



THE ARMY LAWYER

ARTICLES

Measuring the Effectiveness of the Military Justice System

Colonel Jerrett W. Dunlap, Jr.

They Came In Like a Wrecking Ball: Recent Trends at CAAF In Dealing With Apparent UCI

Lieutenant Colonel John L. Kiel, Jr.

A Messy Primer on Military Justice Procedure: CAAF Decision Provides Lessons on How to Effectively Navigate the Accused's Right to a Speedy Trial

Major Michael Petrusic

Post-Trial Procedure and Review of Courts-Martial Under the Military Justice Act of 2016

Colonel (Ret.) James A. Young, USAF

TJAGLCS FEATURES

Lore of the Corps

Command Influence "Back in the Day"

Mr. Frederic L. Borch III

Elementary Lessons: Elements v. Theories

Colonel (Ret.) James A. Young, USAF & Colleen E. Cronin

USALSA REPORT

A View from the Bench: Maximizing the Effect of Your Motions Practice

Lieutenant Colonel Jacob D. Bashore

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Lore of the Corps

Command Influence “Back in the Day” <i>Mr. Frederic L. Borch III</i>	1
--	---

USALSA Report

A View from the Bench: Maximizing the Effect of Your Motions Practice <i>Lieutenant Colonel Jacob D. Bashore</i>	3
--	---

Articles

Measuring the Effectiveness of the Military Justice System <i>Colonel Jerrett W. Dunlap, Jr.</i>	9
--	---

They Came In Like a Wrecking Ball: Recent Trends at CAAF In Dealing With Apparent UCI <i>Lieutenant Colonel John L. Kiel, Jr.</i>	18
---	----

A Messy Primer on Military Justice Procedure: CAAF Decision Provides Lessons on How to Effectively Navigate the Accused’s Right to a Speedy Trial <i>Major Michael Petrusic</i>	26
---	----

Post-Trial Procedure and Review of Courts-Martial Under the Military Justice Act of 2016 <i>Colonel (Ret.) James A. Young, USAF</i>	31
---	----

TJAGLCS Features

Elementary Lessons: Elements v. Theories <i>Colonel (Ret.) James A. Young, USAF & Colleen E. Cronin</i>	38
---	----

Lore of the Corps

Command Influence ‘Back in the Day’

By Fred L. Borch

Regimental Historian & Archivist

Every judge advocate is soon familiar with the prohibition on “unlawfully influencing [the] action of [a] court” contained in Article 37, Uniform Code of Military Justice (UCMJ). That provision spells out in clear language that it is a criminal offense for any person (subject to the UCMJ) to try “to coerce, or by any unauthorized means, influence the action of a court-martial or other military tribunal.”¹ Over the years, military appellate courts have handed down scores of decisions on unlawful command influence, and its presence in our military justice system continues to bedevil practitioners.² But it was not always so, and this Lore of the Corps examines command influence ‘back in the day’—in this case World War II, when command influence was exerted from the highest possible level in the Army.

On March 5, 1943, Major General James A. Ulio, The



Major General James A. Ulio, The Adjutant General

Adjutant General, issued a “confidential” memorandum. While directly addressed to “All officers exercising general court-martial jurisdiction” in the United States, General Ulio wrote that that the “policies” announced in the memorandum were “intended for general application throughout the Army.” In fact, “information copies” went to the commanding generals

of Army Ground Forces, Army Air Forces, and Services of Supply—which meant that every senior leader in the Army and Army Air Force received Ulio’s confidential missive.³

The subject of the memorandum was “Uniformity of sentences adjudged by general court-martial” and Major General Ulio signed the memorandum “By order of the Secretary of War.” Ulio began by stating that there was a

“highly undesirable disparity in general court-martial sentences . . . [and that] many of these sentences serve little or no disciplinary purposes but do arouse unnecessary anxiety in relatives of the individual in question.”⁴

Consequently, The Adjutant General wrote that “no case should be referred to a general court-martial unless the offense charged warrants [a] dishonorable discharge.” Additionally, convening authorities were advised that if a Soldier was punished with a dishonorable discharge, then there must be a sufficient “period of confinement” adjudged with that discharge that would ensure that the accused “will remain in confinement until the end of the war.” Otherwise, “the sentence amounts to immunity against risk of battle and is to that extent [a] reward instead of punishment.”⁵

Major General Ulio realized—as did every commander in the European and Pacific Theater—that some Soldiers might be tempted to commit crimes in order to get out of combat. As a result, Ulio added the following guidance: “Although it is impossible to predict with certainty the end of hostilities . . . sentences of not less than five years confinement . . . are considered appropriate.”⁶

As far as The Adjutant General was concerned—and he was speaking for the Secretary of War—Soldiers should not be tried by general courts-martial unless the convening authority understood that a dishonorable discharge and five years imprisonment was the expected punishment.

Major General Ulio’s memorandum also contains some clear guidance for specific offenses. “Desertion,” he wrote, “is a serious and cowardly offense.” Consequently, confinement of “not less than five years is considered appropriate [and] ten years is not an unreasonable sentence in aggravated cases.” But Ulio’s “observations” did not apply to desertion “in a theater of operation or in the face of the enemy.”⁷ In those situations, longer periods of confinement or even the death penalty might be warranted, as Private Eddie Slovik would learn in January 1945 when he was “shot to

¹ UCMJ art. 37 (2016).

² See *United States v. Charette*, 15 M.J. 197 (C.M.A. 1983); *United States v. Cortes*, 29 M.J. 946 (A.C.M.R. 1990). See also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 104 (2016).

³ Memorandum from The Adjutant General’s Office to all officers exercising general-court martial jurisdiction within the continental limits of the United States, subject: Uniformity of sentences adjudged by general courts-martial, 5 March 1943 [Hereinafter Uniformity Memo].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 2.

death by musketry” for deserting from his unit while in France.⁸

As for the striking of a commissioned officer, Ulio’s memorandum states that this “grave and serious offense” requires a severe punishment. “Five years’ confinement would be appropriate, with ten years as a probable maximum. But Major General Ulio was not without some understanding of officer-enlisted relationships. This explains why, when discussing the appropriate punishment for “deliberate disobedience of a commissioned officer,” The Adjutant General wrote that while the offense ordinarily called for a “severe punishment,” a general court-martial “may be unwarranted in case the offense be *due wholly or partly to faulty judgment or leadership on the part of the officer.*”⁹

Major General Ulio wanted to be certain that all general court-martial convening authorities understood their responsibilities. Consequently, while reminding these officers that courts-martial panels imposed their sentences by “secret, written ballot” and “according to the evidence and the dictates of their conscience,” Ulio recommended that “commanders take positive steps to inculcate proper conceptions and standards of court-martial procedure.” As The Adjutant General put it, “division commanders and other general courts-martial convening authorities” should: (1) “personally interview” new court members; (2) “discuss principles” of good order and discipline; (3) “and review past errors on the part of courts-martial.”¹⁰

The bottom line, as the memorandum explained, was that a convening authority should “devote his efforts to instructing a court before it tries cases, rather than criticize its actions after a case has been tried.” Major General Ulio did advise, however, that discussions with court-members be “general in nature and in no sense connected with a pending case.”¹¹

Presumably, more than a few commanders met personally with court members and orally discussed the contents of Major General Ulio’s memorandum. But at least one convening authority took a different approach. At the Ninth Service Command, Fort Douglas, Utah, the general court-martial convening authority, Major General Joyce, directed that a copy of Ulio’s letter be given to each member of the general court. When that panel member was relieved from his court-martial duties, he was to surrender the letter “to the Post Commander for delivery to a new member appointed as a replacement.”¹²

Today, judge advocates would be alarmed to see a memorandum like Ulio’s published and distributed to convening authorities. In 1943, however, the Articles of War were silent on the issue of influencing court-members. There was no Article 37 equivalent and there was nothing illegal

about Ulio’s memorandum, which presumably had been shown to (and coordinated with) judge advocates in the Office of The Judge Advocate General.

When one also remembers that Army lawyers did not, as a general rule, participate in courts-martial proceedings *at any level*, except when serving as law members at general courts-martial, concerns about improperly influencing panel members about their responsibilities were not of much interest. After all, was not Ulio’s desire for sentence uniformity nothing more than a desire for consistency—which would promote good order and discipline?

Finally, the War Department and the Army and Army Air Force of the World War II era was simply a very different institution. By 1945, there were eight million men and women wearing Army uniforms and, between 1941 and 1945, more than one million courts-martial were tried in the Army alone. When one considers that the Army tried fewer than 700 courts-martial total last year, perhaps Ulio’s memorandum—at least at first glance—makes some sense. In any event, that was command influence ‘back in the day.’

⁸ See JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER 192-94 (1975). See also, Fred L. Borch, *Shot by Firing Squad: The Trial and Execution of Pvt. Eddie Slovik*, THE ARMY LAW., May 2010, at 1.

⁹ Uniformity Memo, *supra* note 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

USALSA Report

U.S. Army Legal Services Agency

Trial Judiciary Note

A View from the Bench: Maximizing the Effect of Your Motions Practice

*Lieutenant Colonel Jacob D. Bashore**

*Be brief, be pointed; let your matter stand
Lucid in order, solid, and at hand;
Spend not your words on trifles, but condense;
Strike with the mass of thought, not drops of sense;
Press to close with vigor, once begun,
And leave, (how hard the task!) leave off, when done.¹*

I. Introduction

Motions practice often receives too little attention in advocacy training and preparation for trial. This apathy towards motions is somewhat surprising, as well thought out motions practice can be critical to success at trial. Effectively using pretrial motions allows counsel to visualize the entire trial weeks in advance in order to prepare their themes and theories, and their proof.

But how do you get there and maximize the effect of your motions practice? What is required of the trial advocate? A friend of mine summarizes it this way: “Your job is to know the law or learn it before you argue it. The first chance to demonstrate that is in pretrial motions practice. So do your job right. Don’t come limping into the fight.” So let’s break down how to “do your job right” into three parts: steps to take before you write, while you are writing, and after you submit your written motion to the court.

II. Pre-Writing

As my friend’s guidance to counsel suggests, your first opportunity to demonstrate your competency in the law is when you file or respond to substantive motions and subsequently litigate those issues at a pretrial hearing. However, it is a bit deeper and more complicated than that. Not only will you demonstrate your competency in the law, but you will demonstrate your ability to comprehend the facts of that particular case and your ability to weave those facts with theory, law, and advocacy. In a nutshell, this is your first

opportunity to build your credibility, that is “show yourself worthy of trust and affection,”² as an advocate.

The importance of credibility cannot be overstated. As a former trial and appellate judge once wrote, “credibility is the most important character attribute a trial attorney can have. Without it, a trial attorney cannot accomplish his two most important missions: educate and persuade the fact finder. Counsel at all times should be wary of the impact their actions may have on their credibility.”³ You only get one opportunity to make that first great impression, and you should take every opportunity to ensure you are viewed as a credible advocate worth trusting. Submit and litigate a motion with only half-hearted effort, and you will reap the credibility and outcome consistent with the effort you put into that motion.

Thus your mission to become a competent, credible, and effective advocate begins the moment you touch a case for the very first time. Your case file should have a place to list potential legal issues that might require a pretrial motion or might require you to respond to a pretrial motion by the opposing party. This list not only prepares you for trial, but it helps you provide your leadership or client with reasonable expectations involving case-shaping and case-determinative issues. As you continue to learn the facts of the case through early witness interviews and apply those facts to the law, new issues may emerge, many potential issues will wither away, and the issues requiring pretrial litigation will become clear.

The timing of motions is an important part of successful motions practice. Either the court’s pretrial order or other rules will usually dictate when motions must be filed. But if court orders and rules of practice are not enough to ensure timely filings, counsel should consider the effect of untimely

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¹ Justice Joseph Story, *Advice to a Young Lawyer*, in 2 LIFE AND LETTERS OF JOSEPH STORY 88 (William W. Story ed., 1851).

² ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE xxiii (2008).

³ Colonel James W. Herring, Jr., *A View from the Bench: Make the Routine, Routine*, THE ARMY LAWYER, Aug. 2014, at 41 n.3.

motions. Because judges strive to always get to the right answer, they do not like to be surprised. If your issue is unique, nuanced, or complicated, asking the judge to rule “on-the-fly” without sufficient time to research the issue and consider both parties’ arguments may result in a ruling with which you do not agree and is detrimental to your case. Choose to force an on-the-fly decision on a discretionary evidentiary issue at your peril. There are ways to maximize trial strategy and prevent interfering with judicial economy, while simultaneously following the Rules for Courts-Martial, the Rules of Practice, and the court’s pretrial order. Ensure you explore those options and take appropriate action to both preserve your credibility and get the best result for your client.

Intertwined in this pre-writing process is the critical task of researching the law. A trial advocate creates their reputation and demonstrates their worth to their client through the application of a case’s facts to the law. What new appellate attorneys learn, most of whom have served as trial attorneys, is that an enormous amount of law exists outside of the Manual for Courts-Martial (MCM). This should be a lesson learned by trial advocates, not appellate attorneys, working the issues throughout the entire trial process. Too often, inexperienced counsel do not know where to start looking outside the MCM and Military Judges’ Benchbook, so they read little else in preparation for filing motions and trial. That minimal effort will often get minimal results.

There are several resources to expand your knowledge and ability to identify and litigate issues in your cases. First, The Judge Advocate General’s School produces an outstanding resource in the Criminal Law Deskbook.⁴ This document should be saved to your desktop and used regularly. The three most useful chapters are Crimes, Sexual Offenses, and Defenses, Chapters 20, 21, and 22, respectively.⁵ These chapters will help you identify issues related to the charged offenses themselves, helpful not only for pretrial motions but critical for presenting and defending the case at trial. The Deskbook also covers a myriad of other topics often raised in pretrial motions, to include unlawful command influence, self-incrimination, search and seizure, discovery and production, and many others. Chapter 16 discusses the Rules for Courts-Martial and case law pertaining to motions practice and provides a list of possible motions that should be considered by both parties in every case. Second, through your LexisNexis account, you have access to two valuable hornbooks—*Military Rules of Evidence Manual*⁶ and *Military Crimes and Defenses*.⁷ They provide an invaluable tool in compiling relevant case law for a majority of the issues

that you will encounter. Third, you should use the Court of Appeals for the Armed Forces (CAAF) opinion digest webpage.⁸ This digest provides CAAF opinion summaries regarding scores of topics covered in CAAF cases dated back to 1999. Fourth, ask fellow counsel for prior decisions by your judge on the same point. Reading the judge’s previous analysis on similar issues will help you better craft your arguments.

As you use these resources, along with good old-fashion case law research, you must develop a system to synthesize the legal authority that you review. Your system can be an electronic digest that collects related cases in easily referenced folders or a more “low tech” methodology of printing and compiling cases by topic. Compiling cases by topic allows counsel to quickly retrieve the most relevant case law when counsel later encounters a similar issue. Every counsel practicing today should have at the ready important cases on issues that are routinely litigated—aspects of Article 120, M.R.E. 404(b), 412–414, and 513, production of witnesses, and production of evidence, to name the most prevalent. Having these cases at the ready will assist you not only in writing your motions but in responding to your opponent’s arguments and answering the judge’s questions at the motions hearing.

III. Writing

Now that you have mastered the facts through interviews of witnesses and dissecting the case file and you have identified the relevant legal issues by researching the law applicable to the charges and other issues discovered in the case, it is time to begin outlining and writing. As a starting point, use of a “brief bank” is a poor method of drafting motions. Use of someone else’s brief in this manner reeks of laziness, and deprives you of the full exercise of learning the law by drafting your own persuasive arguments based on your own synthesis of the law. During the motions hearing, it will become evident to the judge that your motion is not your product if you are unable to explain or recall information contained in the brief. Brief banks have their place. They help identify key case law at the start of legal research, they may spark some ideas as to argument, and they may ensure you do not miss a critical point. But you should not place your credibility and reputation on the line with someone else’s motion⁹—a motion that likely involved distinguishable facts and possibly intervening case law.

⁴ THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH. U.S. ARMY, CRIMINAL L DESKBOOK, <https://tjaglcspublic.army.mil/tjaglcs-publications> (last visited 23 Jan. 2018).

⁵ *Id.*

⁶ STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* (8th ed. 2015).

⁷ DAVID A. SCHLUETER ET AL., *MILITARY CRIMES AND DEFENSES* (2nd ed. 2012)(as this resource grows outdated, counsel should ensure cases found here remain the most relevant case on point).

⁸ U.S. CT. OF APPEALS FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/opinions_digest.htm (last visited 23 Jan. 2018).

⁹ “Counsel’s signature constitutes a certification that he or she has read the motion . . . ; that, to the best of the signer’s knowledge . . . it is well grounded in fact and warranted by existing law or is a good faith argument for the extension, modification, or reversal of existing law; and that it is not

If you planned correctly when the judge issued the pretrial order, you will not need to rely on someone else's work. Your writing process will begin with plenty of time for drafting, conducting any additional research and investigation, editing, and seeking feedback from co-counsel and supervisors. Starting this process the night before motions are due is a recipe for disaster, depriving your clients of the quality representation they deserve. From the onset, start the backward planning process, and you will not be caught flat-footed.

The organization of a motion is relatively easy, as the Rules of Practice dictate the format for all trial motions, to include providing counsel an example format that briefly describes the content required.¹⁰ The rules require that all motions be presented in the following six sections:

- (1) the relief sought; (2) the burden of persuasion and burden of proof; (3) the facts in issue as believed by counsel and supported by the evidence; (4) a list of evidence and witnesses to be produced; (5) argument and the legal authority upon which the argument is based and contrary legal authority of which counsel is aware; and (6) a conclusion that restates the relief sought.¹¹

An explanation of each section follows.

(A) Relief Sought

This is the most underutilized section in Army motions practice. Counsel usually meet the basic requirements of 1) telling the court what the party wants, and 2) stating whether they request oral argument. By limiting yourself to these two points, you deprive your motion of a strong, persuasive introduction that informs the reader of why all the subsequent text is important.

A typical "relief sought" section of a court-martial motion might state: "The Defense requests that the Court suppress the statement of the Accused given to Detective Smith. The Defense requests oral argument." That opening tells the judge little more than what is in the document's caption. The judge now has to skim through the entire motion hoping to determine the basis in law and fact for the request. Otherwise, the judge will read the "Facts" section without a clue as to how the proffered facts may be relevant, seriously depriving the writer of the persuasive power designed in the writing. There is an easy fix.

Counsel should view this section more as "Introduction" or "Summary of the Argument," with the obvious requirements to state the relief sought and the need for oral

interposed for any improper purpose" UNITED STATES ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL, Rule 3.4 (1 Nov. 2013) [hereinafter RULES OF PRACTICE].

¹⁰ *Id.* at 4–5, 20–21 (Rule 3, App. C).

¹¹ *Id.* at 4.

argument. Compare the above example to the following: "When a civilian investigator interrogates a military suspect at the behest of military officials, the civilian investigator must first read the military suspect his rights under Article 31(b). In this case, Detective Smith did not inform Private Jones of his rights under Article 31(b) before eliciting incriminating statements from Private Jones while interrogating him at the Fort Hood CID office at the request of Agent Murphy. Thus, the Defense requests that this Court suppress Private Jones statements to Detective Smith. Oral argument is requested."

Now the judge clearly knows not only the relief sought but also has an idea as to both the legal and factual basis for the request. As the judge reads the facts section and any attached documentation, the judge can focus on matters that are important to the issue presented in the motion.

There are numerous books that discuss how to present a persuasive introduction.¹² The key is writing a concise but comprehensive statement that tells the court what you want and why you are entitled to it. The judge must know what question to answer, on what grounds the party believes the question is to be answered, and why it should be answered in your favor. Anything short of that is a waste of an opportunity to persuade.

(B) Burden of Persuasion and Burden of Proof

The first question the court is likely to ask the parties before discussing anything else related to a motion concerns the burden of persuasion and burden of proof. The burden of persuasion establishes who presents evidence first and how the other party responds. There are several resources to help you determine who has the burden of persuasion, to include Appendix C in the Rules of Practice and Chapter 16 of the Criminal Law Deskbook.

Counsel are often confused regarding burdens in pretrial motions to preclude the opposing party from admitting evidence at trial, for example, when the defense seeks to prevent the government from admitting a text message based on hearsay. It is easy to be drawn into R.C.M. 905(c)(2)'s general rule that places the burden of persuasion on the moving party. In my example, when counsel accept this general rule as dispositive, the defense takes on the burden merely by seeking a pretrial ruling on the admissibility of evidence. If that were the rule, it would dissuade the defense from seeking a preliminary ruling on whether *the government's* evidence is admissible. Rather, as the government is the proponent of the evidence, it retains the burden to demonstrate admissibility.¹³ That burden does not

¹² *See, e.g.*, BRYAN A. GARNER, THE WINNING BRIEF 77–142 (3d ed. 2014); TERRILL POLLMAN ET AL., LEGAL WRITING 277–87 (2d ed. 2014).

¹³ *See* United States v. D.W.B., 74 M.J. 630, 639–43 (N-M. Ct. Crim. App. 2015)(citing cases).

change merely because an opponent objects pretrial to the admission of that evidence at trial.

Finally, do not list the burdens in this section and then ignore them throughout the rest of the motion. Incorporate the burdens into your argument, demonstrating how you met your burden or why the opposing party did not meet their burden. Like any good argument, do not just say it. Analyze and argue it in detail.

(C) Facts (the facts in issue as believed by counsel and supported by the evidence)

The “facts” listed in your motion are not evidence. They are mere offers of proof meant to help prepare the judge and the parties for the motions hearing. As Rule of Practice 17.8 states, “[a] judge’s essential findings will not be based on offers of proof.”¹⁴ Accordingly, a motion’s asserted facts amount merely to an exposition of the facts the moving party expects to elicit, but they are not evidence in and of themselves. As an appellate court warned judges long ago, we must “not let counsel stray into stating what someone would say if they were called. Force them to call the witness, provide valid real and documentary evidence or provide a stipulation. Sticking to proper procedure will save [the judge] time and grief and provide a solid record.”¹⁵

Thus, do not assume the judge will accept your assertions and allow you to move directly to argument. Rather, attach documentary evidence to support your claims, be prepared to call witnesses to support your claims, or talk with opposing counsel prior to the hearing and enter into a written stipulation of fact for the purposes of the motion. Under Rule of Practice 3, for the court to consider facts without evidence, counsel must enter into a separate written stipulation of fact on undisputed matters so that it is clear which facts both parties agree on and the judge can engage in an appropriate colloquy with the accused.¹⁶

Do not use the “facts” section of your brief to restate every fact related to the case. You need only state the facts that are relevant to decide the particular motion you are filing. For example, if you are filing a motion to dismiss for failure to comply with the R.C.M. 707 “120 day” clock, you will probably not need to relate all the underlying facts of the alleged crime. Instead, you will need to focus on the facts related to the timeline between preferral of charges and arraignment. Including facts which have no relevance to your motion will confuse the reader and detract from your subsequent argument.

You must gain a mastery of the facts in your case before you begin to write. Your failure to master the facts may lead to either “overstatement” or “omission,” both ways to quickly lose credibility. By overstating the facts, “readers will be instantly on guard, and everything that has preceded your overstatement as well as everything that follows it will be suspect in their minds because they have lost confidence in your judgment or your poise.”¹⁷ Nothing could be worse for the litigator whose job is to persuade the judge to rule in favor of their client. Be scrupulous in asserting your facts, and, if anything, understate but do not overstate. Keep it simple, and keep it to “just the facts, ma’am.”

Another common error is omitting facts that may appear harmful to your position. Counsel owe a duty of candor to the court. Omitting material facts, likely to be highlighted by your opponent, will certainly result in a loss of credibility. Bad facts must be dealt with, not ignored. It simply does not make sense to run and hide from “bad” facts. The judge “must look facts in the face,”¹⁸ so you should confront them head-on as well. Eventually, the judge is going to identify the overstated or omitted facts, and if you have not analyzed the true facts within your issue development, the judge must 1) wonder why you overstated or omitted the true account, and 2) conduct the analysis without your input or perspective. Neither helps you obtain the result that you want for your client.

(D) Witness/Evidence (a list of evidence and witnesses to be produced)

In this section, you must list each document and witness that you request the court rely on. In doing so, you should carefully consider what evidence is necessary to meet your burden. The goal is to present enough evidence to meet the burden, while avoiding the presentation of unnecessary evidence.

Ensure that the witnesses you request are available at the motions hearing, either in-person or remotely. If the defense expects the government to produce its listed witnesses for the motions hearing, the defense must comply with R.C.M. 703(c)(2) by providing the government with the contact information for the witness and a synopsis of expected testimony sufficient to show the relevance and necessity of the witness.

Do not present unnecessary evidence. First, if the document is already in the record of trial, there is no need to present it again. Instead, you can simply refer to the document already contained in the record. For example, you

¹⁴ RULES OF PRACTICE, *supra* note 9, at 11.

¹⁵ *United States v. Stubbs*, 23 M.J. 188, 195 (C.M.A. 1987).

¹⁶ RULES OF PRACTICE, *supra* note 9, at 5 (“Motions requiring findings of fact must be supported by evidence presented by the parties or by a written stipulation of fact.”).

¹⁷ WILLIAM STRUNK JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 73 (4th ed. 2000).

¹⁸ *Frank v. Bangum*, 237 U.S. 309, 347 (1915)(Holmes, J., dissenting).

do not need to attach the charge sheet to your motion as an enclosure. The charge sheet is already in the record and may be considered by the judge in ruling on your motion. Second, if your opponent has already attached the document as an enclosure to her motion, there is no need for you to attach it to your response brief. It is already a part of the record and you may rely upon it to the same extent as your opponent. Finally, if you intend to offer a document into evidence during the trial, attach it as a Prosecution or Defense Exhibit as opposed to an enclosure to your motion. There is no need for the document to be attached twice in the record of trial.

(E) Legal Authority and Argument (argument and the legal authority upon which the argument is based and contrary legal authority of which counsel is aware)

If the “Relief Sought” section is the most underutilized, the “Legal Authority and Argument” section is the most underdeveloped. This section is for obvious reasons the most important portion of your motion. This is where you apply the facts to the law. You spent three years in law school developing the skills necessary to expertly advocate for your client through this very analysis, and it is the key aspect in obtaining the sought relief. So why does it so often get the short shrift?

One court summarized your task this way—“Praised be he who can state a cause in a clear, simple and succinct manner, and then stop.”¹⁹ The hard part for many counsel is not the “stop” part, but ensuring they state their “cause in a clear, simple and succinct manner.” One way to meet this objective is to use what many legal writing experts, and the Rules of Practice, recommend— “signposts”²⁰ or “bold headings so the court can follow.”²¹ Each bold heading should provide a clear, concise statement foretelling the argument about to be advanced.²² Here is an example:

1. Detective Smith interrogated the accused at the request of CID investigators concerning a jointly investigated crime.
2. Therefore, M.R.E. 305(b)(1) required Detective Smith to advise the accused of his rights under Article 31(b).
3. Because Detective Smith failed to advise the accused of his rights, the only remedy is suppression of the accused’s statement.

As in this example, a reading of just the bold headings provides a clear picture to the judge why you believe you win both factually and legally. This technique not only assists the reader, it assists the writer in providing organization to the

motion and ensures the writer stays on point when writing beneath each heading.

Under each heading, you should include your detailed analysis of both the law and the facts concerning that point. Where the law provides a certain “test” or “factors” to be applied, your analysis should begin with a clear recitation of that test or those factors. You must then demonstrate why the facts of your case meet that test or those factors. Your analysis should include a comparison to other appellate opinions, with an explanation of why your facts are either similar or dissimilar, leading to the result you advocate.

Let me provide a too frequently occurring example concerning admissibility of an alleged sexual assault victim’s other sexual behavior. In these motions, counsel inevitably lay out in extensive detail the holdings of *Gaddis* and *Ellerbrock*.²³ While reference to those cases makes sense, as they are considered the pivotal cases on M.R.E. 412, the trial practitioner must realize that the judge is very familiar with both cases. Stringing together quotation after quotation from those two cases adds very little value to the motion, and is unlikely to persuade the judge to rule in your favor. Find cases on point with your facts. Remember, *the judge is not your law clerk*. It is your responsibility to find similar cases—and if you cannot find military cases you should look for federal cases when analogous rules exist—and analyze those similar cases to demonstrate why certain evidence should or should not be admitted. If you conducted an exhaustive search and found nothing on point, say so. But nothing is more satisfying to a litigator than to read an opinion that mirrors the arguments made with the cases provided by the litigator. Do not just cite the seminal cases followed by a page of argument and concluding with a fist-pounding assertion that justice demands the judge grant your request. Instead, convince the judge through the application of your facts to the law that your position is correct. Find cases on point and argue them.

Also in your analysis, as I stated in the “Facts” section above, do not run and hide from the “bad” facts—“Facts do not cease to exist because they are ignored.”²⁴ If you believe those “bad” facts are not dispositive, then you should compare and contrast case law to demonstrate why those seemingly “bad” facts do not prevent you from obtaining the requested relief. Young advocates love to argue the obvious points, but the judge does not need much help with the obvious points. What the judge, and your client, needs is for you to clearly present those tough facts in contrast with the law and provide a clear legal basis for the requested relief. To do otherwise is a waste of effort.

¹⁹ *Jungwirth v. Jungwirth*, 240 P. 222, 223 (Ore. 1925).

²⁰ GARNER, *supra* note 12, at 173; ROSS GUBERMAN, *POINT MADE* 93 (2d ed. 2014).

²¹ RULES OF PRACTICE, *supra* note 9, at 20.

²² GARNER, *supra* note 12, at 403–22.

²³ *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011); *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011).

²⁴ *United States v. Jordan*, 57 M.J. 236, 244 (C.A.A.F. 2002)(Sullivan, S.J., dissenting)(quoting ALDOUS HUXLEY, *PROPER STUDIES* (1927)).

A few final points on presentation of case law. Use block quotations sparingly, and minimize the stringing together of case quotations.²⁵ Both methods of writing invite skimming and point to a “lazy” writer who has not taken the time to synthesize the law.²⁶ Instead, quickly synthesize the law with citations to support your reading of the law, including a parenthetical quickly explaining why or how that case supports your argument.²⁷ Simply listing cases with no clear statement of their relevance does not advance your cause and at best invites the reader to guess at the relevance, and at worst to ignore your citation. And finally, ensure your citations, to include introductory signals, are in accordance with *The Bluebook*. Refusing to take the time to demonstrate your professionalism may cause you to lose credibility and will inevitably distract from your argument

This section of your motion is the most important part of the brief. Ensure that you understand the law, state it correctly in your brief, and demonstrate why the facts of the case support the conclusion you advocate. Keep it succinct, yet fully apply the law to the facts in your case.

(F) Conclusion (a conclusion that restates the relief sought)

“Close powerfully.”²⁸ Restating the relief sought is the minimum requisite effort to comply with the Rules of Practice. Even this simple task sometimes proves too much, as the conclusion too often contradicts the first page’s “Relief Sought” section. Those errors are likely the result of laziness in using a previously filed or brief bank motion—and evidence of no personal and supervisory review. Consider spending a few extra moments to recast your issues in a fresh, powerful, and persuasive light, highlighting your primary arguments and reasons the court should grant your requested relief. If the judge read your brief straight through, this will be the last paragraph read. Make sure you leave the desired lasting impression and go out with a bang, rather than a fizzle.

IV. Post-Submission

You have written your motion, incorporated feedback from fellow counsel who critically reviewed your motion, and submitted your final product to the court. All is done. Well, still not quite. When the opposing party submits their response, ensure you review it in a timely manner. While not necessary in all cases, you should consider filing a reply. A reply motion may be appropriate when you become aware of additional case law relevant to deciding the issue, you significantly alter or add new points to your argument, the

opposing party addresses significant matters not addressed in your motion, or the opposing party points out a significant error in your presentation of the law or facts. A reply in these scenarios allows the motions hearing to be a much more efficient tool for the court to obtain all of the facts and answers necessary to fully decide the issues at hand.

Likewise, counsel must come to the motions hearing fully prepared to discuss in detail the facts and appellate decisions cited in both parties’ motions. An inability to fully answer the judge’s questions or present detailed counter-arguments deprives counsel of their last opportunity to effectively advocate for their client. Pretrial hearings are fully maximized when both counsel come fully prepared, providing the court the best opportunity to ensure a just result.

V. Conclusion

Your client, whether that is the United States or an accused Soldier, deserves an attorney who is competent, professional, and always gives their best effort. You owe it to your client, the profession of law, and the profession of arms to give it your best effort each time you come before the court. Do not “come limping into the fight” with half-hearted approaches or just filing paper to get something in. Rather, prepare, strategize, write, and then fight “with vigor.”

²⁵ GARNER, *supra* note 12, at 494 (“You shouldn’t see yourself as a mere quotation-assembler.”).

²⁶ GUBERMAN, *supra* note 20, at 176 (“Quotations from cases are effective only if used sparingly. Quoting at length from opinion after opinion is a lazy way of writing a brief, and the finished product is likely to be unconvincing. Long before the brief approaches its end, the reader has begun to skip over the quotations.” (quoting Federal Circuit Judge Dan Friedman)); *see also* SCALIA & GARNER, *supra* note 3, at 125–29.

²⁷ “Accompanying a citation with a parenthetical serves three important purposes—(1) it tells the brief reader why you are citing the case, (2) it shows where the case fits into the theme or focus of your brief, and (3) it achieves the objective of concise brief writing.” GUBERMAN, *supra* note 20, at 163 (quoting RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ADVOCACY 263–64 (2d ed. NITA 2003)).

²⁸ SCALIA & GARNER, *supra* note 3, at 37.

Measuring the Effectiveness of the Military Justice System

Colonel Jerrett W. Dunlap, Jr.*

I. Introduction

Since 1775, the Army has endeavored to maintain good order and discipline within its ranks. General George Washington wrote: “Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak and esteem to all.”² Sounding a similar refrain, Army Chief of Staff General Mark Milley recently said history shows units imbued with trust, cohesion, and esprit de corps can defeat larger and better equipped units.³ Yet, General Milley warned that misconduct can “rip apart unit trust, discipline and cohesion,” bringing a unit to its knees by destroying readiness.⁴

The federal government has attempted to promote discipline within the armed forces since the founding of the Republic. The *Manual for Courts-Martial* (MCM), produced by the President under his constitutional authority as Commander in Chief,⁵ states that “[t]he 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.”⁶ Congress has the constitutional authority to make rules and regulations to govern the military.⁷ Relying on this authority, Congress attempted to balance the military’s need for discipline with the due process rights demanded by justice when it replaced the Articles of War with the Uniform Code of Military Justice (UCMJ) following World War II.⁸

Congress continues its efforts to balance the demands of justice with the need to maintain good order and discipline. In the 2017 National Defense Authorization Act, Congress mandated a program for effective prosecution and defense at courts-martial.

The Secretary concerned shall carry out a program to ensure that trial counsel and defense counsel detailed to prosecute or defend a court-martial have sufficient experience and knowledge to effectively prosecute or defend the case; and a deliberate professional developmental process is in place to ensure effective prosecution and defense in all courts-martial.⁹

The congressional directive does not define how experience, knowledge, or effectiveness should be measured. In fact, there is no consensus among practitioners or academics on measuring when experience and knowledge are sufficient, nor when prosecution or defense in courts-martial are effective.¹⁰

This article explores the need for standards to measure the effectiveness of military justice.¹¹ In order to measure the effectiveness of the military justice system, policymakers should develop testable hypotheses and conduct unbiased assessments of available data in order to confirm or refute the hypotheses.¹² Such measures should relate directly to the purpose of the military justice system.¹³ The article then analyzes three potential methods for measuring the effectiveness of the military justice system: the Trial Court Performance Standards, the Long and Nugent-Borakove proposal, and the Judicial Proceedings Panel approach. It concludes that the Long and Nugent-Borakove effectiveness measures best allow the Service Secretaries to assess the

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¹ U.S. Army Ctr. of Military History, *Washington Takes Command of Continental Army in 1775*, U.S. ARMY (June 5, 2014), <https://www.army.mil/article/40819> (last visited May 29, 2017).

² David Vergun, *Three Ways to Derail Sexual Assault, Harassment, According to Gen. Milley*, U.S. ARMY (Dec. 12, 2016), https://www.army.mil/article/179413/three_ways_to_derail_sexual_assault_harassment_according_to_gen_milley (last visited May 29, 2017).

³ *Id.*

⁴ U.S. CONST. art. II, § 2.

⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. I, ¶ 3 (2016) [hereinafter MCM].

⁶ U.S. CONST. art. I, § 8.

⁷ Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 8 (2000).

⁸ 10 U.S.C. § 542 (2016).

⁹ Military courts do have standards for determining when defense counsel are ineffective, violating an accused’s right to effective assistance of counsel. *See*, United States v. Captain, 75 M.J. 99, 106 (C.A.A.F. 2016) (discussing the standard an appellant bears to prevail on an ineffective assistance claim, namely that the performance of defense counsel was deficient and that he was prejudiced by the error).

¹⁰ Measures of Effectiveness (MOEs) is a term of art for the Joint Force. Joint Publication 3-0 states MOEs are used in joint operations to help answer the question, “Are we creating the effect(s) or conditions in the [operational environment] that we desire?” JOINT CHIEFS OF STAFF, JOINT PUB. 3-0 JOINT OPERATIONS, AT II-11 (17 Jan. 2017). While there are similarities between the doctrinal term MOE and the measures of effectiveness discussed in this article, they are not synonymous.

¹¹ Stephen J. Gerras and Leonard Wong, *Changing Minds in the Army: Why It Is So Difficult and What to Do About It*, STRATEGIC STUDIES INST. 24 (Oct. 28, 2013).

¹² MCM, *supra* note 6, pt. I, ¶ 3.

experience, knowledge, and professional development of court-martial counsel.¹⁴

II. The Purpose of the Military Justice System

A discussion of effectiveness should begin by defining the system's purpose. The primary purpose of the military justice system is composed of three subjects: good order and discipline in the armed forces, efficiency and effectiveness in the military establishment, and justice.¹⁵ There are several factors that make it difficult to quantify and measure the military justice system's effectiveness. Good order and discipline, efficiency and effectiveness, and particularly justice are complex concepts. We will first examine good order and discipline.

A. Good Order and Discipline

Army commanders have long lauded the attributes of good order and discipline. General William Westmoreland described discipline while discussing military justice reform during the Vietnam War.¹⁶

Discipline is an attitude of respect for authority which is developed by leadership, precept, and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed. Discipline conditions the soldier to perform his military duty even if it requires him to act in a way that is highly inconsistent with his basic instinct for self-preservation. Discipline markedly differentiates the soldier from his counterpart in civilian society. Unlike the order that is sought in civilian society, military discipline is absolutely essential in the Armed Forces.¹⁷

Good order and discipline in the armed forces can also be defined as the absence of misconduct. Congress penalizes misconduct specifically named in 63 UCMJ articles.¹⁸ The UCMJ's General Article also penalizes misconduct "prejudicial to good order and discipline in the armed forces,"

as well as service-discrediting misconduct.¹⁹ Accordingly, tracking criminal misconduct is one way to measure good order and discipline, or the lack thereof, after the fact.

Military law recognizes five principal reasons for penalizing criminal misconduct.²⁰ The reasons are rehabilitation and punishment of the wrongdoer, protection of society, preservation of good order and discipline in the military, and deterrence.²¹ Deterrence, when effective, works in three ways: incapacitation, specific deterrence, and general deterrence.²² Incapacitation of the criminal protects society during the incarceration period.²³ Specific deterrence is directed toward stopping recidivism.²⁴ General deterrence is the crime-preventing effect resulting from the threat of punishment.²⁵ Given these reasons for penalizing criminal misconduct, an effective military justice system would rehabilitate and punish wrongdoers, protect society, and deter criminal misconduct, which would be reflected in the preservation (or restoration) of good order and discipline.

B. Efficiency and Effectiveness in the Military Establishment

The next purpose of the military justice system is promoting efficiency and effectiveness in the military establishment.²⁶ Unfortunately, the terms are not defined in the MCM. The term effectiveness is only used in this fashion in the preamble to the MCM.²⁷ The term efficiency is used occasionally in the MCM in reference to command functions, such as inspections or the prevention of sexual offenses.²⁸ Military law also considers the adverse impact on the efficiency of the command as an aggravating factor for court-martial sentencing.²⁹ Nevertheless, the MCM uses efficiency most frequently in reference to the military justice process, such as "judicial economy and efficiency."³⁰ As used in the MCM, an efficient and effective military establishment would expeditiously process misconduct, while minimizing adverse impact on the command.

C. Promoting Justice

The final purpose of military law is to promote justice.³¹ Justice is multifaceted in its meaning and focus. Defined as the proper administration of laws, justice can be process-

¹⁴ 10 U.S.C. § 542.

¹⁵ MCM, *supra* note 6, pt. I, ¶ 3.

¹⁶ General (Retired) William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 1, 5 (1971-1972).

¹⁷ *Id.*

¹⁸ UCMJ art. 80-133 (2016).

¹⁹ *Id.* art. 134.

²⁰ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK, 64 (10 Sept. 2014).

²¹ *Id.*

²² Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 U. CHI. CRIM. & JUST. 200 (2013).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ MCM, *supra* note 6, pt. I, ¶ 3.

²⁷ *Id.*

²⁸ MCM, *supra* note 6, MIL. R. EVID. 313 analysis, at A22-24; MCM, MIL. R. EVID. 412 analysis, at A22-24.

²⁹ MCM, *supra* note 6, R.C.M. 1001(b)(4).

³⁰ MCM, *supra* note 6, R.C.M. 703 analysis, at A21-34.

³¹ MCM, *supra* note 6, pt. I, ¶ 3.

focused.³² In this sense, justice refers to laws and procedural rights being applied consistently and fairly regardless of rank or position. We also speak of bringing a criminal to justice, a perpetrator-focused phrase intended to hold suspects accountable through the criminal justice system.³³ Justice can also be victim focused; defined as promoting the safety of victims and giving them a voice.³⁴ Finally, justice can be focused on promoting the safety of society at large.³⁵ A military justice system that effectively promotes justice would take all of these factors into consideration and apply them consistently and fairly to alleged victims, the suspected perpetrator, and to society at large.

The UCMJ is an attempt by Congress to balance good order and discipline with due process rights that are generally associated with justice.³⁶ Under this formulation, the national security of the United States will be strengthened if military law promotes justice, good order and discipline, and efficiency and effectiveness.³⁷ Having discussed what right looks like in the military justice system, we will now examine some of the factors that complicate measuring its effectiveness.

III. Challenges to Measuring the Effectiveness of a Criminal Justice System

In theory, a perfectly functioning justice system would convict all guilty individuals, while acquitting all individuals who are not guilty. In reality, the statistical probability will always exist that an accused may be wrongly found guilty of committing a crime. This is often called a false positive, or a Type I error in statistical parlance.³⁸ Similarly, a false negative or Type II error occurs when an accused who is guilty of committing a crime is wrongly acquitted of the charges.³⁹ The desire to reduce false positives is the driver for the high standard of proof in criminal justice, and lies at the root of the famous quotation by English jurist William Blackstone: “[I]t is better that ten guilty persons escape than one innocent suffer.”⁴⁰ Concern over false positives and the high standard of proof increase the complexity of measuring a criminal justice system’s effectiveness.

Several equally subjective and complex factors make determining whether a crime occurred very difficult. Crimes are social constructs that are defined by federal, state, and

local government. The definitions change over time as society’s perception of what constitutes a crime evolves. Crimes such as rape, sexual assault, and stalking are very complex as the acts and intent of the suspect as well as the consent of the victim are relevant to the definition of the crime.⁴¹ The difficulty in clearly determining whether an accused is guilty of committing a crime is one of the greatest obstacles to accurately determining whether a criminal justice system effectively minimizes false positives and false negatives.⁴²

The inability to objectively determine guilt complicates efforts to accurately measure the effectiveness of a criminal justice system. Social scientists endeavor to use multivariate statistical research to identify theoretically relevant reasons for criminal trial outcomes.⁴³ However, their research is not able to identify and measure all factors that are relevant to the outcome.⁴⁴ Dr. Cassia Spohn, an independent criminologist, testified to the Judicial Proceedings Panel that court documents and other relevant data cannot account for all variables that may have influenced case outcomes, such as

- the relationship between the victim and the accused;
- whether the victim was engaging in any kind of risk-taking behavior, especially drinking or using illegal drugs;
- the credibility of the victim;
- the degree of injury to the victim;
- cooperation in the investigation and prosecution of the case;
- whether there was delay in reporting or whether the crime or incident was immediately reported;
- whether the victim had any kind of motive to lie about the incident; and
- any indication of the presence of physical evidence or witnesses.⁴⁵

³² *Justice*, BLACK’S LAW DICTIONARY (6th ed. 1990).

³³ GUY WALTERS, HUNTING EVIL: THE NAZI WAR CRIMINALS WHO ESCAPED AND THE QUEST TO BRING THEM TO JUSTICE 1 (2009).

³⁴ Jennifer G. Long and Elaine Nugent-Borakove, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, 12 STRATEGIES 4-5 (Apr. 2014), <http://www.aequitasresource.org/beyond-conviction-rates.pdf> (last visited May 29, 2017).

³⁵ *Id.* at 5.

³⁶ Major Anthony J. Ghoitto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N.D. L. REV. 485 (2014).

³⁷ MCM, *supra* note 6, pt. I, ¶ 3.

³⁸ CHARLES WHELLAN, NAKED STATISTICS 161-62 (2013).

³⁹ *Id.*

⁴⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

⁴¹ UCMJ art. 120 (2016).

⁴² WHELLAN, *supra* note 38, at 161-62.

⁴³ JUD. PROC. PANEL, REPORT ON STATISTICAL DATA REGARDING MILITARY ADJUDICATION OF SEXUAL ASSAULT OFFENSES 15 (2016).

⁴⁴ *Id.*

⁴⁵ *Id.* at 16.

These variables listed by Dr. Spohn illustrate the complex and subjective nature of data that are potentially relevant to determining the guilt of an accused.

The act of gathering and reporting crime statistics also creates many challenges to measuring a criminal justice system's effectiveness. An audit of the New York Police Department's (NYPD) crime reporting process examined the challenges related to accurately gathering and reporting crime statistics.⁴⁶ The report noted that "the effects of unreported crime, the subjectivity inherent in crime classifications, the shifting procedures and rules for classifying crimes, and downgrading and suppression necessarily vary in any given year."⁴⁷ The report also noted that overemphasis and politicization of year-over-year declines in crime statistics can undermine the integrity of the statistics and have a negative impact on law enforcement tools.⁴⁸

There are few easily quantifiable measures of effectiveness in criminal justice.⁴⁹ The conviction rate is perhaps the most readily quantifiable and most often used measure of effectiveness.⁵⁰ Yet there are problems with relying on conviction rates as an accurate effectiveness-measure. Conviction rates give an incomplete picture of competence, procedures, the difficulty of cases tried, and myriad other factors.⁵¹ Moreover, emphasizing conviction rates can create undesirable consequences on prosecution decisions, such as declining to prosecute hard-to-prove cases.⁵² Prosecutors can increase conviction rates by only prosecuting cases when they have strong confidence in gaining a conviction. Rates can also increase when law enforcement officials do not forward difficult cases. Conversely, conviction rates can decrease when prosecutors try difficult or complex cases, such as sexual assault allegations where the victim is intoxicated or has blacked out. Commentators question whether prosecutors weed out too many cases due to concern over prosecution rates, resource shortages, bias, or other reasons.⁵³

Given these factors that complicate measuring a criminal justice system's effectiveness, there are points that policymakers should consider. First, leaders must recognize that intuition is insufficient when evaluating the effectiveness

of the military justice system. U.S. Army War College faculty members Stephen Gerras and Leonard Wong have studied the role intuition often plays with senior policymakers.⁵⁴

Although intuition and expertise are critical to leaders—when faced with volatile, uncertain, complex, and ambiguous issues—senior decisionmakers must appreciate the limitations of applying expertise and intuition since it will often lead to close-mindedness and a tendency to dismiss dissonant information too quickly. Recent research on senior Army leaders (i.e., general officers) shows a strong inclination to trust intuition over empirical evidence when making complex decisions.⁵⁵

In order to measure the effectiveness of the military justice system, policymakers should develop testable hypotheses and conduct unbiased assessments of available data in order to confirm or refute the hypotheses.⁵⁶

Second, measures should relate directly to the purpose of the military justice system, namely promoting justice, maintaining good order and discipline, and promoting efficiency and effectiveness in the military establishment, which will strengthen U.S. national security.⁵⁷ Focusing on the purpose of the military justice system will reduce the likelihood that politics or other non-justice-related factors influence the selected measures. As was noted in the NYPD crime statistics audit, overemphasis and politicization of crime statistics can undermine the integrity of the measures and negatively impact law enforcement tools.⁵⁸ Finally, policymakers should carefully consider the consequences that may result from the effectiveness measures that are employed. For example, an emphasis on conviction rates may create reluctance in prosecutors to pursue hard-to-prove cases.⁵⁹ On the other hand, an emphasis on increased prosecution of sexual assault allegations may raise concerns that prosecutors are overcharging due to political pressure.⁶⁰

⁴⁶ NYPD CRIM. REP. REV. COMM., THE REPORTING OF THE CRIME REPORTING REVIEW COMMITTEE TO COMMISSIONER RAYMOND W. KELLY CONCERNING COMPSTAT AUDITING 1 (2013).

⁴⁷ *Id.* at 54.

⁴⁸ *Id.*

⁴⁹ Long and Nugent-Borakove, *supra* note 34, at 1-2.

⁵⁰ *Id.*

⁵¹ Other factors include the quality of strategies employed by the prosecution, the impact of prosecution (or failure to prosecute) on the victim, or the impact a prosecution can have on preventing future crimes or promoting community safety. *Id.*

⁵² *Id.*

⁵³ *Id.* at 1. See also, e.g., Eric Rasmussen, Manu Raghav, and Mark Ramseyer, *Convictions versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. & ECONOMICS REV., 3 (Mar. 1, 2009) (analyzing data related to conviction rates, prosecution budgets, and related literature).

⁵⁴ Gerras and Wong, *supra* note 13, at 14-15 (citing Glenn K. Cunningham, A Phenomenological Study of the Use of Intuition Among Senior Military Commanders, 160 (2012) (Ph.D. dissertation., Capella University)).

⁵⁵ *Id.*

⁵⁶ *Id.* at 24.

⁵⁷ MCM, *supra* note 6, pt. I, ¶ 3.

⁵⁸ NYPD CRIM. REP. REV. COMM., *supra* note 46, at 54.

⁵⁹ Long and Nugent-Borakove, *supra* note 34, at 1-2.

⁶⁰ Marisa Taylor and Chris Adams, *Military's Newly Aggressive Rape Prosecution has Pitfalls*, MCCLATCHY DC BUREAU (Nov. 28, 2011), <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24719683.html> (last visited Mar. 22, 2017).

III. Tools for Measuring the Effectiveness of the Military Justice System

Having discussed the difficulties in measuring effectiveness, we will now analyze three efforts to measure the effectiveness of criminal justice systems.

A. Trial Court Performance Standards

We begin by considering the National Center for State Courts' effort to measure the effectiveness of the civilian court system.⁶¹ Beginning in the 1970s, there were several efforts to measure the effectiveness of the civilian court system, which generally focused on process.⁶² In 1987, the National Center for State Courts developed the Trial Court Performance Standards (TCPS) to establish performance standards for state trial courts.⁶³ The TCPS focus on the quality of performance, rather than on process.⁶⁴ The five TCPS areas are: (1) access to justice; (2) expeditiousness and timeliness; (3) equality, fairness, and integrity; (4) independence and accountability; and (5) public trust and confidence.⁶⁵ Within these five TCPS areas, twenty-two specific performance standards are linked to sixty-eight performance measures.⁶⁶ Examples of some of the twenty-two performance standards include: ensuring that court facilities are safe, accessible, and convenient to use (Standard 1.2); establishing and complying with guidelines for case processing (Standard 2.1); taking responsibility for the enforcement of court orders (Standard 3.5); and ensuring the trial court is perceived to be independent and accountable (Standard 5.3).⁶⁷ Examples of the sixty-eight performance measures include a measure of the ratio of case disposition to case filings (Measure 2.1.2); assessment of the court's media policies and practices (Measure 4.4.2); and surveys of various reference groups, such as attorneys, court employees, and the general public (Measure 3.3.3).⁶⁸ While some of these standards and performance measures have general applicability to the military justice system, many of them are not applicable.

The five TCPS performance areas were designed to be customer oriented, namely focused on those who used the courts, not those who run them.⁶⁹ Accordingly, the TCPS performance areas focused on performance and outcome

rather than on structures, and based on reliable data rather than on reputation.⁷⁰ An implicit reason for establishing TCPS was the recognition that existing judicial and support resources could only effectively handle growing caseloads through a more focused approach.⁷¹ The TCPS are designed to function as a blueprint for improving the administration of justice in state trial courts.

B. Long and Nugent-Borakove

The second effort to be considered was proposed by Jennifer Long and Elaine Nugent-Borakove to measure the effectiveness of the civilian criminal system.⁷² Long and Nugent-Borakove (LNB) recommend three types of measures.⁷³ The first are *outcome/output* measures; outcomes define the organization's broader goals and outputs are the tangible product produced by the organization.⁷⁴ In prosecution, ensuring justice is achieved is typically considered the outcome, while the output is the case disposition.⁷⁵ Long and Nugent-Borakove also point out "[t]o be useful as a performance measure, justice must be defined—is it safety of victims, overall public safety, holding offenders accountable, that the appropriate procedures were followed, or something else?"⁷⁶

The second LNB type of effectiveness measures are *satisfaction and quality* measures, which "focus on perceptions of victims and/or the community about how cases are handled and their outcomes."⁷⁷ The *satisfaction and quality* measures examine the processes used to realize outcomes and outputs.⁷⁸ The third LNB type of effectiveness measures are *efficiency and timeliness* measures, which look at timing, length of time, and the level of effort and resources required to bring about outcomes and outputs.⁷⁹ Long and Nugent-Borakove describe the utility of efficiency and timeliness measures.

Efficiency and timeliness measures are particularly useful in that the length of time it takes to produce an output or outcome has a bearing on successful performance in the other types of measures. For example, faster case disposition can lead to increased satisfaction among victims about the

⁶¹ George F. Cole, *Performance Measures for the Trial Courts, Prosecution, and Public Defense*, in PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 96 (1993).

⁶² *Id.*

⁶³ *Id.* at 87-89.

⁶⁴ *Id.*

⁶⁵ *Id.* at 98.

⁶⁶ Nancy E. Gist, *Trial Court Performance Standards and Measurement System*, BUREAU OF JUSTICE ASSISTANCE, <https://www.ncjrs.gov/pdffiles/tcps.pdf> (last visited Feb. 9, 2017).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Cole, *supra* note 61, at 98.

⁷⁰ *Id.*

⁷¹ Gist, *supra* note 66.

⁷² Long and Nugent-Borakove, *supra* note 34, at 5.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 6.

process; swifter responses to criminal activity can help reduce recidivism.⁸⁰

The LNB measures look beyond evaluating conviction rates and focus on the complex task of measuring the effectiveness of a criminal justice system.

C. Judicial Proceedings Panel

The final effort to measure effectiveness comes from the Judicial Proceedings Panel (JPP). The JPP was created by Congress to measure the effectiveness of the military justice system's treatment of sexual assault cases.⁸¹ Congress implemented several UCMJ reforms relating to rape, sexual assault, and other sexual misconduct in the 2012 National Defense Authorization Act.⁸² Congress later tasked the JPP to assess the UCMJ reforms and make recommendations for improving them.⁸³ Additional JPP duties include reviewing and evaluating current trends in response to sexual assault crimes, identifying punishment trends in sexual assault cases, and assessing trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases together with the impact of those trends.⁸⁴ To date, the JPP has produced four reports related to sexual assault in the military.⁸⁵ The JPP's *Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses* is particularly useful to evaluate the effectiveness of the military justice system's adjudication of sexual assault because it provides otherwise hard to find data that can be used by scholars, practitioners, and policy makers to quantitatively measure the effectiveness of the military justice system.

IV. Comparing Effectiveness-Measurement Approaches

We will now compare these three approaches and determine which is most appropriate for measuring the effectiveness of the military justice system. As discussed above, the TCPS has five broad areas: (1) access to justice; (2) expeditiousness and timeliness; (3) equality, fairness, and integrity; (4) independence and accountability; and (5) public trust and confidence.⁸⁶ However, the twenty-two standards and sixty-eight performance measures are specific to the state court system, which limits the applicability of many of the

standards and performance measures with regard to the military justice system. For example, many of the standards and performance measures relate to *civil law* matters that are not present in the military justice *criminal law* system. There is also significant overlap between the five TCPS areas and the three LNB types of measures; (1) *output/outcome*, (2) *satisfaction and quality*, and (3) *efficiency and timeliness*.⁸⁷ The LNB proposal was initially designed to measure success in sexual assault prosecution, but the measures they propose remain applicable to the entire military justice system because of their breadth. The three LNB types of measures have greater applicability to the military justice system than the TCPS's twenty-two standards and sixty-eight performance measures. The LNB measures also more closely reflect the purpose of the military justice system.⁸⁸ This makes the LNB proposal a better effectiveness measure than the TCPS standards and performance measures.

Unlike the TCPS areas or the LNB measures, the JPP measures focus narrowly on sexual assault in the military justice system.⁸⁹ While the LNB measures were motivated by a desire to improve sexual assault prosecution, the measures are broad enough to apply to all type of UCMJ offenses.⁹⁰ The JPP was not designed to look at the broader effectiveness of the military justice system.⁹¹ While the JPP sexual-assault-data may be extrapolated as a sample of the system, the performance measures employed by the JPP are too narrow to directly measure the entire military justice system. In comparison to the JPP's areas of focus, the three LNB-measures provide a more holistic method of evaluating the effectiveness of the military justice system. The three LNB measures are superior to the TCPS or JPP approach because they can be used to measure the effectiveness of the military justice system as a whole, without being burdened with irrelevant measures.

Finally, the LNB measures are consistent with the three points that policymakers should consider in measuring the military justice system's effectiveness, discussed above.⁹² The LNB effectiveness measures allow policymakers to develop hypotheses and assess data to test the hypotheses.⁹³ The LNB measures also relate to the military justice system's purpose of promoting justice, maintaining good order and discipline, as well as promoting efficiency and effectiveness in the military establishment.⁹⁴ Lastly, the LNB measures

⁸⁰ *Id.*

⁸¹ JUD. PROC. PANEL, CHARTER: JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS PANEL I (2016).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* Congress also tasked the Judicial Proceedings Panel with multiple duties directly related to specific sexual assault-related provisions of the UCMJ and Military Rules of Evidence. *Id.*

⁸⁵ JUD. PROC. PANEL, REPORT ON RESTITUTION AND COMPENSATION FOR MILITARY ADULT SEXUAL ASSAULT CRIMES (2016); JUD. PROC. PANEL, REPORT ON ARTICLE 120 OF THE UNIFORM CODE OF MILITARY JUSTICE (2016); JUD. PROC. PANEL, REPORT ON RETALIATION RELATED TO SEXUAL ASSAULT OFFENSES (2016); JUD. PROC. PANEL, REPORT ON STATISTICAL DATA REGARDING MILITARY ADJUDICATION OF SEXUAL ASSAULT OFFENSES (2016).

⁸⁶ Cole, *supra* note 61, at 98.

⁸⁷ Long and Nugent-Borakove, *supra* note 34, at 5.

⁸⁸ MCM, *supra* note 6, pt. I, ¶ 3.

⁸⁹ JUD. PROC. PANEL, *supra* note 81, at 1.

⁹⁰ Long and Nugent-Borakove, *supra* note 34, at 6.

⁹¹ JUD. PROC. PANEL, *supra* note 81, at 1.

⁹² See notes 55-61 and accompanying text.

⁹³ Gerras and Wong, *supra* note 12, at 24.

⁹⁴ MCM, *supra* note 6, pt. I, ¶ 3.

allow policymakers to mitigate unwanted consequences that may result from the effectiveness measures that are employed. For example, using conviction rates as an effectiveness measure can create incentives to decline the prosecution of meritorious cases to avoid potential acquittals.⁹⁵ By employing broad, balanced measures of *output/outcome*, *satisfaction and quality*, and *efficiency and timeliness*,⁹⁶ policymakers can avoid damaging the military justice process by creating overemphasis on a particular measure and politicization.⁹⁷

V. Applying the LNB Performance Measures to Military Justice Reform Efforts

Policymakers can apply the LNB measures, *output/outcome*, *satisfaction and quality*, and *efficiency and timeliness*,⁹⁸ to assess the effectiveness of the current military justice system and proposed reform efforts. The LNB performance measures will allow the Service Secretaries and members of Congress to measure the effectiveness of the military justice system; to evaluate the sufficiency of counsel's experience and knowledge; and to determine whether a service's professional developmental process for trial and defense counsel is effective.⁹⁹

A. Proposals to Reform the Military Justice System

Examination of proposals to reform the military-justice system through the LNB lens shows the utility of the measures. In one example of a proposed reform, Mr. Charles "Cully" Stimpson of the Heritage Foundation proposed that all services should adopt a career litigation track.¹⁰⁰ Mr. Stimpson's proposal would have the Army and Air Force adopt the Navy's litigation track model, where approximately ten percent of Navy Judge Advocates are placed almost exclusively in criminal litigation positions.¹⁰¹ A litigation track is intended to increase the level of trial experience of its track-members because they would remain in litigation positions throughout their careers. Mr. Stimpson bases his argument on the assertion that there is "no amount of training, book learning, or conversations over coffee that can overcome lack of real experience in a courtroom handling real, contested cases as a prosecutor or defense attorney."¹⁰² Mr. Stimpson then uses an anecdotal example of a civilian district attorney working in a large district attorney's office, who tries significantly more cases than any member of the Judge

Advocate General's Corps over their careers.¹⁰³ Mr. Stimpson concludes by arguing the services should follow the examples of civilian district attorney's offices with regard to case management and training by adopting a career management tool that purportedly maximizes experience.¹⁰⁴

Another military justice reform proposal by Major Jeffrey Gilberg envisions a comprehensive reorganization of the Army military justice system "to better utilize the litigation experience within the Corps, while simultaneously improving the development of junior judge advocates, the quality of the Army's litigation practice, and the degree of justice delivered to all."¹⁰⁵ While Major Gilberg's proposal looks to improve professional development, the quality of litigation practice, and the delivery of justice, he focuses on experience level of counsel, measured by number and type of cases tried, as the method of measuring the effectiveness of counsel.¹⁰⁶

Mr. Stimpson and Major Gilberg should be lauded for their efforts to improve the military justice system. Scholarly endeavors are necessary to improve the system and are a worthy goal that all should support. The proposals by Mr. Stimpson and Major Gilberg both focus on the experience level of counsel as the primary criterion. This focus is too narrow to adequately measure the proposed reforms and overall effectiveness of the system. The Stimpson and Gilberg proposals lack the elements to measure effectiveness. At a basic level, both Mr. Stimpson and Major Gilberg employ circular reasoning by proposing to increase the experience level of counsel while using experience as the prime criterion to measure the proposal's effectiveness. In essence, they argue that experience is most important criteria to measure litigation effectiveness and their proposals should be adopted because they purport to increase experience.

While the experience level of counsel is a factor that Congress, scholars, and practitioners all mention as being relevant to an effective military justice system, none of them identify what level of experience is sufficient to "ensure effective prosecution and defense in all courts-martial."¹⁰⁷ There is no accepted number of cases tried that serves as a benchmark indicating a counsel has sufficient experience to be effective. Experience alone, as measured by the number and type of cases tried, is not sufficient to ensure effectiveness. There are countless examples of experienced counsel who are not effective in terms of competence, efficiency, ethics, or other outcomes related to criminal

⁹⁵ Long and Nugent-Borakove, *supra* note 34, at 1-2.

⁹⁶ *Id.* at 5-6.

⁹⁷ NYPD CRIM. REP. REV. COMM, *supra* note 46, at 54.

⁹⁸ Long and Nugent-Borakove, *supra* note 34, at 5-6.

⁹⁹ 10 U.S.C. § 542.

¹⁰⁰ Charles Stimpson, *Army and Air Force JAG Corps Need Career Litigators Now*, DAILY SIGNAL (May 2, 2016), http://dailysignal.com/print?post_id=263111 (last visited Feb. 8, 2017).

¹⁰¹ *Id.* See also, U.S. DEP'T OF NAVY, JAGINST 1150.2D, MILITARY JUSTICE LITIGATION CAREER TRACK (15 Feb. 2017) (providing procedural

guidance for the Navy Judge Advocate General's Corps Military Justice Litigation Career Track program).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Major Jeffrey Gilberg, *The Secret to Military Justice Success: Maximizing Experience*, 220 MIL. L. REV. 1, 4 (2014).

¹⁰⁶ *Id.*

¹⁰⁷ 10 U.S.C. § 542.

justice.¹⁰⁸ The relationship between experience and motivation, particularly burnout, has been widely studied.¹⁰⁹ While most would agree that more experience is better, all other things being equal, some studies indicate that gains in experience may not always lead to gains in effectiveness.¹¹⁰ It is conceivable that a highly motivated counsel could outperform counsel with substantially more experience, but who is lacking motivation.

Mr. Stimpson's analysis also raises concerns because it is based largely on general rules, anecdotes, and intuition, which are insufficient when evaluating the effectiveness of the military justice system.¹¹¹ While Major Gilberg gathers data related to the number of cases tried by military counsel to quantitatively measure experience, his analysis does not look to criteria beyond experience. Focusing on one factor alone significantly limits the scope of effectiveness that can be measured. His analysis does not measure the broader purpose of military law and does not consider potential unanticipated consequences that may result.¹¹²

B. Application of LNB Types of Measures

Before implementing these proposals, policymakers should test the underlying hypotheses that restructuring litigation within the Department of Defense will increase the experience level of military counsel and thereby improve the effectiveness of the military justice system.¹¹³ Use of the three LNB types of measures can be an effective method to measure the reform proposals offered by Mr. Stimpson and Major Gilberg. Beginning with *outcome/output* measures, policymakers should use available data to examine how the proposed reforms change outcomes and outputs. The *outcomes/output* measures should focus on data that reflects the military justice system's broader goals.¹¹⁴ As discussed in detail above, these goals include promoting justice, maintaining good order and discipline, and promoting efficiency and effectiveness in the military establishment.¹¹⁵ The *satisfaction and quality* measures should focus on victims and community perceptions, as well as processes used to bring about outcomes and outputs.¹¹⁶ Finally, the *efficiency and timeliness* measures should look at the time and resources required to bring about outcomes and outputs.¹¹⁷

Thus, it is clear that policymakers lack an effective method of measuring military justice system effectiveness because they have not settled on performance measures. Table 1 is an example of the types of specific performance measures that policymakers could employ to measure the effectiveness of the military justice system. Much of the data is available through the Herculean-efforts of the JPP.¹¹⁸ Other data is regularly reported through the military justice system.

TABLE 1. SAMPLE MILITARY JUSTICE SYSTEM PERFORMANCE MEASURES¹¹⁹

Type of Performance Measure	Purpose of Measure	Specific Performance Measure
Outcome Measures	Promoting Justice Fair/consistent process Good Order and Discipline	Trial/Appellate procedural violations Cross-rank sentence comparison Recidivism
Output Measures	Rehabilitation Punishment Retribution Deterrence	Rehabilitation efforts Conviction Incarceration Sentence
Satisfaction and Quality Measures	Public perceptions Victim perceptions Victims have a voice	Restitution Victim satisfaction Victim safety Surveys (public, attorneys, witnesses, victims, etc.)
Efficiency and Timeliness Measures	Promoting Efficiency	Timeliness of adjudication Pretrial processing times Post-trial processing times

¹⁰⁸ See, e.g., Jordan Smith, *Anatomy of a Snitch Scandal: How Orange County Prosecutors Covered Up Rampant Misuse of Jailhouse Informants*, INTERCEPT (May 14, 2016), <https://theintercept.com/2016/05/14/orange-county-scandal-jailhouse-informants/> (last visited Feb. 8, 2017); Michael Powell, *Misconduct by Prosecutors, Once Again*, N.Y. TIMES, Aug. 13, 2012, at A-13.

¹⁰⁹ See e.g., Rachel Clancy et al., *Motivation Measures in Sports: A Critical Review and Biometric Analysis*, FRONTIERS PSYCHOL. (Mar. 9, 2017) (analyzing empirical efforts to measure motivation in sports).

¹¹⁰ Dean A. Shepherd et al., *VCs' Decision Processes: Evidence Suggesting More Experience May Not Always Be Better*, 18 J. BUS. VENTURING 301 (2003).

¹¹¹ Gerras and Wong, *supra* note 12, at 14-15.

¹¹² For example, unintended consequences could include a negative impact on recruiting or retention if military justice opportunities are limited or

reduced. Litigation opportunities, alongside numerous airborne operations and armored formations, play a prominent role in a current recruiting video entitled "Your First Four Years in the Army JAG Corps." See, JAGCNET, <https://www.jagcnet.army.mil/JARO> (last visited Dec. 16, 2017).

¹¹³ *Id.* at 24.

¹¹⁴ Long and Nugent-Borakove, *supra* note 34, at 5.

¹¹⁵ MCM, *supra* note 6, pt. I, ¶ 3.

¹¹⁶ Long and Nugent-Borakove, *supra* note 34, at 6.

¹¹⁷ *Id.*

¹¹⁸ JUD. PROC. PANEL, *supra* note 43, at 76.

¹¹⁹ *Id.* at 5.

To test Mr. Simpson's proposal, policy makers could compare the relevant data relating to the Navy's litigation track with the Army and Air Force military justice systems to see if there is a significant difference between the *outcomes/output* measures of the services. For example, the JPP's extensive sexual-assault-related data could be analyzed.¹²⁰ Dr. Spohn's analysis of the differences in outcomes by military service, used by the JPP, is summarized as follows.

As these results show, there were significant differences in outcomes by military service for penetrative offenses (because of small cell sizes, we could not calculate statistical significance for cases involving contact offenses). For cases in which the most serious charge was a penetrative offense, the overall conviction rate (i.e., convicted of a penetrative offense + convicted of a contact offense + convicted of a non-sex offense) was 61.7% for the Coast Guard, 55.1% for the Army, 51.7% for the Marine Corps, 47.3% for the Navy and 44.2% for the Air Force. The odds of being convicted of a penetrative offense were highest for the Army (28.0%), lowest for the Marine Corps (16.9%). The likelihood that the accused would be acquitted of all charges was lowest for the Marine Corps (8.8%) and highest for the Air Force (26.1%); by contrast, the likelihood that the case would be dismissed without further action was lowest for the Army (9.0%) and highest for the Coast Guard (26.5%). The services also differed in their use of alternative dispositions.¹²¹

These outcomes could be a starting point to fully analyze a proposed reform. While data for all specific performance may not be readily available to policymakers, there is real value in analyzing multiple types of relevant data, rather than focusing on generalizations, intuition, or only one factor.

IV. Conclusion

Recent efforts to reform the military justice system have received significant interest by the public, the media, and members of Congress.¹²² Policymakers and practitioners should fully support efforts to reform and improve the military justice system. Yet care should be exercised to achieve the balance between justice, good order and discipline, and due process rights that Congress intended when it enacted the UCMJ.¹²³ While progress in seeking justice for victims and society remains an important goal, care

must be taken to ensure the pendulum of justice does not swing too far from the due process rights of service members.¹²⁴ Application of the LNB performance measures is an appropriate method to measure the effectiveness of the military justice system, improve the performance of counsel, and protect the balance between justice and due process. Current exertions to improve military justice are consistent with the Army's efforts since 1775 to instill discipline, which General Washington said "is the soul of an army."¹²⁵

¹²⁰ *Id.*

¹²¹ *Id.* at 62.

¹²² Taylor and Adams, *supra* note 60.

¹²³ Ghoitto, *supra* note 36, at 485.

¹²⁴ Taylor and Adams, *supra* note 60.

¹²⁵ U.S. Army Ctr. of Military History, *supra* note 1.

They Came In Like a Wrecking Ball¹: Recent Trends at CAAF In Dealing With Apparent UCI

Lieutenant Colonel John L. Kiel, Jr.*

Cowboy legend John Wayne once offered up a bit of advice to fellow actor Michael Cain exhorting him in that famous drawl to remember to “talk low, talk slow, and don’t say too much.”² Given the recent unlawful command influence (UCI) decisions coming out of the Court of Appeals for the Armed Forces (CAAF), judge advocates advising convening authorities would be well served to heed the same advice. As the following cases illustrate, what you say and how you say it could mean the difference between having your case affirmed or having it returned for a rehearing.

The CAAF has recently drawn some very bright lines when it comes to apparent UCI. Gone are the days when you could breathe a sigh of relief knowing that there had been only apparent and not actual UCI found in your case. Appellate courts continue to reaffirm that UCI in whatever form, is still the “mortal enemy of military justice.”³ In fact, Judge Ohlson reminds us in *United States v. Boyce*, the first UCI case we will discuss, that CAAF “unequivocally endorses the Supreme Court’s observation that ‘federal courts have an independent interest in ensuring ... that legal proceedings appear fair to all who observe them.’”⁴

I: United States v. Boyce

United States v. Boyce is intriguing for a number of reasons. Among them is the fact *Boyce* deals with apparent UCI committed by both command and technical chain channels and that the convening authority was none other than Lieutenant General (Lt. Gen.) Craig A. Franklin from *United States v. Wilkerson* infamy.⁵ To recap quickly, Air Force Lieutenant Colonel (Lt. Col.) James Wilkerson had been convicted by a general court-martial panel for sexually

assaulting a female house guest after he and his wife invited her back to their home following a USO concert.⁶ Lieutenant Colonel Wilkerson went downstairs during the middle of the night, climbed in bed with the victim, fondled her breasts, and digitally penetrated her.⁷ Wilkerson’s wife ended up finding her husband in bed with the victim when she turned on a light downstairs the next morning.⁸ Enraged, Mrs. Wilkerson threw the victim out of the house.⁹ The all-male panel found Lt. Col. Wilkerson guilty of committing the assault and sentenced him to be dismissed from the Air Force and to serve a period of one year in confinement.¹⁰ After reviewing the lengthy material submitted by the defense as part of Wilkerson’s clemency request, Lt. Gen. Franklin ultimately set aside the findings of the court-martial, against his Staff Judge Advocate’s (SJA) advice. This set off a firestorm of controversy in the press and resulted in Congress severely curtailing the convening authority’s ability to grant clemency in future cases.¹¹

On 3 September 2013, approximately seven months after the *Wilkerson* debacle, Lt. Gen. Franklin declined to refer to court-martial an unrelated sex assault case, this time in accordance with his SJA’s advice.¹² Shortly after Lt. Gen. Franklin dismissed the charges and specifications in *United States v. Wright*, Colonel (Col.) Bialke, the SJA for both *Wilkerson* and *Wright*, received a telephone call from Lt. Gen. Richard Harding, The Judge Advocate General of the Air Force.¹³ General Harding warned Col. Bialke that his boss’s “failure to refer the case to trial would place the Air Force in a difficult position with Congress.”¹⁴ Harding further warned that “absent a ‘smoking gun’ victims are to be believed and their cases referred to trial; and [that] dismissing the charges

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¹ MILEY CYRUS, *Wrecking Ball*, on BANGERZ (RCA Records 2013).

² See <http://www.cowboyway.com/JohnWayneQuotes.htm> (last visited Oct. 4, 2017).

³ *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). The Court of Appeals for the Armed Forces [hereinafter CAAF] used to be called the Court of Military Appeals (CMA) before it was redesignated in 1994.

⁴ *United States v. Boyce*, 76 M.J. 242, *253, (C.A.A.F. 2017), (citing *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

⁵ Lieutenant General Franklin became the center of attention in the media and in congressional hearings. As a result of his decision to set aside the panel’s verdict, Congress substantially curtailed the ability of convening authorities to grant clemency under Article 60, UCMJ.

⁶ Nancy Montgomery, *Former IG Gets 1-Year Sentence, Dismissal for Sexual Assault*, STARS AND STRIPES, Nov. 3, 2012, available at <https://www.stripes.com/news/former-ig-gets-1-year-sentence-dismissal-for-sexual-assault-1.195865#.Wdt9uf5IJVc>. The United Service Organizations (USO) collectively provides services to millions of service

members each year. They are perhaps most famous for hosting concerts and bringing celebrities to meet the troops overseas.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Craig Whitlock, *Air Force General to Retire After Criticism for Handling of Sexual Assault Case*, WASH. POST, Jan. 8, 2014, available at https://www.washingtonpost.com/world/national-security/air-force-general-criticized-for-handling-of-sexual-assault-cases-to-retain/2014/01/08/9942df96-787d-11e3-b1c5-739e63e9c9a7_story.html?utm_term=.1be5a60aa86d.

¹² *United States v. Boyce*, 76 M.J. 242, *245 (C.A.A.F. 2017) (citing *United States v. Wright*, 75 M.J. 501, 502 (A.F. Ct. Crim. App. 2015)).

¹³ *Id.*

¹⁴ *Id.* at *245-46.

without meeting with the named victim violated an Air Force regulation.”¹⁵

Shortly after deciding not to refer charges in *Wright*, Lt. Gen. Franklin received another telephone call on 27 December 2013, this time from the Air Force Chief of Staff, who politely informed him that the newly appointed Air Force Secretary had lost confidence in him.¹⁶ The Chief told Lt. Gen. Franklin that he had two options—he could voluntarily retire from the Air Force at the lower rank of major general or he could wait for the new Secretary to remove him from command.¹⁷ Later that day, while reviewing his options, Lt. Gen. Franklin received the referral packet for *United States v. Boyce*, which he promptly referred to a general court-martial in accordance with the article 32 investigating officer’s recommendation and SJA’s advice.¹⁸ Two days later, Franklin announced that he would immediately step down as the Third Air Force Commander and officially retire on 31 January 2014.¹⁹

Airman Boyce’s defense counsel immediately sought to depose Franklin after reading that he was stepping down as the commander of Third Air Force. Defense counsel got their wish and interviewed Lt. Gen. Franklin on 28 January 2014.²⁰ During the interview, Lt. Gen. Franklin admitted “there probably is an appearance of UCI but I wasn’t affected by it” and that it “would be foolish to say there is no appearance of UCI.”²¹ Armed with that information, Wilkerson immediately filed a motion to dismiss all charges due to the UCI.²²

At trial, the government produced an affidavit from Lt. Gen. Franklin wherein he claimed that any comments made by superior government officials had “absolutely no impact” on his ability to render independent and impartial decisions as a GCMCA.²³ Franklin acknowledged however, that his decision to set aside the *Wilkerson* verdict generated a huge amount of controversy and that his decision in *Wright* was second-guessed by the convening authority of the Air Force District of Washington, who referred the case to a general court-martial anyway.²⁴

After considering all of the evidence, the trial judge found that while there had been no actual UCI, the defense

had successfully demonstrated that there was apparent UCI.²⁵ The judge concluded however, that because Lt. Gen. Franklin was the most “bombproof of any convening authority” out there, he had been unaffected by UCI when he made his decision to refer Boyce’s case.²⁶ The judge noted that Lt. Gen. Franklin had clearly demonstrated in *Wilkerson* and *Wright* his ability to make independent decisions with regard to sex assault cases in the face of withering criticism from senior military and civilian leaders and lawmakers.²⁷ The judge also noted that Franklin provided an affidavit whereby he “unequivocally attested to his not being influenced in any way by outside pressure.”²⁸ The Air Force Court of Criminal Appeals (AFCCA) affirmed the trial court’s decision stating, “We are convinced that an objective, disinterested, reasonable person, fully informed of all the facts and circumstances, would not believe that the convening authority was affected by UCI and would not ‘harbor a significant doubt about the fairness’ of Appellant’s court-martial proceeding.”²⁹ The AFCCA also agreed that Lt. Gen. Franklin was “the most bombproof of any convening authority” due to the fact that he was able to act independently despite possible career ending phone calls from the TJAG and the Chief of Staff, and members of Congress publically calling for his removal from command.³⁰

The CAAF granted Boyce’s petition but limited its review to whether there had been apparent UCI committed when Lt. Gen. Franklin referred the case. After reviewing the record, Judge Ohlson concluded that “members of the public would understandably question whether the conduct of the Secretary of the Air Force and/or the Chief of Staff of the Air Force improperly inhibited Lt Gen Franklin from exercising his court-martial convening authority in a truly independent and impartial manner as is required to ensure the integrity of the referral process.”³¹

Judge Ohlson also took umbrage with the trial judge’s assertion that Lt. Gen. Franklin had been the most bombproof convening authority out there. Ohlson emphatically observed that “if anything, Lt Gen Franklin would have been more acutely aware than other GCMCAs about how closely his referral decisions were being scrutinized by his superiors *and* about the potential personal consequences of ‘ignoring

¹⁵ *Id.*

¹⁶ *Id.* at *245. Deborah Lee James was appointed as Secretary of the Air Force on December 20, 2013.

¹⁷ *Id.* at *246.

¹⁸ *United States v. Boyce*, 2016 CCA Lexis 198, *20, *21 (A.F. Ct. Crim. App. Mar. 24, 2016).

¹⁹ *United States v. Boyce*, 76 M.J. 242, *246 (C.A.A.F. 2017).

²⁰ *Id.*

²¹ *Id.* at *245-46.

²² *Id.*

²³ *Id.* at *246.

²⁴ *Id.*

²⁵ *United States v. Boyce*, 2016 CCA Lexis 198, *22, *23 (A.F. Ct. Crim. App. Mar. 24, 2016).

²⁶ *Id.*

²⁷ *Id.* at *23.

²⁸ *Id.*

²⁹ *Id.* at *25, *26.

³⁰ *Id.* at *23.

³¹ *United States v. Boyce*, 76 M.J. 242, *246 (C.A.A.F. 2017).

political pressure’ when making those referral decisions.”³² He noted that Franklin could have been subject to immediate removal had the Secretary discovered that he had refused to refer “another” meritorious case to court-martial.³³

The majority opinion spent a fair amount of time discussing how apparent UCI jurisprudence had developed over the years, and then laid out a two-pronged test to determine whether apparent UCI exists.³⁴ First, the appellant must show facts, which if true, would constitute UCI.³⁵ Second, he must show that the UCI placed “an intolerable strain on the public’s perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.”³⁶ Judge Ohlson also emphasized that unlike actual UCI, where prejudice to the accused is required, there is no such requirement to prevail on a claim of apparent UCI.³⁷

Relying on precedent established in *United States v. Salyer*³⁸ and *United States v. Biagese*,³⁹ Ohlson then laid out an analytical framework for courts to use in applying the two-pronged test.⁴⁰ First, the appellant must show some evidence that UCI occurred.⁴¹ That burden is pretty low and all it requires is that the appellant produce evidence that consists of something more than just speculation or a mere allegation.⁴² If the appellant satisfies this requirement, the burden shifts to the government to either prove beyond a reasonable doubt that the predicate facts proffered by the appellant do not exist, or that they do not amount to UCI.⁴³ If the government fails to satisfy this burden, then it must prove beyond a reasonable doubt that the UCI did not place “an intolerable strain” upon how the public perceives the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.⁴⁴ If the government can prove that, then the analysis stops and the appellant merits no relief.⁴⁵ If not, the court will fashion an appropriate remedy for the UCI.⁴⁶

The CAAF ultimately concluded that Boyce had met his initial burden of demonstrating some evidence of UCI committed by the Chief of Staff and Secretary of the Air Force.⁴⁷ It also held that after the burden shifted, the government failed to demonstrate beyond a reasonable doubt that the predicate facts cited to by Boyce did not exist or that they did not amount to UCI.⁴⁸ After Boyce had established that apparent UCI was present, the government then also failed to meet its burden of proving beyond a reasonable doubt that the conduct of the Air Force Secretary and/or the Chief of Staff, did not place an intolerable strain upon the public’s perception of the military justice system.⁴⁹

Boyce also asserted that actual UCI had permeated Franklin’s referral decision but Judge Ohlson quickly dispensed with that claim because of the low standard (reasonable grounds) involved in determining whether to refer charges to a general court-martial.⁵⁰ Ohlson aptly noted that there had been two independent witnesses, not just one, who made allegations of abuse against Boyce; that there was physical evidence corroborating both witness’s allegations; that Boyce had previously engaged in similar violence; and that the Article 32 investigating officer, every subordinate commander, and the SJA all recommended referral of charges against him.⁵¹

The fact that there had been no actual UCI found caused Chief Judge Stucky and Judge Ryan to author separate dissenting opinions. The Chief Judge wrote that it was impossible for the newly appointed Secretary of the Air Force to have committed actual UCI because there is no evidence that she even knew of the existence of Boyce’s case nor did she try to influence or coerce Lt. Gen. Franklin in any way.⁵² Instead, she was simply exercising her prerogative as Secretary to remove a commander she had lost confidence in.⁵³ Stucky argued that because there was no actual UCI present, the test that the Court used to determine whether apparent UCI existed made no sense.⁵⁴ If an objective, disinterested observer looking in on this case knew that there was no actual UCI committed by the Air Force Chief of Staff or the Secretary, why then would they ever “harbor a

³² *Id.* at *251.

³³ *Id.* at *250

³⁴ *Id.* at *249.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at *248.

³⁸ 72 M.J. 415 (C.A.A.F. 2013).

³⁹ 50 M.J. 143 (C.A.A.F. 1999).

⁴⁰ *United States v. Boyce*, 76 M.J. 242, *249-50 (C.A.A.F. 2017).

⁴¹ *Id.* at *249 (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)).

⁴² *Id.* at *249 (citing *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013)).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at *250

⁴⁶ *Id.*

⁴⁷ *Id.* at *252.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at *253.

⁵³ *Id.*

⁵⁴ *Id.* at *253-54.

significant doubt about the fairness of the proceeding,” Stucky wondered?⁵⁵

Judge Ryan agreed with Judge Stucky that it would be illogical to conclude that an objective observer would harbor doubts about the fairness of the proceedings when there was no actual UCI present.⁵⁶ She noted that the only way an appellate court can set aside a finding or sentence on account of legal error is to demonstrate that the error somehow materially prejudiced the substantial rights of the accused.⁵⁷ Judge Ryan argued that there was no evidence that either the Chief of Staff or Secretary attempted to influence the action of Boyce’s court-martial, mainly because neither one even knew about it. In fact, Ryan reasoned, the only person actually prejudiced in this case was Lt. Gen. Franklin whose “reputation was sullied and career cut short.”⁵⁸

II. United States v. Barry

Shortly after issuing the *Boyce* decision, CAAF reviewed the case of Senior Chief Keith Barry, a Navy SEAL who was convicted at a general court-martial for raping his girlfriend.⁵⁹ Barry invited his girlfriend back to his hotel room where they engaged in consensual foreplay that involved Barry tying her up by the ankles and wrists and digitally penetrating her while she laid bound, face down on the bed.⁶⁰ When Barry began having anal sex with her, she immediately pleaded with him to stop.⁶¹ The very next day, she disclosed what had happened to her cousin and a month later, she reported being raped to the Naval Criminal Investigative Service (NCIS).⁶² At trial, a military judge sitting alone convicted Barry of sexual assault and sentenced him to be confined for a period of three years and to be dishonorably discharged.⁶³

In his clemency matters, Barry asserted legal error on the grounds that the trial judge failed to release portions of the victim’s mental health records that were constitutionally required and that she abused her discretion by cutting off Barry’s testimony during sentencing when he attempted to explain how the victim asked him if he was open to experimenting with bondage and anal sex the day before the assault.⁶⁴

Rear Admiral (RADM) Lorge, the convening authority in the case, responded to the clemency request with highly unusual language directed to the appellate courts.⁶⁵ Lorge wrote, in part:

In my seven years as a General Court-Martial Convening Authority, I have never reviewed a case that has given me greater pause than the one that is before me now. The evidence presented at trial and the clemency submitted on behalf of the accused was compelling and caused me concern as to whether SOCS Barry received a fair trial or an appropriate sentence.⁶⁶

Lorge strongly urged the court to consider remanding the case back to him for a rehearing or in the alternative, to disapprove the dishonorable discharge allowing Barry to retire in the rank that he last honorably served.⁶⁷

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed the assignments of error, to include whether RADM Lorge abused his discretion in denying a request for rehearing, despite harboring significant doubts about the fairness and integrity of the court-martial.⁶⁸ The NMCCA found no legal error in the trial judge’s decisions to limit discovery of the victim’s mental health records and to limit the scope of Barry’s sworn testimony during presentencing.⁶⁹ The NMCCA also found Lorge’s decision not to order a rehearing was not an abuse of discretion because Barry received everything he should have received at clemency which included an “individualized, legally appropriate and careful review of his sentence by the convening authority.”⁷⁰ Six months later, on 27 April 2017, CAAF summarily affirmed the NMCCA’s decision.⁷¹

But this did not end the case. On the same day that CAAF summarily affirmed Barry’s conviction, his military defense counsel received third-hand information from someone in the Navy-Marine Corps Appellate Government Division confirming that RADM Lorge did not want to approve the findings and sentence and that he only did so after meeting with the Deputy Judge Advocate General of the Navy

⁵⁵ *Id.* at *254.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at *255.

⁵⁹ *United States v. Barry*, No. 201500064, 2016 WL 6426695 (N. M. Ct. Crim. App. Oct. 31, 2016).

⁶⁰ *Id.* at *1.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at *6, *10.

⁶⁵ Declaration of LCDR Leah A. O’Brien, Appendix 2 at 3, *United States v. Barry*, No. 17-0162/NA (C.A.A.F. May 4, 2017).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *United States v. Barry*, No. 201500064, 2016 WL 6426695 at *4 (N. M. Ct. Crim. App. Oct. 31, 2016).

⁶⁹ *Id.* at *6-7.

⁷⁰ *Id.* at *4-5.

⁷¹ *United States Court of Appeals for the Armed Forces Daily Journal*, Friday, June 30, 2017, available at <http://www.armfor.uscourts.gov/newcaaf/journal/2017Jrn/2017Jun.htm>. (last visited Nov. 22, 2017).

(DJAG), RADM James Crawford, III.⁷² Barry's trial defense counsel secured an affidavit from RADM Lorge and provided it to his appellate defense counsel.⁷³ Armed with the affidavit, Barry's counsel petitioned CAAF to order a DuBay hearing to determine whether the convening authority had been subject to UCI during the clemency phase of the proceedings.⁷⁴ The CAAF set aside its 27 April order and directed that a military judge from another service conduct a DuBay hearing to determine whether senior Navy leaders had exerted UCI on RADM Lorge.⁷⁵

On September 26th and 27th, the Chief Trial Judge of the Air Force, Colonel Vance H. Spath, conducted the DuBay hearing.⁷⁶ After two full days of receiving evidence, Judge Spath concluded that the TJAG, DJAG, and Lorge's SJA all exerted UCI on him.⁷⁷ In order to avoid confusion, we will start with the TJAG's role, followed by the SJA's and then the DJAG's roles in exerting UCI on RADM Lorge during the clemency phase of Barry's court-martial.

A. TJAG role in UCI

Barry was convicted on 31 October 2014.⁷⁸ Eight months prior to that, in February of 2014, RADM Lorge described meeting Vice Admiral (VADM) Nanette DeRenzi, the NAVY TJAG, in his San Diego office.⁷⁹ Admiral DeRenzi had been in town for an unrelated event but popped in to see RADM Lorge as a professional courtesy.⁸⁰ Lorge recalled that during the meeting VADM DeRenzi spoke about how tenuous it had become for commanders to act as convening authorities in sex assault cases because of the political pressure Congress kept exerting on the military.⁸¹ She lamented how every three to four months, court-martial decisions convening authorities made seemed to be called into question by members of Congress and even the President.⁸² As a result, VADM DeRenzi explained, she spent a great deal of her time defending the role of commanders as convening authorities in the military justice system to members of Congress.⁸³

⁷² *Id.* at 2. Vice Admiral Crawford currently serves as the 43d Judge Advocate General of the Navy.

⁷³ Petition for Reconsideration at 5, *United States v. Barry*, No. 17-0162/NA (C.A.A.F. May 5, 2017).

⁷⁴ CAAF Daily Journal, *supra* note 67.

⁷⁵ *Id.*

⁷⁶ Findings of Fact & Conclusions, *United States v. Barry*, No. 17-0162/NA (C.A.A.F. Oct. 24, 2017).

⁷⁷ *Id.* at 8.

⁷⁸ *Id.* at 2.

⁷⁹ Declaration of RADM Patrick J. Lorge, USN (RET.), Appendix 1 at 4, *United States v. Barry*, No. 17-0162/NA (C.A.A.F. May 5, 2017).

⁸⁰ *Id.*

B. SJA role in UCI

Nearly a year after his visit with VADM DeRenzi, RADM Lorge received the record of trial (ROT) and staff judge advocate advice (SJAR) for the Barry case from Commander (CDR) Dominic Jones, his SJA.⁸⁴ While CDR Jones's recommendation to approve the findings and recommendations was always consistent, his advice about available clemency options was anything but. In his original SJAR, CDR Jones advised Lorge that under Article 60 of the Uniform Code of Military Justice (UCMJ), his authority to grant clemency was unrestricted.⁸⁵ About three weeks later, Jones issued an addendum to the SJAR advising Lorge that due to recent amendments Congress made to Article 60, the only thing he could do was approve the findings and sentence.⁸⁶ Having felt his hands were tied at that point, that's exactly what RADM Lorge did.⁸⁷ When the NMCCA reviewed the case on 16 March 2015, they quickly discovered that the SJA had misinterpreted the effective date for the Article 60 amendments and remanded it back for corrective post-trial processing.⁸⁸

When the case came back, the SJA advised Lorge that while his original advice had been correct (that clemency powers were unrestricted) Jones still insisted that Lorge approve the findings and sentence.⁸⁹ Lorge testified that he spent a great deal of time pouring through the ROT and the clemency submissions trying to figure out what to do.⁹⁰ After studying and pondering all of it, Lorge still felt that the government had not met its burden at trial and that the trial judge made rulings that unfairly prejudiced Barry.⁹¹ Commander Jones made the decision to call RADM James Crawford, III, the NAVY DJAG, in hopes that Crawford would convince his boss to approve the findings and

⁸¹ *Id.*

⁸² *Id.*

⁸³ Findings of Fact & Conclusions, *supra* note 75, at 2.

⁸⁴ *Id.* at 3.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 3.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *United States v. Barry*, No. 201500064, 2016 WL 6426695 at *6 (N. M. Ct. Crim. App. Oct. 31, 2016).

sentence.⁹² Admirals Lorge and Crawford had been friends since 2001.⁹³

C. DJAG role in UCI

On 30 April 2015, the two admirals met to discuss Lorge's clemency options at an office call conducted at Lorge's San Diego headquarters.⁹⁴ Testimony at the DuBay hearing indicates that at one point during this meeting, RADM Crawford told his long-time friend "not to put a target on his back."⁹⁵ At the hearing, Lorge testified that while he could not recall exactly what Crawford had said to him, he felt like Crawford gave legal advice to approve the findings and sentence.⁹⁶ After RADM Crawford returned to Washington, D.C., Lorge and Jones continued to discuss Barry's case. Commander Jones kept insisting that Lorge approve the findings and sentence, but RADM Lorge was still disinclined.⁹⁷ Finally, in an effort to give his boss another option, Jones recommended that Lorge put something in the action that would communicate to the appellate court his sincere and strong reservations about the case.⁹⁸

While pondering that option, RADM Lorge called his old friend on the phone and asked him what he thought about Jones's proposal.⁹⁹ Barry's appellate counsel stated in his affidavit, that during the phone call, RADM Crawford again advised RADM Lorge to approve the findings and sentence and warned him, "If you disapprove the findings, it will ruin your career."¹⁰⁰ Crawford then told him that the most that he would be able to do was to address the appellate court in the action as CDR Jones had recommended.¹⁰¹ Lorge testified at the DuBay hearing that while he could not recall exactly what was said during this phone call, he again felt that he had received legal advice from RADM Crawford.¹⁰² Shortly after the phone call, Lorge approved the findings and sentence and expressed his misgivings about the case in the action to the appellate court.¹⁰³

III. DuBay Hearing

After reviewing all of this evidence, the DuBay judge concluded that senior military leaders, including VADM DeRenzi, RADM Crawford, and CDR Jones all exerted UCI on RADM Lorge during the clemency phase of the court-martial proceedings.¹⁰⁴ Even though VADM DeRenzi never spoke about the Barry case, her comments about Congress second-guessing convening authorities and the amount of time she spent defending them reaffirmed in Lorge's mind what he perceived to be the harsh political landscape surrounding sex assault cases.¹⁰⁵ Admiral Crawford's office visit and telephone call to RADM Lorge were clear cut examples of UCI. His comment to Lorge about "not putting a target on his back" coupled with very clear advice to approve the findings and sentence, provide insight into the amount of "pressure" that RADM Lorge believed Crawford had exerted on him.¹⁰⁶ Judge Spath also noted that CDR Jones's incessant demands that Lorge approve the findings and sentence after wrongly telling him that that was his only option, certainly contributed to the UCI in this case.¹⁰⁷

Judge Spath ultimately concluded that RADM Lorge decided on a course of action that he did not wish to take because of the UCI and bad legal advice.¹⁰⁸ Spath stated that "it appears the final action taken in this case is unfortunate and does not engender confidence in the processing of this case or the military justice system as a whole. Actual or apparent unlawful command influence tainted the final action in this case."¹⁰⁹ Judge Spath acknowledged that even though CAAF's order allowed for him to make conclusions of law and analysis, he conceded that CAAF would ultimately conduct a de novo review of its own.¹¹⁰ That did not keep him from recommending however, that CAAF order a new action at a minimum, or in the alternative, that it honor the GCMCA's original stated desire and order a new trial.¹¹¹

The CAAF has not issued a decision yet in *Barry*, but given its holding in *United States v. Boyce*, the Court is likely to find at least apparent UCI permeated the clemency phase of Barry's court-martial proceedings. Barry was able to set forth "some evidence" at the DuBay hearing that UCI had been exerted on him. The government was unable to prove beyond a reasonable doubt that the predicate facts did not exist or that the UCI did not actually occur. The government

⁹² Declaration of LCDR O'Brien, *supra* note 68, at 2.

⁹³ Declaration of RADM Lorge, *supra* note 78, at 3.

⁹⁴ Findings of Fact & Conclusions, *supra* note 75, at 3.

⁹⁵ *Id.* at 4.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Petition for Reconsideration at 5, *United States v. Barry*, No. 17-0162/NA (C.A.A.F. May 5, 2017).

¹⁰¹ Findings of Fact & Conclusions, *supra* note 75, at 4.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 7.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 8.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 9.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 9.

also failed to convince the DuBay judge and will likely fail to convince CAAF beyond a reasonable doubt that VADM DeRenzi's, CDR Jones's, and RADM Crawford's actions did not place an intolerable strain on the public's perception of military justice. And remember, CAAF is no longer concerned about whether Barry was actually prejudiced by the UCI, it will only look to see what effect it had on the public's perception of the court-martial proceedings.¹¹²

In *United States v. Boyce*, it is important to recall that there was proof that neither the Chief of Staff nor the Secretary of the Air Force had ever spoken to Lt. Gen Franklin about *Boyce*, mostly because both were completely unaware the case existed.¹¹³ In *Barry* however, RADM Crawford specifically met with RADM Lorge in person to discuss his clemency options and then spoke to him again over the phone to specifically discuss them once more. Crawford's warnings to "not put a target on your back" and "if you disapprove the findings it will ruin your career" are nearly identical to the ultimatum the Air Force Chief of Staff gave to Lt. Gen. Franklin telling him that he could either wait to be fired or retire immediately. Given the direct discussions Admirals Crawford and Lorge had about the Barry case, CAAF is almost guaranteed to find apparent UCI had taken place and that Crawford's advice in particular placed an intolerable strain on the public's perception of at least the clemency phase of the court-martial proceedings. Because the SJA repeatedly failed to advise Lorge properly about his clemency options and then later about whether he could order a new hearing, the CAAF is likely to set aside Barry's findings and sentence without prejudice and authorize the convening authority to order a new hearing as the original convening authority had originally requested.

IV. Lessons Learned

So what are the takeaways from *Boyce* and *Barry*? First and foremost, SJAs must remember that they can commit UCI.¹¹⁴ In both cases, the appellate courts found that telephone calls from the Air Force and Navy TJAGs to subordinate SJAs and in *Barry*'s case, to the convening authority directly, placed an intolerable strain on the public's perception of military justice. Telling your boss not to put a target on his back and warning him that political atmospherics require him to take certain action is always going to be "some evidence" of apparent UCI under *United States v. Boyce*. Perhaps the biggest takeaway from *Boyce* is that the Court doesn't even have to look for actual prejudice to the accused.

If they find that UCI placed an intolerable strain on the public's perception of any aspect of the court-martial proceedings, they are going to fashion a remedy to cure it even if the accused has suffered no prejudice because of it.

What can SJA's do then to guard against apparent UCI? For starters, when TJAG calls, don't answer the phone! Kidding aside, you should never, ever put TJAG (or DJAG) in a potentially compromising position by discussing cases that are still pending in your jurisdiction. Providing an update for the high profile tracker is one thing, getting his advice and passing it along to your convening authority is quite another. As we saw in both cases, you, your boss, and TJAG may all end up testifying at a DuBay hearing concerning the intimate details of your private conversations. If your boss feels comfortable enough to pick up the phone and call TJAG to discuss specific cases, you need to know exactly what was said and then try like hell to prevent him from doing it again. Lastly, keep your legal advice free from politics. That can only lead to trouble down the road. The only thing your legal advice should be steeped in is the law and the facts.

At the end of the day, SJAs must figure out how to convey legal advice that comports with the evidence, is grounded in the rules, and is consistent with powers the convening authority can exercise under the UCMJ without cajoling them into taking action that the President or members of Congress might like them to take. Congress has codified a number of procedures to help prevent legal advisors and convening authorities from exerting UCI on their subordinates. In the Fiscal Year 2014 National Defense Authorization Act, Congress amended Article 60, UCMJ to ensure that convening authorities can no longer set aside findings of guilt for sex assault offenses.¹¹⁵ They also severely curtailed what the convening authority can do to alter the sentence.¹¹⁶ Both adult and child sex assault offenses under Article 120, UCMJ now carry with them a mandatory dishonorable discharge or dismissal and must be referred to a general court-martial.¹¹⁷ Additionally, Congress imposed mandatory review of sex assault cases whenever the SJA and the convening authority both agree not to refer a case to trial or when the SJA recommends it but the convening authority then refuses to refer the case.¹¹⁸ In the first scenario, the next higher GCMCA will conduct a review and make an independent decision and in the second, the GCMCA must forward the case to the Service Secretary for review.¹¹⁹

The amendments to Article 60 will help prevent the UCI issues litigated in *Barry*. Had they been in effect, RADM

¹¹² *United States v. Boyce*, 76 M.J. 242, *248 (C.A.A.F. 2017).

¹¹³ *Id.* at *253.

¹¹⁴ *See, e.g.*, *United States v. Youngblood*, 47 M.J. 338 (C.A.A.F. 1997); *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006); *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994); *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986); *United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997); Lieutenant Colonel Daniel G. Brookhart, *Physician Heal Thyself: How Judge Advocates Can Commit Unlawful Command Influence*, ARMY LAW., Mar. 2010.

¹¹⁵ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-55 (2013) [hereinafter FY14 NDAA]. Now at Article 60, UCMJ.

¹¹⁶ *Id.*

¹¹⁷ *See* FY14 NDAA § 1705. Now at Articles 18 and 56, UCMJ.

¹¹⁸ *See* FY14 NDAA § 1744. This section has been incorporated into AR 27-10 para. 5-19c, dated May 11, 2016.

¹¹⁹ *Id.*

Lorge's hands would have been truly tied and he couldn't have set aside the findings and sentence even though he wanted to. In cases where the convening authority has doubts about whether to refer the case despite his SJA's advice, the safest option is to let the convening authority independently work out if they truly want the Service Secretary reviewing their homework. If they insist, send the case file up and let the superior convening authority and their legal advisor conduct an independent review. You get to avoid UCI and your boss gets to avoid retrying the case. The absolute worst thing you can do is to inject politics into the discussion. While John Wayne's counsel to avoid saying "too much" is generally great advice, when it comes to pondering political considerations with the convening authority, the best advice is to say nothing at all!

A Messy Primer on Military Justice Procedure: CAAF Decision Provides Lessons on How to Effectively Navigate the Accused's Right to a Speedy Trial

Major Michael Petrusic*

I. Introduction

In *United States v. Cooley*,¹ the Court of Appeals for the Armed Forces (CAAF) addressed a case that “unfolds like a messy primer on military justice procedure.”² The case featured three sets of charges, with the first set dismissed for a violation of Rule for Courts-Martial (RCM) 707, the second set preferred and then later dismissed by the convening authority so that additional specifications could be added, and the third set referred and finally resulting in a guilty plea.³ “Throughout this time, [Cooley] sat in pretrial confinement for a total of 289 continuous days despite five formal speedy trial demands.”⁴ The military judge ultimately convicted Cooley, pursuant to his conditional guilty plea, of several specifications of attempted sexual misconduct and possession of child pornography, and sentenced him to confinement and a punitive discharge.⁵ But the appellate courts did not take kindly to the excessive pretrial delay, with CAAF ultimately affirming the Coast Guard Court of Criminal Appeals dismissal of the charges on speedy trial grounds.⁶

The pretrial timeline in the *Cooley* case began in July 2012 and did not conclude until his court-martial in October 2013, with Cooley subject to pretrial confinement and restriction for the majority of this time.⁷ Cooley admitted to substantial misconduct and was first placed in confinement on 20 July 2012, but was released and put on restriction a week later.⁸ Although Cooley returned to confinement on 20 December 2012, the government did not prefer the initial charges in the case until 19 February 2013; following an

Article 32 preliminary hearing, the convening authority referred these charges on 18 March 2013.⁹ The military judge dismissed these initial charges without prejudice for a violation of the RCM 707 120-day clock on 23 May 2013.¹⁰ The government re-preferred the charges, but the convening authority dismissed this second set of charges without prejudice on 14 June 2013; the government then re-preferred the original charges along with new charges that same day.¹¹ The convening authority referred the third set of charges on 7 August 2013 following a second preliminary hearing, but the trial counsel requested continuances for arraignment and trial because of logistical issues.¹² Cooley was finally arraigned on 10 September 2013 and tried on 4 October 2013.¹³ The defense submitted five speedy trial demands throughout this period.¹⁴

Based on this convoluted timeline, CAAF affirmed dismissal of the charges on RCM 707¹⁵ and Article 10, Uniform Code of Military Justice (UCMJ)¹⁶ speedy trial grounds.¹⁷ Although the dismissal of charges in this case was based on a particularly sloppy procedural history and questionable pretrial decisions by the government,¹⁸ CAAF's decision nonetheless provides important lessons for both trial counsel seeking to avoid dismissal due to speedy trial violations and defense counsel seeking to zealously enforce the accused's right to a speedy trial.

II. The Law

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¹ *United States v. Cooley*, 75 M.J. 247 (C.A.A.F. 2016).

² *Id.* at 251.

³ *See id.* at 251-252.

⁴ *Id.* at 251.

⁵ *See id.* at 252.

⁶ *See United States v. Cooley*, 75 M.J. 247, 252, 263 (C.A.A.F. 2016). The Court of Appeals for the Armed Forces (CAAF) affirmed the lower court's dismissal of the charges and specifications properly before it, but rejected the lower court's reasoning in several respects. *See id.* at 252-53.

⁷ *See id.* at 253-55.

⁸ *See id.* at 253 (noting that Cooley's restriction was lifted except for certain conditions in August 2012).

⁹ *See id.* at 253-54.

¹⁰ *United States v. Cooley*, 75 M.J. 247, 254 (C.A.A.F. 2016).

¹¹ *See id.*

¹² *See id.* at 254-55.

¹³ *See id.* at 255.

¹⁴ *See id.* at 253-55 (stating that Cooley submitted speedy trial demands on 12 November 2012, 5 December 2012, 25 January 2013, 6 June 2013, and 19 August 2013).

¹⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (2016) [hereinafter MCM].

¹⁶ UCMJ art. 10 (2016).

¹⁷ *See Cooley*, 75 M.J. at 252-53.

¹⁸ *See id.* at 256-57 (characterizing the case as “the outlier that warrants the interposition of Article 10, UCMJ”).

An accused can seek speedy trial relief from four distinct sources: the Fifth and Sixth Amendments to the U.S. Constitution, Article 10 of the UCMJ, and RCM 707. One or more of these sources might apply in a court-martial depending on the facts of the case, with Article 10 and RCM 707 being the most frequently applied avenues of relief in courts-martial.¹⁹

Article 10 is only triggered when a Soldier is arrested or placed in pretrial confinement, and requires that “immediate steps shall be taken to . . . try him or to dismiss the charges and release him.”²⁰ Article 10 does not require constant motion on the part of the government, but it does require that the government be able to show reasonable diligence in bringing the charges to trial.²¹ In determining whether the government has met the Article 10 reasonable diligence standard, courts should apply the four-factor analysis articulated in *Barker v. Wingo*, 407 U.S. 514 (1972), which assesses: “(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant.”²²

Contrary to Article 10, RCM 707 protections are triggered in all courts-martial. This rule requires that the government bring an accused “to trial within 120 days after the earlier of: (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or (3) Entry on active duty under R.C.M. 204.”²³ The accused is “brought to trial” for purposes of this rule at arraignment.²⁴ The 120-day speedy trial clock can restart in the case of dismissal, release from pretrial restraint for a significant period, or a government appeal.²⁵ Certain periods of time are excluded from the 120-day count, including pretrial delays approved by

a military judge (after referral) or the convening authority (before referral).²⁶ The military judge may dismiss charges with or without prejudice for failure to comply with the requirements of RCM 707.²⁷

III. Government Lessons Learned

The government made several missteps in the *Cooley* case that ultimately led to the dismissal of charges based on both Article 10 and RCM 707. The following are some of the key learning points from *Cooley* for government counsel at the trial level:

Maintain Momentum in Pretrial Processing: The pretrial processing of *Cooley*’s court-martial inexplicably stalled at numerous points, including during the investigative stage, before preferral of charges, and before referral.²⁸ The CAAF criticized the government both for the excessive length of these delays and for the inadequate justification for them.²⁹ The trial counsel must always track actions that may trigger speedy trial protections and then maintain consistent momentum in pretrial processing, especially when an accused is in pretrial confinement and the more stringent protections of Article 10 have attached. Where trial counsel recognize that pretrial processing of a case will be delayed due to factors outside of the government counsel’s control, they must avoid any actions that will trigger speedy trial protections, especially rushing to place the accused in restraint or preferring charges. Maintaining momentum in moving the case to trial will help trial counsel ensure they do not cut too close to the 120-day deadline of RCM 707, and will help demonstrate the government’s “reasonable diligence” in

¹⁹ The Fifth Amendment applies to pre-preferral delay and provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, . . . without due process of law.” U.S. CONST. amend. V. To make a Fifth Amendment speedy trial claim, the defense must show that there has been egregious or intentional tactical delay by the government, and actual—as opposed to speculative—prejudice to the accused’s case. See *United States v. Reed*, 41 M.J. 449, 450–52 (C.A.A.F. 1995) (finding a seventeen month delay between identification of the accused as a suspect and preferral of charges was not egregious or intentional tactical delay and noting that where the accused is not confined, the statute of limitations is the “primary protection” against pre-accusation delay). The Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. CONST. amend. VI. In determining whether the government has violated the accused’s Sixth Amendment rights, courts will conduct a balancing test considering the length of the delay, the reason for the delay, whether the accused demanded speedy trial, and whether there was actual prejudice to the accused. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995) (applying the *Barker* balancing test).

²⁰ UCMJ art. 10 (2016). Although both Article 10 and Rule for Courts-Martial (RCM) 707 protect the right to a speedy trial, courts have made clear these are distinct sources of speedy trial rights and limitations as to one are not necessarily applicable to the other. See *United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005) (“We have found . . . the language of Article 10 is ‘clearly different’ from R.C.M. 707 and have held that Article 10 is not restricted by R.C.M. 707.”).

²¹ See *Cooley*, 75 M.J. at 259; *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993) (“Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive.”). The CAAF has rejected a set number of days at which Article 10 is presumed to have been violated

in favor of the reasonable diligence standard. See *Kossman*, 38 M.J. at 261–62.

²² *Cooley*, 75 M.J. at 259.

²³ MCM, *supra* note 15, R.C.M. 707(a). Conditions on liberty and administrative restraint “imposed for operational or other military purposes independent of military justice” are not types of restraint that trigger the RCM 707 speedy trial clock. See MCM, *supra* note 15, R.C.M. 304(a)(1), (h).

²⁴ MCM, *supra* note 15, R.C.M. 707(b)(1).

²⁵ See MCM, *supra* note 15, R.C.M. 707(b)(3).

²⁶ See MCM, *supra* note 15, R.C.M. 707(c) (providing in the discussion a nonexclusive list of potential reasons the convening authority or military judge may grant excludable delay).

²⁷ See MCM, *supra* note 15, R.C.M. 707(d)(1).

²⁸ See *Cooley*, 75 M.J. at 253–55 (detailing, *inter alia*, a more than one month delay in processing digital evidence, a two month delay in preferring charges after *Cooley* was confined for a second time, a two week delay in *Cooley*’s initial arraignment, a three week delay in the convening authority dismissing the second set of charges to add additional charges, a more than one month delay to conduct the preliminary hearing on the additional charges, and a more than one month delay between referral of the third set of charges and arraignment).

²⁹ See *id.* at 259–62.

bringing the accused to trial for Article 10 purposes.³⁰ Where delay does occur, trial counsel must ensure it is minimal and that there is adequate justification for the delay.

Track and Document Trial Timelines Closely: In the *Cooley* decision, CAAF repeatedly criticized the government for the lack of information in the record explaining periods of pretrial delay.³¹ This was problematic for the government as it held the burden of documenting delay and the reasons for it to demonstrate the reasonable diligence required by Article 10.³² And documenting delay—particularly any periods of excludable delay—is also essential where Article 10 protections have not been triggered both to ensure the government properly tracks the 120-day clock and to help trial counsel respond to defense speedy trial motions under RCM 707.³³ In short, the government always bears the burden of accurately and diligently tracking all pretrial processing, and the reasons and duration of any delays.

Avoid Unnecessary Investigative Delay: The CAAF noted that investigators seized Cooley’s electronics on 20 July 2012, but failed to forward these devices for digital forensic analysis until 7 September 2012.³⁴ And after receiving the results of this analysis on 1 October 2012 indicating the presence of apparent child pornography, investigators did not forward the suspect images to the National Center for Missing and Exploited Children to determine if they matched known images of child pornography until 14 November 2012.³⁵ These facts illustrate that trial counsel must maintain pressure on investigators to expedite the processing of evidence once the RCM 707 120-day clock has been triggered, especially in cases where the accused has been placed in pretrial confinement and the enhanced protections of Article 10 apply.

Immediately Prefer Charges Upon Pretrial Confinement: Notwithstanding that Cooley was first put in pretrial

confinement on 20 July 2012 and then confined again on 20 December 2012, the first set of charges in the case were not preferred until 19 February 2013.³⁶ The U.S. Army Trial Judiciary’s Standing Operating Procedures for Military Magistrates indicates a strong preference for having charges preferred against a confined Soldier by the time of the magistrate review, stating: “[a]s the probable cause standard for ordering a Soldier into pretrial confinement is the same standard used in preferring charges, a trial counsel should be able to provide a military magistrate with a copy of the preferred charge sheet prior to the actual review.”³⁷ Where an offense is serious enough to put an accused in pretrial confinement, it is also serious enough for the trial counsel to prioritize preparing the charge sheet.³⁸ Contrary to the months-long delay in preferring charges in the *Cooley* case, the charge sheet in such cases must be prepared either by the time of the magistrate review, or very shortly thereafter.

Do not Sit on Charges: Following the trial court’s dismissal of the first set of charges against Cooley without prejudice, the government re-preferred the same charges on 23 May 2013, and then dismissed those charges about three weeks later, apparently to add two new charges.³⁹ The government then incurred an additional five week delay to conduct a second preliminary hearing into misconduct that the government was already aware of before the parties conducted the initial preliminary hearing in the case.⁴⁰ The CAAF took note of this needless delay, stating the “Government’s belated decision to prefer a charge it could have brought months earlier, occasioning an additional 135 days of delay, weighs heavily against the Government in considering whether it proceeded with reasonable diligence for purposes of Article 10, UCMJ.”⁴¹ Where the government has speedy trial concerns, and particularly when the accused is in pretrial confinement, the government must move quickly to bring all known offenses it wishes to pursue to trial, rather

³⁰ Counsel must think beyond the 120-day clock of RCM 707 when an accused has been placed in pretrial confinement because the fact that the prosecution meets the 120-day standard does not demonstrate that the government has met the requirements of Article 10. *See id.* at 259.

³¹ *See id.* at 260–62. For example, in one portion of the opinion, the court states: “Unlike past cases in which the Government’s explanations for delay have been justified, . . . the Government has failed to provide adequate support and evidence in this case. Nothing in the record supports these claims or indicates that the Government acted with reasonable diligence after the May 23, 2013, dismissal.” *Id.* at 261 (citations omitted).

³² “Under Article 10, UCMJ, outside of an explicit delay caused by the defense, the Government bears the burden to demonstrate and explain reasonable diligence in moving its case forward in response to a motion to dismiss.” *Id.* at 260. “[I]t is the Government’s responsibility to provide evidence showing the actions necessitated and executed in a particular case justified delay when an accused was in pretrial confinement.” *Id.* at 259.

³³ *See MCM, supra* note 15, R.C.M. 707(c)(2) (“Upon accused’s timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made a part of the appellate record.”). The record prepared by the government should include written documentation of all excludable delay granted by the convening authority prior to referral for any reasons, including delays requested by the defense (which also must be approved by the convening authority). *See MCM, supra* note 15, R.C.M. 707(c)(1) discussion.

³⁴ *See Cooley*, 75 M.J. at 253.

³⁵ *See id.* The CAAF decision does not indicate why the processing of this evidence was so significantly delayed.

³⁶ *See id.*

³⁷ U.S. ARMY TRIAL JUDICIARY, STANDING OPERATING PROCEDURES FOR MILITARY MAGISTRATES 12 (10 Sept. 2013).

³⁸ The Military Justice Act of 2016 further codifies the need to expedite the processing of charges for which the accused has been placed in pretrial confinement by requiring the President to set procedures to ensure the prompt forwarding of these charges. Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5121, 130 Stat. 2000 (2016).

³⁹ *See Cooley*, 75 M.J. at 254.

⁴⁰ *See id.* at 254–55.

⁴¹ *Id.* at 253. The CAAF further noted that when an accused is in pretrial confinement, it is not the case that “the Government, having had charges dismissed without prejudice for violating R.C.M. 707, may take that as an invitation to start its charging decisions afresh based on information it had access to before the initial charges were referred and dismissed.” *Id.* at 257.

than slow-rolling the process to perfect its case.

Avoid Gamesmanship: In conducting its Article 10 analysis, the only prejudice identified by CAAF stemmed from the government's mishandling of a defense expert request. The defense first requested an expert in psychology on 17 April 2013, which the convening authority denied; the military judge at the time then ordered the government to provide an expert on 16 May 2013.⁴² After the military judge's first dismissal of the charges without prejudice, the defense again requested an expert in the same field on 9 July 2013; the convening authority denied this second request, and the new military judge ordered the government to provide the same expert assistance the first judge had already ordered on 11 September 2013.⁴³ Because of the late appointment of the expert, he was unable to meet with Cooley until four days before trial and was unable to conduct several tests due to the last-minute consultation.⁴⁴ The CAAF determined this was prejudicial because the government-caused "delay created a situation in which it appears Appellant was hampered in his ability to present evidence in mitigation."⁴⁵ Trial counsel must avoid litigating—or relitigating⁴⁶—unnecessary motions and should endeavor to provide the defense all the resources they need to adequately represent the accused, particularly when the accused is in pretrial confinement.

Have Trial Logistics Issues Resolved Before Referral: Even though the convening authority referred the final set of charges against Cooley to court-martial on 7 August 2013, the government requested that the military judge grant continuances of the arraignment and trial dates in order to conduct additional logistical preparations, which pushed Cooley's trial out to 4 October 2013.⁴⁷ The CAAF was critical of this additional pretrial delay for the government to logistically and administratively prepare for trial,⁴⁸ especially considering that Cooley was first placed in confinement on 20 July 2012 and first had charges preferred against him on 19 February 2013.⁴⁹ Where an accused is in pretrial confinement, the government simply has to be ready to go to trial in all respects—substantively, logistically, and

administratively—as soon as the convening authority refers the case to court-martial or very shortly thereafter.

IV. Defense Lessons Learned

Although the unforced errors detailed in the *Cooley* decision were on the government side, CAAF's opinion reinforces the importance of several steps defense counsel can take to ensure their clients receive a quick disposition of their case⁵⁰ and are best-situated to assert speedy trial errors at the appellate level:

Aggressively Demand Speedy Trial: Cooley's defense counsel submitted speedy trial demands five times throughout the pretrial processing of his case,⁵¹ and CAAF relied on this fact, in part, to determine that the government failed to meet its Article 10 reasonable diligence obligation.⁵² Indeed, whether the defense has demanded speedy trial is one of the four factors courts are required to consider when assessing whether the government has met the requirements of Article 10.⁵³ But even where an accused is not subject to the additional protections of Article 10, diligently demanding speedy trial will help ensure the defense is not unduly credited with pretrial delay, and could help create a record of the causes for excessive pretrial delay that would be helpful to the defense on appeal.

Preserve Speedy Trial Issues for Appeal: Cooley pleaded guilty at his court-martial, but his plea was conditioned on preserving his right to appeal RCM 707 and Article 10 violations.⁵⁴ This was important because a "plea of guilty which results in a finding of guilty waives any [RCM 707] speedy trial issue as to that offense"⁵⁵ unless the accused enters "a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion."⁵⁶ Furthermore, prior to pleading guilty, Cooley moved to dismiss all charges and specifications at several points due to violations of Article 10 and RCM 707,⁵⁷ which was

⁴² See *id.* at 254.

⁴³ See *United States v. Cooley*, 75 M.J. 247, 254-55 (C.A.A.F. 2016).

⁴⁴ See *id.*

⁴⁵ *Id.* at 262 (noting "the Government forced Appellant to relitigate a request for expert assistance that had previously been approved by a military judge—despite the same charges being included in *Cooley III* that were included in *Cooley I*—resulting in further delay," "the expert was unable to meet with Appellant until September 30, 2013, four days before the general court-martial, and was unable to administer at least six sexual offender-related tests because he did not have the time," and "the expert was only able to form a limited impression of Appellant.").

⁴⁶ In addition to potential speedy trial concerns that may arise from relitigating matters, trial counsel should also consider whether the government's action is barred by RCM 905(g), which states that any matter finally determined by a court-martial "may not be disputed by the United States in any other court-martial of the same accused" arising from the same transaction. MCM, *supra* note 15, R.C.M. 905(g).

⁴⁷ See *Cooley*, 75 M.J. at 255.

⁴⁸ See *id.* at 261.

⁴⁹ See *id.* at 253.

⁵⁰ Although there may be circumstances where a strategic defense counsel may not want to rush a case to trial, in the majority of cases, the client will likely desire a quick resolution to the case, especially where the accused is in pretrial confinement or otherwise restricted.

⁵¹ See *id.* at 262.

⁵² See *United States v. Cooley*, 75 M.J. 247, 262 (C.A.A.F. 2016).

⁵³ See *supra* note 22 and accompanying text.

⁵⁴ See *Cooley*, 75 M.J. at 252.

⁵⁵ MCM, *supra* note 15, R.C.M. 707(e).

⁵⁶ MCM, *supra* note 15, R.C.M. 910(a)(2).

⁵⁷ *Cooley*, 75 M.J. at 255.

significant because CAAF has previously held that “where an accused unsuccessfully raises an Article 10 issue and thereafter pleads guilty, waiver does not apply.”⁵⁸ Where defense counsel believes the accused’s right to a speedy trial may be at issue, they must ensure they both raise an objection at or before court-martial,⁵⁹ and preserve the issue for appeal if the accused pleads guilty.

Ensure the Record Properly Reflects Reasons for Delay:

The reason for pretrial delay is one of the four factors courts must consider in assessing whether the government has met the Article 10 reasonable diligence standard, and approved defense delay can be excluded from the RCM 707 120-day clock.⁶⁰ The government bears most of the burden of ensuring the appellate record properly reflects all periods of delay in order to allow litigation of speedy trial issues on appeal,⁶¹ but skilled defense counsel should also closely scrutinize the characterization of pretrial delay to ensure that periods of delay are not improperly attributed to the defense, and that the delay is characterized in a manner that weighs most heavily against the government on appeal.⁶²

V. Conclusion

The *Cooley* case represents an extreme example of needless pretrial government delay that necessitated an extraordinary remedy from CAAF. Though the delays in this case and the reasons for those delays were particularly egregious, the opinion does reiterate numerous simple steps both parties can take at the trial level to best protect the interests of their client. Both trial and defense counsel should take note of these lessons to ensure that simple attorney errors do not lead to the government losing a favorable verdict on appeal, or the defense depriving their client of the opportunity to later litigate speedy trial concerns before the appellate courts.

⁵⁸ *Mizgala*, 61 M.J. at 126.

⁵⁹ *See MCM, supra* note 15, R.C.M. 707(e) discussion (“Speedy trial issues may also be waived by a failure to raise the issue at trial.”); *MCM, supra* note 15, R.C.M. 905(e) (“Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.”); *MCM, supra* note 15, R.C.M. 907(b)(2) (noting that motions for dismissal under RCM 707 is a waivable ground).

⁶⁰ *See supra* notes 22–25 and accompanying text.

⁶¹ *See supra* notes 31–33 and accompanying text.

⁶² *See Cooley*, 75 M.J. at 260 (noting that for purposes of assessing potential Article 10 violations, “a deliberate effort by the Government to delay the trial in order to hamper the defense weighs heavily against the Government,” more neutral reasons like negligence or a busy court docket weigh less heavily against the government, and defense delay weighs against the accused).

Post-Trial Procedure and Review of Courts-Martial Under the Military Justice Act of 2016

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In August 2013, the Chairman of the Joint Chiefs of Staff, writing on behalf of the Joint Chiefs, recommended that the Secretary of Defense “direct the Department of Defense General Counsel to conduct a comprehensive, holistic review of the UCMJ [Uniform Code of Military Justice] and the military justice system . . . solely intended to ensure that our system most effectively and efficiently does justice consistent with due process and good order and discipline.”¹ The Secretary of Defense directed his General Counsel to conduct a review of the UCMJ and the rules in the Manual for Courts-Martial and service regulations for implementing the UCMJ.² The General Counsel established the Military Justice Review Group (MJRG) to perform the review and suggest changes.³

The MJRG’s report eventually was sent to Congress and became the basis of the Military Justice Act of 2016 (MJA), part of National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, which was signed into law by President Barack Obama on December 23, 2016.⁴ By its own terms, the MJA becomes effective for all but cases previously referred to trial by court-martial “on the date designated by the President, which date shall be not later than the first day of the first calendar month that begins two years after the date of enactment of this Act.”⁵ Therefore, the MJA takes effect no later than 1 January 2019.

Many of the changes are somewhat cosmetic. The articles have been restyled to adopt clear and consistent style conventions, offenses have been reorganized under different articles,⁶ and some offenses defined by the President as to the prejudice of good order and discipline under the general article⁷ have been codified.⁸

But Congress substantially altered court-martial post-trial and appellate procedures. The MJA aims to streamline

the process and continues the recent trend to limit the role of the convening authority. This article summarizes those changes that will apply to special and general courts-martial.

I. Adjournment of the Court-Martial

Currently, after final adjournment of a court-martial, the trial counsel is required to promptly notify the accused’s commander, the convening authority, and, when confinement is adjudged, the officer in charge of the confinement facility of the results of trial.⁹ The MJA takes a different approach. It tasks the military judge with preparing “a document entitled ‘Statement of Trial Results’” for entry into the record.¹⁰ “Copies of the ‘Statement of Trial Results’ shall be provided promptly to the convening authority, the accused, and any victim of the offense.”¹¹ Because this last statement is written in the passive voice, it is unclear who is required to make the appropriate distribution. It is likely that this duty will be assigned to the trial counsel by either a rule for court-martial or by the military judge. After trial, the military judge is required to address all post-trial motions that “may affect a plea, a finding, the sentence, the Statement of Trial Results, the record of trial, or any post-trial action by the convening authority” that may be resolved before entry of judgment.¹²

II. The Record of Trial

Currently, the trial counsel is charged with seeing that the record of trial is prepared, under the direction of the military judge.¹³ Once the record is prepared, the trial counsel examines it for accuracy and causes any necessary corrections to be made.¹⁴ “Except when unreasonable delay will result, the trial counsel shall permit the defense counsel to examine the

¹ U.S. Dep’t of Def., Memorandum from the Chairman of the Joint Chiefs of Staff on Recommendation of the Joint Chiefs of Staff with respect to Holistic Review of the Uniform Code of Military Justice (Aug. 5, 2013), *quoted in* MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP: PART I: UCMJ RECOMMENDATIONS 87 (Mar. 25, 2015) [hereinafter MJRG REP.].

² MJRG REP., *supra* note 1, at 5.

³ *Id.*

⁴ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542, 130 Stat. 2894, 2894-968 (2016) [hereinafter MJA].

⁵ MJA, *supra* note 4, §§542(a), (c)(2).

⁶ MJA, *supra* note 4, §5401, Reorganization of Punitive Articles.

⁷ UCMJ art. 134 (2016).

⁸ *See, e.g.*, MJA, § 5426, UCMJ, art. 114 (new). Article 114 previously described the offense of dueling. The offense has been retitled “Endangerment offenses,” which will include the offenses of “Reckless Endangerment,” “Firearm Discharge, Endangering Human Life,” and “Carrying Concealed Weapon,” in addition to “Dueling.” Those offenses are currently found in MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. iv, ¶¶ 100a, 81, 68a, 112 (2016 ed.), respectively.

⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1101(a) (2016) [hereinafter MCM].

¹⁰ MJA, *supra* note 4, §5321, UCMJ art. 60(a)(1) (new).

¹¹ *Id.* §5321, UCMJ art. 60(a)(2) (new).

¹² *Id.* §5321, UCMJ art. 60(b) (new).

¹³ MCM, *supra* note 9, R.C.M. 1103(b)(1) (2016).

¹⁴ MCM, *supra* note 9, R.C.M. 1103(i)(1)(A) (2016).

record before authentication.”¹⁵ The military judge is then required to authenticate—“declare[] that the record accurately reports the proceedings¹⁶—the record of general courts-martial, and special courts-martial in which a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months is adjudged.”¹⁷

Military judges will rejoice in the MJA’s deletion of the requirement that they authenticate the record. Instead, court reporters will certify the accuracy of the record.¹⁸ Of course, the military judge will resolve any disputes between the parties concerning the contents of the record before entering judgment.¹⁹

III. Action of the Convening Authority

Until enactment of the NDAA FY 2014),²⁰ the convening authority’s ability to modify the findings and sentence of a court-martial was basically “unfettered,”²¹ as long as the modification did not increase the charges or the sentence. The convening authority was not required to act on the findings;²² however, she was required to act on the sentence, as the jurisdiction of the Courts of Criminal Appeals (CCA) is limited to cases with an approved sentence.²³ The convening authority could set aside a finding of guilty²⁴ or approve a finding of guilty to a lesser-included offense.²⁵ She could “approve, disapprove, commute, or suspend the sentence in whole or in part.”²⁶

In the NDAA FY2014, Congress eliminated what it termed the “Unlimited Command Prerogative and Discretion” of the convening authority to approve a court-martial’s findings and sentence.²⁷ The MJA continues restricting the convening authority’s actions, although these restrictions will now be located in a new provision, Article 60a, UCMJ.²⁸

Under the MJA, the convening authority will be able to act on the findings only if the maximum authorized sentence to confinement for any offense of which the accused is convicted is two years or less;²⁹ the total of the sentences to confinement running consecutively does not exceed six months;³⁰ a punitive discharge is not adjudged;³¹ and the accused was not convicted of an offense under Article 120(a) or (b), Article 120b, or any other offense specified by the Secretary of Defense.³²

Generally, the convening authority will have the authority to reduce, commute, or suspend the sentence only if the total period of confinement adjudged for all offenses running consecutively is six months or less³³ but no punitive discharge³⁴ or sentence to death³⁵ is imposed. The convening authority has broader powers over the sentence in two circumstances:

(1) Upon recommendation of the military judge, the convening authority may suspend a sentence to confinement, in whole or in part, or a sentence to a punitive discharge.³⁶ Nevertheless, the convening authority may not suspend a mandatory minimum sentence or suspend a sentence to an extent greater than recommended by the military judge.³⁷

(2) If an accused “provides substantial assistance in the investigation or prosecution of another person,” whether that be before or after entry of judgment, the convening authority may, upon recommendation by the trial counsel, “reduce, commute, or suspend a sentence in whole or in part, including any mandatory minimum sentence.”³⁸ This provision provides substantial incentive for an accused to cooperate with the Government in investigating and prosecuting others.

In determining whether to act on a case, the convening authority is required to consider written submissions of the

¹⁵ MCM, *supra* note 9, R.C.M. 1103(i)(1)(B) (2016).

¹⁶ MCM, *supra* note 9, R.C.M. 1104(a)(1) (2016).

¹⁷ MCM, *supra* note 9, R.C.M. 1104(a)(2)(A) (2016). Other records of trial are authenticated under service regulations. *Id.*

¹⁸ MJA, *supra* note 4, §5238(1), UCMJ, art. 54(a) (new).

¹⁹ *See id.*, §5321, UCMJ, art. 60(b) (new).

²⁰ National Defense Authorization Act For Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 955 (2013).

²¹ *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (quoting *United States v. Finster*, 51 M.J. 185, 186 (C.A.A.F. 1999)).

²² UCMJ art. 60(c)(3) (2016).

²³ UCMJ art. 66(b)(1) (2016).

²⁴ UCMJ art. 60(c)(3)(A) (2016).

²⁵ UCMJ art. 60(c)(3)(B) (2016).

²⁶ UCMJ art. 60(c)(2) (2016).

²⁷ National Defense Authorization Act For Fiscal Year 2014, Pub. L. No. 113-66, §1702(b), 127 Stat. 672, 955 (2013).

²⁸ MJA, *supra* note 4, §5322, UCMJ, art. 60a (new).

²⁹ *Id.* §5322, UCMJ, art. 60a(a)(1)(B), (a)(2)(A) (new).

³⁰ *Id.* §5322, UCMJ, art. 60a(a)(2)(B) (new).

³¹ *Id.* §5322, UCMJ, art. 60a(a)(2)(C) (new).

³² *Id.* §5322, UCMJ, art. 60a(a)(2)(D) (new).

³³ *Id.* §5322, UCMJ, art. 60a(b)(1)(A) (new).

³⁴ *Id.* §5322, UCMJ, art. 60a(b)(1)(B) (new).

³⁵ *Id.* §5322, UCMJ, art. 60a(b)(1)(C) (new).

³⁶ *Id.* §5322, UCMJ, art. 60a(c)(1) (new). The military judge’s recommendation must be included in the Statement of Trial Results and contain an explanation of the reasons for the recommendation. *Id.*

³⁷ *Id.* §5322, UCMJ art. 60a(c)(2) (new).

³⁸ *Id.* §5322, UCMJ art. 60a(d) (new).

accused and any victim of an offense.³⁹ She may not consider “any submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial.”⁴⁰ “If the convening authority reduces, commutes, or suspends the sentence,” she “shall include a written explanation of the reasons for such action.”⁴¹ The convening authority must forward the action to the military judge, with copies to the accused and any victim.⁴²

IV. Entry of Judgment

After receiving the case from the convening authority, the military judge will enter the judgment of the court into the record of trial.⁴³ The judgment of the court will consist of the Statement of Trial Results and any modifications made due to the action of the convening authority or any post-trial ruling of the military judge that affects the plea, the findings, or the sentence.⁴⁴ The judgment must be provided to the accused and any victim, and made available to the public.⁴⁵ If, after entry of judgment, the convening authority acts to reduce, commute, or suspend a sentence due to the accused’s substantial assistance, she must forward this action “to the chief trial judge for appropriate modification of the entry of judgment, which shall be transmitted to The Judge Advocate General (TJAG) for appropriate action.”⁴⁶ It is only after the entry of judgment that an accused may waive or withdraw from appellate review.⁴⁷

V. Government Appeals of the Sentence

The entry of judgment also starts a 60-day clock, during which the Government may, with the approval of TJAG, appeal the sentence to the CCA on the grounds that: “(A) the sentence violates the law; or (B) the sentence is plainly unreasonable.”⁴⁸ This is a mischievous provision.

It was proposed by the MJRG to take effect five years after implementation of the MJA, within a sentencing regime

in which the military judge would have responsibility for sentencing in all but death penalty cases and the judge’s sentencing prerogatives would be constrained by sentencing parameters.⁴⁹ But Congress refused to adopt judge alone sentencing or sentencing parameters.⁵⁰ Instead, it enacted a system whereby the default is judge alone sentencing, but an accused who elects trial on the merits before members may demand member sentencing.⁵¹ Much as they do today, the members “shall announce a single sentence for all of the offenses of which the accused was found guilty.”⁵² Judge alone sentencing is different and a significant departure from past practice:

[T]he military judge shall, with respect to each offense of which the accused is found guilty, specify the term of confinement, if any, and the amount of the fine, if any. If the accused is sentenced to confinement for more than one offense, the military judge shall specify whether the terms of confinement are to run consecutively or concurrently.⁵³

Congress has left it to the President to expound the rules for the military judge to apply in determining how the sentences should run.

Under the MJA regime, we can expect not only that sentence disparities will continue but be exacerbated by the incongruous methods court members and military judges must use in determining an appropriate sentence. In subtle ways, perhaps, it may affect government charging decisions. It will certainly put pressure on trial defense counsel in advising an accused. For example, if an accused wishes to be sentenced by court members, he will have to plead not guilty to at least one offense,⁵⁴ which may weaken the ability of the defense to argue that by pleading guilty the accused has taken the first step towards rehabilitation.

These disparities are also likely, at least initially, to encourage a significant number of government appeals. But

³⁹ *Id.* §5322, UCMJ art. 60a(e)(1) (new).

⁴⁰ *Id.* §5322, UCMJ art. 60a(e)(2) (new).

⁴¹ *Id.* §5322, UCMJ art. 60a(f)(2) (new).

⁴² *Id.* §5322, UCMJ art. 60a(f)(1) (new).

⁴³ *Id.* §5324, UCMJ art. 60c(a)(1) (new).

⁴⁴ *Id.* §5324, UCMJ art. 60c(a)(1) (new).

⁴⁵ *Id.* §5324, UCMJ art. 60c(a)(2) (new). The easiest way to make the judgment available to the public would appear to be through a webpage.

⁴⁶ *Id.* §5322, UCMJ art. 60a(f)(3) (new).

⁴⁷ *Id.* §5325, UCMJ art. 61(a), (b) (new). An accused may neither waive nor withdraw from appellate review in a death penalty case. *Id.* UCMJ, art. 61(c) (new).

⁴⁸ *Id.* §5301(a), UCMJ art. 56(d)(1) (new); *Id.* §5330(b), UCMJ, art. 66(b)(2) (new). It appears the decision of the CCA on sentence will be subject to review at the Court of Appeals for the Armed Forces. *See id.* §5331(b), UCMJ, art. 67(c)(1) (new).

⁴⁹ MJRG REP., *supra* note 1, at 511–14, 524–25.

⁵⁰ *See* MJA, *supra* note 4, § 5301(a), UCMJ, art. 56(c)(2), (3) (new).

⁵¹ *Id.* §5182(b), UCMJ art. 25(d)(1) (new). The statute uses the term “request.”

⁵² *Id.* §5301(a), UCMJ art. 56(c)(3) (new).

⁵³ *Id.* §5301(a), UCMJ art. 56(c)(2) (new).

⁵⁴ *See id.* §5182(b), UCMJ art. 25(d)(1) (new).

such appeals will exact a cost. In cases in which the imposed sentence does not meet the jurisdictional minimum for appellate review by the CCA, the accused will be entitled, upon filing an appeal, to full review of the case, not just review of the sentence.⁵⁵ Furthermore, most staff judge advocates will not be enthusiastic about marshaling the resources and witnesses necessary to hold a rehearing on sentence.

VI. Initial Review of Court-Martial Convictions

A. The Current Law

Under current law, if an accused does not waive or withdraw from appellate review,⁵⁶ the disposition of the case will depend on the approved sentence as follows:

(1) For cases in which the sentence, as approved by the convening authority, includes death, a punitive discharge, or confinement for at least one year, TJAG must refer the case to the CCA.⁵⁷ The CCA “may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record should be approved.”⁵⁸

(2) If the approved sentence does not meet the jurisdictional minimum to be referred to the CCA, the case is reviewed as follows:

(a) General court-martial cases “shall be examined in the office of the Judge Advocate General,” and “[i]f any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both.”⁵⁹

(b) Other cases “may be modified or set aside in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.”⁶⁰

(c) Cases in which there is a guilty finding but are not reviewed under Article 66 or Article 69 “shall be reviewed by a judge advocate under regulations of the Secretary con-

cerned.”⁶¹ The judge advocate is required to conclude in writing “as to whether: (A) the court had jurisdiction over the accused and the offense; (B) the charge and specifications stated an offense; and (C) the sentence was within the limits prescribed as a matter of law.”⁶² The judge advocate must respond to each error alleged in writing by the accused and recommend appropriate action.⁶³

The Judge Advocate General may refer cases falling under (2)(a) and (b) to the CCA for “action only with respect to matters of law.”⁶⁴

B. Under the MJA

1. Cases Eligible for Direct Review

Under the MJA, unless an accused waives or withdraws from appellate review,⁶⁵ the CCA must review (automatic review) any case in which the judgment entered includes a sentence to death, a punitive discharge, or confinement for two years or more.⁶⁶ An accused is also entitled to have the CCA review his case if he *files a timely appeal* in the following situations:

(A) the sentence to confinement exceeds six months but it not subject to automatic review;

(B) the Government previously appealed the case under Article 62;

(C) The Judge Advocate General previously sent the case to the CCA for review of the sentence under Article 56(d); or

(D) the accused applies for review from a decision of TJAG under Article 69(d)(1)(B) “*and the application has been granted by the Court.*”⁶⁷

Whether an accused is entitled to automatic review or files a timely appeal, the CCA is required to review the whole case for error, whether issues are raised or not, as the CCA “may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.”⁶⁸ In cases where a military judge sentenced the accused, the CCA will, apparently, be required to consider whether the sentence on each offense is correct in

⁵⁵ *Id.* §5330(b), UCMJ art. 66(b)(1)(c) (new).

⁵⁶ An accused with an approved sentence to death may not waive or withdraw from appellate review. UCMJ art. 61(a), (b).

⁵⁷ UCMJ art. 66(b) (2016).

⁵⁸ UCMJ art. 66(c) (2016).

⁵⁹ UCMJ art. 69(a) (2016).

⁶⁰ UCMJ art. 69(b) (2016).

⁶¹ UCMJ art. 64(a) (2016).

⁶² UCMJ art. 64(a)(1) (2016).

⁶³ UCMJ art. 64(a)(3) (2016).

⁶⁴ UCMJ art. 69(d) (2016).

⁶⁵ MJA, *supra* note 4, §5325, UCMJ art. 61(a), (b) (new). An accused may not waive or withdraw from appellate review if the judgment entered includes a sentence to death. *Id.* §5325, UCMJ art. 61(c) (new).

⁶⁶ *Id.* §5330(b), UCMJ art. 66(b)(3) (new).

⁶⁷ *Id.* §5330(b), UCMJ art. 66(b)(1) (new) (emphasis added).

⁶⁸ *Id.* §5330(b), UCMJ art. 66(d)(1) (new).

law and fact and should be approved, and whether the military judge abused his discretion in determining whether the sentences should run consecutively or concurrently.

2. Cases Not Eligible for Direct Appeal

Cases not eligible for appeal to the CCA and cases in which appeal is waived, withdrawn, or not filed will be reviewed by an attorney in the Office of The Judge Advocate General.⁶⁹ Review in such cases is limited to conclusions as to the trial court's jurisdiction over the accused and the offense, that the charge and specification stated an offense, and that the sentence was within prescribed limits as a matter of law.⁷⁰ "If after a review of a record . . . , the attorney conducting the review believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part," or order a rehearing.⁷¹

In cases not reviewed by the CCA, TJAG may, upon application of the accused, modify or set aside, in whole or in part, the findings and sentence.⁷² After acting on the case, TJAG may refer it to the CCA or the accused may submit an application for review at the CCA.⁷³ The CCA may grant an accused's application only if the case is timely filed and "demonstrates a substantial basis for concluding that the action on review . . . constituted prejudicial error."⁷⁴ This appears to be a higher standard than the "good cause shown" standard an accused with a jurisdictional sentence would have to meet to get his case reviewed by the Court of Appeals for the Armed Forces (CAAF).⁷⁵ In any case reviewed by the CCA under Article 69, "the court may take action only with respect to matters of law."⁷⁶

C. Government Appeals of the Sentence

When the government appeals the sentence within sixty days of the entry of judgment,⁷⁷ the CCA may consider whether the sentence "violates the law" or is "plainly unreasonable."⁷⁸ As explained above, this rule is based on an

MJRG proposal in which all sentencing, except for death penalty cases, would be performed by a military judge sitting alone, using sentencing parameters. Under such a regime, there probably would have been a presumption that a sentence within the parameters would not be plainly unreasonable and, therefore, great deference would be afforded such a sentence. Without parameters there will likely be greater disparity in sentencing than anticipated by the MJRG and nothing to measure a sentence's unreasonableness against, other than each individual appellate judge's experience, which amounts to pure equity.⁷⁹

As enacted, government appeals of sentences provide a perverse incentive for the government not to appeal very light sentences—those not entitled to normal review at the CCA—because to do so would grant an accused complete review of his case.⁸⁰ And unlike its normal review to ensure that the sentence is correct in law and fact and is the sentence that should be approved, the CCA is not authorized to reassess the sentence on such government appeals. If it sets aside the sentence because it "violates the law" or is "plainly unreasonable," the CCA's authority is limited: it may only "(A) modify the sentence to a lesser sentence; or (B) order a rehearing."⁸¹

VII. The Court of Appeals for the Armed Forces

Congress enacted two substantive changes to Article 67, which provides for review by the CAAF. First, it requires TJAG to notify the other services Judge Advocate Generals of his intent to certify a case to the CAAF.⁸² This "is intended to ensure that each Judge Advocate General has an opportunity to provide input on the decision to appeal cases that have the potential for impacting the law that affects all the services."⁸³

Second, the MJA clarifies the role of the CAAF in reviewing certain issues considered by the CCA. Historically, the CAAF could "act only with respect to the findings and sentence as approved by the convening authority as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."⁸⁴ This caused the CAAF to struggle with questions of its jurisdiction over interlocutory questions decided by the

⁶⁹ *Id.* §5329, UCMJ art. 65(d) (new).

⁷⁰ *Id.* §5329, UCMJ art. 65(d)(3)(B) (new).

⁷¹ *Id.* §5329, UCMJ art. 65(e) (new).

⁷² *Id.* §5333, UCMJ art. 69(a) (new).

⁷³ *Id.* §5333, UCMJ art. 69(d)(1) (new).

⁷⁴ *Id.* §5333, UCMJ art. 69(d)(2) (new).

⁷⁵ See UCMJ art. 67(a)(3). This standard was not changed in the MJA.

⁷⁶ MJA, *supra* note 4, §5333, UCMJ art. 69(e) (new). This is also the current limitation on the CCA. See UCMJ art. 69(e).

⁷⁷ MJA, *supra* note 4, §5301(a), UCMJ art. 56(d) (new).

⁷⁸ *Id.* §5330(b), UCMJ art. 66(e)(1)(B) (new).

⁷⁹ See *United States v. Nerad*, 69 M.J. 138, 149 (C.A.A.F. 2010) (Stucky, J., dissenting).

⁸⁰ MJA, *supra* note 4, §5330(b), UCMJ art. 66(b)(3) (new).

⁸¹ *Id.* §5330(b), UCMJ art. 66(f)(2) (new) (emphasis added).

⁸² *Id.* §5331(a), UCMJ art. 67(a)(2) (new).

⁸³ MJRG REP., *supra*, note 1, at 625.

⁸⁴ UCMJ art. 67(c) (2016).

CCAs.⁸⁵ The MJA resolves the issue by granting the CAAF jurisdiction to consider “a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.”⁸⁶

Additionally, although no change to Article 67 was necessary, the ability of the government to appeal a sentence to the CCA will likely affect the CAAF’s normal hands-off approach to review of sentences. The CAAF has held that “[t]he power to review a case for sentence appropriateness, including relative uniformity, is vested in the Courts of Criminal Appeals, not in our Court, which is limited to errors of law.”⁸⁷ Thus, the CAAF currently limits its review of the CCA’s determination of sentence appropriateness “to preventing obvious miscarriages of justice or abuses of discretion.”⁸⁸ Under the MJA, TJAG can appeal the sentence to the CCA because it “violates the law” or is “plainly unreasonable.”⁸⁹ Those are questions of law that may be reviewed *de novo* by the CAAF. Nevertheless, the CAAF is likely to give considerable deference to the CCAs as to whether a sentence is “plainly unreasonable.”

VIII. Miscellaneous Amendments

(1) Appellate counsel. “To the greatest extent practicable,” TJAG shall provide at least one “learned counsel” to an accused appealing a sentence to death. That includes hiring a civilian, where necessary.⁹⁰

(2) Vacation of suspension. A hearing to vacate a suspended sentence will be necessary only if the probationer so desires, and the special court-martial convening authority may detail a judge advocate to conduct such a hearing.⁹¹

(3) Petition for a new trial. The time to petition TJAG for a new trial has been extended from two years from the date of the convening authority’s action to three years after entry of judgment.⁹²

(4) Restoration. Congress has granted the President authority to prescribe regulations “governing eligibility for pay

and allowances for the period after the date on which an executed part of a court-martial sentence is set aside.”⁹³

IX. Conclusion

Overall, the MJRG accomplished the task set for it by the Joint Chiefs and the Secretary of Defense: changes recommended by the MJRG and enacted by Congress will make the military justice system more efficient. On the other hand, by refusing to adopt the MJRG’s recommendation for judge alone sentencing, and instead requiring the different sentencing authorities to employ contrary methodologies for arriving at an appropriate sentence, Congress inserted gratuitous uncertainty into the sentencing process.

But the biggest failure of both the MJRG and Congress is the refusal to afford the appellate review to which every accused convicted at a special or general court-martial should be entitled: an appeal of right to the CCA. To grant an accused who receives a sentence that includes confinement for six months and a day to appeal to a CCA while forcing an accused receiving a sentence to confinement of six months to first apply to TJAG for relief before submitting an appeal that the CCA may deny as a matter of discretion is hardly justice. We even grant war criminals tried by military commissions better appellate process. Every accused convicted by military commission is entitled to automatic review of his conviction.⁹⁴ He is then entitled to an appeal of right to the United States Court of Appeals for the District of Columbia,⁹⁵ and to petition the Supreme Court for certiorari.⁹⁶ Meanwhile, a military accused who is convicted of an offense but is not sentenced to confinement for more than six months is not guaranteed any appeal of right and, even when the CCA does review his case, unless the CAAF grants review, the Supreme Court is without jurisdiction to hear his appeal.⁹⁷

Congress should have required automatic review of death penalty cases only, as the MJRG suggested.⁹⁸ In all other cases where a conviction results, the accused should have an appeal of right to the CCA. The accused and counsel should be responsible for assigning specific errors, and the CCA

⁸⁵ Compare *United States v. Lopez de Victoria*, 66 M.J. 67, 70 (C.A.A.F. 2008) (holding that the CAAF has jurisdiction to review the judgment of the CCA on a government appeal under Article 62 despite the silence of the statute) with *Randolph v. H.V.*, 76 M.J. 27, 31 (C.A.A.F. 2017) (holding that the CAAF lacked jurisdiction to review the CCA’s granting a writ of mandamus to an alleged victim who was seeking to prevent military judge from examining her mental health records).

⁸⁶ MJA, *supra* note 4, §5331(b)(5), UCMJ art. 67(c)(1)(B) (new).

⁸⁷ *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *but see United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010) (holding that the CAAF reviews “a Court of Criminal Appeals’ sentence appropriateness determination for abuse of discretion”).

⁸⁸ *Lacy*, 50 M.J. at 288 (internal quotation marks and citation omitted).

⁸⁹ MJA, *supra* note 4, §5301(a), UCMJ art. 56(d)(1) (new).

⁹⁰ *Id.* §5334, UCMJ art. 70(f) (new).

⁹¹ *Id.* §5335(a), (b), UCMJ art. 72(a) (new).

⁹² *Id.* §5336, UCMJ, art. 73 (new).

⁹³ *Id.* §5337, UCMJ, art. 75(d) (new). This will resolve an issue that the CAAF was unable to. *See Howell v. United States*, 75 M.J. 386 (C.A.A.F. 2016), *cert. denied*, 137 S. Ct. 1374 (2017), *reh’g denied*, No. 16-536, 2017 WL 2039263 (May 15, 2017).

⁹⁴ 10 U.S.C. §§950c(a), 950f(c).

⁹⁵ 10 U.S.C. §950g(a).

⁹⁶ 10 U.S.C. §950g(e).

⁹⁷ 28 U.S.C. §1259(c), (d).

⁹⁸ MJRG REP., *supra* note 1, at 609.

should only be required to review those issues. An accused who receives confinement for only six months still has a conviction and, therefore, ought to have an appeal of right to the CCA. And the CAAF's failure to grant review should not foreclose Supreme Court jurisdiction.

Perhaps that will change in the not too distant future. Congress made an additional amendment to the UCMJ that suggests a greater interest in military justice than in the past. Specifically, Article 146 was amended to eliminate a largely ineffectual Code Committee and replace it with the Military Justice Review Panel,⁹⁹ composed of thirteen members¹⁰⁰ “appointed from among private United States citizens with expertise in criminal law, as well as appropriate and diverse experience in investigation, prosecution, defense, victim representation, or adjudication with respect to courts-martial, Federal civilian courts, or State courts.”¹⁰¹ Each member is to be appointed for a term of eight years¹⁰² and will be appointed to the panel by the Secretary of Defense from recommendations of the Attorney General, the Judge Advocates General, the Chief Justice of the United States, and the Chief Judge of the CAAF.¹⁰³ The panel is required to “conduct an initial review and assessment of the implementation of” the MJA in FY2020¹⁰⁴ and comprehensive reviews during FY2024 and every eight years thereafter,¹⁰⁵ and interim reviews beginning in FY2028 and every eight years thereafter.¹⁰⁶

Although the implementation of the MJA will begin no later than 1 January 2019, it will probably be at least a year after that before we begin to see the effect of the changes on the military appellate system. Even then, it is probable that the CAAF will not have decided a sufficient number of cases for its experience to be helpful in the FY2020 initial review and assessment of the changes wrought by the MJA.

⁹⁹ MJA, *supra* note 4, §5521, UCMJ art. 146 (new).

¹⁰⁰ MJA, *supra* note 4, §5521, UCMJ art. 146(b)(1) (new).

¹⁰¹ MJA, *supra* note 4, §5521, UCMJ art. 146(c) (new).

¹⁰² MJA, *supra* note 4, §5521, UCMJ art. 146(e) (new).

¹⁰³ MJA, *supra* note 4, §5521, UCMJ art. 146(b) (new).

¹⁰⁴ MJA, *supra* note 4, §5521, UCMJ art. 146(f)(1) (new).

¹⁰⁵ MJA, *supra* note 4, §5521, UCMJ art. 146(f)(3) (new).

¹⁰⁶ MJA, *supra* note 4, §5521, UCMJ art. 146(f)(4) (new).

Elementary Lessons: Elements v. Theories

Colonel James A. Young, USAF (Retired)* & Colleen E. Cronin**

I. Introduction

There is a distinct difference between elements of a criminal offense and theories of criminal liability. The distinction importantly separates what the prosecution must prove beyond a reasonable doubt from those brute facts upon which the members are not required to agree. This comment explains how a military judge's failure to understand this distinction resulted in faulty instructions and a misleading findings worksheet that caused an accused's conviction to be set aside. It also explains the differences in order to decrease the likelihood that the errors will be duplicated.

II. The Facts

Aviation Ordnanceman Airman (AN) Jeffrey D. Sager was charged with two specifications of violating Article 120(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920(d).¹ The specification of which he was convicted alleged that he had committed a sexual act upon another military member when he "knew or reasonably should have known" that the alleged victim was "asleep, unconscious, or otherwise unaware that the sexual contact was occurring."²

The military judge instructed the members, in part, as follows:

The interesting part is you have to circle under the charge and specification the theory of the government you adopt if you convict. . . . It's he knew or should have known That means you're going to have to vote on that—on both theories

The first vote is going to be, okay, is he guilty or not guilty of the charge under the . . . specification under the theory of "knew" he knew. Is he guilty or not guilty under the theory of "should have known" because the government has both theories But you have to circle the one that's applicable.³

The military judge provided the members with the following findings worksheet as to the specification of which AN Sager was convicted:

II. To the Additional Charge and the specification thereunder:

(a) Not Guilty

(b) Guilty in that AN Sager committed a sexual contact upon AN K [REDACTED] when AN Sager (knew) (or) (~~reasonably should have known~~) that AN K [REDACTED] was (asleep), (unconscious), (or) (~~otherwise unaware~~) that the sexual act was occurring.

Consistent with the military judge's instructions to select one theory of AN Sager's knowledge of the alleged victim's condition, the worksheet set apart by parentheses "knew" from "reasonably should have known." The members selected "reasonably should have known." Although the military judge never directed the members to select a theory of the alleged victim's condition while the sexual act was occurring—that he was "asleep," "unconscious," or "otherwise unaware"—the format of the findings worksheet suggested that they should. Each of the three theories was set apart by parentheses, as were the theories of AN Sager's knowledge. The members selected the theory that the alleged victim was unaware the sexual act was occurring for some reason other than being asleep or unconscious.⁴

III. Opinion of the Court of Criminal Appeals

On appeal before the United States Navy-Marine Corps Court of Criminal Appeals (CCA), AN Sager argued that the court members had rejected the prosecution's theories that the alleged victim was either asleep or unconscious, and the prosecution had not provided notice as to the physical state that rendered the alleged victim "otherwise unaware."⁵

The CCA concluded

that asleep or unconscious are examples of how an individual may be "otherwise unaware" and are not alternate theories of criminal liability. A plain reading of the phrase is that a person cannot engage in sexual contact with another person when he/she knows or reasonably should know that the recipient of the contact does not know it is happening. We find that, as applied to the appellant's case, Article 120(d) provided sufficient notice of the proscribed conduct and there is no risk of arbitrary and discriminatory enforcement.⁶

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¹ United States v. Sager, 76 M.J. 158, 159 (C.A.A.F. 2017).

² *Id.* at 159.

³ *Id.*

⁴ *Id.* at 160.

⁵ United States v. Sager, No. 201400356, 2105 WL 9487926, at *3 (N-M. Ct. Crim. App. Dec. 29, 2015) (unpublished).

⁶ *Id.* at *3.

IV. Opinion of the Court of Appeals for the Armed Forces

AN Sager petitioned the United States Court of Appeals for the Armed Forces (CAAF) for review, contending the CCA had erred in holding that the terms “asleep” and “unconscious” were merely examples of how a victim could be “otherwise unaware,” rather than separate theories of criminal liability.⁷ The CAAF agreed with AN Sager and held that “[u]nder the ‘ordinary meaning’ canon of construction, . . . ‘asleep,’ ‘unconscious,’ or ‘otherwise unaware,’ as set forth in Article 120(b)(2), reflect separate theories of liability,”⁸ and remanded to the CCA for reconsideration.

V. Discussion

The underlying error in this case stems from the military judge’s failure to understand the difference between the elements of the offense and the means by which one can commit the offense. This misunderstanding led the military judge to provide improper instructions and a misleading findings worksheet to the members.

“‘Elements’ are the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction.’”⁹ The theory of criminal liability is the “means,” on the other hand, and refers to how the accused “actually perpetrated the crime—what [the Supreme Court has] referred to as the underlying brute facts.”¹⁰

[A] federal jury need not always decide unanimately which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimately concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.¹¹

The military has followed the Supreme Court’s lead in making this distinction, having “recognized that military criminal

practice requires neither unanimous panel members, nor panel agreement on one theory of liability, as long as two-thirds of the panel members agree that the government has proven all the elements of the offense.”¹²

This legal concept is illustrated by the consolidated offense of larceny under Article 121, UCMJ.¹³ Common law “offenses of larceny by asportation, larceny by trick and device, obtaining property by false pretenses, and embezzlement” are now simply theories of criminal liability.¹⁴ This consolidation eliminated the “thin borderlines” between the offenses, which

gave rise to a favorite indoor sport played for high stakes in our appellate courts: A defendant, convicted of one of the three crimes, claimed on appeal that, though he is guilty of a crime, his crime is one of the other two. Sometimes this pleasant game was carried to extremes: A defendant charged with larceny, is acquitted by the trial court (generally on the defendant’s motion for a directed verdict of acquittal) on the ground that the evidence shows him guilty of embezzlement. Subsequently tried for embezzlement, he is convicted; but he appeals on the ground that the evidence proves larceny rather than embezzlement. The appellate court agrees and reverses the conviction.¹⁵

Article 121 now avoids “the technical distinction which has heretofore differentiated one type of theft from another and is in keeping with modern civil trends.”¹⁶ As a result, “the particular means of acquisition of the property became relatively unimportant, and the critical question in each case now is the intent with which the property in question is held by the accused.”¹⁷

Article 121 provides that an accused commits an offense of larceny if he wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—

(1) with the intent to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner.¹⁸

⁷ United States v. Sager, 75 M.J. 349 (C.A.A.F. 2016).

⁸ Sager, 76 M.J. at 162.

⁹ Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (quoting BLACK’S LAW DICTIONARY 634 (10th ed. 2014)).

¹⁰ Id. at 2251 (quotation marks and citation omitted).

¹¹ Richardson v. United States, 526 U.S. 813, 817 (1999) (citations omitted).

¹² United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 2007) (citing United States v. Vidal, 23 M.J. 319, 325 (C.M.A. 1987)); accord United States v. Westmoreland, 31 M.J. 160, 165 (C.M.A. 1990).

¹³ 10 U.S.C. 921 (2016).

¹⁴ United States v. Lubasky, 68 M.J. 260, 263 (C.A.A.F. 2010).

¹⁵ 3 WAYNE R. LAFAVE ET AL., SUBSTANTIVE CRIMINAL LAW (2d ed. 2003).

¹⁶ Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services, 81st Cong. 1232 (1949).

¹⁷ United States v. Aldridge, 25 C.M.A. 330, 332, 8 C.M.R. 130, 132 (1953); accord, United States v. Lubasky, 68 M.J. 260, 263 (C.A.A.F. 2010).

¹⁸ Article 121, UCMJ, 10 U.S.C. § 921 (2016).

The form specification provided in the *Manual for Courts-Martial (MCM)* reads:

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, steal _____, (military property), of a value of (about) \$ _____, the property of _____.¹⁹

After the evidence is presented, the military judge instructs the members on the elements of the offense. The first element for the offense of larceny is “[t]hat the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or any other person.”²⁰ The members are not instructed to agree on one of the three theories contained in this element, because the requisite number of members is only required to agree that the prosecution proved all of the elements beyond a reasonable doubt. Likewise, the members need not agree on one particular theory as to the accused’s intent per the fourth element: that the accused had “the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.”²¹ Each member of the two-thirds voting to convict, however, must find that the prosecution established one of the theories beyond a reasonable doubt.

We find a somewhat parallel situation within the Article 120(d)(2) offense of which AN Sager was convicted.²² An accused is guilty of that offense if he “commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.”²³ The elements of the offense are:

- (i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva or anus or mouth by the penis;
- (ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and
- (iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring.²⁴

The form specification in the *MCM* reads as follows:

¹⁹ *MCM* pt. IV, ¶ 46.f.(1) (2016 ed.). A specification alleging that the accused “did steal” is legally sufficient to address the historical predicate offenses. *United States v. Antonelli*, 35 M.J. 122, 127 (C.A.A.F. 1992).

²⁰ *MCM* pt. IV, ¶ 46.b.(1)(a) (2016 ed.).

²¹ *Id.*

²² UCMJ art. 120(d)(2).

²³ *Id.*

In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, by causing penetration of _____’s (vulva) (anus) (mouth) with _____’s penis when he/she knew or reasonably should have known that _____ was (asleep) (unconscious) (unaware the sexual act was occurring due to _____).²⁵

In his instructions, the military judge properly recognized that whether an accused “knew” or “should have known” the status of the victim are two separate theories. What he apparently did not understand regarding his findings worksheet was that the court members did not need to agree on one of those theories as long as two-thirds of the members found either of the theories beyond a reasonable doubt. It is difficult to determine what the military judge thought about the phrase “asleep, unconscious, or otherwise unaware,” as he did not instruct that they were theories of criminal liability. Regardless, the military judge’s findings worksheet was bound to lead the members astray by suggesting (with identical parentheses for both groupings) they had to agree on the victim’s condition, in the same manner they had to agree on the accused’s knowledge.

Just as there are thin borderlines between the common law offenses that have been consolidated under Article 121, so it is with the distinctions between “asleep, unconscious, or otherwise unaware.” As Judge Stucky noted in his dissenting opinion, AN Sager’s victim testified that “he drank excessively, ‘passed out,’ and awoke to Appellant” performing one sex act on him, and then AN Sager performed another sex act while the victim was “too intoxicated to respond.”²⁶ It is unclear whether the victim was unconscious due to alcohol consumption or was asleep, maybe both. Given a findings worksheet suggesting they had to select one of the three, it is not surprising that the members chose the most ambiguous term—“otherwise unaware.” The requisite members did not need to reach consensus, as the conviction under the statute only requires members to decide that all *elements* were proved beyond a reasonable doubt, not which *theory* best fulfills a particular element.²⁷

These problems can easily be remedied by amending the form specification and the judges’ instructions. The best option is to take the larceny approach: amend the form specification by substituting the term “unaware” for the phrase “asleep, unconscious, or otherwise unaware.” In his instructions, the military judge would then explain that an alleged victim is

²⁴ *MCM* pt. IV, ¶ 45.b.(3)(e).

²⁵ *Id.*

²⁶ *Sager*, 76 M.J. at 163 (Stucky, J., dissenting).

²⁷ Of course, “[a]n appellate court cannot affirm a criminal conviction on the basis of a theory of liability not presented to the trier of fact.” *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing *Chiarella v. United States*, 445 U.S. 222, 236–37 (1980)).

unaware if he or she is “asleep, unconscious, or otherwise unaware.” The benefit of removing the three different theories from the form specification would be to eliminate any suggestion that the members have to agree on a theory of criminal liability in reaching their decision on guilt. To be clear, the military judge should specifically instruct the members that they need not agree on the theory or basis of the victim being unaware.

IV. Conclusion

It is essential for military justice practitioners to be able to distinguish the elements of an offense from theories of criminal liability by which the offense may be committed and to understand the consequences resulting from their differences. In AN Sager’s case, the military judge recognized the differences but not the consequences. He did not understand that court members were not required to agree on a theory of criminal liability. If he had, the findings worksheet would have given the members only two options: Guilty or Not Guilty. And Appellant’s conviction for sexual assault would have been affirmed.

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