Bush signed the Ronald W. Reagan National Defense Authorization Act (NDAA) for Fiscal Year 2005 on October 28, 2004.<sup>44</sup> In addition to the sections requiring the annual reporting of instances of sexual assaults and the creation of a uniform definition of sexual assault, the 2005 NDAA also required the Secretary of Defense to

[R]eview the Uniform Code of Military Justice and the Manual for Courts-Martial with the objective of determining what *changes are required to improve* the ability of the military justice system to address *issues relating to sexual assault* and to conform the Uniform Code of Military Justice and the Manual for Courts-Martial *more closely to other Federal laws and regulations* that address such issues.<sup>45</sup>

Thus, in an attempt to address the problem of military sexual assault, Congress sought proposals from the DoD to modify the UCMJ, implicitly

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<sup>42</sup> *See id.* at 330.

<sup>43</sup> *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005) (“Article 120 is antiquated in its approach to sexual offenses.”).

<sup>44</sup> *See* 2005 NDAA, *supra* note, at 18.

<sup>45</sup> *Id.*, §571(a) (emphasis added).

recognizing that the provisions in the UCMJ that dealt with sexual assault required modification for improvement.

A subcommittee of DoD's Joint Service Committee (JSC) for Military Justice took up the task of developing recommendations to go to Congress. The JSC is comprised of representatives of the major stakeholders in the DoD's uniformed and civilian legal community, and is responsible, in part, for reviewing the Manual for Courts Martial (MCM) and proposing updates to the UCMJ.<sup>46</sup> The subcommittee reviewed the then-current UCMJ, MCM, several federal criminal statutes, and the American Law Institute's Model Penal Code, and, ultimately presented DoD's recommendations to Congress in March 2005.<sup>47</sup>

The subcommittee unanimously recommended against any changes to the UCMJ. Its members could identify no military sexual misconduct that could not be effectively prosecuted under the existing UCMJ and MCM.<sup>48</sup> Furthermore, the JSC subcommittee asserted that any "rationale for significant change [would be] outweighed by the confusion and disruption that such change would cause."<sup>49</sup> Finally, the subcommittee emphasized that given the "well-developed, sophisticated jurisprudence" in the military justice system, changes in the UCMJ or other regulations would not likely result in any significant increase in prosecutions of sexual offenses.<sup>50</sup>

However, the subcommittee further stated that "if higher authorities direct a UCMJ change to substantially conform to [federal criminal law]," one of potential changes it had considered represented the option "that best takes into account unique military requirements."<sup>51</sup> This option would divide sexual misconduct into degrees according to various aggravating factors.<sup>52</sup> Despite the fact that the subcommittee explicitly advocated no change in existing law as necessary or prudent to deal with the problem of military sexual assault, this option soon formed the basis of the amendments to Article 120 that Congress later enacted.<sup>53</sup>

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<sup>46</sup> U.S. DEPARTMENT OF DEFENSE, DoD DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (2003), available at <http://www.dtic.mil/whs/directives/corres/pdf/550017p.pdf>.

<sup>47</sup> Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice at 1 (Feb. 2005) available at [http://www.defenselink.mil/dodgc/php/docs/subcommittee\\_reportMarkHarvey1-13-05.doc](http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc), [hereinafter Sex Crimes and the UCMJ].

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

<sup>49</sup> *Id.* at 2.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at 85.

<sup>53</sup> *See* Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., Jun. 2006, at 27 (referencing discussions with a House Armed Services Committee attorney who served as a member of a drafting committee for the new sexual assault legislation).

## B. The “New” Article 120

Contrary to the primary recommendation of the DoD subcommittee, the 2006 National Defense Authorization Act included a complete rewrite of Article 120.<sup>54</sup> Unfortunately for those seeking to understand Congress’ intent, the available legislative history provides little explanation of the specific reasons or purposes for the complete revision.

For example, the report of the House Committee on Armed Services’ version of the NDAA included only one paragraph summarizing the rewrite of the article.<sup>55</sup> Furthermore, the Conference Report on the combined House and Senate bill noted that the Senate version of the NDAA bill did not include a revision to Article 120.<sup>56</sup> Additionally, floor debate in Congress contains only a single apparent reference to the rewrite. Representative Loretta Sanchez of California noted that the rewritten Article 120 provided for a “modern complete sexual assault statute that protects victims [and] empowers commanders and prosecutors.”<sup>57</sup> Furthermore, she stated that the amended statute “affords increased protection for victims by emphasizing acts of the perpetrator rather than the reaction of the victim during the assault.”<sup>58</sup>

The President signed the 2006 NDAA and its Article 120 rewrite into law on January 6, 2006.<sup>59</sup> According to the statute, the new Article 120 would not go in to effect until October 1, 2007.<sup>60</sup> The revised article now specifies 14 categories of sexual assault offenses, including rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact.<sup>61</sup>

Understanding the categories of offenses under the revised article requires first examining the definitions of “sexual act” and “sexual contact.” The statute defines a “sexual act” as contact between the penis and vulva or penetration of a genital opening of another by hand, finger, or other object with intent to abuse, humiliate, harass, or degrade, or to arouse or gratify sexual desire.<sup>62</sup> It defines “sexual contact” as the intentional touching of another with the intent to abuse, humiliate, harass, or degrade, or to arouse or gratify sexual desire.<sup>63</sup> After initially identifying the nature of the conduct between the perpetrator and the victim, determination of the

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<sup>54</sup> See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3137 (2006) [hereinafter 2006 NDAA].

<sup>55</sup> See H.R. Rep. No. 109-089, § 555 (2005) (noting that the amended Article 120 would include both “a series of graded offenses relating to rape, sexual assault and other sexual misconduct” and “a precise description of each offense.”).

<sup>56</sup> See H.R. Rep. No. 109-360, § 552 (2005).

<sup>57</sup> 151 Cong. Rec. H3912-02, 3920 (2005).

<sup>58</sup> *Id.*

<sup>59</sup> See 2006 NDAA *supra* note, at 54.

<sup>60</sup> See *id.*

<sup>61</sup> See 10 U.S.C. § 920, (a) – (h) (2011).

<sup>62</sup> 10 U.S.C. § 920(t)(1).

<sup>63</sup> 10 U.S.C. § 920(t)(2).

specific offense then requires further consideration of numerous aggravating factors, including the use of weapons, force, or threats of bodily harm.<sup>64</sup>

Along with the enumeration of several new offenses, the amended Article 120 includes two other important changes. First, the statute eliminated the previous requirement in rape and sexual assault prosecutions that the government prove the accused committed the sexual conduct without the consent of the victim. The new Article 120 replaced this requirement with provisions for the accused to raise and assert consent, and reasonable mistake of fact as to consent, as affirmative defenses to the alleged offenses of rape, aggravated sexual assault, aggravated sexual contact, or abusive sexual contact.<sup>65</sup> This differs considerably from the previous version of Article 120, which required the government to prove the accused committed the act of sexual intercourse, with force, and without consent.<sup>66</sup>

Second, the new Article 120 requires an accused that raises the affirmative defense(s) of consent and/or reasonable mistake of fact as to consent, to support the defense(s) by a preponderance of the evidence.<sup>67</sup> After the defense satisfies this initial quantum of proof, the burden of proof then shifts to the government to disprove the existence of consent or reasonable mistake of fact as to consent, beyond a reasonable doubt.<sup>68</sup>

These two provisions effect the changes worked by the new legislative scheme, as Representative Sanchez described them: that the law will now shift the focus of sexual assault prosecutions away from the victim and toward the conduct of the accused. However, these two provisions triggered very serious appellate challenges that have resulted in judicial conclusions that the new law may be unconstitutional. The new law clearly needs further legislative refinement and interpretation to survive further scrutiny and to further Congress' apparent intent.

#### IV. APPELLATE CHALLENGES AND JUDICIAL INTERPRETATIONS

Even before the newly revised Article 120 became effective in October 2007, several commentators detailed possible problems with the amendments shortly after its enactment.<sup>69</sup> Using these critiques, military defense counsel almost immediately attacked the constitutionality and application of the amended article as soon as accused members were charged with offenses under it. Since its enactment, each of the services' Criminal Courts of Appeal, as well as the U.S. Court of Appeals for the

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<sup>64</sup> See 10 U.S.C. § 920(t)(3) – (t)(8).

<sup>65</sup> See 10 U.S.C. § 920(r).

<sup>66</sup> See Johnson, *supra* note 57, at 27.

<sup>67</sup> See 10 U.S.C. § 920(t)(16).

<sup>68</sup> See *id.*

<sup>69</sup> See, e.g., Major Howard H. Hoegge III, ““Overshift” The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120, ARMY LAW., May 2007, at 2.

Armed Forces, has now considered and decided several of these challenges. The resulting decisions have caused significant uncertainty and concern in the military justice system. Agreeing with the early critics, those decisions have concluded that in some (and perhaps most or even all) cases, the new statute impermissibly and unconstitutionally shifts part of the burden of proof to the accused.

According to challengers, the revised article's definitions of force, "substantially incapacitated," and consent, combined with the removal of the previous element of lack of consent which the government had to prove, now unconstitutionally require an accused who raises the affirmative defense of consent to disprove an element of the alleged crime for which the government must satisfy the ultimate burden of proof beyond a reasonable doubt. Challenges such as this embody the aforementioned dangers of legislative overreach and have been addressed in *United States v. Crotchett*,<sup>70</sup> *United States v. Neal*,<sup>71</sup> and *United States v. Prather*.<sup>72</sup>

#### A. *United States v. Crotchett*

The Navy-Marine Corps Court of Criminal Appeals (N-M.C.C.A) tackled an iteration of the burden shifting challenge in *Crotchett*. In that case, the government charged a Sailor with aggravated sexual assault under Article 120(c), claiming that the alleged victim was substantially incapable of communicating her willingness to engage in sexual intercourse with the accused.<sup>73</sup> At trial, the accused raised the affirmative defense of consent.<sup>74</sup> After hearing arguments, the trial court dismissed the charge and specification against the accused, ruling that the prosecution would violate the accused's Fifth Amendment right to due process by unconstitutionally shifting the burden of proof to the defense to disprove an essential element of the offense.<sup>75</sup> Specifically, this essential element was the alleged victim's substantial incapacity to communicate her unwillingness.<sup>76</sup> In short, the accused argued that in order to show that the alleged victim consented to intercourse, he would have to show that she *did* have the capacity to communicate her willingness, which is the logical opposite of the government's element.

The appellate court reversed the ruling of the trial court.<sup>77</sup> In analyzing the lower court's ruling, the appellate court acknowledged an "apparent overlap of defense and government burdens" when the affirmative

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<sup>70</sup> *United States v. Crotchett*, 67 M.J. 713 (N-M. Ct. Crim. App. 2009)), *rev. denied*, 68 M.J. 222 (C.A.A.F. 2009).

<sup>71</sup> *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010), *cert. denied*, 131 S. Ct. 121 (2010).

<sup>72</sup> *United States v. Prather*, 69 M.J. 338, *reconsideration denied*, 70 M.J. 30 (C.A.A.F. 2011).

<sup>73</sup> *See Crotchett*, 67 M.J. at 714.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

defense of consent is raised in a trial of aggravated sexual assault.<sup>78</sup> The appellate court distinguished these burdens by parsing what specifically the parties must prove in order to meet their respective burdens, either when raising an affirmative defense or when proving the elements of the offense.

First, according to the statute's definition of consent, the accused must show that the alleged victim used "words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person."<sup>79</sup> The court determined the accused need only show that the alleged victim (1) uttered words or performed an overt act that (2) indicated a freely given agreement.<sup>80</sup> Unlike the government, which must prove that the alleged victim was *actually* substantially incapable of communicating unwillingness, the accused need only show that the alleged victim *objectively* manifested consent.<sup>81</sup> Thus, instead of shifting the burden of proof to the accused, the *Crotchett* court held that the accused's burden of proof to raise the affirmative defense of consent is similar, but distinct and separate from, the government's ultimate burden of proof to sustain a criminal conviction.

#### B. *United States v. Neal*

While *Crotchett* dealt with the question of consent where the alleged victim was allegedly substantially incapable of communicating her unwillingness, *Neal* involved a case of purported burden shifting where the accused attempted to use the affirmative defense of consent in a prosecution for aggravated sexual contact under Article 120(e).<sup>82</sup> As an example of the graduated levels of misconduct punishable under the new Article 120, the government in *Neal* had to prove that the accused (1) engaged in sexual contact, (2) by force, and (3) with the intent to arouse, abuse, or humiliate.<sup>83</sup> After the accused raised the consent defense, the trial court dismissed the charge against him by interpreting Article 120(e) "as requiring the defense to disprove an implied element, [the] lack of consent," which therefore "unconstitutionally shifted the burden of proof on an element from the government to the defense."<sup>84</sup> After the government appealed the trial court's ruling, the appellate court reversed and remanded the case, and the Judge Advocate General of the Navy certified several issues for review by the U.S. Court of Appeals for the Armed Forces (C.A.A.F.).

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<sup>78</sup> See *id.* at 715.

<sup>79</sup> 10 U.S.C. § 920(t)(14).

<sup>80</sup> See *Crotchett*, 67 M.J. at 715.

<sup>81</sup> See *id.*

<sup>82</sup> See *Neal*, 68 M.J. at 291.

<sup>83</sup> See *id.* at 297.

<sup>84</sup> *Id.* at 291.

On appeal to C.A.A.F., the accused argued that his assertion of the affirmative defense of consent created an “implicit element” that the law requires him to disprove the element of force for which the government must satisfy the burden of proof.<sup>85</sup> The accused argued that for the government to prove the element of force, it must necessarily also prove lack of consent, because “[o]ne does not submit if willing, one need not be overcome if willing, and one does not resist that which one wants.”<sup>86</sup> Thus, the accused advocated that asserting an affirmative defense of consent required him to disprove lack of consent (i.e., by showing that there was consent), which thereby improperly shifted the burden of proof from the government to him.

C.A.A.F. disagreed and affirmed the decision of the appellate court.<sup>87</sup> The court held that, at least in a prosecution under Article 120(e), the burden of proof does not shift to the accused when the accused raises the affirmative defense of consent.<sup>88</sup> The court noted the purpose of the revised statute to focus on the conduct of the accused and not on the mental state of the victim.<sup>89</sup> Much like the *Crotchett* court, C.A.A.F. in *Neal* focused on the government’s burden. Specifically, the court noted the government need not prove whether the victim was, *in fact*, not willing to submit if it were not for the forceful conduct of the accused.<sup>90</sup> Rather, the court noted that “if the evidence demonstrates that the degree of force applied by an accused constitutes ‘action to compel’ [the alleged victim], the statute does not require further proof that the alleged victim, in fact, did not consent.”<sup>91</sup> Thus, by parsing the limits of what the government must prove, C.A.A.F. held that assertion of the affirmative defense of consent does not unconstitutionally shift the burden to the accused.

### C. *United States v. Prather*

In *Prather*, C.A.A.F. addressed the affirmative defense of consent in a prosecution under Article 120(c)(2).<sup>92</sup> The facts in *Prather* resemble the scenario in our introduction, *supra*: the victim testified that she passed out due to intoxication and awoke to find the accused on top of and penetrating her, but the accused claimed they had consensual intercourse.<sup>93</sup> After the presentation of evidence, the military judge then “engaged counsel in a lengthy discussion concerning the instructions he intended to give the

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<sup>85</sup> *Neal*, 68 M.J. at 302.

<sup>86</sup> *Id.*

<sup>87</sup> *See id.* at 303.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Prather*, 69 M.J. at 341–43.

<sup>93</sup> *See id.* at 340–41.

members” for the sexual assault charged under Article 120(c)(2).<sup>94</sup> During this discussion, defense counsel requested that the military judge instruct the members in accordance with the Military Judges’ Benchbook,<sup>95</sup> which suggested treating consent as a traditional affirmative defense.<sup>96</sup> The military judge denied the defense request and issued instructions that “generally tracked the statutory scheme, including the shifting burdens consistent with Article 120(t)(16)...with respect to the affirmative defenses.”<sup>97</sup> After the accused was convicted of aggravated sexual assault in violation of Article 120(c)(2), on review the Air Force Court of Criminal Appeals found no violation of the accused’s due process rights.<sup>98</sup>

Unlike in *Neal*, where the court took significant interpretative steps to uphold the constitutionality of the burden shifting scheme under Article 120(e), C.A.A.F. held in *Prather* that, at least as applied to the facts of this case, the interplay between Article 120(c)(2), Article 120(t)(14), and Article 120(t)(16) “results in an unconstitutional burden shift to the accused.”<sup>99</sup> In *Neal*, the court rejected the argument that the government’s burden to prove force required a corollary proof of lack of consent. However, in *Prather*, the court found such a connection between the government’s burden of proof and a necessary element for an affirmative defense. The court stated that while there may be some “abstract distinction” between the terms “substantially incapacitated” in Article 120(c)(2) and “substantially incapable” in Article 120(t)(14), “in the context presented here we see no meaningful constitutional distinction in analyzing the burden shift.”<sup>100</sup> Thus, according to the court, the accused in *Prather* could not prove consent without first proving that the victim had the capacity to consent.<sup>101</sup> The court continued by holding that even though the military judge instructed the members consistent with the text of Article 120, “the statutory scheme was not cured by the military judge’s instructions.”<sup>102</sup>

In addition, the court continued its analysis of Article 120 by addressing the propriety of the second burden shift in Article 120(t)(16).<sup>103</sup> Although holding the initial burden shift under Article 120(t)(16) unconstitutional mooted further analysis of the second burden shift, the court agreed with the accused that “the second burden shift is a legal

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<sup>94</sup> *Id.* at 340.

<sup>95</sup> See U.S. DEP’T OF ARMY, PAM. 27-9 (Jan. 1, January 2010), available at [http://www.apd.army.mil/pdffiles/p27\\_9.pdf](http://www.apd.army.mil/pdffiles/p27_9.pdf) (The Benchbook is utilized by military judges in courts-martial through all four branches of service) [hereinafter DA PAM. 27-9].

<sup>96</sup> See *Prather*, 69 M.J. at 340.

<sup>97</sup> *Id.* at 340.

<sup>98</sup> *Id.*

<sup>99</sup> *Prather*, 69 M.J. at 340-343.

<sup>100</sup> *Id.* at 343.

<sup>101</sup> See *id.*

<sup>102</sup> *Id.* at 344

<sup>103</sup> See *id.* at 344-45.



impossibility.”<sup>104</sup> Similar to prior criticisms of the second burden shift scheme,<sup>105</sup> the court noted that the problem is structural: if a trier of fact has found that an affirmative defense is proven by a preponderance of the evidence, it is legally impossible for the government to disprove that affirmative defense beyond a reasonable doubt.<sup>106</sup> In a separate opinion, Judge Baker went further in his criticism of Article 120(t)(16), calling the second burden shift unenforceable and unconstitutional if literally followed.<sup>107</sup>

*Prather* creates significant unresolved questions as to how to apply the new Article 120 in future cases.<sup>108</sup> While the majority opinion did not explicitly limit its constitutional holding “as applied” only to the facts in that case, several limiting phrases seem to indicate that the majority intended to constrain the scope of its decision.<sup>109</sup> However, the apparent limited nature of *Prather* is complicated by the majority’s response to Judge Baker’s criticism of the majority’s failure to indicate what instruction by the military judge, if any, could cure the constitutional deficiencies identified in the first burden shift. In a footnote, the majority states that no instruction “could have cured the error where the members already had been instructed in a manner consistent with the text of Article 120.”<sup>110</sup> Thus, while the *Prather* court appears to have taken steps to limit its holding to the facts presented, its assertion that no plausible instruction could resolve the “constitutional and textual difficulties” may have seemed to permit a wider interpretation of the case.<sup>111</sup>

However, in *United States v. Boore*, the Air Force’s appellate court firmly reversed a trial decision by a military judge who adopted that wider interpretation, and threw out the proverbial baby with the bathwater.<sup>112</sup> In *Boore*, the accused was charged with abusive sexual contact with the alleged victim while she was substantially incapacitated, among other offenses.<sup>113</sup>

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<sup>104</sup> *Id.*, at 345 n.10.

<sup>105</sup> See Hoege, *supra* note 69, at 15.

<sup>106</sup> See *Prather*, 69 M.J. at 345.

<sup>107</sup> See *id.* at 347–351–52 (Baker, J., dissenting as to Part A and concurring in the result).

<sup>108</sup> See, e.g., Marcus Fulton, *CAAF Provides Answers, Raises Questions in Prather*, CAAFLOG (Feb. 9, 2011), available at <http://www.caaflog.com/2011/02/09/caaf-provides-answers-raises-questions-in-prather/>.

<sup>109</sup> See *Prather*, 69 M.J. at 340 (“...the statutory interplay between the relevant provisions of Article 120 . . . under these circumstances, results in an unconstitutional burden shift to the accused.” (emphasis added)); *Id.* at 345 (“As we have found that the initial burden shift in Article 120(t)(16) . . . to be unconstitutional under the circumstances presented in this case, the issue involving the second burden shift becomes moot.” (emphasis added)).

<sup>110</sup> *Id.* at 344, n.9.

<sup>111</sup> *Id.* In addition, *Prather*’s holding should have no blanket effect on the applicability of the holding in *Crotchett*. Where *Prather* dealt with the burden shifting scheme as applied to a charge under Article 120(c)(2) (“substantially incapacitated”), *Crotchett* involved the burden shifting scheme as analyzed in a charge under Article 120(c)(2)(C) (“substantially incapable of . . . communicating unwillingness to engage in the sexual act.”).

<sup>112</sup> *United States v. Boore*, Misc. Dkt. No. 2011-01 (A.F. Ct. Crim. App., Aug. 3, 2011).

<sup>113</sup> See *id.* at 1.

He argued that similar to *Prather*, in order for him to show consent or a mistake of fact as to consent, he would have to prove the alleged victim was not substantially incapacitated and therefore would be forced to disprove an element of the offense.<sup>114</sup> The trial judge ruled in the accused's favor, and dismissed the abusive sexual contact charge as unconstitutional. In his ruling, the judge stated that C.A.A.F. in *Prather* had held the entire Article 120 to be constitutionally unenforceable, and that he lacked authority to sever (t)(16) or to provide curative instructions – because, he said C.A.A.F. in the subsequent case of *United States v. Medina* had prohibited such a remedy, and he held it would render the remainder of the statute incoherent and invade and contravene Congressional intent.<sup>115</sup>

Upon appeal of the judge's decision by the Government,<sup>116</sup> the court held that the trial judge had erred to the extent that he found Article 120 to be facially unconstitutional, and/or that he asserted that C.A.A.F. had so held in *Prather*.<sup>117</sup> The court further held that C.A.A.F. had not prohibited application of the canon of constitutional avoidance by severance.<sup>118</sup> The court found “no difficulty” in remedying the constitutional infirmity by severing out Article 120(t)(16)'s requirement that the accused prove the affirmative defense, by a preponderance of the evidence, from the remainder of the statute.<sup>119</sup> The court further observed that this would not frustrate Congressional intent:

[I]t is clear . . . that the law's purpose is to criminalize sexual assault by military members. While Congress may have wanted to put more of a burden on the accused with respect to proving an affirmative defense, it is unrealistic to believe that Congress would have preferred to have the entire statute invalidated and thereby leave commanders without a means to prosecute sexual assault crimes rather than simply eliminating the offending burden shifting provision.<sup>120</sup>

The complex analyses in these cases demonstrate that Article 120 “is neither a model of clarity nor a model statute.”<sup>121</sup> While the courts in *Crotchett* and *Neal* strained to reject constitutional challenges to the provision, in at least one case C.A.A.F. has found the burden shifting scheme of Article 120 to be unconstitutional as to the facts presented. The

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<sup>114</sup> See *id.*

<sup>115</sup> See *id.* at 2, citing *United States v. Medina*, 69 M.J. 462, 465 n.5, *reconsideration denied*, 70 M.J. 35 (C.A.A.F. 2011).

<sup>116</sup> See U.C.M.J. Article 62, 10 U.S.C. §862(a)(1)(A).

<sup>117</sup> *Boore*, slip op. at 3.

<sup>118</sup> See *id.* at 3-4.

<sup>119</sup> See *id.* at 4.

<sup>120</sup> See *id.* at 5.

<sup>121</sup> *Neal*, 68 M.J. at 305 (Ryan, J., concurring in part and dissenting in part).

Air Force’s appellate court subsequently followed in a case with similar facts. *Prather* and *Boore* do much to clarify the legal landscape and map the course to constitutionally adjudicate Article 120 cases where the accused raises the affirmative defense – while preserving the remainder of the statute and legislative scheme. However, only Congressional action to clarify and enhance Article 120 will avert continuing difficulty and potential confusion in the military courts in this area.

## V. SUGGESTED CHANGES

Article 120 requires amendments to ensure a constitutional application of the article and to reduce confusion during sexual assault prosecutions. Two such changes include (1) a redefinition of consent in Article 120(r) and (2) an amendment of the procedures used when raising the affirmative defense of consent under Article 120(t)(16).

### A. Redefine the Use of Consent in Article 120(r)

One suggested change is a legislative redefinition of the use of consent in Article 120(r). This unnecessarily confusing provision provided the textual support for the burden shifting challenges in *Crotchett*, *Neal*, and *Prather*. According to the current statute, “consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution” for several offenses under Article 120, such as rape and aggravated sexual contact.<sup>122</sup>

Refining what is meant by “consent” will clarify Congress’ intent regarding the treatment of evidence of an alleged victim’s permission, as introduced by either the accused or the government. In *Neal*, the court declined to broadly interpret the phrase, rejecting the interpretation that would never allow the use of consent evidence except when the accused meets his initial burden to establish an affirmative defense.<sup>123</sup> According to the *Neal* court, although the government need not prove lack of consent, evidence regarding consent should be allowed in order to “not preclude treating evidence of consent as a subsidiary fact potentially relevant to a broader issue in the case, such as the element of force.”<sup>124</sup>

Despite the court’s interpretation in *Neal*, Congress should undertake to clarify the evidentiary role of consent. If the revised article intends to emphasize the acts of the perpetrator rather than the reaction of the victim, restricting use of consent evidence would protect against investigating what a victim allegedly did or said during a sexual assault.

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<sup>122</sup> 10 U.S.C. § 920(r).

<sup>123</sup> *Neal*, 68 M.J. at 301-02.

<sup>124</sup> *Id.* at 304.

Such a limitation of consent would run counter to the Article 120(r) analysis in *Neal*, but would more effectively fulfill Congress' apparent intentions.

Therefore, a simple legislative fix would better articulate Congress' desire regarding the use of consent in Article 120(r). Congress may amend Article 120(r) to read “*evidence of consent and mistake of fact as to consent is not to be admitted in a prosecution under any subsection, except for the purpose of an affirmative defense....*” If enacted, this change would resolve the different interpretations presented in *Neal* and would protect victims from embarrassing revelations.

#### B. Amend the Affirmative Defense Procedures in Article 120(t)(16)

A second recommended refinement of the article involves the procedural aspects of the use of affirmative defenses under Article 120(t)(16). According to this section, raising an affirmative defense in a sexual assault prosecution triggers a two-step process. First, “[t]he accused has the burden of proving the affirmative defense by a preponderance of evidence.”<sup>125</sup> Second, “[a]fter the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.”<sup>126</sup>

Specifically, Congress should clarify (1) who determines whether the accused has met his initial burden, and (2) when during the trial the accused must meet that first burden. However, the statute provides no guidance as to whether the military judge or the panel of members decides that question, or the timing of that decision. While the statute does require that the accused must prove consent existed by a preponderance of the evidence,<sup>127</sup> this choice of a burden of proof standard is a clear indication the determination is a question of fact for the fact-finder.

According to one author, neither C.A.A.F. nor any of the service appellate courts has endorsed splitting this fact-finding role between the military judge and panel.<sup>128</sup> Furthermore, if the members bear the responsibility to determine whether the accused met his burden, the second step of the process is nonsensical “as the fact-finder would be asked to consider whether or not reasonable doubt exists in the identical evidence the fact-finder just used to conclude that, more likely than not, the defense exists.”<sup>129</sup> The illogical nature of Article 120(t)(16) formed the basis of the *Prather* court's condemnation of the burden shifting scheme.

C.A.A.F. has yet to definitively endorse an instruction for the procedures provided in Article 120(t)(16). C.A.A.F. declined to address the Article 120(t)(16) instruction issue in *Neal*, noting that while the trial judge

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<sup>125</sup> 10 U.S.C. § 920(t)(16).

<sup>126</sup> 10 U.S.C. § 920(t)(16).

<sup>127</sup> *See id.*

<sup>128</sup> *See Hoegel, supra note 69 at 12.*

<sup>129</sup> *Id.*

“identified interpretative considerations” in applying the procedures in Article 120(t)(16), review of the lower court’s ruling was not required as the trial court did not dismiss the charge based on that section.<sup>130</sup> However, in *Prather* the court noted that, at least in the circumstances presented, there existed no plausible instruction (presumably including those suggested in the Benchbook) that would cure the “constitutional and textual difficulties” found in applying the burden shifting scheme.<sup>131</sup> Additionally, in *United States v. Medina*, C.A.A.F. held that it was harmless error for a military judge, without a legally sufficient explanation, to give an instruction consistent with the Benchbook’s instruction.<sup>132</sup>

Finally, in a case originally tried in September 2009, C.A.A.F. very recently signaled that it will revisit (and perhaps further clarify) its previous ruling in *Prather*. In *United States v. Stewart*, C.A.A.F. granted review to answer whether “it [is] legally possible for the prosecution to disprove an affirmative defense beyond a reasonable doubt once the military judge has determined that the defense has been proved by a preponderance of the evidence and, if not, is the military judge required to enter a finding of not guilty in such a case under R.C.M. 917?”<sup>133</sup> At trial, the military judge had applied Article 120(t)(16) and found that the defense had introduced sufficient evidence of consent and mistake of fact as to consent to meet its preponderance burden.<sup>134</sup> However, when he instructed the members on findings, the judge omitted any reference to the accused’s burden of proof or persuasion on the affirmative defenses, and simply placed the burden on the prosecution to prove, beyond a reasonable doubt, that the alleged victim did not consent to the sexual act and that the accused did not reasonably and honestly believe that she had. On appeal, the Navy-Marine Corps Court of Criminal Appeals found no error in that approach.<sup>135</sup> However, the appellant also unsuccessfully argued that the judge’s finding that he proved the affirmative defenses by a preponderance precluded a subsequent finding of guilt by the members.<sup>136</sup> C.A.A.F. now intends to hear argument on that point. It seems very likely that C.A.A.F. will agree with the lower court, but the fact that it will soon issue another opinion on the subject signals the continuing challenges of constitutionally applying the statutory scheme.

In the face of these confusing procedures, the Military Judges’ Benchbook, which establishes pattern instructions and suggested procedures for courts-martial, advises military judges to sidestep the problematic burden-shifting scheme entirely. Following *Neal* and *Prather*, the Army amended the Benchbook’s instruction in Article 120 cases. According to

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<sup>130</sup> *Neal*, 68 M.J. at 304.

<sup>131</sup> *Prather*, 69 M.J. at 334, 344, n.9.

<sup>132</sup> *Medina*, 69 M.J. 462 .

<sup>133</sup> *United States v. Stewart*, No. NMCCA 201000021 (N-M. Ct. Crim. App. Jan. 31, 2011), *review granted*, \_ M.J. \_\_, No. 11-0440/MC (C.A.A.F., Aug. 10, 2011).

<sup>134</sup> *See id.* at 7.

<sup>135</sup> *See id.* at 8.

<sup>136</sup> *See id.* at 8-9.

the change, when applying an affirmative defense to an Article 120 offense, military judges must now state on the record:

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language “The accused has the burden of proving the affirmative defense by a preponderance of the evidence. After the defense meets this burden,” in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judges’ Benchbook, DA Pam 27-9.<sup>137</sup>

Thus, the Benchbook approach simply disregards the first burden shift, in an effort to comply with both C.A.A.F.’s constitutional holdings and the statute Congress enacted. This highlights one obvious and simple solution: Congress can further modify Article 120(t)(16) to delete what the Benchbook instruction has severed.

Given this murky state of affirmative defense procedures and C.A.A.F.’s concession that a fix for the scheme “clearly rests with Congress,”<sup>138</sup> the statute should be amended to provide clarity and increased protections for both alleged victims and the accused. For example, rather than require that the accused prove an affirmative defense by a preponderance of the evidence, Congress should amend the statute to treat an affirmative defense under Article 120 as any other affirmative defense, thereby allowing its consideration by the trier of fact if the accused can show some evidence that would support the defense. Once the accused has met this “some evidence” initial burden, the government would then be required to disprove the affirmative defense, and prove the required elements of the offense, beyond a reasonable doubt.

This scheme, consistent with the long history of military justice affirmative defense procedures, is similar to course of action suggested by the Military Judges’ Benchbook. Congressional codification of those procedures in Article 120(t)(16), or at least legislative recognition that an affirmative defense under Article 120 should be employed consistent with

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<sup>137</sup> DA PAM 27-9, *supra* note 9796, Approved Change 11-02 (Article 120 Affirmative Defenses), available at <http://www.caaflog.com/wp-content/uploads/BB-change.pdf>.

<sup>138</sup> *Medina*, 69 M.J. at 465, n.5.

other areas of the UCMJ, should properly balance the due process rights of the accused against a desire to facilitate sexual assault prosecutions.

## VI. CONCLUSION

The military justice system alone will not solve the problem of military sexual assault. The pervasiveness of the issue, evidenced by the increasing instances of sexual assault and the long history of gender inequity in the military, demonstrates the need for additional measures beyond a revised military sexual assault statute. Regardless, the 2007 rewrite of Article 120 represents a positive effort and first step towards improving the military legal system's protection of victims, and mitigating the effect of sexual assault on unit cohesiveness, trust, and overall military readiness. The purposes for enacting the rewrite reflect Congress' attitude towards the military sexual assault problem and should be at the forefront when considering additional revisions and interpretations as to the role of consent in sexual assault courts-martial. As this issue exemplifies the tension between an accused's right to a fair trial and the military necessity of combating a corrosive internal threat, expect the issue of Article 120 to receive continued attention from the military's appellate courts.

