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Articles

Book Review

Revisiting *United States v. Allen*: Applying Civilian Pretrial Confinement Credit for Unrelated Offenses Against Court-Martial Sentences to Post-Trial Confinement Under 18 U.S.C. § 3585(b)(2)

Major Michael L. Kanabrocki[*]

Appellant asserts the military judge erred by not awarding him pretrial confinement credit for the period civilian authorities confined him, prior to his court-martial, for unrelated state charges. Assuming arguendo 18 U.S.C. § 3585(b)(2) does apply, . . . trial judges lack the authority to calculate and apply pretrial confinement credit.[1]

I. Introduction

Administrative sentence credit for pretrial confinement is a relatively modern concept in military law. Before the Court of Military Appeals (CMA) issued its 1984 opinion in *United States v. Allen*,[2] military accused were not automatically entitled to credit for the time they lawfully spent in jail awaiting their trials by court-martial.[3] Unlike in the federal civilian system, where "credit for lawful pretrial detention is regarded as a matter 'of legislative grace[,] and not a [C]onstitutional guarantee,'"[4] neither the Uniform Code of Military Justice (UCMJ) nor the *Manual for Courts-Martial* (*MCM*) provide for credit for lawful pretrial confinement.[5] In *Allen*, however, the CMA applied the then-existing federal pretrial-confinement-credit statute[6] to trials by court-martial via Department of Defense Instruction (DODI) 1325.4.[7] Thus, for the first time in military criminal jurisprudence, *Allen* mandated compulsory sentence credit for lawful pretrial confinement "in connection with the offense or acts for which sentence was imposed."[8]

Later in 1984, Congress and the Executive Branch revised the statutory and regulatory authority upon which the CMA

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[1] United States v. Gogue, No. 20050650, slip. op. at 1 n.* (A. Ct. Crim. App. May 18, 2007) (en banc).

[2] 17 M.J. 126 (C.M.A. 1984).

[3] United States v. Davidson, 14 M.J. 81, 83–84 (C.M.A. 1982) (stating that, unless an accused could show that pretrial confinement as a matter of military law [equated to] punishment of [post-trial] confinement at hard labor for purposes of Article 56, and therefore violated Article 13, an accused was not entitled to credit for otherwise lawful pretrial confinement); United States v. Larner, 1 M.J. 371, 374 n.11 (C.M.A. 1976) ("[C]onvicted accused in our system [are] not entitled by right to credit on [their] sentence[s] for pretrial confinement.").

[4] United States v. Smith, 56 M.J. 290, 292 (C.A.A.F. 2002) (quoting Lewis v. Cardwell, 609 F.2d 926, 928 (9th Cir. 1979)); *see* 18 U.S.C. § 3585(b) (2000).

[5] *Smith*, 56 M.J. at 292 ("There is no provision in the UCMJ or the Manual for Courts-Martial that requires credit against an adjudged sentence for lawful pretrial confinement."); United States v. Rock, 52 M.J. 154, 156 (C.A.A.F. 1999) ("Commonly referred to as 'Allen' credit, this apparently has not been incorporated into the Manual for Courts-Martial . . . .").

[6] Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 214, 217 (codified as amended at 18 U.S.C. § 3568 (1982), but repealed and replaced in 1984). The relevant provision in this Act provided in pertinent part, "[A]ny . . . person [sentenced to confinement shall receive] credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." *Id.*

[7] Although § 3568 excluded "offense[s] triable by court-martial," the Secretary of Defense "voluntarily incorporat[ed into the military justice system] the pretrial-sentence credit extended to other Justice Department convicts" through a Department of Defense Instruction. *Allen*, 17 M.J. at 127 (citing U.S. DEP'T OF DEFENSE, INSTR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES para. III.Q.6 (7 Oct. 1968) [hereinafter DODI 1325.4 (1968)]). As such, "*Allen* saw pretrial confinement credit computation in the armed forces as a creature of regulation." United States v. Spencer, 32 M.J. 841, 842 (N.M.C.M.R. 1991).

[8] Bail Reform Act of 1966 § 4, 80 Stat. at 217.

relied in *Allen*. Congress repealed 18 U.S.C. § 3568,[9] and enacted 18 U.S.C. § 3585, which currently provides an expanded basis for granting sentence credit.[10] Administrative credit is available not only for confinement "in connection with the offense for which the sentence was imposed,"[11] but also for "any other charge for which the defendant was arrested *after* the commission of the offense for which the sentence was imposed."[12] Not having had this credit applied against another sentence is a precondition to credit eligibility.[13] Furthermore, after a series of revisions, the Secretary of Defense reissued DODI 1325.4 (1968) as DODI 1325.7 (2001).[14]

In 2002, the Court of Appeals for the Armed Forces (CAAF)[15] acknowledged these statutory and regulatory revisions. In its analysis in *United States v. Smith*, the CAAF observed that the regulatory basis for applying 18 U.S.C. § 3568 "was later revised and reissued," but "without significant change to the provision at issue in this case."[16] After revalidating the underlying reasoning in *Allen*, the CAAF expressly found: "As written, 18 U.S.C. § 3585(b) and DODI 1325.7 apply only to prisoners serving [court-martial] sentences to confinement."[17] Thus, the CAAF preserved the executive decision to extend to all military accused the federal, civilian entitlement to credit for *lawful* pretrial confinement. In the wake of *Allen* and *Smith*, the service courts of criminal appeals continue to grant credit for lawful pretrial confinement in light of the broadened rules.[18]

Logically, when an accused is entitled to pretrial confinement credit for the time he lawfully spends in jail awaiting trial, there must be a comprehensive procedure at the trial level to claim the credit. Rules for Courts-Martial (RCM) 905 and 906 provide the accused with an avenue to claim sentence credit for lawful pretrial confinement, i.e., a motion for appropriate relief.[19] Raising the claim in this way "promote[s] the efficiency of the entire justice system by requiring the parties to advance their claims at trial, where the underlying facts can best be determined."[20] Therefore, at trial, military judges have the primary "responsibility for providing credit where credit is due . . . and for ensuring the fair and just administration of

[9] On 12 October 1984, Congress enacted the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 2001. The relevant portion of this Act is codified at 18 U.S.C. § 3585(b) (2000), and replaces § 3568. Section 3585(b) became effective on 1 November 1987. *See* § 235(a)(1), 98 Stat. at 2031, *amended by* Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728 (mentioned at 18 U.S.C. § 3551 note).

[10] *See* 18 U.S.C. § 3858(b)(1)–(2).

[11] *Id.* § 3858(b)(1) (previously provided for in § 3568).

[12] *Id.* § 3858(b)(2) (new provision) (emphasis added).

[13] *Id.* § 3858(b).

[14] U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (17 July 2001) (C1, 10 June 2003) [hereinafter DODI 1325.7 (2001)].

[15] On 5 October 1994, Congress renamed the Court of Military Appeals the Court of Appeals for the Armed Forces. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a)(1), 108 Stat. 2663, 2831 (1994) (mentioned at 10 U.S.C. § 941 note).

[16] United States v. Smith, 56 M.J. 290, 293 (C.A.A.F. 2002). The provision at issue states: "Procedures used to compute sentences shall conform to those established by the Department of Justice for Federal prisoners unless they conflict with this Instruction . . . or existing Service regulations." DODI 1325.7 (2001), *supra* note 14, para. 6.3.1.5.

[17] *Smith*, 56 M.J. at 293. The issue granted in *Smith* concerned whether Smith was entitled to pretrial confinement credit against a sentence that did not provide for confinement. *Id.* at 292–93. The *Smith* court answered the issue in the negative. *Id.* Based on *Allen*, and by logical and necessary implication, however, Smith would have been entitled to credit had his sentence provided for confinement.

[18] *E.g.*, United States v. Thompson, No. 36943, 2007 CCA LEXIS 377, at *4 (A.F. Ct. Crim. App. Sept. 24, 2007) ("We order that the appellant receive a credit of three days against the confinement portion of his sentence."); United States v. Gilchrist, 61 M.J. 785, 787 n.3 (A. Ct. Crim. App. 2005) ("[W]e will order one additional day of [pretrial confinement] credit, pursuant to *United States v. Allen* . . . ."); United States v. Gonzalez, 61 M.J. 633, 635 (C.G. Ct. Crim. App. 2005) ("We will grant [a]ppellant one day of credit for pretrial confinement . . . ."); United States v. Simmons, No. 200100335, 2002 CCA LEXIS 294, at *7 (N-M. Ct. Crim. App. Nov. 25, 2002) ("[W]e . . . order an additional 5 days of credit pursuant to *United States v. Allen* . . . ."); *cf.* United States v. Flores-Muller, No. S31183, 2007 CCA LEXIS 540, at *4–5 (A.F. Ct. Crim. App. Nov. 13, 2007) (finding that had appellant not already been awarded pretrial confinement credit against his civilian sentence, he would have been entitled to such credit against his military sentence pursuant to *Allen* and 18 U.S.C. § 3585(b) (2000)).

[19] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905, 906 (2008) [hereinafter MCM]. Rule for Courts-Martial 905(a) defines a motion as "an application to the military judge for particular relief." Rule for Courts-Martial 906(a) defines a "motion for appropriate relief [as] a request for a ruling to cure a defect which deprives a party of a right." The list of motions included in RCM 906(b) "is not exclusive."

[20] United States v. King, 58 M.J. 110, 114 (C.A.A.F. 2003) (citing Hormel v. Helvering, 312 U.S. 552, 556 (1941), for the proposition that "our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact"); *see also* United States v. Olano, 507 U.S. 725 (1993).

justice."[21] Furthermore, if an accused fails to make the motion for appropriate sentence credit before the trial court adjourns, he "waives that issue on appeal."[22]

Based on the authority noted above, 18 U.S.C. § 3585(b)(2)—the federal pretrial-confinement-credit statute's new prong—affords military accused credit for pretrial confinement based on offenses where civilian authorities placed them into official detention, and where they were not tried by court-martial. A condition precedent to receiving credit under this prong is that the offenses must have been committed *after* the date the accused committed the offenses for which a court-martial tried, convicted, and sentenced him. Under the reasoning in *Allen* and its progeny, § 3585(b)(2) applies to trials by court-martial. When an accused raises a timely motion at trial for appropriate relief for this type of sentence credit, the military judge is responsible for litigating the motion, and calculating and awarding appropriate administrative credit.

The most recent development in this area of the law occurred in May 2007. Contrary to established military sentence-credit jurisprudence, the Army Court of Criminal Appeals (ACCA), sitting en banc in *United States v. Gogue*,[23] summarily held that 18 U.S.C. § 3585(b)(2) does not apply to an accused tried by court-martial. In addressing any notion of the statute's possible applicability, the ACCA briefly asserted "trial judges lack the authority to calculate and award pretrial confinement credit."[24] Without any analysis—or deference to *Allen*, *Smith*, or DODI 1325.7 (2001)—the ACCA based its holding upon the U.S. Supreme Court's opinion in *United States v. Wilson*, which determined a "district court[, i.e., trial court,] . . . cannot apply § 3585(b) at sentencing."[25]

This article argues that the ACCA incorrectly decided *Gogue* by finding § 3585(b)(2) inapplicable to military accused tried by court-martial. Section 3585(b)(2) is one part of the larger statute the CAAF and other service courts of criminal appeals have found applicable to military accused pursuant to the reasoning in *Allen*. Furthermore, by its holding, the court unnecessarily usurped from military trial judges their Congressionally- and Presidentially-granted—and judicially supported—power to adjudicate motions for appropriate relief claiming "unrelated crimes credit."[26] The adverse decision in *Gouge* is a call to the CAAF to revisit *United States v. Allen*, and reapply old facts to a relatively certain, yet undeveloped, sentence-credit provision in military criminal practice.

The purpose of this article is to provide military justice practitioners with a comprehensive guide for litigating, and winning, motions for sentence credit stemming from lawful pretrial confinement imposed for unrelated state, federal, and foreign offenses for which credit has not otherwise been granted under 18 U.S.C. § 3585(b)(2). Part II.A provides a historical overview of pre-*Allen* pretrial confinement credit jurisprudence—when automatic credit for *lawful* pretrial confinement did not exist. Part II.B discusses *Allen*, 18 U.S.C. § 3568, and DODI 1325.4 (1968). Part II.C explains how § 3568 and its regulatory conduit have evolved, surveys key post-*Allen* court decisions, and demonstrates how case law has developed and extended the sentence credit originally provided by *Allen*. Part III.A takes a close look at the *Gogue* decision and its thirteen-page dissent. Parts III.B and III.C rebut the conclusions in *Gogue*, demonstrate that unrelated-crimes credit is available to military accused, and show that military trial judges are empowered to adjudicate *all* motions for appropriate

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[21] *King*, 58 M.J. at 116 (Baker, J., concurring in result) ("If indeed an appellant has been denied a liberty interest, which amounts to confinement, he should have his claim to credit adjudicated by competent *judicial* authority.") (emphasis added).

[22] *Id.* at 115 (majority opinion) (citing RCM 905(e) and holding that "failure at trial to seek . . . credit . . . waives that issue on appeal in the absence of plain error"). Rule for Courts-Martial 905(e) states:

> Failure by a party to raise defenses or objections or to make motions or requests[,] which must be made before pleas are entered under [RCM 905(b),] shall constitute waiver. . . . Other motions, requests, defenses, or objections[, under RCM 906(b)(1)–(14), 907(b)(2)–(3), 915, and 917,] . . . 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 19, R.C.M. 905(e). Furthermore, RCM 801(g) states: "Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual[,] or by the military judge under authority of this Manual, . . . shall constitute waiver thereof." *Id.* R.C.M. 801(g).

[23] No. 20050650, slip. op. at 1 n.* (A. Ct. Crim. App. May 18, 2007) (en banc), *rev. granted*, 66 M.J. 287 (C.A.A.F. 2008).

[24] *Id.*

[25] 503 U.S. 329, 333 (1992). The ACCA also cited the Federal Circuit Courts of Appeals to show strict adherence to the holding in *Wilson*. *See* United States v. Peters, 470 F.3d 907, 909 (9th Cir. 2006); United States v. Tindall, 455 F.3d 885, 888 (8th Cir. 2006); United States v. Williams, 425 F.3d 987, 990 (11th Cir. 2005); United States v. Barrera-Saucedo, 385 F.3d 533, 536 (5th Cir. 2004); United States v. Morales-Madera, 352 F.3d 1, 15 (1st Cir. 2003); United States v. Rivers, 329 F.3d 119, 122 (2d Cir. 2003); Ruggiano v. Reish, 307 F.3d 121, 133 (3d Cir. 2002); United States v. Crozier, 259 F.3d 503, 520 (6th Cir. 2001); United States v. Ross, 219 F.3d 592, 594 (7th Cir. 2000); United States v. Gonzales, 65 F.3d 814, 822 (10th Cir. 1995); *see also* Virgin Islands v. Rivera, 34 V.I. 98, 101–02 (1996) (consistent with *Wilson*).

[26] In *Gogue*, Judge Sullivan coined the term "unrelated crimes credit," and used it in her dissent interchangeably with "credit pursuant to 18 U.S.C. § 3585(b)(2)." *Gogue*, No. 20050650, slip. op. at 3 (Sullivan, J., dissenting). The author will apply the same convention throughout this article.

relief for pretrial confinement credit.[27] Finally, Part IV discusses the suggested contents of a motion for appropriate relief for unrelated-crimes credit in accordance with § 3585(b)(2).

II. Background

A. No Automatic Credit for Lawful Pretrial Confinement

> [*P*]*re-conviction jail time credit is* [*a matter*] *of legislative grace.*[28]

Before the CMA's 1984 landmark opinion in *United States v. Allen*,[29] an accused did not automatically receive sentence credit for the time he lawfully spent in pretrial confinement awaiting trial by court-martial.[30] Prior to 1984, the prevailing view was that pretrial restraint—in the form of physical confinement—simply did not equate to post-trial punishment.[31] Imposing post-trial punishment *before* trial was illegal.[32] An accused, however, could claim and receive credit for pretrial confinement if he could show the nature of his confinement was "more rigorous than necessary to insure his presence at trial,"[33] or the conditions "were as onerous as those faced by prisoners serving [post-trial] sentences to confinement."[34] Proof of pretrial confinement unnecessary in degree, or as burdensome as "punishment which a court-martial may direct for an offense,"[35] entitled an accused to credit for *unlawful* pretrial confinement. Otherwise, credit for lawful detention was unavailable.

Without proof of unduly rigorous or punitive pretrial confinement conditions, an accused was entitled only to a subordinate form of pretrial confinement *consideration* regarding sentence appropriateness.[36] As originally designed, military law provided for the convening authority—and no one else—to take into account an accused's pretrial confinement when he acted on the accused's sentence.[37] The convening authority, however, was not obligated to grant any credit.[38] After

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[27] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; MCM, *supra* note 19, R.C.M. 801(a)(4), 905(a), 906(a); United States v. King, 58 M.J. 110, 116 (C.A.A.F. 2003) (Baker, J., concurring in result).

[28] Gray v. Warden of Mont. State Prison, 523 F.2d 989, 990 (9th Cir. 1975).

[29] 17 M.J. 126 (C.M.A. 1984).

[30] United States v. Davidson, 14 M.J. 81, 83–84 (C.M.A. 1982).

[31] *Id.* at 84 (stating "a prisoner could not be legally punished until the convening authority acted" on the adjudged sentence) (citing G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 160–61, 189 (3d ed. rev. 1913), and WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 124–25 (2d ed. 1920 reprint) ("The arrest by confinement of an enlisted man with a view to trial and for the purposes of trial is wholly distinguished from a confinement imposed by sentence. It is a temporary restraint of the person, not a punishment . . . .")).

[32] On this point Winthrop stated: "The imposition upon soldiers, while confined in [pretrial] arrest, of disciplinary punishments is, in our service, wholly illegal." WINTHROP, *supra* note 31, at 124. Seventy years after Winthrop's originally-penned 1886 treatise, the Honorable Robinson O. Everett similarly noted: "Pretrial confinement—or pretrial restraint of any type for that matter—cannot permissibly be imposed as punishment, for punishment requires a trial [and conviction]." ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 119 (1956).

[33] *Davidson*, 14 M.J. at 83 (citing UCMJ art. 13 (1982)). Article 13 provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence . . . .

UCMJ art. 13. The current version of this statute is unchanged. UCMJ art. 13 (2000); United States v. Harris, 66 M.J. 166 (C.A.A.F. 2008).

[34] *Davidson*, 14 M.J. at 83; *see* United States v. Larner, 1 M.J. 371, 373 (C.M.A. 1976) ("[One] month served in illegal pretrial confinement ought to count the same as [one] month served after trial.").

[35] UCMJ art. 56 ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."); *see Davidson*, 14 M.J. at 83–84.

[36] Unites States v. Blackwell, 41 C.M.R. 196, 199 n.2 (C.M.A. 1970) ("[C]redit . . . for pretrial confinement . . . is a matter for the court-martial and the convening authority to consider in adjudging an appropriate sentence.").

[37] *Davidson*, 14 M.J. at 85 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. XVIII, ¶ 87*b* (1949) [hereinafter 1949 MCM] ("The reviewing authority may properly consider as a basis for mitigation or remission not only matters relating solely to clemency, such as long confinement pending trial . . . , but any other factors which may properly be considered in fixing the punishment."); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. XVIII, ¶ 87b (1928) [hereinafter 1928 MCM] (stating same); MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. XVI, ¶ 401 (1921) ("When the reviewing or confirming authority takes final action upon the case[,] it is proper for him to consider any period of confinement served by the accused prior to and during the trial, and in a proper case[,] to make it the basis of mitigation of the sentence."); MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. XVI, ¶ 401 (1917) ("It is appropriate for the appointing authority to consider, at the time of approval, confinement served by an accused prior thereto, and in a proper case make it the basis of mitigation of the sentence."). Pretrial confinement was not among the factors the court-martial could consider in determining an appropriate sentence. *See, e.g.*, 1949 MCM, *supra*, pt. XV, ¶ 79, 80; 1928 MCM, *supra*, pt. XV, ¶ 79, 80. Simply put, "the court [could] not trench directly

Congress enacted the UCMJ, the President considerably broadened the scope of pretrial confinement consideration. In 1951, President Truman added a provision to the *MCM* that stated "pretrial confinement was a matter to be brought to the attention of the court-martial and to be considered by it in adjudging an appropriate sentence."[39] This new provision aside, the convening authority retained his power to consider pretrial confinement when he later acted on the sentence.[40] Shortly thereafter, military judges were required to "'particularly delineate' factors such as pretrial confinement" [41] when they instructed the members "to consider all matters in extenuation and mitigation."[42]

Despite the lack of automatic pretrial confinement credit, and notwithstanding a failed motion for appropriate relief from *unlawful* pretrial confinement, an accused could still have the court-martial and the convening authority consider his pretrial confinement time; the former during presentencing proceedings, and the latter at action.[43] This system, however, was less than perfect. Without an obligation to grant day-for-day credit, there was no way to determine—much less guarantee—how much weight, if any, a court-martial would give to pretrial confinement when it adjudged a sentence to post-trial confinement. The same held true for the convening authority, when he had to decide an appropriate sentence for the convicted servicemember's crimes. Whether an accused would receive credit for all, some, or none of his lawful pretrial confinement rested solely upon the discretionary, deliberative processes exercised by the court-martial and convening authority. As we shall see in the next section, the *Allen* opinion radically changed the existing confinement-credit system, and brought certainty to the credit-determination process.

B. Entitlement to Pretrial Confinement Credit Under *Allen*

Private First Class (PFC) Allen pleaded guilty to robbery and assault consummated by a battery.[44] For these crimes, an officer panel sentenced PFC Allen to a bad-conduct discharge, confinement for twenty-four months, partial forfeitures, and

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or indirectly upon the *remitting or mitigating power* of the commander [by inappropriately considering] the long confinement undergone by the accused while awaiting trial [and] . . . award[ing] no sentence." WINTHROP, *supra* note 31, at 402.

[38] WINTHROP, *supra* note 31, at 124 ("[T]he fact of a prolonged arrest . . . could not be pleaded in bar of trial[, but] . . . would properly go to induce a mitigation [or remission] of the punishment . . . by the reviewing authority."). Winthrop further explained:

> [T]he period of an arrest in confinement before trial, or before final action upon the sentence, however unreasonably protracted, cannot legally be *credited* upon the term of imprisonment imposed by the sentence, [but] in executing the same, . . . the reviewing authority, if he thinks it just and proper that this period should be deducted from the term adjudged by the court, can do so only by a proportionate mitigation of the sentence . . . , or subsequently by a partial remission . . . .

Id. at 426.

[39] *Davidson*, 14 M.J. at 85–86 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. XIII, ¶ 75*b*(1) (1951) [hereinafter 1951 MCM] ("The trial counsel will read to the court from the first page of the charge sheet the data as to the age, pay, and service of the accused, and the duration and nature of any restraint imposed prior to trial."); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. XIII, ¶ 75*b*(1) (1968) [hereinafter 1968 MCM] (stating same); MCM, *supra* note 19, R.C.M. 1001(b)(1) (stating same).

[40] *See* 1951 MCM, *supra* note 39, pt. XVII, ¶ 88*b* ("The convening authority may properly consider as a basis for approving only a part of a legal sentence not only matters relating solely to clemency, such as long confinement pending trial . . . , but any other pertinent factors."); 1968 MCM, *supra* note 39, pt. XVII, ¶ 88*b* (stating same); *see also* MCM, *supra* note 19, R.C.M. 1107(b)(3)(A)(i) ("Before taking action, the convening authority shall consider . . . [t]he [report] of result of trial," which indicates credit granted for pretrial confinement.); *id.* R.C.M. 1107(d)(2) discussion ("In determining what sentence should be approved the convening authority should consider all relevant factors including . . . all matters relating to clemency, such as pretrial confinement.").

[41] United States v. Stark, 19 M.J. 519, 527 (A.C.M.R. 1984) (quoting *Davidson*, 14 M.J. at 86).

[42] *Davidson*, 14 M.J. at 86. With respect to the instruction in *Davidson*, the court found that "[n]o particular mention was made of the [143 days] appellant spent in pretrial confinement," and held that "the military judge's rote instructions . . . were inadequate as a matter of law." *Id.* at 85 n.9, 86. The court also found the staff judge advocate's advice to the convening authority similarly deficient. *Id.* at 85 n.10. In *United States v. Allen*, 17 M.J. 126, 127 (C.M.A. 1984), the court quoted from the record an example of an instruction that met "the demands of the law expressed in . . . *Davidson*." That instruction provided the following:

> [Y]ou should consider the nature and duration of the accused's pretrial restraint. You will recall that the accused was confined at Pearl Harbor . . . and has continued in continuous pretrial confinement until this day. Now, you must take into consideration this pretrial confinement; however, you need not give credit for this pretrial confinement on a day for day basis[,] or . . . on the basis of any other formula or any mathematical computation, but you must consider it in arriving at an appropriate sentence.

Id. at 126–27 (first two alterations in original).

[43] "To be sure, prior to sentencing, a court-martial is informed of the period that an accused has spent in pretrial confinement . . . ; and this information may be given weight in imposing a sentence, and later by reviewing authorities who examine the appropriateness of the original sentence." EVERETT, *supra* note 32, at 119.

[44] *Allen*, 17 M.J. at 126 n.*.

reduction to Private E1.[45] The convening authority approved and the court of military review affirmed the findings of guilty and the sentence.[46] Before the CMA, PFC Allen asserted he was entitled to eighty-one days of credit for the time he lawfully spent in pretrial confinement awaiting trial by court-martial.[47] The CMA agreed with PFC Allen, granted him eighty-one days of confinement credit, but otherwise affirmed the approved findings of guilty and the sentence.

The heart of PFC Allen's assertion was that "DOD Instruction 1325.4 (October 7, 1968) . . . states, *inter alia*, that procedures employed by the military services for computation of sentence[s] are to be in conformity with those published by the Department of Justice."[48] At the time, the Department of Justice (DOJ) followed the Congressional mandate found in 18 U.S.C. § 3568, which provided:

> The Attorney General shall give any . . . [imprisoned] person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, . . . which is in violation of an Act of Congress and is triable in any court established by Act of Congress.[49]

Despite language in § 3568 apparently exempting the military justice system from its application, PFC Allen argued "the Secretary of Defense . . . voluntarily adopted" this federal provision for awarding credit for lawful pretrial confinement by virtue of issuing "the foregoing instruction."[50] Therefore, PFC Allen argued he was entitled to eighty-one days of pretrial confinement credit based on the Defense Secretary's regulatory mandate. Having found no evidence of intent to the contrary,[51] and having received none from the government,[52] the court agreed with PFC Allen.

The *Allen* court began its analysis by looking at the history behind § 3568, and using the history as the contextual framework within which the Defense Secretary issued his instruction. When the Secretary first issued DODI 1325.4 in 1955,[53] neither military accused tried in district courts and confined in federal prisons, nor those tried by court-martial and then transferred to such facilities, received pretrial confinement credit.[54] Although the federal-civilian and military-justice systems did not provide credit for pretrial confinement, the Defense Secretary affirmatively expressed his intent that sentence uniformity be maintained among the military services,[55] and between the federal-civilian and military-justice systems

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[45] *Id.*

[46] *Id.*

[47] *Id.* at 126.

[48] *Id.* The relevant part of this instruction states in its entirety: "Computation of Sentences. Procedures employed in the computation of sentences will be in conformity with those published by the Department of Justice, which govern the computation of sentences of federal prisoners and military prisoners under the jurisdiction of the Justice Department." DODI 1325.4 (1968), *supra* note 7, para. III.Q.6.

[49] *Allen*, 17 M.J. at 126–27 (citing Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 214, 217 (codified as amended at 18 U.S.C. § 3568 (1982), but repealed in 1984)).

[50] *Id.* at 127 (referring to DODI 1325.4 (1968), *supra* note 7).

[51] *Id.* at 128 ("[W]e are unable to find any [contrary] supporting evidence that such was [not] the intention of the Secretary in this exercise of his instructional powers.").

[52] *Id.* at 129 (Everett, C.J., concurring) ("According to the comments made by counsel during oral argument, any memoranda or correspondence which might have provided insight into the origins of this Instruction have been destroyed or, in any event, cannot be located.").

[53] U.S. DEP'T OF DEFENSE, INSTR. 1325.4, UNIFORM POLICIES AND PROCEDURES AFFECTING MILITARY PRISONERS AND PLACES OF CONFINEMENT (14 Jan. 1955) [hereinafter DODI 1325.4 (1955)].

[54] *Allen*, 17 M.J. at 127 (plurality opinion); *see supra* Part II.A. In 1932, Congress enacted the original legislation concerning sentence computation for federal prisoners. Act of June 29, 1932, Pub. L. No. 72-210, ch. 310, § 1, 47 Stat. 381 (codified at 18 U.S.C. § 709a (1934), revised 1948). The enactment dealt specifically with post-conviction sentence commencement dates, and any adjustments for interim post-conviction detention. *Id.* It did not provide for any credit for pretrial confinement. The Act of 1932 provided:

> [T]he sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term.

Id.; United States v. Jazorek, 226 F.2d 693, 695 (7th Cir. 1955) (quoting 18 U.S.C. § 709a (1940)). In 1948, § 709a "was reformulated, without change . . . , and is now 18 U.S.C. § 3568." Allen v. Ciccone, 425 F.2d 989, 991 (8th Cir. 1970) (quoting 18 U.S.C. § 3568 (1970)); United States v. Jazorek, 226 F.2d 693, 694–95 (7th Cir. 1955); Act of June 25, 1948, Pub. L. No. 80-772, ch. 227, § 3568, 62 Stat. 683, 838 (codified at 18 U.S.C. § 3568 (1952)).

[55] DODI 1325.4 (1955), *supra* note 53, para. III.Q ("Sentence Operation. It is the purpose of the following provisions to provide uniform execution of sentences adjudged by courts-martial and other military tribunals of the Department of Defense.").

generally.[56] Credit for pretrial confinement first became available in 1960 to certain federal prisoners—those tried in district courts who received mandatory minimum sentences—pursuant to 18 U.S.C. § 3568.[57] In 1966, Congress enlarged the scope of § 3568 and provided pretrial confinement credit to all federal prisoners, the nature of their sentences notwithstanding.[58] The 1966 version of § 3568, however, applied only to offenses "other than . . . offense[s] triable by court-martial."[59] This statutory language created an apparent disparity between the ways military accused were treated in the civilian-criminal and military-justice systems.

Against this backdrop, the *Allen* court next considered the Defense Secretary's instruction. The court noted that in July 1968, Congress passed the Military Correctional Facilities Act,[60] which "[spoke] not of sentence computation, but of uniform military administration."[61] In all likelihood, this Act prompted the Secretary to rewrite and reissue DODI 1325.4 (1955); he did so in 1968, and retained "the paragraph on sentence computation procedures,"[62] which stated:

> Procedures employed in the computation of sentences will be in conformity with those published by the Department of Justice, which govern the computation of sentences of federal prisoners and military prisoners under the jurisdiction of the Justice Department.[63]

Having considered this paragraph, the *Allen* court turned to the DOJ's procedural rules regarding sentence computation. The court noted the U.S. Parole Commission issued the relevant rule on behalf of the DOJ, which provided, in relevant part:

> [A]ny such [convicted] person shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.[64]

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[56] *Id.* para. III.Q.6 ("Computation of Sentences. Procedures employed in the computation of sentences will be in conformity with those published by the Department of Justice, which govern the computation of sentences of federal prisoners and military prisoners under the jurisdiction of that Department.").

[57] *Allen*, 17 M.J. at 127. In 1960, Congress amended the original version of § 3568 and added a provision that afforded federal prisoners, who could not post bail, pretrial confinement credit to offset any mandatory minimum sentence. Jonah v. Carmona, 446 F.3d 1000, 1003 (9th Cir. 2006). The amendment stated, in relevant part:

> [T]he Attorney General shall give any such [convicted] person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.

Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1, 74 Stat. 738. As amended, "[t]his statute covered only those [military accused] prosecuted in District Court who were unable to make bail," *Allen*, 17 M.J. at 128, not those tried by court-martial because a system of "bail does not exist in the military." United States v. Rexroat, 38 M.J. 292, 295 (C.M.A. 1993).

[58] *Allen*, 17 M.J. at 128. To eliminate a misunderstanding by some federal courts that "credit was required under § 3568 only for those defendants whose convictions carried mandatory minimum sentences," *Jonah*, 446 F.3d at 1003, Congress again amended § 3568 in the 1966 Bail Reform Act to provide pretrial confinement credit for all federal prisoners. Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 214, 217 (repealed 1984). In relevant part, this amendment declared:

> The Attorney General shall give any such [convicted] person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

Id.

[59] Bail Reform Act of 1966 § 4, 80 Stat. at 217.

[60] Pub. L. No. 90-377, § 1, 82 Stat. 287, 287–88 (codified as enacted at 10 U.S.C. §§ 951–954 (1970)). These sections cover generally: (1) the establishment, organization, and administration of military correctional facilities; (2) parole; (3) remission or suspension of sentences; (4) restoration to duty; (5) reenlistment; and (6) voluntary extension of service obligations for probation. The current version of the Act also provides for military prisoner transfers between the United States and foreign countries, and for using appropriated funds in connection with deserter apprehensions and confinement facility expenses. 10 U.S.C. §§ 955–956 (2000).

[61] *Allen*, 17 M.J. at 128.

[62] *Id.* "Department of Defense Instruction (DOD Inst) 1325.4 (Oct. 7, 1968) . . . [was] issued under a grant of authority from Congress contained in 10 U.S.C. §§ 951–55." United States v. Palmiter, 20 M.J. 90, 92 n.2 (C.M.A. 1985).

> Congress has conferred broad discretion upon service secretaries and commanders to establish and operate military correctional facilities. 10 U.S.C. 951–56 (2000). These statutes have been implemented by detailed guidance set forth by Department of Defense (DOD) Directive 1325.4 [May 19, 1988] . . . and DOD Instruction 1325.7 . . . (July 17, 2001).

United States v. Kreutzer, 60 M.J. 400, 401 (C.A.A.F. 2004) (summary disposition) (Crawford, J., dissenting).

[63] *Allen*, 17 M.J. at 127 (quoting DODI 1325.4 (1968), *supra* note 7, para. III.Q.6).

[64] *Id.* at 128 (quoting 28 C.F.R. § 2.10(a) (1980)). The court also noted the U.S. Bureau of Prisons—the agency responsible for implementing DOJ and U.S. Parole Commission rules and regulations—adopted this rule in "Policy Statement 7600.59, para. 4.b.(1)." *Id.*; *see also* Hart v. Kurth, 5 M.J. 932, 934 (N.M.C.M.R. 1978) (noting that "Bureau of Prisons Policy Statement 7600.59 of 27 May 1975 . . . [contains an] *Application* paragraph [that] specifically states: 'Jail credit is controlled by Title 18, U.S. Code, Section 3568 . . . .'").

Based upon the foregoing analysis, the *Allen* court held:

> [W]e must be judicially prudent and read the instruction as written, as voluntarily incorporating the pretrial-sentence credit extended to other Justice Department convicts. After all, . . . all other aspects of the Justice-Department system are more specifically mentioned and explicitly incorporated via this instruction. It is improbable that [DODI 1325.4 (1968)], adopting a unified system, would be promulgated without one of the foundation blocks[, i.e., automatic credit for lawful pretrial confinement].[65]

In his concurring opinion, then-Chief Judge Everett put Judge Fletcher's opinion of the court into perspective, and highlighted the salient and prospective results of *Allen*. First, and most obvious, servicemembers tried by court-martial would now stand "in the same position as military or civilian defendant[s] . . . tried in . . . Federal District Court[s]."[66] They would not suffer the risk of serving more than the maximum allowable sentence for the crimes they were convicted of—a result obtained by considering "the aggregate of pretrial and post-trial confinement,"[67] especially in cases of lengthy pretrial confinement. Furthermore, requiring full, day-for-day credit for pretrial confinement removed any uncertainty from the sentence-credit construct that resulted from a discretionary, credit-determination process.[68]

Moreover, Chief Judge Everett noted that, from the government's perspective, mandatory, day-for-day credit places a convening authority in a better position to gauge at "what level of court-martial he should refer charges against an accused."[69] Similarly, from a defense perspective, an accused has a more informed and reasoned basis upon which to choose "what pleas to enter or what pretrial agreement to propose."[70] Lastly, the military judge can properly instruct any panel members on "how pretrial confinement is treated for sentencing purposes."[71] In sum, the *Allen* court found the Defense Secretary's instruction consistent with the spirit of Congress' Military Correctional Facilities Act of 1968 and American Bar Association standards for criminal justice[72] because the instruction required universal application of 18 U.S.C. § 3568 to all servicemembers facing trial by court-martial, and was in harmony with the larger federal, criminal-justice system.[73]

C. Post-*Allen* Developments: Two Steps Forward

1. Statutory Changes

In October 1984—nine months after the opinion in *Allen*—Congress repealed the singled-pronged, pretrial-confinement-credit statute codified at 18 U.S.C. § 3568.[74] At the same time, Congress approved a new, double-pronged statute, codified at 18 U.S.C. § 3585, which became effective in November 1987.[75] As it did then, § 3585(b) currently states:

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[65] *Allen*, 17 M.J. at 128.

[66] *Id.* at 129 (Everett, C.J., concurring).

[67] *Id.*

[68] *Id.* (noting the way the system was designed, "no one [could] foresee exactly what weight [would] be given to pretrial confinement by various sentencing authorities and convening authorities").

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] The court quoted the following standard in its opinion:

> Credit against the maximum term and any minimum term should be given to a defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which a charge is based. This should specifically include credit for time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to arrival at the institution to which the defendant has been committed.

Id. at 128 (plurality opinion) (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES § 18-4.7(a) (2d ed. 1979)); ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING § 18-3.21(f)(i)–(iii) (3d ed. 1994) (restatement of former Standard 18-4.7).

[73] *Allen*, 17 M.J. at 128.

[74] *See supra* note 9 and accompanying text.

[75] *Id.*

> Credit for prior custody. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> (1) as a result of the offense for which the sentence was imposed; or
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.[76]

By enacting § 3585(b), Congress effectively enlarged the grounds upon which a federal prisoner could claim credit for pretrial confinement; it combined the original ground in § 3568 with a new, additional ground. Credit remains available for pretrial confinement directly related to "the offense for which the sentence [is ultimately] imposed."[77] Credit is now also available for pretrial confinement based upon "any other charge for which the defendant [is] arrested *after* the commission of the offense for which the sentence [is ultimately] imposed."[78] In accordance with § 3585(b), a federal prisoner who has not received pretrial confinement credit—under either basis—against another sentence is entitled to receive such credit against his impending sentence.[79] More importantly, however, Congress omitted language previously contained in § 3568 that excluded from credit eligibility "any criminal offense . . . triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress."[80] Thus, by this omission, Congress specifically and statutorily included convicted servicemembers in the group of federal prisoners eligible for pretrial confinement credit. As a result, the statute's military, regulatory counterpart discussed below also changed.

2. Regulatory Changes

Despite Congress having enacted 18 U.S.C. § 3585(b) in 1984, with a 1 November 1987 effective date, the Secretary of Defense revised DODI 1325.4 (1968).[81] In May 1988, the Secretary reissued the revised instruction as a directive, which retained the same number as the instruction, and the sentence-computation mandate without significant change. The directive stated:

> Computation of sentences. Procedures employed in the computation of sentences shall conform to those established by the Department of Justice (DoJ) for Federal prisoners unless they conflict with this Directive.[82]

In September 1999, the Secretary amended Department of Defense Directive (DODD) 1325.4 (1988), but omitted "the language quoted above regarding computation of sentences."[83] In December 1999, however, the Secretary issued DODI

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[76] 18 U.S.C. § 3585(b) (2000).

[77] *Id.* § 3858(b)(1) (surviving provision).

[78] *Id.* § 3858(b)(2) (new provision) (emphasis added).

[79] *Id.* § 3858(b). Interpreting this new statute the same way, the U.S. Supreme Court opined:

> Congress altered § 3568 in at least three ways when it enacted § 3585(b). First, Congress replaced the term "custody" with the term "official detention." Second, Congress made clear that a defendant could not receive a double credit for his detention time. Third, Congress enlarged the class of defendants eligible to receive credit. Under the old law, a defendant could receive credit only for time spent in custody in connection with "the offense . . . for which sentence was imposed." Under the new law, a defendant may receive credit both for this time and for time spent in official detention in connection with "any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed."

United States v. Wilson, 503 U.S. 329, 337 (1992) (alteration in original).

[80] *Compare* 18 U.S.C. § 3568 (1982), *with* § 3585(b). Appendix A provides a chart tracking this statute's development, as well as its regulatory progeny. *See infra* App. A.

[81] DODI 1325.4 (1968), *supra* note 7; *see supra* note 9 and accompanying text.

[82] U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES enclosure 1, para. H.5 (19 May 1988) [hereinafter DODD 1325.4 (1988)].

[83] United States v. Tardif, 55 M.J. 670, 671 (C.G. Ct. Crim. App. 2001) (discussing *Allen* credit and citing U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES (28 Sept. 1999) [hereinafter DODD 1325.4 (1999)]), *set aside on other grounds*, 57 M.J. 219 (C.A.A.F. 2002), *on remand at* 58 M.J. 714 (C.G. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 394 (C.A.A.F. 2004).

1325.7 (1999)[84] to complement DODD 1325.4 (1999). The DODI 1325.7 (1999) revived the previous sentence-computation mandate, restating it in the following language:

> Procedures used to compute sentences shall conform to those established by the Department of Justice for Federal Prisoners unless they conflict with this Instruction, [DODD 1325.4], or existing Service regulations.[85]

In 2001, the Defense Secretary updated DODI 1325.7 (1999), and made further changes in 2003; however, the December 1999 sentence-computation mandate remains unaltered.[86] Therefore, in its current form, DODI 1325.7 (2001) still voluntarily incorporates federal sentence-computation procedures into military criminal law in exactly the same way its predecessor instruction did in 1955, despite the omission of specific statutory language from 18 U.S.C. § 3585(b) that previously excluded servicemembers tried by court-martial from eligibility for this credit.[87]

While the federal sentence-credit statute and the military regulatory guidance underwent transformation, the sentence-computation rule promulgated by the U.S. Parole Commission,[88] as well as the U.S. Bureau of Prisons' adoption of that rule,[89] remained unchanged. As discussed in the next section, military courts have continued to grant *Allen* credit, and have expanded its applicability.

*3. Key Post-*Allen *Court Opinions*

Consistent with post-*Allen* (post-1984) statutory and regulatory changes to the pretrial-confinement-credit rubric, military courts have continued granting pretrial confinement credit in accordance with *Allen*. This practice has continued because the statutory changes affected by Congress did not fundamentally alter the previous rules adopted by the Secretary of Defense. The changes favorably augmented the rules for the benefit of military accused. The *Allen* opinion provided compulsory credit for lawful pretrial confinement directed solely by military authorities and carried out solely in military confinement facilities. The service courts of criminal appeals, however, expanded upon *Allen* and found credit entitlements where pretrial confinement was, for instance, imposed at the behest of federal or state authorities and served in non-military jails, or imposed at the behest of a foreign government and carried out overseas. What follows is a chronological survey of key post-*Allen* opinions.

a. Same-Crimes Credit Under 18 U.S.C. §§ 3568 and 3585(b)(1)

In *United States v. Huelskamp*,[90] a court-martial convicted Private E1 (PVT) Huelskamp of absence without leave (AWOL) and larceny, and sentenced him to a bad-conduct discharge, confinement for twenty months, and partial forfeitures. On appeal, PVT Huelskamp argued he was entitled to fifteen days of credit for the time "he spent in pretrial confinement in a

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[84] U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (17 Dec. 1999) [hereinafter DODI 1325.7 (1999)].

[85] *Id.* para. 6.3.1.5.

[86] United States v. Smith, 56 M.J. 290, 293 (C.A.A.F. 2002) ("Defense Instruction (DODI) 1325.4 (Oct. 7, 1968) . . . was [ultimately] revised and reissued as DODI 1325.7 (July 17, 2001), without significant change to the provision at issue in this case."); *see also* DODI 1325.7 (2001), *supra* note 14, para. 6.3.1.5 (C1, 10 June 2003) ("Procedures used to compute sentences shall conform to those established by the Department of Justice for Federal Prisoners unless they conflict with this Instruction, [DODD 1325.4], or existing Service regulations.").

[87] Appendix B provides a chart tracking the development of DODI 1325.4 (1955), *supra* note 53; DODD 1325.4 (1988), *supra* note 82; and DODI 1325.7 (1999), *supra* note 84. *See infra* App. B.

[88] 28 C.F.R. § 2.10(a) (2008) ("[A]ny such [convicted] person shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.").

[89] U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5880.28, SENTENCE COMPUTATION MANUAL (CCA of 1984) (19 July 1999) [hereinafter PROGRAM STATEMENT 5880.28]. The relevant rule states, in part:

> Credit related to 18 U.S.C. § 3585(b)(2). Prior Custody Credit will be given for time spent in official detention as the result of any federal, state or foreign arrest which is not related to, yet occurred on or after the date of the federal offense (as shown on the judgment and commitment) for which the [federal] sentence was imposed; provided it has not been credited to another sentence.

Id. ch. I, para. 3c(1)(b); *see also* Hughes v. Slade, 347 F. Supp. 2d 821, 830 (D. Cal. 2004) (quoting and discussing an earlier, identical version of this rule dated 14 February 1997).

[90] 21 M.J. 509 (A.C.M.R. 1985) (discussing confinement directed by military authorities and served in a civilian jail).

civilian jail under the direction of military authorities, pending his return to his unit from AWOL status."[91] The Army Court of Military Review (ACMR) agreed, reasoning the pretrial confinement was "at the request of and solely to facilitate the administrative needs of military AWOL apprehension authorities."[92] Private Huelskamp's pretrial confinement was clearly in connection with an offense for which he was convicted and sentenced by court-martial, i.e., AWOL. Thus, the ACMR's award of *Allen* credit was consistent with the then-extant pretrial-confinement-credit statute, 18 U.S.C. § 3568.

In *United States v. Davis*,[93] military police arrested PFC Davis at the Fort Benning commissary while he was attempting to cash a forged check using a false military identification card. Because the military police could not verify PFC Davis' military status at the time—and, therefore, presumed he was a civilian—they released him to federal law enforcement officers.[94] The federal authorities "held [PFC Davis] in the Muscogee County jail for further investigation and trial."[95] When, one month later, an on-going, joint investigation revealed PFC Davis was an Army deserter, federal authorities returned him to military control; this resulted in his being placed into pretrial confinement at Fort Benning.[96]

On appeal, PFC Davis asserted he was entitled—under *Allen*—to twenty-seven days of credit for the time he spent in civilian pretrial confinement at the direction of the United States Attorney.[97] The ACMR agreed, and explained that, "[h]ad [PFC Davis] been tried in a federal district court[,] he would have received sentence credit for the [twenty-seven] days of pretrial he spent in the Muscogee County jail at the instance [sic] of federal authorities."[98] Therefore, the court held that Soldiers "tried by court-martial must be given sentence credit for time spent in pretrial custody at the instance [sic] of federal civilian authorities in connection with the 'offense or acts' for which a sentence to confinement by court-martial ultimately is imposed."[99] In this case, PFC Davis' pretrial confinement was in connection with the offenses for which he was convicted and sentenced by court-martial, i.e., check forgery and using a fake military identification card.

In *United States v. Dave*,[100] the ACMR expanded upon the holdings in *Allen*, *Huelskamp*, and *Davis*. At trial, Sergeant (SGT) Dave contested charges of carnal knowledge and sodomy.[101] The court-martial, however, convicted SGT Dave on all counts, and sentenced him to a dishonorable discharge, confinement for thirty-six months, partial forfeitures, and reduction to Private E1.[102] The charges arose from SGT Dave's sexual misconduct with a friend's thirteen-year-old daughter.[103] After the child's mother confronted SGT Dave, he voluntarily "reported his 'child molestation' to the local police who placed him in confinement pending a decision by the Army on whether to take jurisdiction of the case."[104] The local police released SGT Dave twenty-four days later when the Army took jurisdiction over the matter.[105]

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[91] *Id.*

[92] *Id.* at 509–10.

[93] 22 M.J. 557 (A.C.M.R. 1986) (discussing confinement directed by federal authorities and served in a civilian jail).

[94] *Id.* at 557–58.

[95] *Id.* at 558.

[96] *Id.*

[97] *Id.* at 557–58.

[98] *Id.* at 558.

[99] *Id.* (citing DODI 1325.4 (1968), *supra* note 7, para. III.Q.6). *Davis* affirmatively expanded the holding in *Huelskamp* by stating: "We do not construe *Huelskamp* to hold that pretrial credit is necessarily excluded in circumstances other than those encountered therein." *Id.* at 558 n.1. The ACMR reaffirmed *Davis* in two subsequent cases. *See* United States v. Peterson, 30 M.J. 946, 950 (A.C.M.R. 1990) (stating, "pursuant to *United States v. Allen*," an accused is entitled to pretrial confinement credit, despite having been "confined 'solely through the impetus of civil authorities,'" for offenses for which he is later convicted and sentenced at trial by court-martial); United States v. Ballesteros, 25 M.J. 891, 893 (A.C.M.R. 1988) ("[S]oldiers tried by court-martial must be given *Allen* credit for . . . [lawful] pretrial confinement in state or federal civilian confinement facilities at the instance [sic] of federal authorities when served in connection with misconduct ultimately resulting in a sentence to confinement imposed by court-martial.").

[100] 31 M.J. 940 (A.C.M.R. 1990) (discussing confinement directed by state authorities and served in a civilian jail).

[101] *Id.* at 941.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

After trial, appellate defense counsel submitted SGT Dave's case to the ACMR without assigning error.[106] The court, however, on its own initiative, "specified the issue of whether appellant was entitled to [twenty-four days of] credit for pretrial confinement in the state facility."[107] Relying specifically on its previous holdings in *Huelskamp* and *Davis* in affirmatively answering this question, the ACMR held: "[A] soldier tried by court-martial *must* be given sentence credit for time spent in pretrial custody by local civilian authorities in connection with the offense or acts solely for which a sentence to confinement by a court-martial is ultimately imposed."[108] Sergeant Dave's pretrial confinement was in connection with his misconduct amounting to *child molestation*; he was tried and sentenced by court-martial for synonymous crimes: carnal knowledge and sodomy.[109] Therefore, SGT Dave was entitled to twenty-four days of credit.[110]

Huelskamp, *Davis*, and *Dave*, read together in light of *Allen*, reflect the judicial mandate that an accused is entitled to credit for pretrial confinement in any civilian facility, notwithstanding whether military, federal, or state authorities imposed the confinement. Credit shall be forthcoming where the accused is tried and sentenced by court-marital for the offenses that prompted the pretrial confinement. Because all of these opinions cite *Allen* exclusively as the source of their authority to grant relief, the logical conclusion is the ACMR awarded sentence credit based on DODI 1325.4 (1968) and 18 U.S.C. § 3568, despite DODD 1325.4 (1988) and 18 U.S.C. § 3585(b)(1) having taken effect after the 1986 *Davis* opinion.[111] In 1995, the Air Force Court of Criminal Appeals (AFCCA) took the lead as the first service court to expressly construe 18 U.S.C. § 3585(b) in a published opinion,[112] and apply the new statute to military accused tried by court-martial within the context of *Allen*.

In *United States v. Murray*,[113] a panel convicted Senior Airman (SrA) Murray for raping, assaulting, and threatening his former girlfriend with a pistol. For these crimes, the members sentenced SrA Murray to a dishonorable discharge, confinement for ten years, partial forfeitures, and reduction to the grade E1.[114] Initially, county deputies in Florida arrested SrA Murray for the alleged rape, and held him in pretrial confinement for forty-six days.[115] When he posted bail, Air Force authorities assumed jurisdiction over the case, and immediately placed SrA Murray into military confinement—where he remained for an additional seventy-eight days.[116] At trial, the military judge awarded SrA Murray seventy-eight days of credit for military pretrial confinement, but denied SrA Murray's motion for forty-six days of credit for the time he spent in civilian pretrial confinement in an Okaloosa County jail.[117]

On appeal, SrA Murray argued he was entitled to forty-six days of *Allen* credit for his civilian pretrial confinement.[118] The AFCCA agreed after addressing two key issues: (1) whether DODD 1325.4 (1988) "still require[d] the military to follow Department of Justice sentence computation rules;" and (2) whether the "Department of Justice [was] required to credit state pretrial confinement to federal sentences."[119] The court found that although DODD 1325.4 (1988) superseded

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[106] *Id.*

[107] *Id.* at 941 n.2.

[108] *Id.* at 942 (emphasis added).

[109] *Id.* at 941.

[110] *Id.* at 942.

[111] *United States v. Belmont* appears to be the first service court opinion to specifically mention 18 U.S.C. § 3585(b) (1988). 27 M.J. 516 (N.M.C.M.R. 1988). *Belmont*, however, is inapposite to the point here because *Belmont* specifically addressed whether pretrial confinement credit in excess of adjudged confinement could offset other types of punishment in the sentence. *Id.* The court answered in the negative. *Id.* at 517–18; *see* United States v. Smith, 56 M.J. 290 (C.A.A.F. 2002) (reaffirming *Belmont* and holding an accused is not entitled to pretrial confinement credit, or any other offset, against a sentence to no confinement).

[112] United States v. Murray, 43 M.J. 507 (A.F. Ct. Crim. App. 1995); *see* Major Amy M. Frisk, *Military Justice Symposium: New Developments in Pretrial Confinement*, ARMY LAW., Mar. 1996, at 25, 32 (discussing the *Murray* opinion).

[113] 43 M.J. at 507 (discussing confinement directed by state authorities and served in a civilian jail, and applying 18 U.S.C. § 3585(b) (1994)).

[114] *Id.* at 510.

[115] *Id.* at 513.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* at 514.

DODI 1325.4 (1968) after the CMA decided *Allen*, the later directive "contain[ed] the same requirement" to apply DOJ sentence computation rules in the military-justice system.[120]

The court next examined 18 U.S.C. § 3585(b), and determined the statute required the DOJ to credit federal prisoners with state pretrial confinement time not otherwise applied against another sentence. The court came to this conclusion based on the following analysis:

> The meaning of 18 U.S.C. § 3585(b) is plain—as long as a federal prisoner has not already received credit for pretrial confinement against another sentence, he receives credit against his pending federal sentence. The statute does not discriminate based on the sovereign responsible for the pretrial confinement. Rather, it readily appears Congress intended this statute to cover state-imposed pretrial confinement. Otherwise, why use broad terms like "official detention" and "any other charge . . . after the commission of the offense," when Congress could have expressly narrowed the scope of the statute to federal custody? Moreover, we see the no-prior-credit proviso in the last line of the statute as including the scenario where a convict has committed crimes under both federal and state law. If a prisoner has been confined by the state after the commission of the offense, then he receives credit against his federal sentence—*unless* such custody already has been credited against a *state* sentence. The United States Sentencing Commission also shares this interpretation of the law.[121]
>
> More important, the United States courts have construed . . . the broader language of the current statute [18 U.S.C. § 3585(b)] to require federal credit for state pretrial confinement. In *Wilson*, the Supreme Court . . . did not dispute the Sixth Circuit's construction of the statute to require federal sentence credit for state pretrial confinement. Indeed, the Court expressly conceded the new statute had broadened the effect of its predecessor in three ways, including enlarging the class of defendants entitled to credit.[122]
>
> Therefore, we also answer the second part of this issue in the affirmative—if [SrA Murray] had been convicted and sentenced in United States District Court, the Attorney General would credit his sentence for the [forty-six] days of state pretrial confinement. Department of Defense Directive 1325.4 [(1988)] requires the military to do the same. In our decretal paragraph, we will direct that [SrA Murray] receive [forty-six] days of additional sentence credit.[123]

Like the ACMR's opinions in *Huelskamp*, *Davis*, and *Dave*—which applied *Allen* and § 3568—the AFCCA's opinion in *Murray* reflects the same judicial mandate under 18 U.S.C. § 3585(b)(1), i.e., an accused is entitled to credit for pretrial confinement in any civilian facility, despite the nature of the sovereignty (military, federal, or state) that imposed the confinement. Credit is due the accused as long as he is tried and sentenced by court-marital for the offenses that prompted the pretrial confinement. The *Murray* Court, consistent with the analysis in *Allen*, relied upon § 3585(b)(1) and DODD 1325.4 (1988) as authority to grant credit for civilian pretrial confinement imposed for the alleged rape for which SrA Murray was ultimately convicted and sentenced by court-martial. Several other courts have followed the reasoning in *Murray*.[124]

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[120] *Id.*

[121] *Id.* (alteration in original); *see also* PROGRAM STATEMENT 5880.28, *supra* note 89, ch. I, para. 3c(1)(b) ("Prior Custody Credit will be given for time spent in official detention as the result of any federal, state or foreign arrest . . . ."); *cf.* Reno v. Koray, 515 U.S. 50, 61, 63 n.5 (1995) (noting the Bureau of Prisons "often grants credit under § 3585(b) for time spent in *state* custody" pursuant to its "internal agency guideline, which is akin to an 'interpretive rule,'" and, therefore, is "entitled to some deference . . . since it is a 'permissible construction of the statute'") (internal citations omitted).

[122] *Murray*, 43 M.J. at 514–15 (referring to United States v. Wilson, 503 U.S. 329, 337 (1992) and recognizing the inclusion of servicemembers in the class of eligible defendants) (internal footnote and citations omitted).

[123] *Id.* at 515; *see* Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, ARMY LAW., Aug. 1999, at 1, 5–7 (discussing *Murray* and noting its "approach is superior").

[124] United States v. Rock, 52 M.J. 154, 157 (C.A.A.F. 1999) ("[I]t is the Secretary of Defense himself who has mandated that the armed forces comply with federal practice and credit pretrial confinement."); United States v. Sarazine, No. 20020321, slip. op. at 2 (A. Ct. Crim. App. Oct. 14, 2004) ("We agree that appellant is entitled to sentence credit 'for time spent in pretrial custody by local civilian authorities in connection with the offense or acts solely for which a sentence to confinement by a court-martial is ultimately imposed.'"); United States v. Tardif, 55 M.J. 670, 673 (C.G. Ct. Crim. App. 2001) ("We agree with the analysis in *Murray*, and hold that an accused must receive day-for-day sentence credit for pretrial confinement by civilian authorities for an 'offense for which the sentence was imposed,' where that pretrial confinement has not been credited against any other sentence."); United States v. Smith, 54 M.J. 783, 878–87 (A.F. Ct. Crim. App. 2001) ("[I]n accordance with our senior court's guidance in *Allen*, we must continue to follow the Department of Justice (DOJ) provisions concerning credit for pretrial confinement."), *aff'd*, 56 M.J. 290, 293 (C.A.A.F. 2002) ("As written, 18 U.S.C. § 3585(b) and DODI 1325.7 [(2001)] apply . . . to prisoners serving [court-martial] sentences to confinement."); United States v. Chaney, 53 M.J. 621, 622–23 (N-M. Ct. Crim. App. 2000) (adopting the reasoning in *Murray* and finding the accused entitled to credit for initial pretrial confinement imposed by civilian authorities); United States v. Gazurian, No. 31372, 1997 CCA LEXIS 144, at *3 (A.F. Ct. Crim. App. Feb. 20, 1997) (citing *Murray* and stating "[s]ervice members are entitled to credit for pretrial confinement served in civilian confinement[,] provided they have not been previously credited for the same confinement[, under either

Thus far, the service courts have considered only whether accused servicemembers were entitled to sentence credit for pretrial confinement imposed by military, federal, and state authorities. In the following two cases, the AFCCA further expanded the entitlement to credit to cover pretrial confinement imposed by foreign governments.

In *United States v. Pinson*, the AFCCA decided whether an accused was entitled to sentence credit when "held in pretrial confinement by a foreign government."[125] Finding an entitlement to credit existed, the *Pinson* Court reasoned that *Allen* afforded an accused credit for military pretrial confinement, and that *Murray* afforded an accused credit for civilian pretrial confinement.[126] Furthermore, since 18 U.S.C. § 3585(b) "does not limit this credit to time spent in facilities within the United States[,] . . . credit *must* [also] be given for pretrial confinement served at the hands of a foreign government."[127] Consistent with *Murray*, the court noted § 3585(b)(1) speaks in terms of "official detention" and "offense[s] for which the sentence was imposed," but is silent concerning the imposing sovereign.[128] Because Icelandic police held SrA Pinson while they investigated "related charges"[129] stemming from his misconduct, the court granted credit for foreign pretrial confinement.

In *United States v. Lenoir*,[130] the AFCCA expanded on *Pinson* and addressed whether an accused is entitled to credit for pretrial confinement directed by a foreign government when the command is unaware of that detention. Relying on *Allen*, *Murray*, and *Pinson*, and unaware of any exception for the command not knowing the accused's plight, the *Lenoir* Court held "the matter falls squarely within the parameters of 18 U.S.C. § 3585(b)."[131] While German police arrested Airman First Class (A1C) Lenoir for possessing cocaine, a court-martial convicted and sentenced him on the same charge.[132] Therefore, the court awarded A1C Lenoir eight days of credit for foreign government pretrial confinement. In the following section, this article discusses § 3585(b)(2) credit for crimes unrelated to the court-martial process.

b. Unrelated-Crimes Credit Under 18 U.S.C. § 3585(b)(2)

While the law developed regarding the first prong of 18 U.S.C. § 3585(b), little development occurred regarding the statute's second prong. When *Murray* was decided in June 1995, the service courts had not yet addressed 18 U.S.C. § 3585(b)(2)—pertaining to unrelated crimes credit.

In 1998, the ACCA issued an opinion in *United States v. Martin*,[133] wherein it discussed § 3585(b)(2). In *Martin*, PVT Martin went AWOL from his unit in Texas on 20 December 1996.[134] Over three months later, on 7 April 1997, local police arrested PVT Martin for offenses wholly unrelated to the AWOL offense for which he was tried by court-martial.[135] After notification on 8 April 1997 of PVT Martin's civilian arrest and detention, on 10 April 1997 military authorities requested local police hold him for transfer to military control. The transfer to military pretrial confinement was completed on 14 April 1997—where PVT Martin remained until trial on 2 June 1997.[136] At trial, the military judge granted pretrial confinement credit only for the period 11 April to 1 June 1997.[137]

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prong of 18 U.S.C. § 3585(b)]"); *cf.* United States v. DeLeon, 53 M.J. 658, 660 (A. Ct. Crim. App. 2000) ("Based on [18 U.S.C. § 3585(b) and DODD 1325.4 (1988)], we hold that any part of a day in pretrial confinement must be calculated as a full day for purposes of pretrial confinement credit under *Allen* . . . ."). This apparent consensus among the service courts regarding credit for state pretrial confinement should allay any concern about the differing service-court approaches to awarding this credit that existed in the 1990s. *See* Seidel, *supra* note 123, at 6–7; Frisk, *supra* note 112, at 31–32.

[125] 54 M.J. 692, 694 (A.F. Ct. Crim. App. 2001) (pretrial confinement in Iceland).

[126] *Id.* at 694–95.

[127] *Id.* at 695.

[128] *Id.*

[129] *Id.* at 694.

[130] No. S30161, 2005 CCA LEXIS 100, at *1 (A.F. Ct. Crim. App. Mar. 22, 2005) (pretrial confinement in Germany).

[131] *Id.* at *3–4.

[132] *Id.* at *3.

[133] No. 9700900 (A. Ct. Crim. App. June 18, 1998).

[134] *Id.* at 2.

[135] *Id.*

[136] *Id.*

[137] *Id.*

On appeal, PVT Martin asserted he was entitled to additional credit for the first three days he spent in civilian pretrial confinement (7–10 April 1997) for the unrelated charges, and based his assertion upon *Allen*, DODD 1325.4 (1988), and 18 U.S.C. § 3585(b)(2).[138] The ACCA acknowledged "the apparent validity of [PVT] Martin's legal argument, but avoid[ed] a [direct] decision on that issue"[139] based on a lack of facts supporting the claim for credit. The court did not expressly state, but very strongly implied, the statute's second prong would have afforded PVT Martin relief had he been able to verify his claim. In its analysis, the ACCA reasoned:

> The evidence of record establishes that appellant was arrested by Mississippi authorities on 7 April 1997 for "any other charge." This arrest occurred "after the commission of the offense for which the sentence was imposed" (the court-martial charges). There is absolutely no evidence in this record that the appellant "has not been credited" with the days from 7-10 April 1997 "against another sentence." For example, there is no evidence of record whether the Mississippi charges ever went to trial, the result of that trial, or whether the appellant received credit toward a sentence to confinement for the period 7-10 April 1997 that he spent in civilian pretrial confinement. The burden was on the appellant to present evidence supporting his claim for pretrial confinement credit. Without a factual predicate, the appellant is entitled to no relief on his claim of error.[140]

The Coast Guard Court of Criminal Appeals (CGCCA) briefly commented on 18 U.S.C. § 3585(b)(2) in *United States v. Tardif*.[141] In *Tardif*, the court relied on *Murray* and § 3585(b)(1) to grant credit for civilian-directed pretrial confinement for the same offense for which the accused was later tried by court-martial.[142] After agreeing with the reasoning in *Murray*, the court acknowledged § 3585(b)(2) and stated: "This provision arguably grants [an accused] credit for pretrial official detention even if the detention bears no relationship to the offenses for which the [accused] was [tried and] sentenced [by court-martial]."[143] Although the CGCCA did not decide *Tardif* on § 3585(b)(2) grounds, it likely would have granted credit on that basis had *Tardif* been synonymous with *Martin* and contained evidence adequate to support granting credit.

In *United States v. Sherman*,[144] the AFCCA revisited the issue raised in *Martin*, and directly addressed the applicability of § 3585(b)(2) to a military accused tried by court-martial. On the night of 24–25 March 2000, Airman (Amn) Sherman went to a nightclub where he met two other airmen.[145] While there, Amn Sherman distributed ecstasy to one of the airmen and a club dancer named "Robbie."[146] Robbie had "an adverse reaction to the ecstasy . . . [and] overdosed."[147] Another club dancer described Amn Sherman to the local police, and told them he "had been dealing drugs at the club for the past three or four weeks."[148] Later that same night, the police arrested Amn Sherman at the club, found ecstasy on his person, and charged him with "*possession* of a controlled substance."[149] Airman Sherman spent five days in civilian pretrial confinement on the possession charge, which local authorities later decided not to prosecute.[150] Based on this misconduct, a court-martial tried and convicted Amn Sherman for "*distribution and use* [of ecstasy], both on divers occasions."[151] His sentence included a discharge and fifteen months' confinement.[152]

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[138] *Id.*

[139] Major Michael J. Hargis, *Pretrial Restraint and Speedy Trial: Catch Up and Leap Ahead*, ARMY LAW., Apr. 1999, at 13, 16 (discussing the *Martin* opinion).

[140] *Martin*, No. 9700900, slip. op. at 3 (quoting 18 U.S.C. § 3585 (b)(2) (1994)).

[141] 55 M.J. 670 (C.G. Ct. Crim. App. 2001).

[142] *Id.* at 671, 673.

[143] *Id.* at 673 (dictum).

[144] 56 M.J. 900 (A.F. Ct. Crim. App. 2002).

[145] *Id.* at 901.

[146] *Id.*

[147] *Id.*

[148] *Id.*

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

[150] *Id.*

[151] *Id.* at 900 (emphasis added).

[152] *Id.*

On appeal to the AFCCA, Amn Sherman argued he was entitled to five days of credit for civilian pretrial confinement "for one of the offenses for which he was tried at his court-martial."[153] In response to the assigned error, the court noted "the record [did] not support the contention . . . that [Amn Sherman] spent time in civilian confinement for *distribution* of ecstasy."[154] However, after discussing the holdings in *Allen*, *Murray*, *Chaney*, *Pinson*, and *Tardif*, the court concluded:

> In this case, as we noted, the appellant was arrested for possession of a controlled substance. The appellant's sentence was imposed for four offenses, including distribution of ecstasy on divers occasions. One of those occasions was his distribution to the dancer, Robbie, in the early morning hours of 25 March, which preceded his arrest for possession. Given the circumstances in this case, we conclude the appellant was eligible for [five] days' credit under 18 U.S.C. § 3585(b)(2).[155]

The court's conclusion here is consistent with the one in *United States v. Smith*.[156] In *Smith*, decided four months prior to *Sherman*, the CAAF expressly stated: "As written, 18 U.S.C. § 3585(b) and DODI 1325.7 apply only to prisoners serving [court-martial] sentences to confinement. We [will not] . . . extend the Secretary of Defense's application of 18 U.S.C. § 3585(b) beyond its terms."[157] One of those terms, § 3585(b)(2), provides an accused with credit for pretrial confinement imposed for "any other charge for which the defendant was arrested *after* the commission of the offense for which the sentence was imposed [by court-martial]."[158] In *Sherman*, the civilian authorities did not prosecute Amn Sherman for possessing ecstasy. His five days in pretrial confinement were therefore "not credited against another sentence."[159] Having concluded Amn Sherman was eligible for credit, the AFCCA correctly applied § 3585(b)(2) and recognized his right to receive five days of credit.[160]

With *Martin*, *Smith*, and *Sherman* leading the way, the CAAF and the service courts of criminal appeals commenced the forward-moving, judicial development of § 3585(b)(2). As we shall see in Part III below, however, the ACCA, in *United States v. Gogue*,[161] issued a decision that appears to have halted that development and sent the area of unrelated-crimes credit in the Army into retrogression.

III. *United States v. Gogue*: Two Steps Back?

A. Anatomy of the Case

From August 2004 to February 2005, Specialist (SPC) Gogue regularly indulged in several controlled substances, which formed the basis for his court-martial for "illegal drug *use*."[162] After he committed most of the above misconduct, local police arrested SPC Gogue in January 2005 for unrelated drug activity, and charged him with "illegally *possessing* a controlled substance."[163] Trial counsel decided not to refer a drug-possession charge to court-martial. Specialist Gogue remained in civilian pretrial confinement for four days for his state drug charge before making bail.[164] After failing to appear for a February 2005 hearing on the civilian charge, and then going AWOL for a brief period in March 2005, local police arrested SPC Gogue for the second time pursuant to a failure-to-appear bench warrant.[165] After the second arrest, he spent an additional eighty-five days in civilian pretrial confinement, which ended with his trial by court-martial.[166]

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[153] *Id.*

[154] *Id.* at 900–01 (emphasis added).

[155] *Id.* at 902.

[156] 56 M.J. 290 (C.A.A.F. 2002).

[157] *Id.* at 293 (refusing to use otherwise creditable pretrial confinement time as an offset against parts of a sentence other than confinement).

[158] 18 U.S.C. § 3858(b)(2) (2000) (emphasis added).

[159] *Id.* § 3858(b).

[160] United States v. Sherman, 56 M.J. 900, 902 (A.F. Ct. Crim. App. 2002).

[161] No. 20050650 (A. Ct. Crim. App. May 18, 2007) (en banc).

[162] *Id.* at 4 (Sullivan, J., dissenting) (emphasis added).

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

[164] *Id.* at 4, 6 n.5 (confinement 18–21 January 2005).

[165] *Id.* at 4.

[166] *Id.* at 4–5, 6 n.5 (confinement 8 March to 31 May 2005).

At trial, SPC Gogue filed a written, 18 U.S.C. § 3585(b)(2) motion for civilian pretrial confinement credit for the period 9 March to 31 May 2005; he agreed with trial counsel that "the state failure-to-appear and drug possession offenses were unrelated to the . . . court-martial."[167] The military judge denied the motion with the following explanation:

> 18 U.S.C. 3585 provides for credit when the accused is detained, "As a result of the offense for which the [court-martial] sentence was imposed." It is true that detention need not be at the request of the military or even with the military's knowledge in order for credit to be given. But here, when the detention is for an offense wholly unrelated and not charged by the government, no sentencing credit is warranted.[168]

Apparently, the military judge based her decision solely on 18 U.S.C. § 3585(b)(1), which provides for traditional *Allen* or same-crimes credit. For reasons not obvious in *Gogue*, the military judge did not consider 18 U.S.C. § 3585(b)(2), which provides credit for unrelated crimes.

On appeal, SPC Gogue claimed the military judge erred by not awarding pretrial confinement credit.[169] Specifically, he argued the military judge failed to consider § 3585(b)(2) when she ruled on the motion, and that § 3585(b)(2) mandates credit because his pretrial confinement time did not offset any other sentence.[170] In an en banc, unpublished decision, the ACCA summarily affirmed the result at trial and refused to grant relief.[171] Without deciding the issue, the majority tacitly opined in a footnote that § 3585(b)(2) does not apply to military accused tried by court-martial.[172] The court also declared that even if the statute applies to accused servicemembers, "the Supreme Court has opined that trial judges lack the authority to calculate and apply pretrial confinement credit."[173]

Two dissenting judges found that 18 U.S.C. § 3585(b)(2) does apply to military accused tried by court-martial, and affords those servicemembers the opportunity to move the trial court for an award of unrelated-crimes credit.[174] The dissent, however, agreeing with the majority, declined to hold military judges responsible for awarding § 3585(b)(2) credit "in every case;" either the convening authority or the confinement facility commander would be responsible.[175] Undoubtedly, the unique facts of this case strongly influenced the second part of the dissent's opinion.[176] In Parts III.B and III.C below, this article addresses various concerns of the court, and argues § 3585(b)(2) is applicable to military accused tried by court-martial, and that military judges have the authority to grant motions for, and award, unrelated-crimes credit.

B. 18 U.S.C. § 3585(b)(2) Applies to Trials by Court-Martial

Contrary to the result in *Gogue*, 18 U.S.C. § 3585(b)(2) applies to trials by court-martial, and entitles military accused to awards of uncredited civilian pretrial confinement time due to "any other charge for which the [accused] was arrested *after* the commission of the offense for which the sentence was imposed [by court-martial]."[177] Historically, the Secretary of Defense has included language in his confinement facility regulations that promotes uniformity in sentence computation between the military and civilian criminal-justice systems. That language appeared for the very first time in the 1955 version of DODI 1325.4, and has appeared in one form or another in subsequent versions of Defense Department sentence-computation directives or instructions since then, including the current version of DODI 1325.7 (2001).[178] Although 18

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[167] *Id.* at 5.

[168] *Id.* (alteration in original).

[169] *Id.* at 6.

[170] *Id.* at 6–7. At the time of court-martial, the state offenses remained unadjudicated. *Id.* at 5.

[171] *Id.* at 1 (en banc).

[172] *Id.* at 1 n.*.

[173] *Id.* (citing United States v. Wilson, 503 U.S. 329, 333 (1992)).

[174] *Id.* at 6 (Sullivan, J., dissenting) ("[O]ur superior court's ruling in . . . *Allen* . . . compels such a conclusion.").

[175] *Id.* at 3–4.

[176] Immediately following his trial by court-martial, SPC Gogue returned to civilian pretrial confinement to await his state trial. *Id.* at 5, 6 n.5 (1–23 June 2005). At the state trial, he pleaded guilty to, and was convicted of, the drug-possession charge, and received a sentence to probation without confinement. *Id.* Thereafter, SPC Gogue remained in civilian confinement until his transfer to military control and post-trial confinement. *Id.* (23–28 June 2005).

[177] 18 U.S.C. § 3585(b)(2) (2000) (emphasis added).

[178] DODI 1325.7 (2001), *supra* note 14, para. 6.3.1.5 (C1, 10 June 2003); *see infra* App. B.

U.S.C. § 3568 expressly did not apply to offenses "triable by court-martial,"[179] the Defense Secretary's instruction made the statute's sentence-credit provision mandatory for the military. The *Allen* Court held that by issuing DODI 1325.4 (1968), the Secretary of Defense "voluntarily incorporat[ed into the military justice system] the pretrial-sentence credit extended to other Justice Department convicts."[180] Today, the *Allen* holding is strengthened by the lack of any exclusionary language in the statutory revision codified at 18 U.S.C. § 3585(b). If Congress did not want either prong of § 3585(b) to apply to convicted servicemembers sentenced to confinement, Congress could have specifically kept the exclusionary provision in the statute, but did not. Nevertheless, the CAAF reaffirmed *Allen* and its analysis in *Smith* wherein the court declared: "18 U.S.C. § 3585(b) and DODI 1325.7 apply only to prisoners serving [post-trial] sentences to confinement."[181]

Furthermore, when the service courts of criminal appeals award what is traditionally known as *Allen* credit, they are really awarding pretrial confinement credit pursuant to 18 U.S.C. § 3585(b)(1) (same-crimes credit). Although the underlying basis for the credit has not changed, its codification is new. Subsection (b)(1) is one of two prongs of § 3585(b), in force since 1 November 1987.[182] The *Allen* credit is no longer based upon the one-pronged § 3568, the section in effect when *Allen* was decided. Congress repealed § 3568 in October 1984, and replaced it with § 3585(b).[183] Thus, when the service courts grant *Allen* credit today, it is a foregone conclusion that § 3585(b) necessarily applies to trials by court-martial as the base statute via the DODI 1325.7 (2001) mandate. The disjunctive "or" between subsections (b)(1) and (b)(2) provides a choice between two permissive conditions of the base statute depending on the facts of each case. If § 3585(b)(1) is the applicable basis for granting traditional *Allen* credit, then, *a fortiori*, § 3585(b)(2) must be the applicable basis for granting unrelated-crimes credit. Both prongs apply to military trials because § 3585(b) does not specifically exclude courts-martial from its application as did its predecessor statute, § 3568. The contrary holding in *Gouge* is therefore unsupported by military law and misapplies the holding in *Wilson*.

As the cases discussed in Parts I and II have demonstrated, if an accused is otherwise qualified, he is entitled to pretrial confinement credit under § 3585(b)(1)–(2) depending upon the facts of his case. The statue is broad enough to cover confinement imposed by all sovereigns (military, federal, civilian, and foreign), carried out in both military and non-military facilities, and in the United States as well as overseas. The take-away here is that, according to *Allen*, *Murray*, *Martin*, *Smith*, and *Sherman*, DODI 1325.7 (2001) is a conduit for applying the sentence-computation rules enacted by Congress and implemented by the DOJ through the U.S. Sentencing Commission and the U.S. Bureau of Prisons. The current version of DODI 1325.7 (2001) states:

> Procedures used to compute sentences shall conform to those established by the Department of Justice for Federal Prisoners unless they conflict with this Instruction, [DODD 1325.4], or existing Service regulations.[184]

In accordance with 18 U.S.C. § 3585(b)(2), the DOJ implements the following sentence-computation procedure in the U.S. Bureau of Prisons' sentence-computation manual:

> Prior Custody Credit will be given for time spent in official detention as the result of any federal, state or foreign arrest which is not related to, yet occurred on or after the date of the federal offense (as shown on the judgment and commitment) for which the [federal] sentence was imposed; provided it has not been credited to another sentence.[185]

To date, this sentence-computation procedure is not in conflict with either DODI 1325.7 (2001) or DODD 1325.4 (2001), or

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[179] 18 U.S.C. § 3568 (1982).

[180] United States v. Allen, 17 M.J. 126, 127 (C.M.A. 1984) (citing DODI 1325.4, *supra* note 7, para. III.Q.6). The Defense Secretary promulgated DODI 1325.4 based upon the Congressional authority given him in the Military Correctional Facilities Act of 1968. *See* United States v. Palmiter, 20 M.J. 90, 92 n.2 (C.M.A. 1985); United States v. Kreutzer, 60 M.J. 400, 401 (C.A.A.F. 2004) (summary disposition).

[181] United States v. Smith, 56 M.J. 290, 293 (C.A.A.F. 2002). The service courts of criminal appeals "should follow the case which directly controls, leaving the [CAAF] the prerogative of overruling its own decisions." United States v. Pack, 65 M.J. 381, 385 (C.A.A.F. 2007) (quoting Agostini v. Felton, 521 U.S. 203, 237 (1997)).

[182] *See supra* note 9 and accompanying text.

[183] *Id.*

[184] DODI 1325.7 (2001), *supra* note 14, para. 6.3.1.5 (C1, 10 June 2003). In *United States v. Adcock*, the CAAF re-acknowledged the established principle "that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." 65 M.J. 18, 23 (C.A.A.F. 2007) (quoting United States v. Dillard, 8 M.J. 213, 213 (C.M.A. 1980)).

[185] PROGRAM STATEMENT 5880.28, *supra* note 89, ch. I, para. 3c(1)(b).

any existing service regulations or sentence computation manuals.[186] Only where a conflict exists would this procedure not apply. Regulatory silence on this matter is not tantamount to regulatory conflict.[187] While this sentence-credit scheme is subject to change as soon as Congress and the Executive determine sentence credits should be added or taken away, 18 U.S.C. § 3585(b) constitutes the applicable sentence-credit law in the military justice system via DODI 1325.7 (2001).

C. Trial Judges' Power to Adjudicate Motions for Appropriate Relief

In *Gogue*, the dissent agreed with the majority that military judges were not empowered to grant unrelated-crimes credit. The dissent's concern on this issue stemmed from the U.S. Supreme Court's opinion in *Wilson* wherein the Court held: "Congress has indicated that computation of the credit must occur after the defendant begins his sentence. A district court, therefore, cannot apply § 3585(b) at sentencing."[188] The dissent—as did the majority—appears to have construed this language, at worst, as a talisman preventing military judges from awarding § 3585(b)(2) credit, or, at best, as a prohibition upon granting such credit unless it can be characterized as a functional equivalent to an award of same-crimes credit, as discussed below.

A close reading of the dissent reveals a struggle to harmonize *Wilson's* application of § 3585(b) with conventional military trial practice. With respect to applying § 3585(b)(2), the dissent expressed the notion that "[m]ilitary trial judges are in no better position than their federal civilian counterparts to determine the appropriate amount of unrelated crimes credit to be given an accused when . . . [such] offenses are pending adjudication."[189] The dissent further stated that granting this credit would be "untenable unless, prior to court-martial, an accused has [already] been convicted and sentenced in state [or federal] court and released from . . . confinement."[190] Under these precise circumstances, granting unrelated-crimes credit is analogous to granting traditional *Allen* credit, i.e., same-crimes credit. When a civilian prosecution is complete—or when civilian authorities decide not to prosecute and the military proceeds to trial—any time spent in civilian pretrial confinement "is necessarily defined" upon the accused's "release . . . from . . . custody," and is therefore known before trial by court-martial.[191] Rather than letting military judges decide for themselves whether an accused has presented enough evidence at trial to warrant an award of pretrial confinement credit, the dissent pulled the matter from the province of the military judge and relegated it to the convening authority or confinement facility commander for adjudication.[192]

Toward the end of its opinion, however, the dissent seemed to have shifted sides by stating that if an accused presents detailed information regarding his unrelated state or federal criminal matters to the military judge—of which the judge is "not

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[186] *See* U.S. DEP'T OF DEFENSE, MANUAL 1325.7-M, DOD SENTENCE COMPUTATION MANUAL paras. C1.1, C1.2.1, C2.4.1, C2.4.2 (27 July 2004) (C2, 9 Mar. 2007) [hereinafter DOD MANUAL 1325.7-M]; U.S. DEP'T OF ARMY, REG. 190-47, MILITARY POLICE: THE ARMY CORRECTIONS SYSTEM para. 10-19f(2) (15 June 2006); U.S. DEP'T OF ARMY, REG. 633-30, APPREHENSIONS AND CONFINEMENT: MILITARY SENTENCES TO CONFINEMENT paras. 4a, 14b(25) (28 Feb. 1989) [hereinafter AR 633-30]; U.S. DEP'T OF AIR FORCE, INSTR. 31-205, THE AIR FORCE CORRECTIONS SYSTEM para. 5.7 (7 Apr. 2004) (C1, 6 July 2007); U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE para. 9.3 (21 Dec. 2007); U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR.1640.9C, DEPARTMENT OF THE NAVY CORRECTIONS MANUAL para. 9101 (3 Jan. 2006) [hereinafter SECNAVINST 1640.9C] (deferring to the procedures provided in DOD Manual 1325.7-M); U.S. DEP'T OF HOMELAND SECURITY, MANUAL M1000.6A, UNITED STATES COAST GUARD PERSONNEL MANUAL paras. 8.F.5.d., 8.F.6.c.5. (8 Jan. 1988) (C41, 18 June 2007). *See generally* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1640.9B, DEPARTMENT OF THE NAVY CORRECTIONS MANUAL para. 9311 (2 Dec. 1996) (providing detailed historical sentence computation rules consistent with PROGRAM STATEMENT 5880.28, *supra* note 89, ch. I, para. 3c(1)(b), but canceled and superseded by SECNAVINST 1640.9C).

[187] United States v. Gogue, No. 20050650, slip. op. at 8 n.8 (A. Ct. Crim. App. May 18, 2007) (Sullivan, J., dissenting) ("[S]ilence on the specific issue of confinement for unrelated offenses by a separate sovereign [is not] a conflict which allows us to ignore the exhortation of DODI 1325.7 [(2001)].").

[188] United States v. Wilson, 503 U.S. 329, 333 (1992).

[189] *Gogue*, No. 20050650, slip. op. at 10.

[190] *Id.* at 11.

[191] *Id.*

[192] An important distinction must be made between a military judge's responsibility to *award* or *grant* pretrial confinement credit, and the confinement facility commander's responsibility to *implement* or *apply* that credit. Military judges are empowered to award credit as an appropriate form of relief for the time an accused has spent in pretrial confinement. *See* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; MCM, *supra* note 19, R.C.M. 801(a)(4), 905(a), 906(a); United States v. King, 58 M.J. 110, 116 (C.A.A.F. 2003) (Baker, J., concurring in result). Confinement facility commanders, however, are responsible for applying pretrial confinement credit against approved sentences to post-trial confinement; they do not alter those approved sentences, but administratively reduce them by the amount of granted credit. *See* DOD MANUAL 1325.7-M, *supra* note 186, para. C2.4.1 ("The [report of result of trial (RROT)] shall constitute the official notice of administrative and judicial credit. Correctional facility commanders shall ensure that each prisoner promptly receives the credit shown in the report."); *id.* para. C2.4.2 ("Each prisoner shall receive all sentence credit directed by the military judge, as shown in the RROT. The judge will direct credit for each day spent in pretrial confinement . . . ."); *see also* Message, 181400Z Jan. 84, HQDA DAJA-CL, subject: Credit for Pretrial Confinement, U.S. v. Allen ("Credits must be applied at the confinement facility, and not through a reduction by the convening authority of the approved sentence, because of the graduated system of good time credits. *See generally* United States v. Larner, 1 M.J. 371 (C.M.A. 1976).").

automatically privy"—the military judge is within his power to grant appropriate credit.[193] With "such a showing at court-martial, unrelated crimes, civilian pretrial confinement based upon them, and any [resulting] sentence . . . play a role . . . supporting a potential sentence credit."[194] This latter approach is the better approach because, as discussed in Part III.C.2, it allows military judges to perform their statutory and regulatory obligations to decide all interlocutory legal questions.[195]

One important aspect of *Wilson* cannot be overstated: it addressed a certain idiosyncrasy pervasive in the federal civilian system. When the Court issued its opinion, it fully realized that postponing grants of sentence credit until a prisoner actually started serving his sentence was a Congressional mandate resulting from the nature of the civilian criminal system.[196] Simply put, "[f]ederal defendants do not always begin to serve their sentences immediately."[197] What works in the federal civilian system, however, does not necessarily work in the military justice system. While federal civilian sentences to confinement may begin to run on some future date after conviction, sentences to confinement in the military generally "begin[] to run from the date the sentence is adjudged,"[198] which is usually the date of conviction and when military accused are immediately transported to their place of post-trial confinement. Unlike a federal civilian defendant, a military accused only has a limited opportunity to submit to the convening authority a request for deferment of confinement.[199]

In their analysis of the RCM, the drafters noted these and other differences between the military and civilian judicial systems. Specifically, "[s]entencing procedures in Federal civilian courts can be followed in courts-martial only to a limited degree."[200] For instance, the "military does not have . . . [a] judicially supervised probation service to prepare presentence reports."[201] As a result, the drafters crafted RCM 1001, which provides trial counsel and trial defense counsel with an avenue for presenting similar evidence, including information about the accused's pretrial confinement.

As discussed below—and contrary to the holding in *Wilson*—the UCMJ and RCM not only provide the mechanism, but require: (1) the government to present to the military judge all pretrial confinement information; and (2) the defense to raise any motion regarding such credit before the military judge. The UCMJ and RCM also require the military judge to litigate and resolve any such motions for appropriate relief. We will first look at how the matter of sentence credit presents itself at trial, and then at a military judge's authority to decide the matter and grant credit.

1. Interlocutory Question or Question of Law?

Every time trial defense counsel raises a motion for appropriate relief seeking pretrial confinement credit for his client, he is asking the military judge to "cure a defect which deprives a party of a right."[202] The defect is uncredited pretrial

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[193] *Gogue*, No. 20050650, slip. op. at 11.

[194] *Id.*

[195] *See supra* note 192 and accompanying discussion *infra* Part III.C.2.

[196] United States v. Wilson, 503 U.S. 329, 333–34 (1992).

[197] *Id.* at 333.

[198] UCMJ art. 57(b) (2000); MCM, *supra* note 19, R.C.M. 1113(d)(2)(A); *see also* AR 633-30, *supra* note 186, para. 4a ("The date the sentence of a court-martial is adjudged will mark the beginning date of the sentence to confinement."). In the federal civilian system, the guilt phase of a trial—resulting in a possible criminal conviction—often precedes the sentencing phase by weeks or even months. *See* Journalist's Guide to Federal Courts, http://www.uscourts.gov/journalistguide/district_criminal.html (last visited Aug. 19, 2008) ("Sentencing is generally scheduled for a month or more after the plea hearing, to allow time for the staff of the court's Probation Office to prepare a presentence investigation report.").

[199] UCMJ art. 57a(a) (2000); MCM, *supra* note 19, R.C.M. 1101(c). Federal civilian defendants, however, have the option of filing a motion for release pending sentencing and pending appeal. *See* 18 U.S.C. § 3143(a)–(b) (2000); Demore v. Hyung Joon Kim, 538 U.S. 510, 578 (2003) (Breyer, J., concurring in part and dissenting in part).

> Federal law makes bail available to a criminal defendant after conviction and pending appeal provided (1) the appeal is "not for the purpose of delay," (2) the appeal "raises a substantial question of law or fact," and (3) the defendant shows by "clear and convincing evidence" that, if released, he "is not likely to flee or pose a danger to the safety" of the community. 18 U.S.C. § 3143(b).

Demore, 538 U.S. at 578 (Breyer, J., concurring in part and dissenting in part); United States v. Ingle, 454 F.3d 1082, 1084 (10th Cir. 2006) ("Pending sentencing, the presumption is that a defendant will be detained. Most defendants, however, may be released upon a showing 'by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community.' 18 U.S.C. § 3143(a)(1).").

[200] MCM, *supra* note 19, R.C.M. 1001 analysis, at A21-71.

[201] *Id.*

[202] *Id.* R.C.M. 906(a).

confinement time, and the right is a statutory entitlement to this credit. Counsel, in essence, is asking the military judge to decide a matter interlocutory in nature and legal in kind.[203]

Motions for pretrial confinement credit are interlocutory matters because they bear neither upon the merits of the case, nor upon the findings of guilty or not guilty; they are purely collateral to prosecuting the charged offenses, i.e., proving the elements of the crimes.[204] A military judge can decide whether an accused is entitled to pretrial confinement credit, and how much, without passing judgment upon the accused for his crimes.

Motions for pretrial confinement credit are also questions of law because they prompt the military judge to apply confinement credit law to a given set of facts.[205] For example, the military judge will apply 18 U.S.C. § 3585(b)(2) to an agreed-upon or disputed time period an accused spent in confinement awaiting trial to determine his eligibility for the credit and the proper amount. Thus, a motion for pretrial confinement credit is an interlocutory question as well as a question of law. The next section examines a military judge's specific authority to adjudicate motions for sentence credit.

2. Power to Decide Interlocutory Questions and Questions of Law

When Congress passed the Military Justice Act of 1968,[206] it "redesignate[d] the law officer of a court-martial as a military judge[,] and [gave] him functions and powers more closely aligned to those of Federal district judges."[207] For example, as federal civilian judge equivalents, military judges are required to preside over all general courts-martial,[208] and "shall rule upon all questions of law and all interlocutory questions arising during the proceedings."[209] Questions of law and interlocutory questions present themselves in the form of motions at trial. Rule for Courts-Martial 905(a) defines a motion as "an application to the *military judge* for particular relief."[210] Moreover, trial defense counsel are required to file motions for appropriate relief[211] seeking credit for pretrial confinement at trial, else the matter will be waived absent plain error.[212] Since motions for pretrial confinement credit are interlocutory questions of law that must be raised at trial, military judges have the primary responsibility for hearing these motions[213] and "for providing credit where credit is due."[214]

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[203] *Id.* R.C.M. 801(e)(5) discussion ("A question may be both interlocutory and a question of law.").

[204] *Id.* ("[I]nterlocutory questions include all issues which arise during trial other than the findings . . . , sentence, and administrative matters . . . . A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty."); *see also* United States v. Berry, 20 C.M.R. 325, 329 (C.M.A. 1956) (stating interlocutory questions are not "concerned with disputed questions of fact regarding a matter which would bar or be a complete defense to the prosecution"); United States v. Ornelas, 6 C.M.R. 96, 100 (C.M.A. 1952) (stating an interlocutory question "does not bear on the ultimate merits of the case").

[205] MCM, *supra* note 19, R.C.M. 801(e)(5) discussion ("Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law . . . ."); United States v. Spaustat, 57 M.J. 256, 260 (C.A.A.F. 2002) ("The proper application of credit for illegal pretrial punishment and lawful pretrial confinement are questions of law . . . ."). "A ruling on an interlocutory [legal] question should be preceded by any necessary inquiry into the pertinent facts and law." MCM, *supra* note 19, 801(e)(4) discussion.

[206] Pub. L. No. 90-632, 82 Stat. 1335.

[207] United States v. Norfleet, 53 M.J. 262, 267 (C.A.A.F. 2000) (noting Congress also "streamline[d] court-martial procedures in line with procedures in U.S. district courts") (internal quotation marks omitted). *See generally* Jacob Hagopian, *The Uniform Code of Military Justice in Transition*, ARMY LAW., July 2000, at 1 (discussing significant changes to the UCMJ contained in the Military Justice Act of 1968).

[208] UCMJ art. 26(a) (2000) ("A military judge shall be detailed to each general court-martial[, and] . . . shall preside over each open session of the court-martial to which he has been detailed.").

[209] *Id.* art. 51(b); MCM, *supra* note 19, R.C.M. 801(a)(4) ("The military judge shall . . . rule on all interlocutory questions and all questions of law raised during the court-martial."); *see also* UCMJ art. 51(d) ("The military judge[, in trials without members,] shall determine all questions of law and fact arising during the proceedings . . . ."); UCMJ art. 39(a)(1)–(2) (2000) ("[T]he military judge may . . . call the court into session . . . [to] hear[] and determin[e] motions raising defenses or objections[, or to decide] . . . any matter which may be ruled upon by the military judge[,] . . . which are capable of determination without trial of the issues raised by a plea of not guilty."). *See generally* Lieutenant Colonel Gary Holland & Major Clyde Tate, *An Ongoing Trend: Expanding the Status and Power of The Military Judge*, ARMY LAW., Oct. 1992, at 23 (discussing military judges' increase in power and status comparable to that of their federal civilian counterparts).

[210] MCM, *supra* note 19, R.C.M. 905(a) (emphasis added).

[211] *Id.* R.C.M. 906(a).

[212] *Id.* R.C.M. 801(g), 905(e); United States v. King, 58 M.J. 110, 115 (C.A.A.F. 2003); *see* United States v. Spaustat, 57 M.J. 256, 268 (C.A.A.F. 2002) (Crawford, J., concurring in result) (stating that waiver under "the *Allen* rule" is grounded in "the fundamental principle that the accused is the gatekeeper of the evidence and director of the sentencing drama").

[213] *King*, 58 M.J. at 114.

[214] *Id.* at 116 (Baker, J., concurring in result); United States v. DeYoung, 29 M.J. 78, 80 (C.M.A. 1989) (citing Article 51(b), UCMJ, and RCM 801(a)(1), and holding that "[w]ith such express congressional and presidential intent, . . . [t]his duty may not be evaded or ignored"); *see also* MCM, *supra* note 19,

Furthermore, if any state, federal, or foreign sovereignty, or military authority imposed pretrial restraint upon an accused, RCM 1001(b)(1) requires trial counsel to disclose that information to the military judge.[215] Pretrial restraint includes pretrial confinement.[216] Army regulations mirror this requirement to disclose,[217] which aids the military judge in making a determination regarding what type and amount of credit to award an accused. Moreover, after a court-martial concludes, sentence credit information is required in the trial report[218] and in the convening authority's initial action.[219] Logically, and according to law and regulation, a military judge must adjudicate the type and amount of credit before the credit can be included in these required documents.[220]

The majority in *Gogue* determined 18 U.S.C. § 3585(b)(2) does not apply to trials by court-martial, but—in any event—military judges are powerless to litigate and award unrelated-crimes credit. The better approach would have been to acknowledge § 3585(b)(2)'s applicability pursuant to the holdings in *Allen*, *Murray*, *Martin*, *Smith*, and *Sherman*, and grant relief in an opinion modeled on *United States v. Kovach*.[221] This result would have been consistent with the *military* sentencing jurisprudence. While this result may not have been attainable at trial in *Gogue*—even with the correct application of the law—trial defense counsel preserved the issue, and the record on appeal was fully developed with supplemental material.[222]

R.C.M. 1001(b)(1) ("If the defense objects to [any pretrial restraint] data as being materially inaccurate or incomplete, or containing specified objectionable matter, *the military judge shall determine the issue*. Objections not asserted are waived.") (emphasis added).

[215] MCM, *supra* note 19, R.C.M. 1001(b)(1) ("Trial counsel shall inform the court-martial of . . . the duration and nature of any pretrial restraint."); *Spaustat*, 57 M.J. at 256 (Crawford, C.J., concurring) ("Military sentencing procedures place a duty on the Government to present evidence which may result in either a lessening of punishment or credit to an accused.").

[216] MCM, *supra* note 19, R.C.M. 304(a)(4) ("Pretrial confinement is physical restraint . . . depriving a person of freedom pending disposition of offenses.").

[217] U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-25 (16 Nov. 2005) ("If the accused has been subjected to pretrial restraint, the trial counsel will . . . [d]isclose [such] on the record[, and, i]f necessary, . . . explain [its] . . . nature . . . [and] request the military judge to conduct an inquiry to determine the relevant facts and rule whether the restraint was tantamount to confinement.").

[218] *Id.* para. 5-30a. ("[The report of result of trial] will include the total number of days credited against confinement adjudged whether automatic credit for pretrial confinement . . . , or judge-ordered additional administrative credit . . . , or for any other reason specified by the judge . . . .").

[219] *Id.* para. 5-32a. ("The convening authority will show in his or her initial action all credits against a sentence to confinement, either as adjudged or as approved, regardless of the source of the credit . . . .").

[220] *See* DOD MANUAL 1325.7-M, *supra* note 186, para. C2.4.1 ("The [report of result of trial] shall constitute the official notice of administrative and judicial credit.").

[221] No. 9800764 (A. Ct. Crim. App. Sept. 16, 1999). In *Kovach*, the ACCA acknowledged 18 U.S.C. § 3585(b)(1) applied to trials by court-martial pursuant to *Allen*. *Id.* at 2. The court granted sixty-nine days credit for civilian pretrial confinement because SGT Kovach "provided proof to the court that his state incarceration was for the same offenses for which he was ultimately court-martialed, and that he received no credit from state sentencing authorities for that confinement." *Id.* As previously noted, however, *see* pp. 16–17, the *Gogue* opinion appears to have started a trend within the ACCA against further favorably developing the area of unrelated-crimes credits. In *United States v. Jacobson*, the ACCA refused to grant ninety-six days of unrelated-crimes credit because, at trial, defense counsel ostensibly waived the matter. No. 20050013, slip. op. at 2 (A. Ct. Crim. App. May 23, 2007). The ACCA further asserted that, on appeal, no credit was due because of "appellant's failure to exhaust his administrative remedies," *despite* "appellant's own uncertainty of the duration of his civilian confinement." *Id.* *Contra* United States v. Thompson, No. 36943, 2007 CCA LEXIS 377, at *3–4 (A.F. Ct. Crim. App. Sept. 24, 2007) (awarding three days of confinement credit despite appellant having foregone his opportunity to request credit at trial, but showing his credit entitlement on appeal). The CAAF has noticed this trend and, on 13 March 2008, granted review in *Gogue* on the following issues:

> WHETHER, PURSUANT TO 18 U.S.C. § 3585, APPELLANT IS ENTITLED TO CREDIT TOWARD THE CONFINEMENT ADJUDGED BY A COURT-MARTIAL FOR CONFINEMENT AT STATE FACILITIES SERVED FOR CHARGES UNRELATED TO HIS COURT-MARTIAL SENTENCE AND NOT CREDITED AGAINST ANOTHER SENTENCE.
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> . . . .
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> WHETHER, UNDER UNITED STATES v. WILSON, 503 U.S. 329 (1992), MILITARY JUDGES LACK THE AUTHORITY TO CALCULATE AND APPLY PRETRIAL CONFINEMENT CREDIT.

United States v. Gogue, 66 M.J. 287 (C.A.A.F. 2008). The CAAF also granted review on the issue: "WHETHER, UNDER 18 U.S.C. § 3585, APPELLANT IS ENTITLED TO CONFINEMENT CREDIT FOR A PERIOD OF INCARCERATION THAT HE SERVED IN A STATE FACILITY FOR A STATE OFFENSE UNRELATED TO THE COURT-MARTIAL." United States v. Owens, 66 M.J. 288 (C.A.A.F. 2008).

[222] United States v. Gogue, No. 20050650, slip. op. at 4 n.2 (A. Ct. Crim. Crim. App. May 18, 2007) (Sullivan, J., dissenting) ("[T]he record was supplemented at the court's request by appellate pleadings, an affidavit and supporting documents filed by the government, and matters subsequently filed by the defense."); *see* United States v. Yanger, 66 M.J. 534, 538–39 (C.G. Ct. Crim. App. 2008) (discussing, without deciding, the issue of credit for civilian pretrial confinement, and inviting the parties to further develop the record on remand).

IV. Motion for Appropriate Relief—Claiming Unrelated Crimes Credit

Trial defense counsel should make a motion for unrelated-crimes credit at trial to avoid waiver.[223] To be *effective*, however, the motion must contain all the necessary, fundamental components.[224] The motion is a request to cure a particular defect, so defense counsel must articulate the precise relief he wants from the military judge, i.e., the exact amount of sentence credit in days, weeks, or months.[225] Defense counsel must also provide the "legal basis" for the requested relief—any statute, rule, regulation, or case law that forms the legal foundation for the requested relief.[226] Finally, defense counsel must present the military judge with "an offer of proof" detailing the specific facts upon which he is relying in support of his motion.[227]

At a minimum, the motion for sentence credit should clearly state the accused is seeking credit for civilian pretrial confinement imposed for an offense unrelated to his trial by court-martial. The motion must thereafter state that the legal basis for the requested relief rests upon the following authorities: 18 U.S.C. § 3585(b)(2); Program Statement 5880.28, ch. I, para. 3c(1)(b); RCM 905; RCM 906; DODI 1325.7 (2001); and the holdings in *Allen*, *Murray*, *Rock*, *Smith*, and *Sherman*.

Furthermore, the offer of proof must consist of the essential facts necessary for successfully adjudicating the motion. Based on the requirements in 18 U.S.C. § 3585(b)(2), as implemented by the DOJ, the accused should assert and substantiate as many of the following facts as possible:

- state, federal, or foreign law enforcement authorities held the accused in official detention during the pretrial confinement period alleged;
- state, federal, or foreign law enforcement authorities imposed the detention for one or more crimes the accused committed *after* he committed the crimes for which he is being tried by court-martial. In other words, the court-martial offenses precede the unrelated civilian offenses;
- the accused was not tried by court-martial for the subsequent, unrelated civilian crimes;
- the accused was not tried by any state, federal, or foreign court for the subsequent, unrelated civilian crimes; and
- the accused has not otherwise received credit for the lawful, civilian pretrial confinement against any other sentence.[228]

The linchpin of the accused's motion is that he received no sentence credit for the unrelated crimes. Factors tending to show the accused received no credit for his civilian pretrial confinement include the following: (1) civilian authorities dismissed the unrelated charges; (2) the trial judge sentenced the accused to probation without confinement, a sentence against which he could not credit the pretrial confinement for the unrelated charges; and (3) the resulting sentence to confinement for the unrelated charges did not include "time served;" a sentence to "time served" indicates the judge credited the accused's pretrial detention against his post-trial sentence.[229]

Providing an adequate factual basis upon which the military judge can ultimately base his decision can mean the difference between winning and losing the motion for sentence credit.[230] Most important, trial defense counsel's proffer is only a good start; an "offer of proof is not evidence, and is not sufficient standing alone to meet the factual standard of proof."[231] Defense counsel must still present evidence of those facts to the military judge through legally competent means,

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[223] United States v. Inong, 58 M.J. 460 (C.A.A.F. 2003); United States v. King, 58 M.J. 110, 115 (C.A.A.F. 2003); United States v. Spaustat, 57 M.J. 256 (C.A.A.F. 2002).

[224] Major Victor Hansen, *The Art of Trial Advocacy*, ARMY LAW., Feb. 2001, at 30 (discussing effective motions practice).

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *See* Hughes v. Slade, 347 F. Supp. 2d 821, 825 (D. Cal. 2004).

[229] *See* PROGRAM STATEMENT 5880.28, *supra* note 89, ch. I, para. 3c(1)(b); *see also Hughes*, 347 F. Supp. 2d at 826 n.7.

[230] *Compare* United States v. Kovach, No. 9800764, slip. op. at 2 (A. Ct. Crim. App. Sept. 16, 1999) ("[Appellant] has provided proof to the court that . . . he received no credit from state sentencing authorities for [his pretrial] confinement[,] . . . and [we] will grant relief."), *with* United States v. Martin, No. 9700900, slip. op. at 3 (A. Ct. Crim. App. June 18, 1998) ("There is absolutely no evidence in this record that the appellant 'has not been credited' with the days . . . 'against another sentence. . . .' Without a factual predicate, the appellant is entitled to no relief on his claim of error."). Appendix C provides a sample motion that conforms to the *Rules of Practice Before Army Courts-Martial* para. 3 (1 May 2004) (current as of March 2007). *See infra* App. C.

[231] Hansen, *supra* note 224, at 31.

e.g., witness testimony,[232] self-authenticating records,[233] or a stipulation of fact,[234] and then marshal and apply the evidence in conjunction with the law in a persuasive argument upon the motion to support the requested relief.[235]

V. Conclusion

Allen credit is still available today despite the updated federal sentence-credit statute, and minor changes to the Defense Secretary's regulatory instruction. In the post-*Allen* era, however, credit for civilian pretrial confinement is available not only for the offenses for which a court-martial tries and sentences military accused (same-crimes credit), but also for all other offenses for which they are officially detained *after* they commit the court-martial offenses (unrelated-crimes credit). Credit on either basis is available to military accused provided they have not otherwise received that credit against another sentence. Despite the adverse decision in *Gogue*, the extant sentencing jurisprudence supports these conclusions. Moreover, when military judges are asked to litigate motions at trial for unrelated-crimes credit, they are fully and legally competent to do so. Based on the current version of 18 U.S.C. § 3585(b)(2) itself—and adopted into military criminal law pursuant to DODI 1325.7 (2001)—military accused are entitled to unrelated-crimes credit, and should move military trial judges for this credit at every available, non-frivolous opportunity.

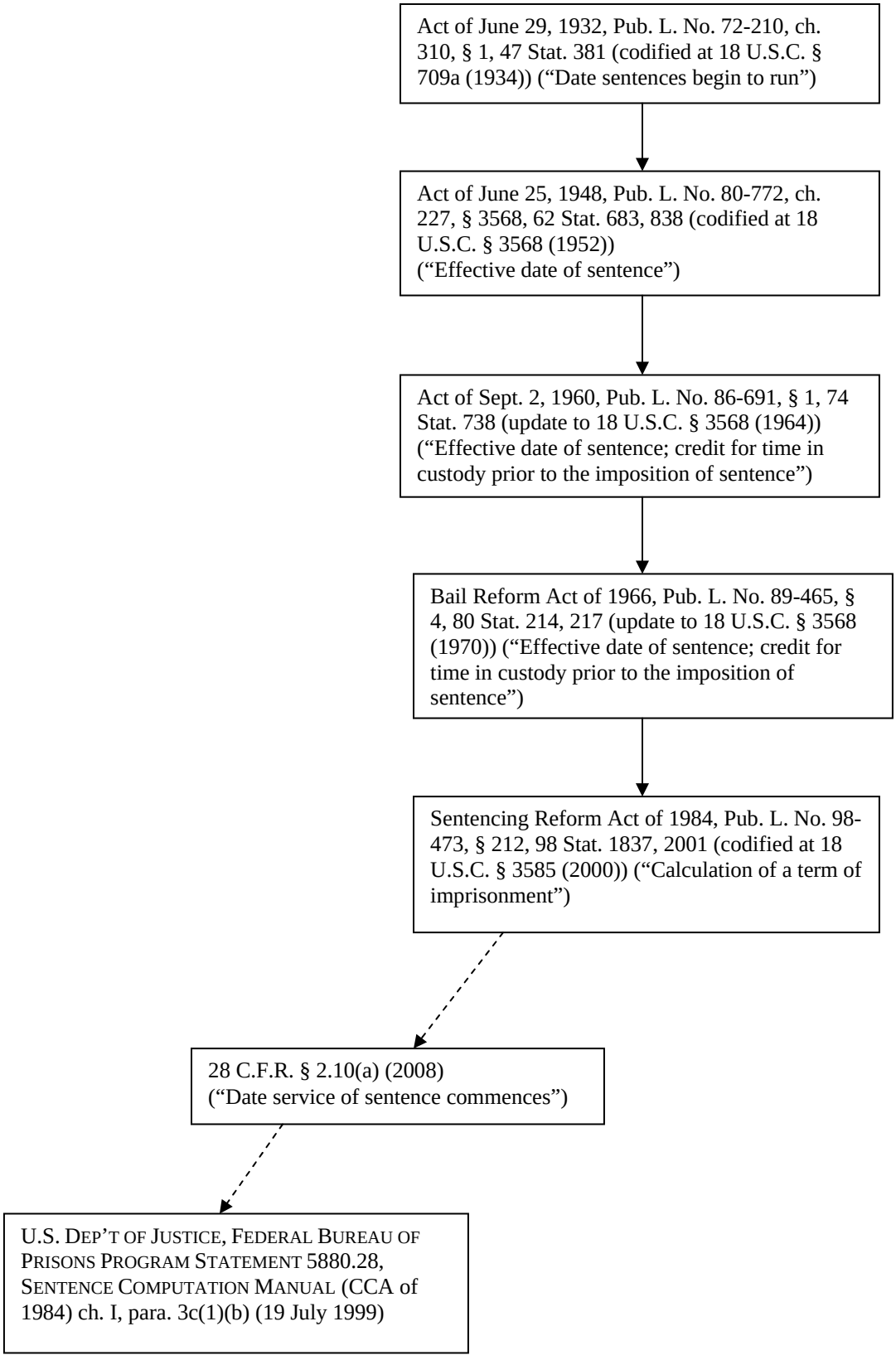
[232] MCM, *supra* note 19, MIL. R. EVID. 601–02.

[233] *Id.* MIL. R. EVID. 902.

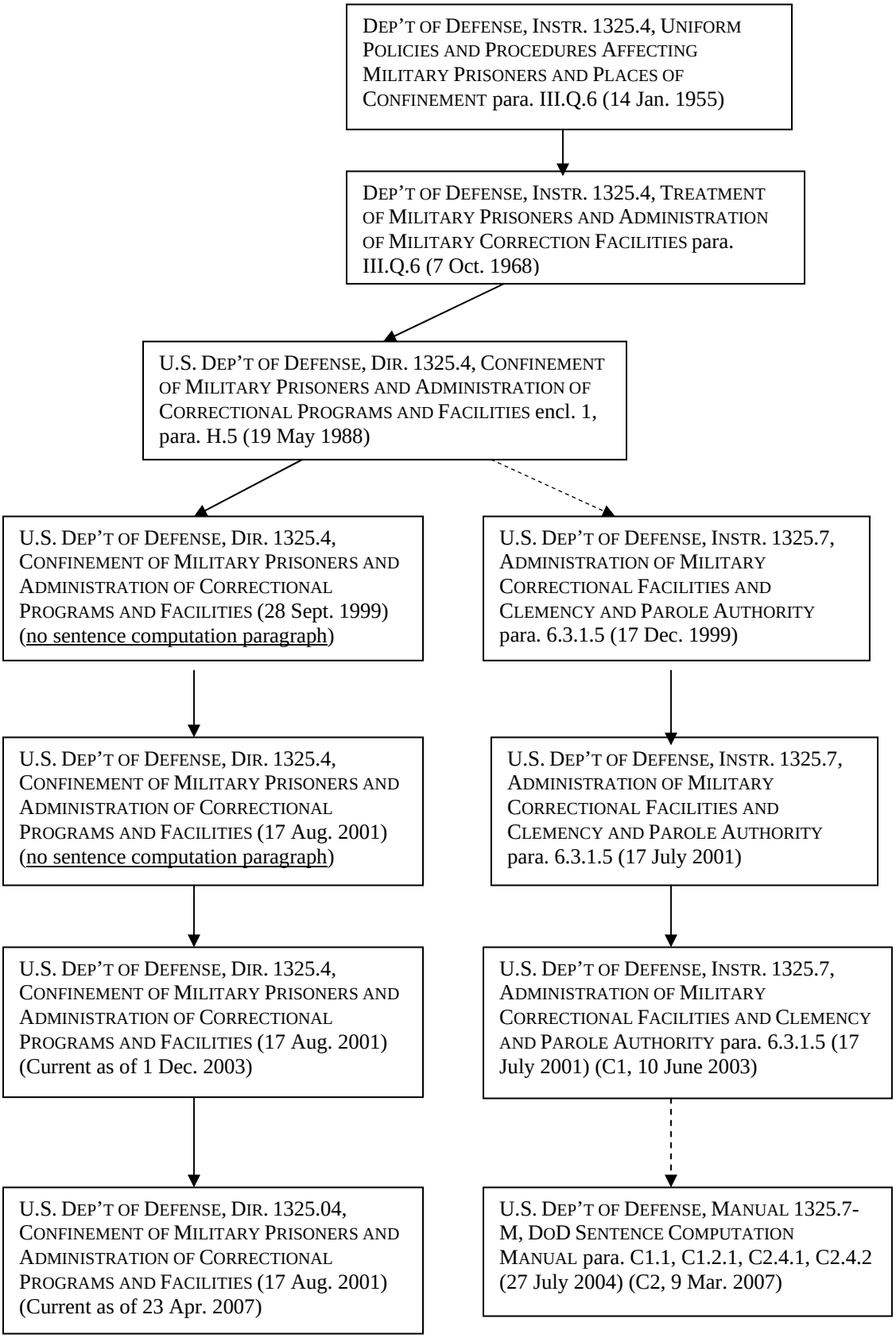
[234] *Id.* R.C.M. 811.

[235] Hansen, *supra* note 224, at 31.

Appendix A


Act of June 29, 1932, Pub. L. No. 72-210, ch. 310, § 1, 47 Stat. 381 (codified at 18 U.S.C. § 709a (1934)) (“Date sentences begin to run”)
Act of June 25, 1948, Pub. L. No. 80-772, ch. 227, § 3568, 62 Stat. 683, 838 (codified at 18 U.S.C. § 3568 (1952)) (“Effective date of sentence”)
Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1, 74 Stat. 738 (update to 18 U.S.C. § 3568 (1964)) (“Effective date of sentence; credit for time in custody prior to the imposition of sentence”)
Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 214, 217 (update to 18 U.S.C. § 3568 (1970)) (“Effective date of sentence; credit for time in custody prior to the imposition of sentence”)
Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 2001 (codified at 18 U.S.C. § 3585 (2000)) (“Calculation of a term of imprisonment”)
28 C.F.R. § 2.10(a) (2008) (“Date service of sentence commences”)
U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5880.28, SENTENCE COMPUTATION MANUAL (CCA of 1984) ch. I, para. 3c(1)(b) (19 July 1999)

Appendix B


DEP'T OF DEFENSE, INSTR. 1325.4, UNIFORM POLICIES AND PROCEDURES AFFECTING MILITARY PRISONERS AND PLACES OF CONFINEMENT para. III.Q.6 (14 Jan. 1955)
DEP'T OF DEFENSE, INSTR. 1325.4, TREATMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTION FACILITIES para. III.Q.6 (7 Oct. 1968)
U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES encl. 1, para. H.5 (19 May 1988)
U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES (28 Sept. 1999) (no sentence computation paragraph)
U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY para. 6.3.1.5 (17 Dec. 1999)
U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES (17 Aug. 2001) (no sentence computation paragraph)
U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY para. 6.3.1.5 (17 July 2001)
U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES (17 Aug. 2001) (Current as of 1 Dec. 2003)
U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY para. 6.3.1.5 (17 July 2001) (C1, 10 June 2003)
U.S. DEP'T OF DEFENSE, DIR. 1325.04, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF CORRECTIONAL PROGRAMS AND FACILITIES (17 Aug. 2001) (Current as of 23 Apr. 2007)
U.S. DEP'T OF DEFENSE, MANUAL 1325.7-M, DOD SENTENCE COMPUTATION MANUAL para. C1.1, C1.2.1, C2.4.1, C2.4.2 (27 July 2004) (C2, 9 Mar. 2007)

Appendix C

Motion Format

UNITED STATES OF AMERICA	)	
	)	Defense Motion for
v.	)	Appropriate Relief
	)	
JONES, Igor L.	)	
Private E1, U.S. Army, 123-45-6789	)	
272d Chemical Company	)	25 April 2008
42d Infantry Division (Mechanized)	)	
Fort Drum, New York 13602	)	

RELIEF SOUGHT

The Defense in the above case requests that the Court grant the accused fourteen (14) days of administrative pretrial confinement credit pursuant to 18 U.S.C. § 3585(b)(2) for the time he spent in official, civilian detention in the Jefferson County Jail, Watertown, New York. The Defense requests oral argument on this matter.

BURDEN OF PROOF AND STANDARD OF PROOF

The burden or standard of proof on any factual issue the resolution of which is necessary to decide this motion shall be by a preponderance of the evidence. R.C.M. 905(c)(1). The burden of persuasion on any factual issue the resolution of which is necessary to decide this motion shall be on the moving party, the Defense. R.C.M. 905(c)(2)(A).

FACTS

The Prosecution and Defense, with the express consent of the accused, agree to stipulate to the following facts for the purposes of this motion.

On 4 January 2008, the 272d Chemical Company chain of command administered a 100% urinalysis inspection. This date coincided with the troops returning from holiday season block leave. Based on his drug use on 26 December 2007, and fearful of what the command might do if he tested positive, Private (PVT) Jones perpetrated an unauthorized absence from his unit (AWOL) on 28 January 2008.

On 3 February 2008, while still AWOL, Jefferson County Police arrested PVT Jones for stealing a six-pack of beer from a neighborhood convenience store in Watertown, New York. As a result, PVT Jones spent fourteen (14) days in civilian pretrial confinement in the Jefferson County Jail, 3–16 February 2008. On 17 February 2008, he pleaded guilty to robbery, and received a sentence to probation—a sentence that his pretrial confinement could not offset. Because the trial judge could not offset a sentence to probation, PVT Jones received no credit against that, or any other, sentence for the fourteen (14) days he spent in the Jefferson County Jail.

In a state of despair, PVT Jones returned to his unit on 1 March 2008 and faced only minor restriction to post. In mid-March 2008, the drug-testing laboratory informed the unit that PVT Jones tested positive for marijuana, cocaine, and ecstasy. On 1 April 2008, the government charged PVT Jones with illegal drug use and AWOL, but not with the convenience store robbery. These charges were later preferred, and referred to trial by court-martial on 15 April 2008.

LAW

The Defense relies on the following authorities in support of its motion:

18 U.S.C. § 3585(b)(2) (2000)

R.C.M. 905(a), (b) (2008)
R.C.M. 906(b) (2008)

United States v. Allen, 17 M.J. 126 (C.M.A 1984)
United States v. Murray, 43 M.J. 507 (A.F. Ct. Crim. App. 1995)
United States v. Rock, 52 M.J. 154 (C.A.A.F. 1999)
United States v. Sherman, 56 M.J. 900 (A.F. Ct. Crim. App. 2002)
United States v. Smith, 56 M.J. 290 (C.A.A.F. 2002)

U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY para. 6.3.1.5 (17 July 2001) (C1, 10 June 2003)

U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5880.28, SENTENCE COMPUTATION MANUAL (CCA of 1984) ch. I, para. 3c(1)(b) (19 July 1999)

WITNESSES/EVIDENCE

The Defense requests that the following witnesses and evidence be produced and present for this motion should the government later disagree with one or more of the stipulated facts, or withdraw from the stipulation in its entirety:

Sergeant James E. Glowacki, Jailor, Jefferson County Jail
Ms. Bertha B. Kool, Custodian of Records, Jefferson County Court Clerk's Office
Jefferson County Jail Prisoner Log Book
Jefferson County Court, Result of Trial for Igor L. Jones, dated 17 February 2008

ARGUMENT

Private Jones is entitled to fourteen days of administrative pretrial confinement credit for the time he spent in official, civilian detention in the Jefferson County Jail, Watertown, New York. This credit is based upon 18 U.S.C. § 3585(b)(2).

In *United States v. Allen*, the court considered the assertion that military accused were entitled to the same pretrial confinement credit federal civilian prisoners received under federal law. This claim was based on "DOD Instruction 1325.4 (October 7, 1968) . . . [, which] state[d], *inter alia*, that procedures employed by the military services for computation of sentence[s] are to be in conformity with those published by the Department of Justice." *United States v. Allen* 17 M.J. 126 (C.M.A. 1984). The *Allen* Court agreed, holding that "the instruction as written . . . voluntarily incorporat[es into the military justice system] the pretrial-sentence credit extended to other Justice Department convicts" pursuant to 18 U.S.C. § 3568. *Id.* at 128.

After the court decided *Allen*, however, § 3568 was replaced by 18 U.S.C. § 3585(b), and DODI 1325.4 was updated and reissued as DODI 1325.7. Despite these changes, the Court of Appeals for the Armed Forces (CAAF) revalidated the *Allen* analysis in two subsequent opinions. In *United States v. Rock*, 52 M.J. 154, 157 (C.A.A.F. 1999), the court stated: "One thing is clear[,] . . . it is the Secretary of Defense himself who has mandated that the armed forces comply with federal practice and credit pretrial confinement." Three years later, in *United States v. Smith*, 56 M.J. 290, 293 (C.A.A.F. 2002), the CAAF observed that the regulatory basis for applying repealed § 3568—DODI 1325.4—"was later revised and reissued [as DODI 1325.7]," but "without significant change to the provision at issue in this case." The CAAF again revalidated the *Allen* analysis and expressly found: "As written, 18 U.S.C. § 3585(b) and DODI 1325.7 apply . . . to prisoners serving [court-martial] sentences to confinement." *Id.* at 293. As such, DODI 1325.7 is the regulatory conduit through which § 3585(b) applies to the military justice system.

18 U.S.C. § 3585(b) currently states:

> A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> (1) as a result of the offense for which the sentence was imposed; or

(2) *as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed*;

that has not been credited against another sentence.

Under § 3585(b)(2), PVT Jones is entitled to sentence credit for the pretrial confinement imposed in connection with the convenience store robbery—the so-called unrelated crime the government did not refer to trial by court-martial. Private Jones is eligible for unrelated-crimes credit under § 3585(b)(2) because his drug use and AWOL offenses predate the convenience store robbery. The civilian pretrial confinement imposed for that robbery has also not been credited against any other sentence to post-trial confinement. Specifically, the 3 February 2008 convenience store robbery qualifies as a "charge for which" PVT Jones "was arrested *after* the commission of" his 26 December 2007 drug use and 28 January 2008 AWOL "offense[s] for which" the court-martial may impose a sentence to confinement. 18 U.S.C. § 3585(b)(2).

In deciding whether civilian pretrial confinement could be credited against a federal post-trial sentence, the Air Force Court of Criminal Appeals (AFCCA) issued an opinion in *United States v. Murray*, 43 M.J. 507 (A.F. Ct. Crim. App. 1995). The AFCCA conducted the following analysis of § 3585(b) with a positive result:

> The meaning of 18 U.S.C. § 3585(b) is plain—as long as a federal prisoner has not already received credit for pretrial confinement against another sentence, he receives credit against his pending federal sentence. The statute does not discriminate based on the sovereign responsible for the pretrial confinement. Rather, it readily appears Congress intended this statute to cover state-imposed pretrial confinement. Otherwise, why use broad terms like "official detention" and "any other charge . . . after the commission of the offense," when Congress could have expressly narrowed the scope of the statute to federal custody? Moreover, we see the no-prior-credit proviso in the last line of the statute as including the scenario where a convict has committed crimes under both federal and state law. If a prisoner has been confined by the state after the commission of the offense, then he receives credit against his federal sentence—*unless* such custody already has been credited against a *state* sentence. The United States Sentencing Commission also shares this interpretation of the law.
>
> More important, the United States courts have construed . . . the broader language of the current statute [18 U.S.C. § 3585(b)] to require federal credit for state pretrial confinement. In *Wilson*, the Supreme Court . . . did not dispute the Sixth Circuit's construction of the statute to require federal sentence credit for state pretrial confinement. Indeed, the Court expressly conceded the new statute had broadened the effect of its predecessor in three ways, including enlarging the class of defendants entitled to credit.
>
> Therefore, . . . if [SrA Murray] had been convicted and sentenced in United States District Court, the Attorney General would credit his sentence for the [forty-six] days of state pretrial confinement. Department of Defense Directive 1325.4 [(1988)] requires the military to do the same. In our decretal paragraph, we will direct that [SrA Murray] receive [forty-six] days of additional sentence credit.

Id. at 514–15; *see also* U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5880.28, SENTENCE COMPUTATION MANUAL (CCA of 1984) ch. I, para. 3c(1)(b) (19 July 1999) ("Prior Custody Credit will be given for time spent in official detention as the result of any federal, state or foreign arrest . . . ."). Although the AFCCA decided *Murray* based on § 3585(b)(1), the court reached the same result, based on § 3585(b)(2) and analogous facts, in its opinion in *United States v. Sherman*, 56 M.J. 900 (A.F. Ct. Crim. App. 2002).

CONCLUSION

Based on the above, the Defense requests that the Court grant the accused fourteen (14) days of administrative pretrial confinement credit pursuant to 18 U.S.C. § 3585(b)(2) for the time he spent in official, civilian detention in the Jefferson County Jail, Watertown, New York.

Timothy J. Calhoun
CPT, JA
Defense Counsel

I certify that I have served or caused to be served a true copy of the above motion on the Trial Counsel on _____ 200__.

Timothy J. Calhoun
CPT, JA
Defense Counsel

Reclaiming the In-Service Conscientious Objection Program: Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection

Major Joseph B. Mackey[*]

Indeed, it seems that just as Voltaire could say that the Holy Roman Empire was neither holy, nor Roman, nor an empire, it could now be said that the [*conscientious objection*] *exemption is available to those who are not religious in any orthodox sense, who have had no training whatever and whose assertion cannot be empirically tested.*[1]

I. Introduction

The conscientious objection exemption to involuntary military service is an important tradition in the United States, but the governing military regulations have resulted in judicial interpretation that has expanded it far beyond its original scope. This expansion adversely affects the U.S. military primarily in two ways. First, heightened judicial scrutiny of the government's decisions concerning in-service conscientious objection applications has the effect of severely limiting discretionary authority in this specific type of personnel action. This scrutiny results in the alienation of applicant servicemembers and commanders from the conscientious objection procedural process. Second, the expansion of the conscientious objection military regulations created an extremely vague standard that is difficult to apply. Although such an expansive exemption may be necessary for deciding claims of involuntarily drafted servicemembers, such an interpretation creates an indefinite standard that results in an unnecessary, disruptive distraction from mission readiness in a volunteer military. After a brief discussion of the historical roots of conscientious objection in America, this article defines the current state of the law of the in-service conscientious objection program. Finally, this article explores the problems created by the current in-service conscientious objection program procedures and recommends regulatory changes to address these problems.

A. Historical Background of Conscientious Objection

Conscientious objection to military service is deeply rooted in American history. From the time Europeans began forming North American settlements in the early 1600s, conscription has existed in America to assist in forming military units.[2] Colonial militias were formed primarily to defend against Native American attacks.[3] As colonies formed militias, some colonists exercised their ideological objections to war. It was no surprise that the same people who left Europe for religious freedom[4] would also be instrumental in the resistance against involuntary military service. Arguably the Quakers were the most influential group in the movement against military conscription.

The Quakers were among the first settlers to demonstrate their pacifist beliefs. One of the earliest recorded cases of anti-violence demonstrations in the United States occurred in the mid-1600s when a Native American war party decided not to attack a group of Quakers because the Quakers neither fought nor ran away.[5] After the Quakers invited the Native Americans

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[1] Armstrong v. Laird, 456 F.2d 521, 523 (1st Cir. 1972) (Aldrich, J., dissenting) (rejecting the majority's conclusion that there was no basis in fact for the draft board's rejection of an inductee's conscientious objection claim).

[2] Harry A. Marmion, *Historical Background of Selective Service in the United States*, *in* SELECTIVE SERVICE AND AMERICAN SOCIETY 35, 36 (Roger W. Little ed., 1969).

[3] Spencer P. Mead, *The Colonial Military: First American Soldiers*, J. AM. HIST. 120 (1907).

[4] DAVID YOUNT, HOW THE QUAKERS INVENTED AMERICA 1 (2007).

[5] In the mid-1600s during a time of exceptional hostilities with Native Americans tribes, the local authorities in western New York and Pennsylvania urged a local Quaker community to move inside the protective walls of a military fort. STEPHEN M. KOHN, JAILED FOR PEACE: THE HISTORY OF AMERICAN DRAFT

into their homes while they prayed, the Indian chief vowed not to harm the Quakers.[6] The Quakers also heavily influenced the creation of the first conscientious objection exemptions to military conscription. In 1676 the Quakers bought West New Jersey and wrote into its charter a pacifist military policy.[7] In 1703, however, West and East New Jersey merged and a new militia law required military service.[8] But when a sympathetic jury refused to convict any of the Quakers who refused to enter military service, the militia law lost support and was not renewed.[9] All subsequent New Jersey militia acts contained exemptions specifically for Quakers.[10] When Virginia Quakers refused to participate in hostilities during the French and Indian War of 1756, Colonel George Washington was so impressed with the depth and sincerity of their beliefs that he released the Quakers from confinement and essentially relieved them of their service commitment.[11] As Quakers and other pacifists[12] continued to resist military conscription, colonial governments began to establish conscientious objection exemptions.[13]

In 1673, Rhode Island included a conscientious objection exemption in its militia law.[14] Even though Rhode Island feared an attack from both the Native Americans and the Dutch, the legislature passed the exemption because it considered conscientious objection part of the fundamental ideal of liberty of conscience.[15] In 1775, the Continental Congress passed a resolution exempting conscientious objectors from military service.[16] In 1777, despite imminent British attacks on important American cities, George Washington believed conscientious objection to be so important that he called upon all persons except conscientious objectors to fight.[17] Several other states also believed conscientious objection to be a right and included exemptions in their constitutions.[18] However, an attempt to include a conscientious objection clause in the Bill of Rights failed.[19] After passing through the House of Representatives, the bill failed in a Senate committee because of concerns over states' rights.[20] Nonetheless, the U.S. Congress began inserting military service exemptions in draft laws. The first such exemption was passed in 1863 by the Union during the Civil War.[21] Not exclusive to conscientious objectors, the exemption to the Enrollment Act allowed individuals to avoid military service if they could either pay a commutation fee of $300 or provide a suitable substitute to serve in their place.[22] The first federal exemption to military service specifically for conscientious objectors was included in the 1864 Draft Act.[23] Since 1864, every draft law passed by the federal government has included an exemption for conscientious objectors.[24]

LAW VIOLATORS, 1658–1985, at 5–6 (1986).The Quakers refused to do so and were approached by a Native American war party. Seeing that they were engaged in worship and were a peaceful people, the war party decided not to kill them. *Id.*

[6] *Id.* at 6.

[7] *Id.*

[8] *Id.* at 7.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Other pacifist religious groups included the Mennonites and the Brethren. 1 SELECTIVE SERVICE SYSTEM, CONSCIENTIOUS OBJECTION 9–13 (1950) [hereinafter SELECTIVE SERVICE SYSTEM, CONSCIENTIOUS OBJECTION] (Special Monograph No. 11).

[13] *Id.*

[14] 2 SELECTIVE SERVICE SYSTEM, BACKGROUNDS OF SELECTIVE SERVICE, MILITARY OBLIGATION: THE AMERICAN TRADITION 16 (1947) [hereinafter SELECTIVE SERVICE SYSTEM, MILITARY OBLIGATION] (Special Monograph No. 1, Part 12 Rhode Island Enactments).

[15] KOHN, *supra* note 5, at 8.

[16] SELECTIVE SERVICE SYSTEM, BACKGROUNDS OF SELECTIVE SERVICE: A HISTORICAL REVIEW OF THE PRINCIPLE OF CITIZEN COMPULSION IN THE RAISING OF ARMIES 89 (1947) [hereinafter SELECTIVE SERVICE SYSTEM, CITIZEN COMPULSION] (Special Monograph No. 1).

[17] KOHN, *supra* note 5, at 10.

[18] These states were Del., Pa., N.Y., and N.H. *Id.*

[19] SELECTIVE SERVICE SYSTEM, CONSCIENTIOUS OBJECTION, *supra* note 12, at 38.

[20] KOHN, *supra* note 5, at 11.

[21] SELECTIVE SERVICE SYSTEM, CITIZEN COMPULSION, *supra* note 16, at 132.

[22] *Id.*

[23] *Id.* at 141.

[24] Selective Service Act, Pub. L. No. 65-12, 40 Stat. 76 (1917); Selective Service and Training Act, 54 Stat. 885 (1940); Military Selective Service Act of 1948, 50 U.S.C.S. §§ 451–473 (LexisNexis 2008).

B. Modern Statutory Conscientious Objection Exemption

The current statutory conscientious objection exemption is short, consisting of only one paragraph in the Military Selective Service Act.[25] Although the statute exempts conscientious objectors from combat service, those granted conscientious objector status must still serve the U.S. government in some capacity.[26] After being granted conscientious objector status, the individual must then either serve in the military as a non-combatant or serve in a non-military civilian work program.[27] Because the statute is so brief, the procedures for the exemption are included within the Selective Service regulations.[28] The Selective Service regulations spell out the substantive standards used by local draft boards to decide conscientious objection claims. Due to a large number of legal challenges by inductees whose claims were denied, there exists extensive judicial interpretation of the Selective Service Act.

C. Judicial Interpretation of the Conscientious Objection Exemption

Arguably the most important decision concerning conscientious objection claims is the 1996 Supreme Court case *Estep v. United States*.[29] In *Estep*, the Court announced the "basis in fact" standard of review for habeas corpus petitions involving denied conscientious objection claims.[30] Upon reviewing the Selective Service Act's language making local draft board's decisions regarding classification of inductees final, the Court held that Congress intended judicial review to be limited rather than precluded.[31] The Court held that judicial review of draft board classification decisions is limited to the question of whether there is a "basis in fact" for the decision.[32] However, the Court made it clear that courts are not to reweigh the evidence to determine if the decision made by the local draft board was justified.[33] Rather, the courts were to determine whether the decisions were made in conformity with the regulations.[34] All courts continue to use this standard of review which has been described as "the narrowest known to the law."[35] Thus, *Estep* set the firm precedent that classification of drafted military inductees is subject to judicial review, albeit a limited one.

However, the Supreme Court explored the shifting nature of the burden of persuasion in conscientious objection habeas corpus cases well before *Estep*.[36] In 1953, the Court explicitly stated that a claimant seeking conscientious objector status must first establish a prima facie case of entitlement to a conscientious objection exemption.[37] For a claimant to satisfy a

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[25] Although the U.S. Armed Forces is currently an all-volunteer force, the Selective Service Act remains in force to effectuate any possible future draft. The heart of the exemption is the introductory sentence: "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C.S. § 456(j).

[26] *See id*.

[27] *Id*.

[28] Selective Service System, 32 C.F.R. §§ 1602–1699 (2007).

[29] 327 U.S. 114 (1946). The Court was reviewing the two appellants' convictions for refusing to submit to induction after the local draft board denied their request for exemption to service. *Id.* Although this case concerns an appellant who applied for the religious minister exemption of the Selective Service Act and not the conscientious objector exemption, all courts have followed the implicit holding in this case that denied conscientious objection claims may be appealed to federal court under habeas corpus proceedings. *See* Aguayo v. Harvey, 476 F.3d 971 (D.C. Cir. 2007); Alhassan v. Hagee, 424 F.3d 518 (7th Cir. 2005); Roby v. United States Dep't of the Navy, 76 F.3d 1052 (9th Cir. 1996); Rainey v. Garrett, 1993 U.S. App. LEXIS 5404 (4th Cir. 1993); Hager v. Sec'y of the Air Force, 938 F.2d 1449 (1st Cir. 1991); Naill v. Alexander, 631 F.2d 696 (10th Cir. 1980); United States *ex rel*. Checkman v. Laird, 469 F.2d 773 (2nd Cir. 1972). The Court later confirmed that the writ of habeas corpus is also available to unconfined servicemembers who submitted to induction even though their requests for a conscientious objection exemption were denied. Witmer v. United States, 348 U.S. 375, 377 (1955).

[30] *Estep*, 327 U.S. at 122.

[31] *Id*.

[32] *Id*. The Court borrowed this standard of review from deportation cases in which Congress had similarly declared deportation orders to be final decisions.

[33] *Id*.

[34] *Id.*

[35] Naill v. Alexander, 631 F.2d 696, 698 (10th Cir. 1980); Bishop v. United States, 412 F.2d 1064, 1067 (9th Cir. 1969); Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957).

[36] *See* Dickinson v. United States, 346 U.S. 389, 396 (1953).

[37] *Id*.

prima facie case, he or she merely has to show that he or she completed the proper paperwork.[38] Once the claimant establishes a prima facie case, the Government must show that there was a basis in fact for the denial.[39] The effective result of the *Estep* decision was to place the burden of persuasion on the Government to disprove a claim of conscientious objection. In his dissent, Justice Jackson argued that the majority's interpretation of the standard is directly at odds with congressional intent.[40] He instead asserted that the burden of persuasion should be placed squarely on the claimant to prove misapplication of law or arbitrary action by the board.[41]

Throughout the Vietnam War, courts continued to hear draft exemption denial cases, resulting in a significant change in the Selective Service Act's conscientious objection exemption. Although a statutory exemption is not constitutionally required,[42] the courts have dramatically broadened the scope of the statutory conscientious objection exemption. This expansion began in *United States v. Seeger*, when the Supreme Court in 1965 interpreted the term "Supreme Being" in the Universal Military Training and Service Act's definition of "religious training and belief" to mean something other than a traditional view of God.[43] The Court broadly interpreted the statute to mean that belief in a "Supreme Being" is one that occupies "the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption."[44] In 1970 the Supreme Court took this one step further in *Welsh v. United States* when it held the appellant, who specifically characterized his belief as non-religious, qualified for conscientious objector status within the same statutory exemption of "religious training and belief."[45] Justice Harlan characterized the opinion as a "remarkable feat of judicial surgery to remove . . . the theistic requirement of [the conscientious objection exemption]."[46]

After the cessation of the draft in 1972, case law interpreting the Selective Service Act's conscientious objection exemption dramatically decreased. Although the Selective Service Act continued to require all males reaching the age of eighteen to register for the Selective Service, a prospective inductee could not submit his claim until after an order to report for induction.[47] Because no one has been inducted since the draft terminated in 1972, there have been no conscientious objector packets considered by local draft boards for approximately thirty-five years. Consequently, the focus of conscientious objection to military service shifted from drafted individuals to those already in service.

D. The In-Service Conscientious Objection Program

The in-service conscientious objection program is a relatively recent phenomenon. Compared to the statutory conscientious objection exemption for involuntarily conscripted individuals, the need for a conscientious objection discharge provision for volunteers is not immediately obvious. But to dismiss the need for an in-service program for volunteers would be to under-appreciate the strong belief in individual freedom of thought and capacity for individuals to change their views over time. The in-service conscientious objection program recognizes that a person who volunteered for military service and

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[38] McGee v. United States, 402 U.S. 479, 488 (1971).

[39] *Dickinson*, 346 U.S. at 396.

[40] *Id*. at 400 (Jackson, J., dissenting).

[41] *Id*.

[42] *See* Johnson v. Robison, 415 U.S. 361, 375 (1974). While holding that the denial of veterans benefits to discharged conscientious objectors was constitutional, the court noted that "Congress . . . is under no obligation to carve out the conscientious objector exemption for military training." *Id*. at 375 n.14 (quoting Robison v. Johnson, 352 F. Supp. 848 (D. Mass. 1973)).

[43] *See* United States v. Seeger, 380 U.S. 163 (1965). The Court interpreted the statutory definition of religious training and belief as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." *Id*. at 164 (quoting Universal Military Training and Service Act, 50 U.S.C. § 456(j) (1958)).

[44] *Id*. at 184.

[45] 398 U.S. 333 (1970).

[46] *Id*. at 355 (Harlan, J., concurring) (accusing the Court of a perverse re-writing of the statute to avoid deciding the constitutional question of whether the statute violated the Establishment Clause). The *Gillette* Court addressed this issue, finding that the exemption as amended by the *Welsh* and *Seeger* definitions did not violate the Establishment Clause. Gillette v. United States, 401 U.S. 437, 448–53 (1971).

[47] *See* Selective Service System, 32 C.F.R. § 1636.2 (2007).

affirmatively denied[48] being a conscientious objector can subsequently have a fundamental change in core values and beliefs that are radically inconsistent with military service.

In 1951, one of the earliest written policies for the Department of Defense (DOD) conscientious objection program only briefly mentioned the handling of in-service claims.[49] This policy required that conscientious objection claims by those servicemembers not previously classified[50] were to be treated in the same manner as claims by those who stated that their records failed to reflect a previously granted conscientious objector status.[51] The directive provided very little guidance and resulted in maximum discretion for military leaders to resolve conscientious objection claims. However, fifty-six years and four regulations later, the DOD has steadily lengthened its conscientious objection regulation and dramatically increased the administrative processing requirements.[52]

The DOD details its current policies and procedures for the in-service conscientious objection program in DOD Instruction (DODI) 1300.06. Although this Instruction explicitly announces that a discharge based on conscientious objection is discretionary within each military department, the policy is that such a discharge will be approved to the extent "practicable and equitable."[53] However, a servicemember who possessed conscientious objection beliefs and failed to assert those beliefs before entering service is not eligible to apply for a conscientious objection discharge.[54] The regulation also places the burden of proof on the applicant to show by clear and convincing evidence that he or she is entitled to conscientious objector status.[55] The DOD recognizes two different categories of conscientious objectors. A Class 1-O[56] objector is a person who sincerely objects to any form of military service and will be discharged from the service.[57] A Class 1-A-O objector, in contrast, is a person who sincerely objects to service as a combatant but who will remain in the service and perform non-combatant duties.[58] To earn conscientious objector status, the applicant must prove that (1) he is conscientiously opposed to war in any form, (2) his opposition is based on religious training and/or belief, and (3) his position is firm, fixed, sincere, and deeply held.[59] Once a claim is submitted, the applicant is interviewed by a chaplain and a psychiatrist.[60] An investigating officer is appointed to investigate the claim and holds an informal hearing.[61] The applicant has the right to be present and be represented by private counsel at the hearing.[62] Upon completion of the informal hearing, the investigating officer is required to complete a report and forward it through the chain of command.[63] Although service

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[48] Military induction forms require an enlistee to affirmatively deny current or previous conscientious beliefs. *See* U.S. Dep't of Defense, DD Form 1966, Record of Military Processing (Mar. 2007) [hereinafter DD Form 1966].

[49] *See* U.S. DEP'T OF DEFENSE, DIR. 1315.1, DISPOSITION OF CONSCIENTIOUS OBJECTORS (18 June 1951).

[50] The directive effectively created two categories of servicemembers who could apply for in-service conscientious objection. *Id.* para. II.D. The first category was volunteers. *Id.* The second category was a catch-all category of those servicemembers who had "not been classified previously" as conscientiously objectors. *Id.* This second category was broad enough to include people whose views were formed before or after entering military service. *Id.*

[51] *Id*.

[52] Subsequent conscientious objection regulations include: U.S. DEP'T OF DEFENSE, DIR. 1300.6, UTILIZATION OF CONSCIENTIOUS OBJECTORS AND PROCEDURES FOR PROCESSING REQUESTS FOR DISCHARGE BASED ON CONSCIENTIOUS OBJECTION (21 Aug. 1962); U.S. DEP'T OF DEFENSE, DIR. 1300.6, CONSCIENTIOUS OBJECTORS (10 May 1968) [hereinafter DODD 1300.6, 10 May 1968]; U.S. DEP'T OF DEFENSE, DIR. 1300.6, CONSCIENTIOUS OBJECTORS (20 Aug. 1971) [hereinafter DODD 1300.6, 20 Aug. 1971]; and U.S. DEP'T OF DEFENSE, INSTR. 1300.06, CONSCIENTIOUS OBJECTORS (5 May 2007) [hereinafter DODI 1300.06].

[53] DODI 1300.06, *supra* note 52, para. 4.1.

[54] *Id*. para 4.1.1.

[55] *Id*. para. 5.3.

[56] Although the DOD uses the designation 1-O and 1-A-O for types of conscientious objectors, the U.S. Army, U.S. Air Force, U.S. Navy and U.S. Marine Corps all use the slightly different designations of 1-0 and 1-A-0.

[57] DODI 1300.06, *supra* note 52, para. 3.1. A servicemember granted 1-O status is discharged "at the convenience of the service." *Id*. para. 8.1.

[58] *Id*. para. 3.1.

[59] *Id*. para. 5.1.

[60] The chaplain compiles a report evaluating the nature and basis of the claim and the applicant's sincerity and depth of conviction. *Id*. para. 7.3. The psychiatrist compiles a report evaluating whether the applicant possesses a psychiatric disorder that would warrant treatment or disposition through medical channels. *Id*.

[61] *Id*. para. 7.4.

[62] *Id*.

[63] *Id*. paras. 7.4, 7.5.

Department Secretaries may delegate approval authority to general courts-martial convening authorities, only the Department Secretary concerned may disapprove an application.[64]

The DOD requires all service Departments to create their own service regulations that implement DODI 1300.06.[65] The Army implements its conscientious objection program through Army Regulation (AR) 600-43.[66] All other services have also promulgated regulations implementing the in-service conscientious objection program and containing substantially similar procedures.[67] The Army's conscientious objection program implements all DOD requirements and adds detail primarily to give investigating officers guidance to assist with investigating claims. One notable provision of AR 600-43 not found in DODI 1300.6 is the requirement for discharged conscientious objectors to repay any unearned bonus, special pay, or expended educational program funds.[68] As noted above, all in-service conscientious objection applications denied at the unit level are forwarded to the service Secretary for final action. The Army created the Department of the Army Conscientious Objection Review Board (DACORB) at the department level to decide these cases for the Secretary.[69] The board consists of three officers from the Army departmental level: a chaplain from the Office of the Chief, Army Chaplains; a Judge Advocate from the Office of the Judge Advocate General; and a line officer from Army Special Review Board of the Army G-1.[70] There are no regulations governing how the board reviews applications, only that it must provide reasons to an applicant if his packet is disapproved.[71] The board does not meet to review cases, but instead reviews them by staffing the action from office to office.[72] Each member votes and cases are decided by a simple majority.[73] There is no right for an applicant to appear before the board and no new matters can be presented except those submitted in response to any comments about the application made by the government at the unit level.[74]

E. Judicial Interpretation of the In-Service Conscientious Objection Program

In the 1972 case of *Parisi v. Davidson*, the Supreme Court opened the door for judicial review of denied in-service conscientious objection claims.[75] For the first time, the Court allowed a servicemember who was denied in-service conscientious objector status to petition for habeas corpus.[76] The Court disposed of this issue in one sentence by declaring that the writ has long been available for servicemembers who claim unlawful retention in the service.[77] Although it was settled law that habeas corpus was available for jailed draft dodgers and conscripted individuals whose conscientious objection claims were denied by draft boards,[78] it was not clear that servicemembers raising a conscientious objection for the

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[64] *Id*. paras. 7.6, 7.1.

[65] *Id*. para. 6.2.1.

[66] U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006) [hereinafter AR 600-43].

[67] U.S. DEP'T OF NAVY, MANUAL 1900-020, CONVENIENCE OF THE GOVERNMENT SEPARATION BASED ON CONSCIENTIOUS OBJECTION (ENLISTED AND OFFICERS) (22 Aug. 2002); U.S. MARINE CORPS, ORDER 1306.13E, CONSCIENTIOUS OBJECTORS (21 Nov. 1986); U.S. DEP'T OF AIR FORCE, INSTR. 36-3204, PROCEDURES FOR APPLYING AS A CONSCIENTIOUS OBJECTOR (15 July 1994) [hereinafter AFI 36-3204]; U.S. DEP'T OF COAST GUARD, COMMANDANT INSTR. 1900.8, CONSCIENTIOUS OBJECTORS AND THE REQUIREMENT TO BEAR ARMS (30 Nov. 1990).

[68] AR 600-43, *supra* note 66, para. 3-1.a.(3). The DODI 1300.06 is silent concerning the repayment of bonuses, special pay, and educational benefits. DODI 1300.06, *supra* note 52.

[69] Other than requiring its existence, AR 600-43 provides no guidance on the structure or procedures of the DACORB. AR 600-43, *supra* note 66, para. 1-4.a.(2). Once the DACORB decides a conscientious objection case, the Deputy Assistant Secretary of the Army (Review Boards) makes the final determination for the case. ASAMRA—Army Review Boards Agency, http://www.asamra.army.mil/mission_arba.htm (last visited July 28, 2008).

[70] Interview with Major Eric Magnell, Administrative Law Attorney, Administrative Law Division, U.S. Army Office of the Judge Advocate General, in Arlington, Va. (Jan. 3, 2008) [hereinafter Magnell Interview].

[71] AR 600-43, *supra* note 66, para. 2-8.d.(3).

[72] Magnell Interview, *supra* note 70.

[73] *Id*.

[74] *Id*.

[75] Although the opinion focuses almost entirely on the issue of exhaustion of administrative remedies, I focus on the brief portion concerning habeas corpus relief for servicemembers seeking a discharge for conscientious objection. 405 U.S. 34 (1972).

[76] Parisi applied for a conscientious objection discharge pursuant to AR 635-20, *Conscientious Objection*. *Id*. at 38.

[77] *Id*. at 39.

[78] *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971).

first time after induction or voluntary enlistment could petition for habeas corpus. The Court completely skipped over any analysis of the custody requirement for a habeas corpus petition.[79] A possible explanation for this omission could be in the nature of Parisi's case. Parisi was actually drafted for military service and applied for conscientious objector status six months after entering the Army. Parisi was also incarcerated as a result of a court-martial conviction for refusing to deploy to Vietnam.[80] So, although Parisi's habeas corpus petition was based on a denied in-service conscientious objection claim, his circumstances looked a lot like all the previous cases decided under the Selective Service Act. The *Parisi* case proved to be the perfect bridge between the Selective Service Act induction cases and in-service conscientious objection cases. Thus, this decision established the precedent that courts could hear habeas corpus petitions concerning denied in-service conscientious objection claims.

The next major issue for the courts was to determine the standard of review applicable to denied in-service conscientious objection claims. With much assistance from the DOD, the Supreme Court once again disposed of this issue relatively easily. In the 1971 case *Gillette v. United States*, the Court held that in-service conscientious objection claims were to be measured using the same standards previously established by the Selective Service Act and interpreted by the courts.[81] The Court cited DODD 1300.6 as conclusive proof of regulatory intent to adopt the same standards of evaluation for in-service conscientious objection claims as those for the Selective Service Act.[82] Not only did the regulation contain much of the same language as the statute, but the regulation explicitly affirmed as policy that the standards should be consistent with the statute.[83]

However, the DOD also gave conflicting signals that it intended to limit the scope of review for in-service conscientious objection claims. In the same directive cited by the *Gillette* Court, DODD 1300.6, the DOD apparently attempted to limit reviewability of requested discharges. The directive stated that no one, including conscientious objectors, has a vested right to a discharge and that any such discharge is discretionary.[84] In the very next update to the conscientious objection regulation published after the *Gillette* case was decided, the DOD removed the language that any declared in-service claims are to be reviewed under the same standards as the Selective Service Act.[85] This same update also included additional language that a conscientious objection discharge was at "the convenience of the government."[86] Finally, the update also clarified that the burden was on the applicant to prove his claim by clear and convincing evidence.[87] However, no court has interpreted any of these changes as DOD's intent to depart from the *Gillette* Court's interpretation that it intended for in-service claims to be reviewed under the same standards as Selective Service Act claims. Therefore, all denied in-service conscientious objection claims continue to be reviewed under the same standards as the Selective Service Act.

The current in-service conscientious objection standards are unclear as to what qualifies as a religious training or belief. As noted by the *Gillette* majority, the danger of erratic decision-making is enhanced when a conscientious objection

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[79] *Parisi*, 405 U.S. at 39; *see also* Habeas Corpus, 28 U.S.C.S. § 2241 (LexisNexis 2008).

[80] However, the Court notes how the conscientious objection claim predated and was independent of the court-martial. *Parisi*, 405 U.S. at 41.

[81] Although Gillette's case was based on a denied claim before induction, the companion case of *Negre v. Larsen* decided in the same opinion involved a post-induction claim pursuant to DODD 1300.06. *Gillette*, 401 U.S. at 442.

[82] *Id.*

[83] *Id.*

> Since it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining 1-O or 1-A-O classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service.

Id. (quoting DODD 1300.6, 10 May 1968, *supra* note 52, para. IV.B.3.b.). The same regulation also cites Selective Service Act case law as the origin of some of its procedures. *Id.* para. V.B.

[84] *Id.*

> No vested right exists for any person to be discharged from military Service at his own request even for conscientious objection before expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of an obligated term of service is discretionary with the military Service concerned, based on judgment of the facts and circumstances in the case.

Id. para. IV.B.1.

[85] *Id.*

[86] *Id.* para. 7.1.

[87] *Id.* para. 5.4. Before this added language, there was no defined burden of proof on the applicant.

exemption of indeterminate scope is honored.[88] This nebulous standard is also criticized as one that favors educated and articulate applicants because they are able to craft a conscientious objection claim that best parrots case law.[89] As discussed further in the next section, the current judicial standard of review essentially forces the government to disprove a petitioner's conscientious objection claim once asserted. This places a near impossible standard on the government to produce evidence of the mental state of the petitioner. The remainder of this article explores the problems arising from the current conscientious objection program and proposes several remedial government actions to provide more meaningful standards and increase judicial deference to military personnel decisions concerning conscientious objection claims.

II. The Problem with the Current In-Service Conscientious Objection Program and Potential Solutions

A. The Problem: No Meaningful Standard Creates Confusion and Unfairness

The problem with the current in-service conscientious objection program is two-fold. First, the judicially-created standard adopted by the DOD is vague and easily met by an articulate applicant. The definition of "religious training or belief" has been expanded beyond its definition to incorporate almost any origin of belief.[90] Second, the currently configured regulatory framework of the in-service conscientious objection program arguably has resulted in the federal judiciary exercising the discretionary authority that rightfully belongs to the military. Previous military in-service conscientious objection regulations initially conveyed an intent to subject all in-service conscientious objection claims to judicial review using the same standards created for claims under the Selective Service System.[91] The courts have fully embraced this intent and currently judge all conscientious objection cases according to substantially the same standards.[92] Consequently, when the military denies a conscientious objection application, the applicant can appeal the decision up to the Supreme Court using rules designed for involuntarily drafted citizens. Even if the military concludes that an applicant has not met the regulatory conscientious objection standard, the current standard of judicial review creates a presumption of validity in favor of the applicant that is extremely difficult for the Government to overcome.

The difficulty with any conscientious objection program lies in the fact that the claim is inescapably subjective. By any definition, a claim of conscientious objection deals with the state of mind of the claimant. It is a matter of belief or, as aptly named, of conscience. As discussed earlier, the original conscientious objection exemption was available solely to applicants whose beliefs were based on religion. But the current regulatory definition expanded this exemption to specifically include non-religious beliefs that are held with the same intensity as a religious belief.[93] This expansion made an already difficult standard even more difficult to measure. Although any conscientious objection exemption cannot avoid the difficulty in reviewing subjective beliefs, the method used to analyze these beliefs can either amplify or reduce this difficulty.

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[88] Gillette v. United States, 401 U.S. 437, 448 (1971).

[89] James L. Lacy, *Alternative Service*, *in* SELECTIVE CONSCIENTIOUS OBJECTION: ACCOMMODATING CONSCIENCE AND SECURITY 107, 112 (Michael F. Noone, Jr. ed., 1989); *see also* ROBERT A. SEELEY, ADVICE FOR CONSCIENTIOUS OBJECTORS, *available at* http://www.objector.org/advice/contents.html (last visited July 28, 2008) (citing case law while providing specific advice on how to apply for conscientious objector status).

[90] *See supra* notes 43–45 and accompanying text. The in-service conscientious objection program currently defines "religious training and/or belief" as follows:

> Belief in an external power or "being" or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or "being" need not be one that has found expression in either religious or societal traditions. However, it should sincerely occupy a place of equal or greater value in the life of its possessor. Deeply held moral or ethical beliefs should be valued with the strength and devotion of traditional religious conviction. The term "religious training and/or belief" may include solely moral or ethical beliefs even though the applicant may not characterize these beliefs as "religious" in the traditional sense, or may expressly characterize them as not religious. The term "religious training and/or belief" does not include a belief that rests solely upon considerations of policy, pragmatism, expediency, or political views.

DODI 1300.06, *supra* note 52, para 3.2.

[91] DODD 1300.6, 10 May 1968, *supra* note 52, para. IV.B.3.b.

[92] *See, e.g.*, *Gillette*, 401 U.S. at 442. However, some courts interpret the in-service conscientious objection program standards differently. *See infra* note 141.

[93] *See* DODI 1300.06, 10 May 1968, *supra* note 52, para. 3.2.

The standard for judicial review of a denied conscientious objection application continues to be the "basis in fact" standard. That is, once an applicant establishes a prima facie case, the burden shifts to the government to show that there was a basis in fact for its decision.[94] An applicant establishes a prima facie case, when he "makes nonfrivolous allegations that, if true, would be sufficient under regulation or statute to warrant granting the requested reclassification."[95] Although the military updated its regulations to require an applicant to prove his conscientious objection belief by clear and convincing evidence, the majority of courts have not changed their standard of review.[96] Most courts still only require applicants to establish a prima facie case to satisfy their burden under a habeas corpus petition.[97] The courts have made it clear that although this standard of review is the "narrowest review known to the law," [98] "it is not toothless."[99] Courts require the government to show "hard, reliable, provable facts" that form a basis for disbelieving the applicant's sincerity, or to show something "concrete in the record which substantially blurs the picture painted by the applicant."[100] In short, suspicion by the Government that a servicemember is not sincere is insufficient. So although by regulation applicants must prove their conscientious objection beliefs to their military service by clear and convincing evidence in order to shift the burden to the Government, on appeal in federal court they only need to assert a prima facie case to do the same. This goes beyond the euphemism of allowing two bites of the apple. It allows a small initial nibble followed by an extraordinarily large chomp.

Another problem with the current in-service conscientious objection exemption is that it appears to favor the privileged. The vague legal standards for conscientious objection created by the Supreme Court in the 1960s and 1970s created a condition where determining the beliefs necessary to qualify for the exemption was confusing, at best. After analyzing the statistics concerning conscientious objection discharges, military historian James L. Lacy concluded that these vague standards resulted in a disproportionate number of exemptions being granted to educated whites during the Vietnam War.[101] Mr. Lacy noted a Selective Service survey from the 1970s concluding that of the Vietnam-era drafted individuals who were granted conscientious objection exemptions, 96% had graduated high school, 40% graduated college, and 70% had completed some college.[102] He also noted that very few blacks were granted conscientious objector status.[103] Although these statistics were collected from draft board conscientious objection determinations, they are relevant to the current in-service regulatory framework because the regulations have largely adopted the judicially created standards.[104] Because of the complexity of navigating the legal system, servicemembers able to appeal their conscientious objection denials are the ones wealthy or lucky enough to retain the assistance of competent legal counsel. A look at the most recent conscientious objection cases decided in federal courts continues the trends noted by Mr. Lacy. Of these cases, approximately 61% of

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[94] Most courts follow this burden-shifting analysis. Rainey v. Garrett, 1993 U.S. App. LEXIS 5404, at *8 (4th Cir. Mar. 16, 1993); Shaffer v. Schlesinger, 531 F.2d 124, 128 (3rd Cir. 1976); Rosenfeld v. Rumble, 515 F.2d 498, 499 (1st Cir. 1975); Sanger v. Seamans, 507 F.2d 814, 816 (9th Cir. 1974); Chilgren v. Schlesinger, 499 F.2d 204, 207 (8th Cir. 1974); Smith v. Laird, 486 F.2d 307, 310 (10th Cir. 1973); *see* United States v. Bush, 509 F.2d 776, 783 (7th Cir. 1975) (applying the basis in fact standard to a pre-induction prima facie case of conscientious objection from an inductee); *see also* United States v. Fuller, 497 F.2d 551, 554 (6th Cir. 1974) (holding that because the inductee failed to establish a prima facie case for conscientious objection, the draft board was not required to show reasons for the application's denial). Some courts, however, appear to gloss over this burden shift and begin the analysis by searching the record for the government's basis in fact for it's denial of conscientious objection applications. Alhassan v. Hagee, 424 F.3d 518, 522 (7th Cir. 2005); Hager v. Sec'y of the Air Force, 938 F.2d 1449, 1454 (1st Cir. 1991) (failing to address the burden-shifting analysis it adopted earlier in *Rosenfeld*).

[95] Woods v. Sheehan, 987 F.2d 1454, 1456 (9th Cir. 1993) (quoting *Sanger*, 507 F.2d at 816).

[96] *See* Harris v. Schlesinger, 526 F.2d 467, 468 (9th Cir. 1975) (noting how the 12 June 1974 version of AR 600-43, *Conscientious Objection*, altered the burden of proof from the previous case law standard of prima facie case to clear and convincing evidence).

[97] Only a few courts have addressed the new standard, but these courts appear to alter their standard of review in language only and provide no new tools for reviewing conscientious objection claims. *See Rainey*, 1993 U.S. App. LEXIS 5404, at *4 (announcing the requirement for habeas corpus petitioners to prove a prima facie conscientious objection claim by clear and convincing evidence but providing no new analysis for reviewing claims); *see also* Zabala v. Hagee, 2007 U.S. Dist LEXIS 27423, at *21 (N.D. Cal. Mar. 29, 2007) (quoting the new standard for applicants to prove a prima facie case by clear and convincing evidence but using exact same analysis from historical conscientious objection case law).

[98] *Woods*, 987 F.2d at 1456.

[99] *Hager*, 938 F.2d at 1454.

[100] *Id*.

[101] Lacy, *supra* note 89, at 112.

[102] *Id*. Mr. Lacy fails to cite the study and the author was unable to locate it or an equivalent study to confirm his results.

[103] *Id*.

[104] The author was unable to obtain current race or rank-specific data for in-service conscientious objection applications. The most recent U.S. Government Accountability Office report on Conscientious Objectors does not detail statistics based on rank or race. U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: NUMBER OF FORMALLY REPORTED APPLICATIONS FOR CONSCIENTIOUS OBJECTORS IS SMALL RELATIVE TO THE TOTAL SIZE OF THE ARMED FORCES 8 (2007) [hereinafter GAO CONSCIENTIOUS OBJECTOR REPORT 2007].

officers were granted writs of habeas corpus, while only about 33% of enlisted were granted the same.[105] Although these numbers are not conclusive, they suggest that education may still play a significant role in resolving in-service conscientious objection cases at the judicial level.

One argument against any change in the current regulatory scheme is that conscientious objectors have little impact on military operations because there are so few applicants. The latest U.S. Government Accountability Office report on conscientious objection in 2007 concluded that the number of applications for in-service conscientious objector status was small compared to the overall size of the military.[106] Although it reached a similar conclusion in its 1993 report, the U.S. General Accounting Office stopped short of concluding that there was no impact on military readiness.[107] Another prominent figure in the 2007 report is the average processing time for conscientious objection applications. On average, it takes the DOD about seven months to process a conscientious objection application.[108] This, of course, does not include the additional time that federal litigation can add to the processing time. Seven or more months is a significant amount of time to ask a commander to make special accommodations for conscientious objection applicants so their duties do not interfere with their alleged beliefs.[109] This is even more significant when combat units are continually training for and deploying in support of the Global War on Terror. Although the effect on military readiness is certainly nowhere near the effect felt by the military during the Vietnam War,[110] the impact is still significant.

The vague in-service conscientious objection standards allow for various interpretations and creates uncertainty. These standards have a negative impact on military units and individual servicemembers. Commanders and their Soldiers need predictability in order to plan for the future. In order to train for missions, commanders need to be able to accurately predict whether their Soldiers will be granted conscientious objector status. Soldiers need this predictability just as much or more than commanders do because it profoundly affects their lifestyle. A vague conscientious objection standard that fails to provide such predictability results in wasted resources for the government and a sense of mystery or unfairness for the Soldier. Both of these results ultimately end in frustration for everyone involved because of lack of control and understanding of the process.

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[105] The author compiled these rudimentary statistics by searching all federal courts for habeas corpus cases involving denied conscientious objection claims since 1980. From a total of twenty nine cases, the following numbers were compiled: Eight of the thirteen officers were granted the writ, while only four of twelve enlisted were granted the writ. Oddly, all eight of the victorious officers were physicians. This also supports the conclusion that better educated servicemembers have a greater chance at achieving conscientious objector status. The cut off date of 1980 was chosen at random. Aguayo v. Harvey, 476 F.3d 971 (D.C. Cir. 2007); Alhassan v. Hagee, 424 F.3d 518 (7th Cir. 2005); Roby v. United States Dep't of the Navy, 76 F.3d 1052 (9th Cir. 1996); Woods v. Sheehan, 987 F.2d 1454 (9th Cir. 1993); Perler-Tomboly v. Sec'y of the Air Force, 1993 U.S. App. LEXIS 31022 (9th Cir. Nov. 24, 1993); Rainey v. Garrett, 1993 U.S. App. LEXIS 5404 (4th Cir. Mar. 16, 1993); Hager v. Sec'y of the Air Force, 938 F.2d 1449 (1st Cir. 1991); Walshe v. Toole, 663 F.2d 320 (1st Cir. 1981); Naill v. Alexander, 631 F.2d 696 (10th Cir. 1980); Rogowskyj v. Conway 2007 U.S. Dist. LEXIS 17162 (D.D.C. Mar. 13, 2007); Watson v. Geren, 483 F. Supp. 2d 226 (D.N.Y. 2007); Kwon v. Sec'y of the Army, 2007 U.S. Dist. Lexis 26201 (E.D. Mich. Apr. 9, 2007); Zabala v. Hagee, 2007 U.S. Dist. LEXIS 27423 (D. Cal. Mar. 29, 2007); Hanna v. Sec'y of the Army, 2006 U.S. Dist. LEXIS 74326 (D. Mass. Oct. 6, 2006); Jashinski v. Holcomb, 482 F. Supp. 2d 785 (D. Tex. 2006); Reynolds v. Widnall, 1997 U.S. Dist. LEXIS 6976 (D. Mass. Mar. 26, 1997); Leonard v. Dep't of Navy, 786 F. Supp. 82 (D. Me. 1992); Reiser v. Stone, 791 F. Supp. 1072 (D. Pa. 1992); Allison v. Stone, 1992 U.S. Dist. LEXIS 12429 (D. Cal. Aug. 6, 1992); Jones v. Mundy, 792 F. Supp. 1009 (D.N.C. 1992); United States *ex rel.* Brandon v. O'Malley, 1991 U.S. Dist LEXIS 11492 (D. Ill. Aug. 19, 1991); Chapin v. Webb, 701 F. Supp. 970 (D. Conn. 1988); Lewis v. Marsh, 1988 U.S. Dist. LEXIS 13930 (D. Ky. Sep. 26, 1988); Goodrich v. Marsh, 659 F. Supp. 855 (D. Ky. 1987); Bailey v. Sec'y of Army, 1987 U.S. Dist. LEXIS 10804 (D. Ala. Nov. 18, 1987); Koh v. Sec'y of Air Force, 559 F. Supp. 852 (D. Cal. 1982); Lawton v. Lehman, 531 F. Supp. 139 (D. Va. 1982); Cywinski v. Binney, 488 F. Supp. 674 (D. Md. 1980).

[106] The report found that between 2002 and 2006 there were only 425 applications submitted from approximately 2.3 million servicemembers in the entire U.S. Armed Forces. GAO CONSCIENTIOUS OBJECTOR REPORT 2007.

[107] The General Accounting Office noted that although the number of overall applications more than doubled from any of the previous four years, the number of applicants probably had no measurable impact on readiness during the Persian Gulf War. *See* U.S. GEN. ACCOUNTING OFFICE, CONSCIENTIOUS OBJECTORS: NUMBER OF APPLICATIONS REMAINED SMALL DURING THE PERSIAN GULF WAR 4 (1993).

[108] The Navy had the shortest average processing time of about five months while the Air Force Reserve had the longest processing time of about one year. GAO CONSCIENTIOUS OBJECTOR REPORT 2007, *supra* note 104, at 15. The U.S. Army and Air Force do, however, impose application processing standards through their respective regulations. The Army requires an application be forwarded to Department of the Army within ninety days of submission. AR 600-43, *supra* note 66, para. 2-1.b. The U.S. Air Force imposes a guideline that each individual involved in the process forward the application to the next person within three working days. AFI 36-3204, *supra* note 67, para. 5.7.

[109] Although commanders are not absolutely required to assign applicants to duties that do not conflict with their beliefs, the regulation directs commanders to "make every effort" to do so. DODI 1300.06, *supra* note 52, para. 7.9.

[110] Near the end of the Vietnam War in 1972, more people were being granted conscientious objector status than were being inducted into the military. *See* KOHN, *supra* note 5, at 93.

B. Potential Solutions

1. The Nuclear Option: Abandoning the In-Service Conscientious Objection Program

An extreme solution to the current in-service conscientious objection exemption problem is to eliminate the program entirely. Terminating the in-service conscientious objection exemption would eliminate not only the need for an administrative procedure to process in-service claims, but also any need for judicial review of those decisions. This option would bypass the difficult problem of how to revise the currently confusing process of handling in-service conscientious objector claims.

As tempting as it may be to simply eliminate the exemption, this is likely not the best option. As discussed earlier, conscientious objection exemption from military service has deep historical roots. Our nation has always valued freedom of individual belief and allowed for conscientious objection to service.[111] This holds true even in an all-volunteer military because people's beliefs can change.[112] Although history and national values weigh heavily against this option, it warrants some discussion because it undoubtedly has some advocates.

A conscientious objection exemption from military service is not constitutionally required and eliminating it would create no significant basis for a legal challenge based on the U.S. Constitution.[113] Furthermore, because the current in-service exemption is not statutorily created, the DOD could unilaterally eliminate the exemption by merely publishing a new regulation. Congress has already granted the President and the Secretary of Defense the power to prescribe regulations for the military.[114] The most persuasive argument for eliminating the in-service exemption is that a servicemember should not be allowed to claim conscientious objection after he has volunteered to serve. Potential servicemembers are required to affirmatively state that they are not conscientious objectors and have no beliefs that would prevent them from participating in war.[115] The argument follows that a servicemember forfeits any right to claim conscientious objection at the time of enlistment. However, this argument dismisses the idea that a person can become a conscientious objector after previously disavowing any such belief. This argument also ignores the negative consequences of having sincere conscientious objectors serving in the military, such as degraded combat effectiveness during military operations and increased criminal and administrative procedures for servicemembers who refuse to train or fight.

Forcing sincere conscientious objectors to remain in the military compels them to choose either to follow their beliefs or to pick up a weapon and fight. But if sincere and deeply held, these beliefs prevent a conscientious objector from participating in military training and combat. This collision of military needs and personal beliefs results in either a refusal to train for combat or a refusal to fight during combat operations. Either way, forcing a conscientious objector to continue performing military service can have dire consequences not only for the individual, but for his entire military unit. Although some may think that requiring the servicemember to make such a decision is the perfect way to determine if he or she is a sincere conscientious objector, such a method would likely only create additional burdens for military units and leaders.[116]

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[111] Parisi v. Davidson, 405 U.S. 34, 45 (1972) (noting the "historic respect in this Nation for valid conscientious objection to military service").

[112] Additionally, some servicemembers who volunteered can be forced to serve for longer than their original contractual commitment. *See* Dep't of Army Message No. 06-232, subject: Active Army Stop Loss/Stop Movement Program for Units Scheduled to Deploy OCONUS in Support of OIF and OEF (22 Aug. 2006); *see also* Michelle Tan, *Stop-Loss Likely to Last Into Fall 2009*, ARMY TIMES, May 5, 2008, *available at* http://www.armytimes.com/news/2008/05/army_stoploss_050308/.

[113] *See* Johnson v. Robison, 415 U.S. 361, 375 (1974). While holding that the denial of veterans benefits to discharged conscientious objectors was constitutional, the court noted that "Congress . . . is under no obligation to carve out the conscientious objector exemption for military training." *Id.* (quoting Robison v. Johnson, 352 F. Supp. 848 (D. Mass. 1973).

[114] *See* 10 U.S.C.S. § 121 (LexisNexis 2008); *see also id.* § 113(b).

[115] *See* DD Form 1966, *supra* note 48.

[116] The case of Army Specialist (SPC) Katherine Jashinski provides a good example of problems that arise from requiring a servicemember to continue military service in spite of claimed conscientious objection beliefs. Jashinski v. Holcomb, 482 F. Supp. 2d 785 (D. Tex. 2006). Specialist Jashinski volunteered for the National Guard and applied for conscientious objector status after receiving activation orders to deploy to Afghanistan. *Id.* After her application was twice denied by the DACORB, she filed suit in federal district court. *Id.* She sought a temporary restraining order to prohibit the Army from deploying her to Afghanistan and a writ of habeas corpus to discharge her from the Army. *Id.* Although her unit deployed to Afghanistan shortly after she submitted her conscientious objection application, the Army allowed SPC Jashinski to remain in the United States until her application and court case were resolved. *Id.* One year after her unit had been deployed to Afghanistan, the court denied both the temporary restraining order and writ of habeas corpus. *Id.* After losing her case, SPC Jashinski refused to conduct weapons training and deploy to Afghanistan. Assoc. Press, *Soldier from Wis., Denied CO Status, Gets Bad Conduct Discharge*, LACROSS TRIB., May 26, 2006, http://www.lacrossetribune.com/articles/2006/05/26/wi/soldier.txt. She was tried by court-martial, convicted of disobeying a lawful order, and sentenced to 120 days confinement and a bad-conduct discharge. *Id.*

Another strong argument for eliminating the in-service conscientious objection program is that the current in-service conscientious objection regulatory scheme already results in the likelihood that sincere conscientious objectors will be forced to continue service in the military. Under the current program, a claimant who possessed conscientious objection beliefs prior to entering the military is barred from claiming the conscientious objection exemption after entry.[117] So, applicants who fail to recognize and make known their pre-existing beliefs prior to enlistment forever waive the right to apply for conscientious objection and must continue military service in their assigned military occupation.[118] The apparent reason for this waiver provision is to encourage people to voice their objections prior to enlisting. This provision demonstrates that our national policy of honoring conscientious objection beliefs is not without limit. It shows that Congress and DOD are willing to compromise the free expression of beliefs in order to set a meaningful limitation on the claim of conscientious objection. This is one of the few provisions currently in our system that helps provide an objective standard by which the conscientious objection program can be measured.

An in-service exemption is needed as a tool for military leaders to maintain morale and discipline. A deeply sincere conscientious objector who will not or cannot obey military orders can seriously and detrimentally affect mission accomplishment. Not only will conscientious objectors refuse to train or fight, but they can also affect morale and discipline in their units. This presents military leaders with two potential problems. First is the concern that other servicemembers will follow the lead of the conscientious objector and refuse to train or fight. A refusal to follow orders has the potential to spread throughout a unit like a disease. Second is the possibility that other servicemembers will harm the conscientious objector for refusing to train or fight. Violence against conscientious objectors was rampant in earlier conflicts[119] and is certainly foreseeable in today's military as well. But apart from the concerns about the individual conscientious objector and the concerns of the military unit, deeper societal concerns argue against forcing sincere conscientious objectors to continue military service.

Although the military could unilaterally repeal the in-service conscientious objection exemption, such a move would go against our national values.[120] The United States was built on the foundation of religious freedom and independent thought. Since its inception, the United States has embraced these ideals by including a conscientious objection exemption in the earliest military conscription laws.[121] Our nation also deeply believes in the ability of individuals to develop and change their own beliefs.[122] It is not only a recognized and accepted principle of the United States, but an accepted principle of the international community as well. The United Nations High Commissioner for Human Rights has called on all nations to exempt conscientious objectors from military service.[123] This national and international support for conscientious objectors suggests that a repeal of the in-service program would, at best, result in social discontent. At worst, it could result in congressional action to codify an in-service conscientious objection exemption or judicial interference in the military personnel decision-making process. Regardless of any potential ramifications of eliminating the exemption, the in-service conscientious objection program appears to be permanently embedded in military planning. Although significantly narrowing the scope of the in-service program may be appropriate, a complete elimination would likely prove to be a mistake.

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[117] The DOD regulation actually limits this waiver to servicemembers who failed to file under the Selective Service System, rendering this limitation in an all-volunteer force meaningless. *See* DODI 1300.06, *supra* note 52, para. 4.1.1. This is essentially the same scheme as found in the Selective Service System where inductees are required to submit claims for service exemption before induction. Selective Service System, 32 C.F.R. § 1633.2 (2007). However, the service regulations make up for the DOD's failure by requiring that conscientious objection beliefs be claimed before any kind of entry into service, including voluntary enlistment. *See* AR 600-43, *supra* note 66; *see also* U.S. MARINE CORPS, ORDER 1306.13E, CONSCIENTIOUS OBJECTORS para. 4.c (21 Nov. 1986).

[118] *See* Grubb v. Birdsong, 452 F.2d 516 (6th Cir. 1971) (holding that the applicant waived his right to conscientious objection because he failed to assert his fixed beliefs prior to induction); *see also* Aguayo v. Harvey, 476 F.3d 971 (D.C. Cir. 2007) (upholding the lower court's decision that the applicant forfeited his claim of conscientious objection by failing to assert his beliefs prior to enlistment).

[119] *See* KOHN, *supra* note 5, at 29–33.

[120] "As the Defense Department itself has recognized, 'the Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces.'" Parisi v. Davidson, 405 U.S. 34, 45 (1972) (quoting DODD 1300.6, 10 May 1968, *supra* note 52).

[121] *See supra* Part I.A.

[122] Our criminal justice system's dependence on the sentencing philosophy of rehabilitation further demonstrates our society's fundamental belief that people can change. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(g) (2008).

[123] By using the language "[a]ware that persons performing military service may develop conscientious objections," the resolution implies that states should have an in-service conscientious objection exemption in addition to the exemption from conscription. U.N. CHR, 55th Sess., 58th mtg., U.N. Doc. E/CN.4/1998/77 (Apr. 22, 1998).

2. The Middle Ground: Eliminating the Class 1-O Exemption

Another possible change to the basic scheme of the in-service conscientious objection program would be to eliminate the discharge provision while retaining the non-combatant status provision. This option is essentially a compromise between total elimination of the program and preserving the existing program as is. Eliminating the Class 1-O exemption would produce the same benefits as would total elimination while continuing to provide accommodation to sincere conscientious objectors by allowing non-combatant service.[124] This option would produce many of the same benefits discussed above as a total elimination of the program. It would help provide a deterrent to insincere applicants by requiring continued service, minimize other servicemembers' feelings of unfairness by requiring continued service, and reduce risk of harm to applicants by moving them to a different unit. Another significant benefit for this option is that it would reduce processing times because applications would no longer need to go to the service headquarters for final approval.[125]

The arguments against elimination of the Class 1-O option are similar to those against total elimination of the in-service conscientious objection program. The strongest argument against this option continues to be that the exemption is historically entrenched in our society and that forcing a servicemember to continue serving counters the basic American value of individual beliefs. This argument is strong, but is counterbalanced by the fact that all of our servicemembers currently volunteer and explicitly state they are not conscientious objectors when they enlist. It is important to recall that the historical roots of the conscientious objection exemption are grounded in the earliest conscription laws. Furthermore, our current program already requires that even the most sincere conscientious objectors compromise their beliefs to some degree.

In some regard, the current in-service conscientious objection program already produces a similar result. While a servicemember's application is pending, he is required to continue service and follow lawful orders until the event of application approval and subsequent discharge.[126] Because commanders are only required to make efforts to accommodate the applicant's beliefs during the application process, servicemembers are not only subject to service in contravention to their beliefs but also may have to perform actual combat duties.[127] Eliminating the Class 1-O exemption would merely be another step in the direction of requiring continued service that contravenes asserted beliefs.

In a larger sense, all U.S. citizens are already forced to provide support to the U.S. military by virtue of their citizenship. United States citizens are required to provide support to the military through the payment of federal taxes. Nearly a quarter of the federal budget is allocated to the DOD.[128] There is no tax exemption for conscientious objection to military operations, and courts have rejected all legal arguments for such an exemption.[129] So, although a conscientious objector may claim an absolute right to abstain from any support to the military, U.S. citizens are already required to provide some contribution to the military through government spending.

As already discussed, any change in the in-service conscientious objection program could be accomplished merely by changing the regulations. The current regulations would not have to be significantly revised to incorporate this change. The Class 1-O and Class 1-A-O conscientious objection categories are primarily distinguished by the definitions alone. Although both classes similarly object to participation in war, the Class 1-A-O conscientious objector's beliefs are "such as to permit

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[124] Non-combatant service currently means

> (1) service in any unit that is unarmed at all times, (2) any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him or her to bear arms or to be trained in their use, or (3) service aboard an armed ship or aircraft or in a combat zone . . . unless the individual concerned is personally and directly involved in the operation of weapons.

DODI 1300.06, 10 May 1968, *supra* note 52, para. 3.3.

[125] *See id*. para. 7.7.

[126] *Id*. para. 7.9.

[127] *See id*.

[128] In fiscal year 2007, the DOD accounted for 22.8% of federal spending. U.S. DEP'T OF TREASURY: 2007 FINANCIAL REPORT OF THE U.S. GOVERNMENT 41 (2007).

[129] A long line of cases in federal courts have concluded that such a self-authorized "war-tax deduction" is invalid. *See* United States v. Lee, 455 U.S. 252, 260 (1982); *see also* Jenkins v. Comm'r, 483 F.3d 90 (2d Cir. 2007); Adams v. Comm'r, 170 F.3d 173 (3d Cir. 1999); Lull v. Comm'r, 602 F.2d 1166 (4th Cir. 1979); Nelson v. United States, 796 F.2d 164 (6th Cir. 1986); First v. Comm'r, 547 F.2d 45 (7th Cir. 1976); Autenrieth v. Cullen, 418 F.2d 586 (9th Cir. 1969); Randall v. Comm'r, 733 F.2d 1565 (11th Cir. 1984).

military service in a non-combatant status."[130] Thus, the regulatory revision to incorporate this change can be accomplished by literally deleting all mention of the Class 1-O conscientious objector.

3. Separate the In-Service Conscientious Objection Program Standard from the Selective Service Exemption Standard

Yet another option is to adopt completely separate standards for reviewing in-service conscientious objection applications from the standard that has been created by the courts. As already discussed, the military formatted its in-service conscientious objection program to mirror the standards created by federal courts for induction.[131] Some of these definitions have severely restricted how an in-service conscientious objection application could be reviewed. When the military first adopted the judicially created standards for conscientious objection, the DOD concluded that it was in the national interest to judge all claims alike.[132] This policy was more appropriate for a system in which people were involuntarily selected and forced to join the military. However, when every recruit must now affirmatively deny any conscientious objection beliefs before voluntarily entering the military, this policy is arguably outdated. From a practical standpoint, it makes sense to consider these factors when formulating standards for review of conscientious objection claims.

A good example of a judicially created standard adopted by the DOD concerns the timing of an application. According to this rule, application timing alone could not be the only factor in determining whether someone is a sincere conscientious objector. This standard was announced as early as 1971 by the Court of Appeals for the Fifth Circuit in *Rothfuss v. Resor*[133] and first showed up in military regulations several years later.[134] This rule quickly morphed from the initial proposition that a delay in applying cannot be a rationale for denial,[135] to the proposition that an application immediately following deployment orders cannot be a rationale for denial.[136] According to this rule, the fact that a servicemember raises the issue of conscientious objection for the first time literally on the eve of a combat deployment cannot be the only basis for denial. In its analysis, the *Rothfuss* court based its decision in adopting the timing rule partially on the fact that the applicable regulations did not announce that timing could be a factor.[137] A potential change in the regulation to separate the in-service program standards from the judicial standards for induction would be to simply state that application timing alone may be the only factor for determining applicant sincerity. Another means to accomplish this same end would be to simply bar claims of conscientious objection for a certain period before a deployment. There are positives and negatives to changing the weight given to the timing factor. While there is arguably merit to the idea that the gravity of facing an imminent combat deployment is sometimes the period when a servicemember searches deep enough to realize his sincerely held conscientious objection beliefs,[138] this argument becomes tenuous when the predeployment phase is abbreviated. However, the point is that the DOD is theoretically free to depart from the court-made standards for induction by simply revising the applicable regulations.

The military has the authority to depart from the judicially created Selective Service standards for conscientious objection. Courts have held that the military has in fact already done so. In 1996, in *Roby v. United States Department of Navy*, the Court of Appeals for the Ninth Circuit held that the military had in fact created a fourth element for the conscientious objector status by requiring that a belief be both sincere and deeply held.[139] Although the court found a basis for its decision both in Supreme Court precedent and military regulations, the court clearly based its decision on deference to

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[130] DODI 1300.06, *supra* note 52, para. 3.1.

[131] *See supra* Part II.A.

[132] DODD 1300.6, 10 May 1968, *supra* note 52, para. IV.B.3.b.

[133] *See* 443 F.2d 554, 558–59 (5th Cir. 1971).

[134] This rule first appeared in the 1974 version of AR 600-43 but has yet to appear in any DOD regulations. *See* U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION para. 1-4(5) (12 June 1974).

[135] United States v. Clifford, 409 F.2d 700, 707 (4th Cir. 1969).

[136] *See Rothfuss*, 443 F.2d at 558–59.

[137] *Id.* at 559.

[138] *See* Hager v. Sec'y of Air Force, 938 F.2d 1449, 1456–57 (1st Cir. 1991) (providing a better discussion of this argument).

[139] 76 F.3d 1052, 1057 (9th Cir. 1996) (rejecting the First and Second Circuits' holdings that depth of conviction was an improper factor). The 1971 version of DODD 1300.6 in effect at the time of the case defined conscientious objector as someone "who is conscientiously opposed to participation in war in any form; whose opposition is found on religious training and belief; and whose position is sincere and deeply held." DODD 1300.6, 20 Aug. 1971, *supra* note 52 para. 5.1.1.

military regulations.[140] The circuit courts are currently split on this issue,[141] but there is clear precedent for the military to amend its regulatory standards for in-service conscientious objection. A solution to resolve this split would be for the DOD to clearly articulate an intent to depart from the judicially created Selective Service conscientious objection exemption standards. Absent a military regulation stating this intent, courts are forced to rely on the previously announced policy to measure such claims in accordance with the Selective Service exemption. The DOD could announce this intent in a new regulation by both explicitly denouncing the previous policy and altering its court-adopted standards for reviewing in-service conscientious objection claims. Then courts will be free to establish a new line of precedents distinct and separate from the Selective Service system cases.

4. Alternative Service: Civilian Non-Military Work Requirement

Another consequence of having vague and confusing standards for the in-service conscientious objection applications is that insincere applicants may be undeservingly granted a military discharge. One option to deter insincere claimants deals not with the standard of review, but with the consequences of a conscientious objection discharge. Requiring discharged conscientious objectors to perform alternative civilian work would provide a deterrent to those who are merely looking to avoid their service commitment. Currently, the primary deterrent to prevent insincere applicants from seeking a conscientious objection discharge is the requirement to repay any unearned bonuses, specialty, or education funds at the time of discharge.[142] And although applicants are required to sign a form acknowledging potential loss of most veterans benefits,[143] this does not provide an effective deterrent because these benefits are determined independent of conscientious objector status.[144] The single determining factor for veterans benefits eligibility is the characterization of discharge.[145] Currently, most conscientious objectors receive honorable discharges,[146] which qualify them for full veterans benefits.[147] Although one argument against alternative service is that it may deter sincere servicemembers from applying for conscientious objection, this argument is tenuous because sincere applicants are presumably concerned with military service that counters their beliefs, not service altogether.[148] That said, requiring alternative service as a condition for discharge would provide a real disincentive for insincere conscientious objectors to seek the in-service conscientious objection exemption because it does not allow them to pursue immediate employment in the private sector.

Further, an alternative service program serves goals other than deterrence. It serves the goal of fairness by showing other servicemembers that a discharged conscientious objector is following through on his commitment to serve the United States. Just as important, an alternative service program benefits individual conscientious objectors by providing them the satisfaction of service to their country. Finally, an alternative service program has the ability to provide needy social programs with skilled employees. For example, a physician who still owes a service obligation and is granted a conscientious objection discharge could serve in an impoverished community that has trouble recruiting doctors. Although the number of discharged conscientious objectors remains low, an alternative service program can still make a significant difference by benefiting the public and individual conscientious objectors.

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[140] *See Roby*, 76 F.3d at 1057.

[141] *See* Kemp v. Bradley, 457 F.2d 627, 629 (8th Cir. 1972) (rejecting a separate depth of conviction test for conscientious objection); *see also Hager*, 938 F.2d at 1459 (joining the Eighth Circuit in rejecting a separate depth of conviction test for conscientious objection).

[142] *See* 37 U.S.C.S. § 303a (LexisNexis 2008).

[143] DODI 1300.06, *supra* note 52, para. 7.2.2.

[144] *See* GAO CONSCIENTIOUS OBJECTOR REPORT 2007, *supra* note 104, at 17.

[145] *Id.*

[146] Out of 224 discharged conscientious objectors between 2002 and 2006, 207 received honorable discharges and 14 received general discharges. *Id.* The type of discharge for the remaining three is unknown. *Id.* at 23.

[147] Dep't of Veterans Affairs, 38 C.F.R. § 3.12 (2007).

[148] However, some conscientious objectors will still be opposed to fulfilling any service commitment. In *Smith v. Laird*, the applicant appealed the district court decision granting him a writ of habeas corpus on the condition that he serve the remainder of his commitment to the military in the Selective Service Alternative civilian work program. *See* Smith v. Laird, 486 F.2d 307 (10th Cir. 1973) (reversing the lower court's decision to require service in the alternative civilian work program as a condition on the granted writ of habeas corpus because neither Congress nor the regulations required such a condition on discharged conscientious objectors).

The key to this analysis is that the Selective Service Act already requires an alternative service program for conscientious objectors exempted from military conscription.[149] The purpose of the alternative service program is to allow exempted conscientious objectors to fulfill their service obligation by performing "appropriate civilian work contributing to the national health, safety, or interest."[150] Under the statutory system, a person exempt from military service as a Class 1-O conscientious objector would be ordered to perform alternative service by his local draft board.[151] Conscientious objectors then reports to the local Alternative Service Office where they are assigned "appropriate work" and monitored until their service obligation is complete.[152] Appropriate types of employment include work in health care services, educational services, environmental programs, social services, community services, and agricultural services.[153] Alternative Service Program employers are limited to U.S. government offices and private entities primarily engaged in either charitable or public improvement activities.[154] Eligible employers are approved by the Alternative Service Office and are listed in the Alternative Service Employer Network.[155] In an apparent effort to prevent this program from being perceived as some form of punishment for conscientious objectors, the Selective Service System makes it clear that its policy is to "treat persons in the Alternative Service Program fairly and with dignity, and to assign them to positions which will make genuine contributions to the national health, safety, or interest."[156]

The Selective Service's Alternative Service Program would be the perfect organization to assist the DOD with administering an alternative in-service program for discharged Class 1-O conscientious objectors. Although the current absence of a draft eliminates a need for the Selective Service System to continuously operate a large-scale program, the Alternative Service Program is establishing the programs necessary to accomplish this mission in the event of a return to the draft.[157] Administering an Alternative Service Program for discharged in-service conscientious objectors would help ensure that the Selective Service System has the proper systems in place in the event of a draft. Compared to full-scale operations during war time, the amount of resources necessary for administering a program for in-service conscientious objectors would be minimal.[158]

Finally, alternative service is not a new concept, and it should be seriously considered for servicemembers seeking a voluntary discharge before their commitment has ended. The very first military conscription laws required that conscientious objectors somehow fill the void created by their absence.[159] An argument against alternative service, and perhaps against any limitation to a conscientious objection exemption, is that servicemembers who volunteer should be given much greater deference to follow a life path that takes them out of the military. But even though the U.S. military is an all-volunteer force, it still must maintain its numbers in a predictable manner so that it can accomplish its mission. This goal is the reason that the military requires volunteers to commit to specific terms of service. A practice of allowing servicemembers to essentially "un-volunteer" would undermine this goal of predictability. Requiring volunteers to fulfill this time commitment, even in an alternative civilian work program, deters insincere applicants who are merely looking to abdicate their responsibilities. At the same time, sincere conscientious objectors will likely be primarily concerned that they receive the significant benefit of service that does not conflict with their beliefs.

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[149] Military Selective Service Act of 1948, 50 U.S.C.S. § 456(j) (LexisNexis 2008).

[150] *Id.*

[151] Selective Service System, 32 C.F.R. § 1656.2 (2007).

[152] *Id.* § 1656.4.

[153] *Id.* § 1656.5.

[154] *Id.*

[155] Selective Service System: Alternative Service Employer Network, https://www.sss.gov/PDFs/PrinterFriendly/asen.pdf (last visited July 29, 2008).

[156] Selective Service System: Alternative Service for Conscientious Objectors, http://www.sss.gov/FactSheets/FSaltsvc.pdf (last visited July 29, 2008).

[157] *See* U.S. SELECTIVE SERVICE SYSTEM, FISCAL YEAR 2006 ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES 23 (2006).

[158] There were a total of 224 Class 1-O conscientious objectors discharged from the DOD from 2002 to 2006 that could have performed alternative service. GAO CONSCIENTIOUS OBJECTOR REPORT 2007, *supra* note 104, at 10. Compare that to 11,950 conscientious objectors during World War II that were assigned alternative service. KOHN, *supra* note 5, at 46. During the Vietnam War, there were approximately 172,000 conscientious objectors that were required to perform alternative service (although nearly 50,000 of those simply "dropped out" due to lack of accountability). Lacy, *supra* note 89, at 112.

[159] The draft law of 1863 required a conscientious objector to do one of four things: (1) find a substitute, (2) pay a fee, (3) work in hospitals, or (4) care for freedman. Lacy, *supra* note 89, at 111.

5. Limiting the Conscientious Objection Exemption to Traditionally Religious Beliefs

Another option to improve the current in-service conscientious objection program is to limit the exemption to claims arising only from traditionally held religious beliefs. This change would effectively reverse the longstanding DOD policy of honoring conscientious objection claims originating from extra-religious beliefs as adopted from the *Seeger* and *Welsh* Supreme Court cases.[160] This could be done by merely amending the regulatory definition of "religious training and belief" to exclude any claims based on non-religious beliefs.

In a 1993 military law review article on the in-service conscientious objection program, Army Judge Advocate Major (MAJ) William Palmer similarly concluded that the program's standard is "confusing and overbroad."[161] Accordingly, he proposed a new definition for the "religious training and belief" requirement to qualify for conscientious objection.[162] The proposed standard limits in-service conscientious objection qualification to only those beliefs that society recognizes as traditionally religious.[163] Major Palmer proposed this new standard to correct the overbroad judicially-created standard.[164] Such a restriction in the definition would accomplish the goal of increasing predictability and fairness in the in-service program by judging conscientious objection claims against a relatively objective standard.

The most significant potential roadblock for instituting a purely religious conscientious objection is that it may violate the Constitution. The First Amendment states, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[165] Although MAJ Palmer provides ample support to conclude that his proposed definition would not violate the Free Exercise Clause of the First Amendment, he fairly quickly brushes over the more problematic Establishment Clause when making the same conclusion.[166] The weaker constitutional argument against a religious only exemption is that it violates the Free Exercise Clause by prohibiting the practice of people's religious, albeit non-traditional, beliefs.[167] Nonetheless, a long line of cases have clearly held that there is no constitutional requirement to provide a religious exemption from military service.[168]

The stronger constitutional argument against a religious only exemption for conscientious objection is that it would violate the Establishment Clause. Because only people with religious pacifist beliefs would be exempted from military service, it could constitute a government endorsement of religion. Major Palmer relies primarily on the *Gillette* case for concluding that a religious only exemption would not violate the Establishment Clause.[169] However, the *Gillette* Court assessed the constitutionality of a definition that had an effect of discriminating between different religious beliefs, not between secular and religious beliefs.[170] The *Gillette* Court intentionally did not address this issue of entanglement or government overreaching in religious affairs.[171] In *Lemon v. Kurtzmon*, the Court laid out the three-pronged test to determine

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[160] *See supra* notes 43–44 and accompanying text.

[161] Major William D. Palmer, *Time to Exorcise Another Ghost from the Vietnam War: Restructuring the In-Service Conscientious Objector Program*, 140 MIL. L. REV. 179, 236 (1993).

[162] Major Palmer's proposed definition for religious training and belief:

> Beliefs arising from recognition of a supernatural component to life. This supernatural component may be represented by belief in God, belief in an afterlife, or belief in the ability to reach a higher existence beyond the world as we understand it. These beliefs must provide an explanation for existence; must impose moral obligations; must encourage or demand specific behaviors or practices; and must be shared by a community of believers.

Id. at 223.

[163] *See id*.

[164] *See supra* Part II.A.

[165] U.S. CONST. amend. I. These clauses are commonly referred to as the Establishment Clause and Free Exercise Clause, respectively.

[166] *See* Palmer, *supra* note 161, at 225.

[167] *Id.*

[168] *Id.*

[169] *Id*. at 234.

[170] It is also important to note that the *Gillette* court reviewed the religious exemption as modified by the *Welsh-Seeger* courts and not a religious-only definition as proposed by Major Palmer. *See* Gillette v. United States, 401 U.S. 437 (1971).

[171] *See id*. at 450 (noting that the petitioners were actually asking for greater entanglement by asking the government to expand the conscientious objection to include religious objections to particular wars. The Court, however, superficially addressed the other *Lemon* factors and found no Establishment violation.).

if a government action violated the Establishment Clause.[172] In order to survive an Establishment Clause challenge, a government action must have a secular legislative purpose, must have a principle or primary effect that neither advances nor inhibits religion, and must not foster excessive government entanglement with religion.[173] Although the Supreme Court refused to strictly apply the *Lemon* test to a recent Establishment Clause case,[174] it remains a commonly used test[175] and continues to provide a valid rationale for analysis. In this case, the first prong of the test is easily satisfied because the purpose of the religious only definition is to provide a fair and meaningful standard by which conscientious objection cases could be judged.[176] The second and third prongs, however, are more complicated and require extensive analysis that could easily be the subject of a separate article.[177] Undoubtedly, a religious only conscientious objection exemption would raise complicated First Amendment issues that may prove to be a significant challenge to implementation.

Although restricting the in-service conscientious objection program to a religious only belief would be a positive step toward the goal of fairness and predictability, many problems unrelated to constitutional concerns would remain. The problem of interpreting a subjective definition of the qualifying belief would be eliminated. Theoretically, this would restrict the number of people eligible for the exemption since the objection would have to be religious based. However, the difficulty in subjectively evaluating the sincerity of someone's innermost beliefs would still be present. The DOD and courts agree that an applicant's sincerity is the crux of the conscientious objection determination.[178] However, switching to a purely religion based definition raises the danger that the in-service conscientious objection program would receive more, not less judicial scrutiny. At least initially it is likely that the resulting heightened scrutiny would increase the chances of judicial interference in these cases.

6. Make an In-Service Conscientious Objection Discharge a Discretionary Act

Another approach to change the in-service conscientious objection program is to amend the program's procedures to make it a truly discretionary governmental act. The government apparently intended to make the in-service conscientious objection program completely discretionary within the government. Both explicit and implicit regulatory language of the program shows this intent to create a discretionary conscientious objection program.[179] Nevertheless, courts have interpreted the currently drafted program to mandate discharge of an applicant once he makes a claim for conscientious objection unless the government can produce a tangible basis in fact for the denial.[180] However, the courts have concluded that the program itself is discretionary.[181] Because the military could arguably eliminate the program, it could also theoretically restructure the program to make each individual discharge discretionary by the military service concerned. The military currently operates such discretionary discharge programs for reasons other than conscientious objection, such as for mental disorders[182] and

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[172] *See* Lemon v. Kurtzmon, 403 U.S. 602 (1971).

[173] *Id*. at 612.

[174] *See* Van Orden v. Perry, 545 U.S. 677, 686 (2005) (refusing to strictly follow the *Lemon* test in deciding whether erection of a stone monument on the Texas state capital grounds violates the Establishment Clause).

[175] McCreary County v. ACLU, 545 U.S. 844, 859 (2005).

[176] Although *Gillette v. United States* was decided before *Lemon v. Kurtzmon*, the Gillette court relied on the secular purpose test when deciding the Establishment Clause issue. *See Gillette*, 401 U.S. at 454.

[177] A starting point for this analysis would be Justice Harlan's dissent in *Welsh*, where he concludes that a religious-only conscientious objection exemption from the draft would violate the Establishment Clause. Welsh v. United States, 398 U.S. 333, 344–67 (1970) (Harlan, J., concurring) (accusing the Court of a perverse re-writing of the statute to avoid deciding the Establishment Clause question).

[178] *See* DODI 1300.06, *supra* note 52, para. 5.2.2; *see also* Witmer v. United States, 348 U.S. 375, 381 (1955).

[179] "Administrative discharge due to conscientious objection prior to the completion of an obligated term of service is *discretionary* with the Military Department concerned, based on a judgment of the facts and circumstances in the case." DODI 1300.06, *supra* note 52, para. 4.1 (emphasis added). "[A]n application for classification as a Conscientious Objector *may* be approved . . . for any individual [who satisfies the three elements of the exemption]." *Id*. para. 5.1 (emphasis added). "Applicants requesting discharge who are determined to be Class 1-O Conscientious Objectors will be discharged for the *convenience of the Government*." *Id*. para. 8.1 (emphasis added).

[180] *See supra* Part II.A.

[181] *See* Johnson v. Robison, 415 U.S. 361, 375 (1974).

[182] U.S. DEP'T OF DEFENSE, DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS para. E3.A1.1.3.4.8. (21 Dec. 1993) (C1, 4 Mar. 1994) [hereinafter DODD 1332.14].

homosexual conduct.[183] These other programs could provide a basis of comparison for converting the non-discretionary in-service conscientious objection program to a discretionary one.

Although the government claims its conscientious objection program is discretionary, the courts interpret the current regulatory procedures as providing no such discretion. A government regulation must clearly state that its decision is committed to agency discretion. In *Chapin v. Webb*, the court highlighted the difference in the Navy's discharge programs for personality disorders and conscientious objection.[184] In that case, the applicant applied for both types of discharge.[185] The court's interpretation of the applicable regulations was that the personality disorder discharge was committed to agency discretion.[186] The court noted that the personality disorder discharge regulations merely established procedures for commanders to initiate and document discharges and did not include substantive standards for evaluation.[187] The court compared these procedures with language from the conscientious objection program regulation that stated "conscientious objector requests 'will be approved to the extent practicable and equitable' within limitations imposed by regulations."[188] The court also cited the language that personality disorders were to be made "at the convenience of the government" as further proof that the decision was committed to agency discretion.[189] Another critical difference noted by the court was the fact the decision to initiate the procedures for a personality disorder discharge belonged to the government, not the individual servicemember.[190] This case shows that differences in drafting discharge procedures have a significant impact on whether the discharge decision is committed to agency discretion.

The military homosexual conduct program provides another good comparison to the in-service conscientious objection program. This program, like the personality disorder discharge, was reviewed and found to be committed to agency discretion.[191] Like the petitioner in *Chapin*, the petitioner in *Adkins v. United States* filed a habeas corpus petition to be discharged from the Navy.[192] Adkins claimed that the Navy's regulations required it to process him for separation due to his homosexual conduct.[193] The court held that the decision not to process Adkins for separation was unreviewable and committed to agency discretion for several reasons.[194] First, the court noted that the Navy regulation clearly stated a policy to process for discharge any servicemember who solicited, attempted, or engaged in homosexual acts.[195] The first step in this process was for the commander to investigate the facts surrounding the claim of homosexual conduct.[196] The commander then either dismissed the claim or proceeded with the process, depending on whether the investigation supported the claim. The court found it important that although the policy required processing, there was no mechanism for review of a claim of homosexuality.[197] But perhaps the most important difference was highlighted by the court when Adkins cited the *Parisi* case and suggested that the homosexual conduct policy was on par with the conscientious objection program.[198] The court quickly

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[183] *Id*. para. E3.A1.1.8.

[184] 701 F. Supp. 970 (D. Conn. 1988).

[185] *Id*.

[186] "Assuming petitioner does suffer from a personality disorder, the regulations he cites do not bind the Navy to discharge him. Indeed, automatic discharge is not mandated under any set of circumstances . . . ." *See id*. at 974 (interpreting the U.S. NAVAL MILITARY PERSONNEL MANUAL para 3620200.1.f(3) (22 Aug. 2002) [hereinafter NAVAL MILITARY PERSONNEL MANUAL].

[187] *Id*. The current personality disorder discharge procedures are included under the title "Other designated physical or mental condition." DODD 1332.14, *supra* note 182, para. E3.A1.1.3.4.8.

[188] *Chapin*, 701 F. Supp. at 974 (quoting NAVAL MILITARY PERSONNEL MANUAL, *supra* note 186. para. 1860120.1). The current in-service conscientious objection regulation continues to use this same language. DODI 1300.06, *supra* note 52, para. 4.1.

[189] *See Chapin*, 701 F. Supp. at 974 (quoting the NAVY MILITARY PERSONNEL MANUAL *supra* note 184, para. 3620200.1.f(3)). Oddly, this language is also found in the current conscientious objection program, but courts continue to hold that the discharge decisions are reviewable. DODI 1300.06, *supra* note 52, para. 8.1.

[190] *See Chapin*, 701 F. Supp. at 976.

[191] *See* Adkins v. United States Navy, 507 F. Supp. 891 (D. Tex. 1981).

[192] *See id*.

[193] *See id*.

[194] *Id*. at 898.

[195] *Id*. at 897.

[196] *Id*.

[197] *Id*. at 898.

[198] *Id.*

disposed of this argument by stating that the two programs had completely different purposes.[199] The difference was that the conscientious objection program was designed for the benefit of conscientious objectors and set out a precise method for servicemembers seeking a discharge.[200] In comparison, the homosexual conduct policy was designed to benefit the Navy by providing a method for "discharging persons believed to be unsuitable for service."[201] This case shows that the method of initiation and purpose of the program are driving factors in determining whether or not a discharge decision is committed to agency discretion.

Although the homosexual conduct and in-service conscientious objection programs differ with respect to the military's discretionary authority, the procedural similarities of the two programs are worth highlighting. Both programs include detailed procedures and substantive standards for determining when a servicemember should be discharged. The presence of substantive standards was one of the primary factors the *Chapin* Court used in determining whether a government decision was reviewable.[202] Also present in both programs is the written policy that a servicemember will be separated upon satisfying the substantive standards.[203] It is this language in the conscientious objection program policy that the *Chapin* Court found to obligate the military to mandatory action and made that action non-discretionary.[204] These similarities make the two separation programs the most similar of all separation programs. The similarities also reinforce the conclusion that the primary difference in the two programs affecting reviewability is the method of initiation of separation. When the power to initiate separation is held by the servicemember, the separation decision becomes non-discretionary and is subject to judicial review. However, when the power to initiate separation is held by the military, the separation becomes discretionary and unreviewable.

Reversing the power of separation initiation is the fundamental change necessary to transform the in-service conscientious objection program into the intended discretionary governmental action. Making this change would require reformulating the basic initiating and processing procedures of the program to a scheme similar to those in the homosexual conduct policy. Like the homosexual conduct policy, there are other programs for separating servicemembers from the military for the convenience of the government.[205] These other programs are designed to discharge a servicemember whose conduct is incompatible with military service. Although other programs exist for involuntarily separating servicemembers for the convenience of the military, the homosexual conduct policy most closely resembles the in-service conscientious objection program in depth of substantive and procedural requirements.[206] Much like the current in-service conscientious objection policy, the homosexual conduct policy requires the command to conduct an initial investigation to determine a factual basis for separation.[207] However, unlike the in-service conscientious objection program, the homosexual conduct policy allows local commanders to take no action if they find no factual basis for separation.[208] Separation under the homosexual conduct policy uses administrative board procedures.[209] This method affords the servicemember the most rights

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[199] *Id*. at 899.

[200] *Id*.

[201] *Id*. Another purpose of the conscientious objection program, however, is to benefit the military by discharging an individual rather than wasting resources on the "hopelessness of converting a sincere conscientious objector into an effective fighting man." Gillette v. United States, 401 U.S. 437, 453 (1971).

[202] *See* Chapin v. Webb, 701 F. Supp. 970, 974 (D. Conn. 1988).

[203] The U.S. government policy on homosexual conduct in the military is that "[*a*] *member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations . . . .*" 10 U.S.C.S. § 654 (LexisNexis 2008) (emphasis added). The DOD policy on the same, of course, mirrors that found in the U.S. Code. DODD 1332.14, *supra* note 182, para. E3.A1.1.8.1.2. Similarly, the DOD policy on conscientious objection is that "a request for classification as a conscientious objector and relief from or restriction of military duties in consequence thereof will be approved to the extent practicable and equitable . . . ." DODI 1300.06, *supra* note 52, para. 4.1.

[204] *See Chapin*, 701 F. Supp. at 974.

[205] For example, separation for parenthood or "other designated physical or mental conditions" (such as a personality disorder) are other involuntary separations for the convenience of the government not involving misconduct. *See* DODD 1332.14, *supra* note 182, para. E3.A1.1.3.

[206] Comparing the homosexual conduct policy to the parenthood and the physical or mental condition discharge policy, the latter two offer very little substantive guidance. *See id*. para. E3.A1.1.3. The homosexual conduct policy also contains additional detailed procedural requirements to conduct investigations prior to initiation of separation proceedings. *Id*.

[207] *Id*. para. E3.A4.

[208] *Id*. para E3.A4.4.2; *see also id*. para. E3.A1.1.8.4.1.

[209] *Id*. para. E3.A1.1.8.4.

under administrative separation procedures.[210] One important difference in the homosexual conduct separation procedures is that the local administrative board may retain a servicemember when it determines that he engaged in homosexual conduct for the purpose of terminating military service or when doing so is in the best interest of the military.[211] The administrative separation procedures used for all other separations allows a board to factor in all of the servicemember's circumstances and cumulative performance when deciding whether or not to discharge the servicemember.[212] Once the board has heard the evidence in the case, it makes a recommendation to the separation authority.[213] The separation authority then makes the final decision, but cannot discharge a servicemember if the board recommends retention.[214] Converting the current in-service conscientious objection program to a similar procedural scheme would eliminate the need for review at the service secretary level and give this power to commanders at the unit level.

A stark difference in the two programs is found in the opposite desires of the servicemembers subject to either one. The servicemember who holds conscientious objection beliefs usually desires to be discharged from the military while the servicemember who has engaged in homosexual conduct often desires to remain in the military. This raises the concern that reserving the right of separation initiation in the commander will preclude a servicemember from being able to assert conscientious objection beliefs in an attempt to seek a discharge. The procedures of the homosexual conduct policy account for this possibility by allowing the servicemember to essentially raise the issue of separation merely by making a statement.[215] Although the homosexual conduct policy does not require a commander to investigate homosexual conduct, the in-service conscientious objection program procedures could include such a requirement to initiate a fact-finding investigation for the sole purpose of determining whether a basis exists for separation.[216] Desires of servicemembers subject to the two programs concerning continued service may be different, but the basic inquiry is the same. The fundamental issue to be resolved is whether the individual servicemember is suitable for continued service in the armed forces.

Transitioning the in-service conscientious objection program to a commander-initiated separation action would provide the military with the discretion necessary in military personnel decisions. The only truly discretionary decisions are those which clearly place the decision for separation initiation on the government, not the individual. The benefits of a discretionary decision may be obvious, but are worth stating. The benefits of the homosexual conduct policy are a good indication of what to expect from making this program discretionary. Not only do commanders initiate the separation process, but the process itself contains thorough substantive and procedural requirements designed to provide detailed guidance on a very complicated subject. This detailed guidance clearly pushes commanders toward certain gates, but the latitude allowed in the regulations also provides them the discretion to decide when it is unnecessary to go through those gates. Certainly many may criticize such a scheme as creating a situation ripe for abuse by local commanders who may ignore policy and blindly retain all servicemembers who claim to be conscientious objectors, but this argument disregards the basic responsibility of commanders to safeguard the well-being of individual servicemembers and their military units as a whole. Commanders at the unit level have a vested interest in maintaining morale, discipline, and unit cohesion. This requires that legitimate conscientious objectors are separated from the military and insincere ones are retained. Further, because local commanders know their servicemembers and units better than a Department of the Army panel or a federal court, they are in a much better position to accurately make this determination.

III. Conclusion

Analyzing the military's in-service conscientious objection program reveals a program out of control. The program contains confusing, vague, standards that produce a high likelihood of inconsistent results. Not only are the outcomes

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[210] Administrative board procedures afford the servicemember the right to formal notice of the proceedings, to a hearing in front of at least three experienced servicemembers, to present evidence and witnesses at the hearing, to question any government witnesses, to a summarized transcript of the hearing, and to have military legal representation (or civilian counsel at the servicemember's expense) at the hearing. *Id*. para. E3.A3.1.3.

[211] *See id*. para. E3.A1.1.8.4.

[212] *See id*. para. E3.A2.1.1.2.4.

[213] *See id*. paras. E3.A3.1.2.4, E3.A3.1.3.6.

[214] *See id*. para. E3.A3.1.3.6.4.2.

[215] *See id.* para. E3.A4.4.5.

[216] *See id*. para. E3.A4. Currently, the in-service conscientious objection program requires commanders to conduct an investigation, but commanders have no discretion to disregard a claim of conscientious objection due to lack of factual basis. DODI 1300.06, *supra* note 52, paras. 7.4, 7.5.

sometimes difficult to understand, the final decisions for in-service conscientious objection cases are often made far removed from the military units by civilian judges at the highest level of our federal judiciary. The current system results in a delayed decision-making process that leaves individual servicemembers and the military units to which they belong in a state of uncertainty while the application process drags on. The delayed system results in seemingly endless opinions by investigators, interviewers, commanders, and reviewers.[217] While a case navigates the extended procedures, applicants must defy their stated conscientious objection beliefs by performing military service that supposedly conflicts with these strongly held pacifist beliefs, or risk prosecution. This extended uncertainty leaves servicemembers and their commanders detached from the decision-making procedure, feeling confused and powerless.

This article discussed several potential methods of returning control of the in-service conscientious objection program to the DOD. The methods ranged in severity from complete termination of the in-service exemption to modification of the adopted Selective Service System standards. Except for a do-nothing alternative, the least disruptive alternative would be for the DOD to adopt the latter and explicitly declare its intent to break from the Selective Service System conscientious objection program standards. At the very least, the government should announce its intended departure from these rules in the very next DOD conscientious objection regulation. However, the foundation of such a system would have to rely on tangible standards evaluating demonstrated conduct by the servicemember. The clash between an inherently intangible claim of belief and the current all volunteer system of military manpower requires that the burden of proving a changed belief rests squarely on the servicemember. The current system allows a servicemember to shift the burden to the government by merely by asserting an unproven claim that, if true, would grant him conscientious objector status.[218] This system leaves the government with the task of proving a negative, which under the current system is nearly impossible, and at the very least, extraordinarily difficult, time consuming, and resource intensive.

Although a departure from the Selective Service Act's conscientious objection exemption review standards would dramatically improve the in-service program, an outright shift in the separation initiation authority to the government is the surest way to return discretion to military leaders. As the courts have held that the personality disorder and homosexual conduct separation provisions are completely discretionary, the in-service conscientious objection program could also be a truly discretionary military personnel decision. By converting the in-service conscientious objection program to one that resembles other involuntary separations for the convenience of the government, commanders would be placed in the driver's seat for controlling this program. Placing the authority for initiation of the separation on the local commanders empowers them to carry out their inherent responsibilities to do what is best for their servicemembers and the unit as a whole.

Of course, all of the proposed changes discussed in this article will have some effect of limiting the current in-service conscientious objection program. The historical underpinnings of the conscientious objection exemption to military service reflect its national value and strongly suggest that the conscientious objection program should be salvaged. But the current form of the program essentially removes this military personnel decision-making authority to not only the highest level of each military service, but ultimately to the highest level of the U.S. judiciary. While the numbers of conscientious objection applications remain low, there appears to be no widespread uproar from either the military or civilian community concerning the current state of the program. However, every unwarranted discharge can weaken our military's ability to fight and win wars. This is true for all ranks and specialties, but it can have an especially detrimental impact on our most highly specialized positions.[219] It is not difficult to anticipate a time when in-service conscientious objection applications increase as the military continues to face more deployments in support of the war on terror. Whether the applicant is in an enlisted infantryman or an officer physician, his chain of command should have the authority to review the application using a uniform and understandable standard that produces predictable results. Revising the in-service conscientious objection program can achieve this goal. Failing to revise the program will only continue to reinforce a broken system that produces flawed results for both servicemembers and the U.S. military.

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[217] The whole process can result in up to thirteen different opinions in the U.S. Army's model if a denied application is appealed to the highest possible authority: (1) Psychiatrist, (2) Chaplain, (3) Investigating Officer, (4) Company Commander, (5) Battalion Commander, (6) Brigade Commander, (7) Staff Judge Advocate, (8) General Court-Martial Convening Authority, (9) DACORB, (10) Deputy Assistant Secretary of the Army (Army Review Boards), (11) U.S. District Court, (12) U.S. Circuit Court, and (13) the U.S. Supreme Court.

[218] *See supra* Part II.A.

[219] *See supra* note 105 and accompanying text (noting that since 1980, all of the successful federal habeas corpus petitions by officers for denied conscientious objection applications were filed by physicians).

Bulletproof[1] Your Trial: How to Avoid Common Mistakes that Jeopardize Your Case on Appeal

Colonel Louis J. Puleo, USMC[2]

Introduction

"Be careful that victories do not carry the seed of future defeats."[3] This article attempts to apply this sage advice by examining some of the common seeds of appellate defeat sown during the course of a trial. The intent of this article is to identify several of the more frequent trial errors with the expectation that counsel will recognize and thus avoid them or, at the very least, mitigate any appellate impact. While even astute practitioners cannot avoid all the issues that may have a potential impact on appeal, counsel can recognize common pitfalls and take appropriate measures to protect the record and minimize the risk of appellate relief. While it would be presumptuous to assume that this article will cover all, or even most, of the common errors, it will attempt, at the very least, to identify those that can be most readily avoided or corrected.

Standards of Review and Findings of Fact

While not an article on appellate standards of review, it would be productive to briefly examine these standards in order to better understand the measures suggested herein and how to "protect the record"[4] for appeal.

Appellate review is a three-step process during which the reviewing court will assess: (1) whether there is an error;[5] (2) whether the party claiming error preserved the issue for appeal;[6] and, when required, (3) whether the error had an effect on the trial.[7] With certain exceptions,[8] an appellant is entitled to relief only if, in the absence of plain error,[9] the party did not waive or forfeit the error[10] and the error materially prejudiced a substantial right of the accused.[11] The last-mentioned requirement, assessing prejudice, while relevant to the trial practitioner, is beyond the scope of this article. The second requirement, preserving the issue for appeal, is generally not in the interest of the Government,[12] except when the Government itself seeks to raise the issue through an interlocutory appeal.[13] Rather, the goal for the trial practitioner is to avoid errors in the first instance and "protect the record," ensuring that the military judge's decision, when favorable to the Government, is sustained on appeal.

Whether the military judge's ruling will be upheld depends upon on the issue involved and the "standard of review" applied by the appellate court, i.e., whether the error involves a constitutional or non-constitutional right and how much

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[1] Bulletproof: "not subject to correction, alteration, or modification." Merriam-Webster OnLine; http://www.merrian-webster.com/dictionary/bulletproof (last visited Apr. 28, 2008).

[2] Director, Navy-Marine Corps Appellate Government Division.

[3] Ralph W. Stockman (1889–1970).

[4] "Protect the record" refers to the practice of introducing sufficient facts or offers of proof into the record along with the necessary legal theory and authorities supporting a particular issue that would sustain the military judge's decision on appeal, without resort to extraordinary appellate action.

[5] United States v. Olano, 507 U.S. 725, 732–33 (1993) (defining "error" as a "deviation from a legal rule").

[6] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905(e) (2008) [hereinafter MCM] (failure to raise a defense, objection, motion, or request in a timely manner will constitute waiver); *Id.* MIL. R. EVID. 103(a) (failure to object to erroneous ruling waives the error absent plain error).

[7] UCMJ art. 59(a) (2008).

[8] *See* United States v. Reynolds, 49 M.J. 260 (C.A.A.F. 1998) (structural defect is presumed to be prejudicial); United States v. Meek, 44 M.J. 1, 6 (C.A.A.F. 1996) (defining a "structural defect" as a defect "which renders any trial unreliable and unfair").

[9] United States v. Powell, 49 M.J. 460, 462 (C.A.A.F. 1998) (applying a three part "plain error" test to determine material prejudice in situations were the error is forfeited due to a party's failure to bring the matter to the attention of the military judge); *see* United States v. Baker, 57 M.J. 330, 337 (C.A.A.F. 2002) (Crawford, J., dissenting) (suggesting a fourth factor in the plain error analysis: "error seriously affect[ing] the fairness, integrity, or public perception of judicial proceedings") (citations omitted).

[10] *Olano*, 507 U.S. at 733 ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'") (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[11] UCMJ art. 59(a).

[12] *See* United States v. Reynoso, 65 M.J. 208 (C.A.A.F. 2008) (finding defense's general "foundation" objection, without more specificity, either expressed or implied from the context of the objection, will forfeit later appellate challenges, absent plain error).

[13] *See* UCMJ art. 62; MCM, *supra* note 6, R.C.M. 908.

deference the appellate court will give to the military judge's ruling. The more deference given to the military judge's ruling, the less likely an appellate court will overturn that ruling. Military judges' decisions are a product of the application of the historical facts of the case to the relevant law or legal standard.[14] For matters of law, appellate courts will review a judge's decision "de novo."[15] The court will give no deference to the military judge and will substitute its own judgment in order to determine whether he applied the correct legal standard to the issue presented. In these circumstances the practitioner should ensure that the record clearly reflects: (1) the law, standard, or authority being applied by the military judge; and, (2) the party who has the burden of production or proof for the specified issue.[16] While it is best for the military judge to reduce his legal findings to writing and attach those to the record, it is not always practical or necessary. Therefore, trial counsel should press the military judge to state on the record the legal basis for this ruling.

Issues of fact, however, remain the focus of the trial counsel's practice. Unlike matters of law, factual determinations or "findings of fact,"[17] with certain exceptions, are reviewed under a "clearly erroneous standard."[18] Thus, the military judge's findings of fact will be afforded substantial deference by the reviewing court unless those findings are fanciful, arbitrary, or unsupported by the facts contained in the record.[19] Provided there is "some evidence" in the record to support the military judge's factual determinations, the factual predicate for his decisions will not be disturbed by appellate authorities.[20] So, counsel must develop a factual record in support of the Government's position and secure findings of fact by the military judge that reflect the basis for the military judge's ruling. That way, upon review, the appellate courts will be bound by those facts.[21] This trial practice protects the judge's decision by restricting the appellate court's review of the specified issue to those facts contained in the military judge's findings of fact.[22]

The importance of a well-developed factual record accompanied by specific findings of fact from the military judge cannot be overstated. As a matter of competent trial practice, counsel should, with few exceptions,[23] provide the military judge with proposed findings of fact in writing. This not only frames the issue for the military judge from the Government's perspective but also serves as an invaluable tool in preparing for motion practice. Most often, because of poor planning, practitioners rely on argument as ersatz evidence during the litigation of a motion. Argument, however, is not evidence and cannot substitute for the facts necessary to support one's position or the military judge's decision.[24] The military judge needs

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[14] *See* Ornelas–Ledesma v. United States, 517 U.S. 690, 696–97 (1996) (Application of the historical facts of the case to the relevant legal standard is know as mixed questions of law and fact. "The historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.") (alternations in original) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982)).

[15] Bose Corps. v. Consumers Union of United States, Inc., 466 U.S. 485, 514 n.31 (1984) (defining "*de novo*" review as an "original appraisal of all the evidence" in order for the court to decide for itself whether the judgment or decision is correct); United States v. Harcrow, 66 M.J. 154 (C.A.A.F. 2008) (questions of law are reviewed *de novo*).

[16] *See* MCM, *supra* note 6, R.C.M. 905(c) (burden and assignment of proof generally on moving party); United States v. Brandell, 35 M.J. 369, 372 (C.M.A. 1992). To avoid waiver, objecting party had burden to identify the specific grounds for challenge to evidence unless "all parties at trial fully appreciate the substance of the defense objection and the military judge has full opportunity to consider it." *Id.*

[17] MCM, *supra* note 6, R.C.M. 905(d) ("Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record."); *see* United States v. Salinas, 65 M.J. 927, 929 (N-M. Ct. Crim. App. 2008) (absence of sufficient findings of fact to support the military judge's opinion would "[o]rdinarily . . . require a rehearing or return of the record to the military judge for entry of complete essential findings.") (citing United States v. Doucet, 43 M.J. 656, 659 (N-M. Ct. Crim. App. 1995)).

[18] United States v. Harris, 66 M.J. 166, 168 (C.A.A.F. 2008) ("[W]e defer to the military judge's findings of fact . . . where they are not clearly erroneous.") (citations omitted).

[19] United States v. Leedy, 65 M.J. 208, 212–13 (C.A.A.F. 2007); *see* United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (finding that the legal and factual review by the appellate court is limited to the matters contained in the record of trial, that is those introduced at trial and not from those outside the record, such as during the Article 32, UCMJ, investigation).

[20] *Leedy*, 65 M.J. at 212–13.

[21] United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004) (appellate courts bound by military judge's findings of fact unless they are clearly erroneous).

[22] Culombe v. Conn., 367 U.S. 568, 603 (1961) ("[A]ll testimonial conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one *caveat* . . . we are not to be bound by findings wholly lacking support in evidence."); *Dowty*, 60 M.J. at 171 ("[W]e are bound by the military judge's findings of fact unless they are 'clearly erroneous.'") (citation omitted).

[23] Of course, there are practical and tactical reasons for not providing the military judge with findings of fact such as when the issue could not be foreseen prior to trial or because the proponent of the motion does not wish to disclose the full factual basis to opposing counsel prior to litigation.

[24] United States v. Clifton, 15 M.J. 26, 29 (C.M.A. 1983).

facts.[25] When challenged on appeal, the appellate court needs findings of fact in order to assess whether the military judge abused his discretion.[26] Done appropriately, findings of fact, supported by the record, will bind the appellate court during review.[27]

Lessons to be Learned: In order to preserve a ruling favorable to the Government, the record must support the military judge's findings of fact. This is the trial counsel's responsibility. The military judge's findings must logically support both the appropriate inferences derived from the facts and the application of the appropriate legal standard. There is no substitute for proffering written findings of fact. As an advocacy tool, the findings provide the military judge with a means to rule in the Government's favor and, as a practical matter, supply the necessary foundation for the military judge's decision during appellate review.

Pretrial Agreements

Forfeiture Provisions and the Accused's Benefit of His Bargain

From the Government's perspective, one of the most troubling issues in recent years is dealing with the breach of the pretrial agreement forfeiture provisions, which is epitomized by the decision in *United States v. Perron*.[28] These breaches arise when the convening authority, pursuant to the terms of a pretrial agreement, agrees to take mitigating action by providing some measure of relief from the automatic forfeiture or reduction in pay grade provisions of the Uniform Code of Military Justice (UCMJ),[29] or from forfeitures or reduction adjudged as part of the accused's sentence. This is done, presumably, out of concern for the financial security of the accused's family especially during any period of the accused's confinement. Unfortunately, after trial, the parties learn that the financial benefits intended cannot or will not be realized due to some intervening factor, such as when the accused is beyond his enlisted contract obligation, when the accused is indebted to the Government,[30] or when the accused's military pay is affected due to incorrect interpretations of law and regulations.[31]

In *Perron*, the accused was convicted, pursuant to his pleas, of wrongful use and possession of a controlled substance. [32] He was sentenced to a bad conduct discharge, ninety days confinement, and reduction to pay grade E-3. Pursuant to a pretrial agreement, the convening authority agreed to suspend all confinement in excess of sixty days for a period of six months, and waive all automatic forfeitures for the benefit of Perron's family during the period of his confinement.[33] Unbeknownst to the parties, the accused's enlistment had expired prior to trial, which placed him in a no-pay status upon confinement.[34] Thus, his family did not receive the financial benefits intended by the parties and memorialized within the pretrial agreement. On remand, to provide Perron with the benefit of his bargain, the convening authority disapproved all confinement, which allowed Perron to receive pay for the previously approved and executed period of confinement.[35] Not satisfied with the outcome, during the second appeal Perron claimed that the timing of the payments, as well as the amount, were material terms of the agreement.[36] Because his family was not paid during the period of his confinement, Perron asserted that he had

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[25] Not all facts in support of a proponent's position need to be in the form of admissible evidence. *See* MCM, *supra* note 6, MIL. R. EVID. 401(a).

[26] United States v. Salinas, 65 M.J. 927 (N-M. Ct. Crim. App. 2008) ("[W]e note that when factual issues are involved in determining a motion, the military judges are to state essential findings on the record. . . . Ordinarily [a failure to do so would] require a rehearing or return of the record to the military judge for entry of complete essential findings.") (citing United States v, Doucet, 43 M.J. 656, 659 (N–M. Ct. Crim. App. 1995)).

[27] *Dowty*, 60 M.J. at 171.

[28] *Perron III*, 58 M.J. 78 (C.A.A. F. 2003).

[29] UCMJ arts. 58(a), (b) (2008) (statutorily mandated reduction in pay grade and forfeiture of pay and allowances based upon the application of certain court-martial punishments).

[30] *E.g.*, United States v. Olson, 25 M.J. 293 (C.M.A. 1987); United States v. Flores, No. 200501199, 2007 CCA LEXIS 73 (N-M. Ct. Crim. App. Mar. 15, 2007).

[31] *E.g.*, United States v. Lundy (*Lundy I*), 58 M.J. 802 (A. Ct. Crim. App. 2003), *aff'd* 63 M.J. 299 (C.A.A.F. 2006) (misinterpretation of transitional assistance legislation and its effect on forfeiture provisions within the pretrial agreement); United States v. Mitchell, 2000 CCA LEXIS 150 (A.F. Ct. Crim. App. 2000), *rev'd*, 58 M.J. 251 (C.A.A.F. 2003) (misinterpretation of agency regulations regarding enlistment extensions and its effect on forfeiture provisions of the pretrial agreement).

[32] *Perron III*, 58 M.J. 78.

[33] *Id*. at 79.

[34] United States v. Perron (*Perron I*), 53 M.J. 774, 774–75 (C.G. Ct. Crim. App. 2000), *rev'd*, 58 M.J. 78 (C.A.A.F. 2003).

[35] United States v. Perron (*Perron II*), 57 M.J. 597, 598 (C.G. Ct. Crim. App. 2001), *rev'd*, 58 M.J. 78 (C.A.A.F. 2003).

[36] *Id*.

not received the expected benefit of his bargain, which was the basis for his guilty pleas. Guilty pleas, which waive certain fundamental constitutional rights,[37] must be made knowingly and voluntarily.[38] Since the parties were mistaken as to the financial consequences of the guilty pleas, Perron asserted that his pleas were improvident and required the court to set aside the findings and sentence.[39] Attempting again to provide Perron with the full benefit of his intended bargain, the Coast Guard Court of Criminal Appeals took further remedial action on the sentence.[40]

The subsequent appeal to the Court of Appeals for the Armed Forces (CAAF) went beyond prior precedent[41] and agreed with Perron, finding that even in the absence of express terms dealing with time, the timing of payment was material to the pretrial agreement.[42] Thus, due to the mutual misunderstanding by the parties, Perron's pleas were not knowingly and voluntarily made, rendering them not provident.[43] In such circumstances there exist only three remedial options: (1) the court can order specific performance of the pretrial agreement terms; (2) the court can set aside the finding and sentence and allow the accused to withdraw his guilty pleas; or, (3) the court can provide some alternative relief.[44] From the Government's perspective, having the court fashion alternative relief was the most preferred option if specific performance was not otherwise available.[45] Despite early precedent giving broad discretion to the appellate courts to fashion such remedies,[46] the *Perron* court all but eliminated that option. The CAAF found that any alternative remedial action imposed on an unwilling accused "intrudes upon an [accused's] decision to plead guilty" and may "result in erroneous conclusions of voluntariness."[47] Since a guilty plea waives a variety of constitutional rights, imposing alternative remedies upon the accused without his express consent violates the "knowing and voluntary" requirements of a constitutional guilty plea.[48] Thus, without the express consent of the accused, alternative remedies are no longer available to remedy the Government's defective performance under the pretrial agreement.[49]

Since Perron did not consent to either the convening authority's or the lower court's alternative remedies, of the two remaining options, specific performance was impossible given the court's reading of a time-of-the-essence term into the forfeiture provisions of the pretrial agreement. Criticism of the court's reasoning aside and the tenuous grounds relied upon to infuse new terms into the pretrial agreement,[50] the only remaining option was to set aside the findings and sentence and allow the Government to retry the accused if it could do so.[51]

One would suspect that the trial defense counsel bears some responsibility for the breach, since he is in the best position to discover the effect administrative matters would have on the terms of the pretrial agreement. The CAAF has addressed defense counsel's responsibility to advise his client concerning the collateral consequences of a guilty plea.[52] However, the

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[37] Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) ("[A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver for the fundamental rights to a jury trial, . . . to confront one's accusers, . . . to present witnesses in one's defense, . . . to remain silent, . . . and to be convicted by proof beyond a reasonable doubt . . . .") (citations omitted).

[38] *Perron II*, 57 M.J. at 598.

[39] *Id*. at 599.

[40] *Id*. (setting aside reduction in grade).

[41] United States v. Williams (*Williams II*), 53 M.J. 293 (C.A.A.F. 2000) (finding accused's pleas improvident where accused relied upon the incorrect advice by counsel and the military judge concerning the effect his guilty plea would have on the forfeiture provisions of his pretrial agreement); United States v. Hardcastle, 53 M.J. 299 (2000) (finding accused's pleas improvident when Government failed to fulfill the terms of the pretrial agreement).

[42] *Perron III*, 58 M.J. 78, 85 (C.A.A.F. 2003).

[43] *Id*.

[44] *Id*. at 84.

[45] *Id*.

[46] *See* United States v. Albert, 30 M.J. 331 (C.M.A. 1990); United States v. Olson, 25 M.J. 293 (C.M.A. 1987).

[47] *Perron III*, 58 M.J. at 85.

[48] *Id*.

[49] *Id*. at 85–86. *But see* United States v. Lundy (*Lundy II*), 63 M.J. 299, 304 (2006) (Effron, J., concurring in part and in the result) (regarding lower court's ability to craft a remedy for a breach of the terms of a pretrial agreement, distinction is made between "alternative relief," which requires the consent of the accused, and "adequate remedy," which allows the court to craft a remedy that provides the accused the benefit of his bargain regardless of his consent).

[50] *Perron III*, 58 M.J. at 86–89 (Crawford, J., dissenting).

[51] *Id.* at 86.

[52] *See* United States v. Williams, 55 M.J. 302, 307 (C.A.A.F. 2001) ("[C]hief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a court-martial conviction and to ascertain his willingness to accept those consequences.") (quoting United States v. Bendania, 12 M.J. 373, 376 (C.M.A. 1982)).

court has never held the trial defense counsel directly responsible for failing to recognize that the accused's status or agency regulations would negate the forfeiture provisions of a pretrial agreement.[53] While placing blame upon the defense counsel may not change the outcome, as the case may be overturned on an ineffective assistance of counsel claim,[54] the consequences of failing to provide the accused with the intended financial benefit of his bargain under the pretrial agreement fall squarely on the Government.[55]

Lessons to be Learned: As with other matters discussed in this article, counsel must pay attention to detail. However, there are instances when matters beyond the control of the convening authority arise, especially regarding issues of pay. This can come from an unexpected source such as when the Government recoups its loss, arising either from the offenses for which the accused is charged or from other administrative matters such as a prior overpayment, by withholding some or all of the accused's pay.[56] What is certain is that the accused, despite the charges and maximum confinement, will claim that but for the forfeiture provisions he would not have entered into the agreement.[57] The convening authority can no longer presume that the defense counsel, who is in a better position to know of potential pay issues and the financial needs of the accused, will properly advise the accused of the consequences that might affect his pay. When coupled with the court's ability to read time of the essence terms into the pretrial agreement, the consequences of failing to abide by the forfeiture provisions are extreme: finding the pleas improvident and setting aside the conviction.[58] Therefore, given the complexity of fiscal regulations, the effect of automatic forfeiture and reduction provisions, and the uncertainty of events that legitimately or otherwise may interfere with the accused's pay, perhaps the best approach is to avoid negotiating forfeiture or reduction protection as part of a pretrial agreement. If the convening authority or the accused is concerned about the financial status of the accused or his family, the convening authority always has the option of granting clemency after trial.[59] Of course the parties must avoid the real or perceived issue of *sub rosa* agreements,[60] but the convening authority can determine what he would consider as appropriate relief during pretrial negotiations and each convening authority must weigh the individual merits against good order and discipline.[61] By avoiding forfeiture or reduction protections in the pretrial agreement, one eliminates the possibility that events beyond the convening authority's control will interfere with the pretrial agreement and jeopardize the plea on appeal.[62] Despite attempts to minimize errors and avoid unintended consequences, there is no substitute for a close examination of the terms of a pretrial agreement, a thorough review of the accused's circumstances and status, and a careful plea inquiry by the military judge in order to avoid appellate issues.

Forfeiture or Fine Provisions

A fine may not be approved against the accused unless it is clear that he was aware that a fine could be imposed.[63] In *United States v. Norman*,[64] the court disapproved an adjudged fine due to the ambiguity created by the pretrial agreement provision addressing "Forfeitures *or* Fines," when the accused was awarded both forfeitures *and* a fine. While the military

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[53] *E.g.*, *Lundy*, 63 M.J. 299 (internal agency regulations affecting pay).

[54] *See Williams II*, 53 M.J. 293, 296 (C.A.A.F. 2000) ("Ignorance of the law on a material matter cannot be the prevailing norm in the legal profession or in the court-martial process.").

[55] *Williams*, 55 M.J. at 306 ("If an accused does not receive the benefit of the bargain reflected in a negotiated pretrial agreement, the pleas will be treated as improvident, the findings will be set aside, and the accused will be subject to retrial.").

[56] *See* United States v. Flores, No. 200501199, 2007 CCA LEXIS 73 (N-M. Ct. Crim. App. Mar. 15, 2007) (setting aside accused's guilty plea because of the Government's failure to pay the accused in accordance with the implied "time of the essence" terms of the pretrial agreement due, in part, to offsets to the accused pay to recoup previous overpayments).

[57] *See* United States v. Williams (*Williams I*), 49 M.J. 542, 545 (N-M. Ct. Crim. App. 1998), *rev'd*, 53 M.J. 293 (C.A.A.F. 2000).

[58] *Williams*, 55 M.J. at 306.

[59] MCM, *supra* note 6, R.C.M. 1107(d).

[60] *Sub rosa*, "Confidential; secret; not for publication." BLACK'S LAW DICTIONARY 1469 (8th ed. 2004); United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976) (military judge required to inquiry into any promises made by the Government in exchange for accused's guilty plea); United States v. Troglin, 44 C.M.R. 237, 242 (C.M.A. 1972) (condemn sub rosa agreements); MCM, *supra* note 6, R.C.M. 705 (requirement to have all promises between accused and Government in writing).

[61] MCM, *supra* note 6, R.C.M. 705.

[62] *But see* United States v. Capers, 62 M.J. 268 (C.A.A.F. 2005) (challenging convening authority's clemency action when parties were mistaken as to accused ability to receive pay).

[63] United States v. Williams, 18 M.J. 186, 189 (C.M.A. 1984).

[64] No. 200700042, 2007 CCA LEXIS 313 (N-M. Ct. Crim. App. Aug. 8, 2007).

judge did advise the accused that the sentence could include, inter alia, "total forfeitures, a fine, and to be dismissed from the naval service," the judge did not advise the accused that his financial liability could exceed total forfeiture of pay and allowances—"that is, that a fine could be awarded *in addition to* total forfeitures."[65] Since ambiguity in the pretrial agreement is held against the Government, the court disapproved the adjudged fine.

Lesson to be Learned: Caption the forfeiture and fine paragraph in the sentence limitation page[66] of the pretrial agreement correctly to avoid possible confusion. Further, counsel should ensure that the military judge addresses the prospect of both total forfeitures and a fine, which would exceed total forfeitures at a general court-martial, as a potential sentence. Perhaps, like the position taken above, the simple solution is not to grant relief from forfeiture or fines as part of the pretrial agreement but rather to reserve the right to grant such relief as a matter of clemency.

Guilty Pleas

Two common appellate challenges to an accused's guilty plea are an inadequate factual basis to support the plea[67] and matters raised during trial that are inconsistent with the plea, calling into question whether the plea was knowing and voluntary.[68] With the exception of statutory elements required to establish an offense, which are reviewed de novo,[69] the military judge's decision to accept a guilty plea is reviewed during appeal under the deferential abuse of discretion standard.[70] A guilty plea will not be set aside unless the record demonstrates "a 'substantial basis' in law and fact for questioning the guilty plea."[71] While the accused bears the burden of establishing that a substantial basis exists,[72] the trial counsel still has a responsibly to protect the record and preserve the accused's plea on appeal. Thus, he must pay particular attention during the providence inquiry to ensure that the accused admits to every element of the offenses pled, including the requisite intent and theory of culpability,[73] and that the military judge addresses and resolves any inconsistencies and defenses during the trial that may give rise to a defense or otherwise call into question the voluntariness of the plea.[74]

Stipulations of Fact

It is axiomatic that before accepting a plea, the military judge must ensure that an adequate factual basis exists to support the plea.[75] This requires the military judge to conduct a detailed colloquy[76] with the accused in order to ensure that he understands the meaning and effect of his plea, that it is rendered voluntarily, and that the accused is willing and able to admit the facts necessary to support each element of the offenses pled.[77]

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[65] *Id*. at *9 (emphasis in original).

[66] MCM, *supra* note 6, R.C.M. 705(d)(2) (an agreement memorializing the specific action to be taken by the convening authority on the adjudged sentence must be set out in a writing separate from other aspects of the agreement).

[67] *See, e.g*., United States v. Mitchell, 66 M.J. 176 (C.A.A.F. 2008) (challenge to guilty plea for indecent assault based on accused claim that the record did not reflect the request specific intent element); United States v. Aleman, 62 M.J. 281 (C.A.A.F. 2006) (challenging providence of plea to willfully suffering the sale of military property because inquiry did not establish a factual basis for omission of a certain duty as required by the article).

[68] Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005). In order to be constitutional, a guilty plea must be knowingly, intelligently, and voluntarily made, "with sufficient awareness of the relevant circumstances and likely consequences." *Id.* (citations omitted).

[69] United States v. Holbrook, 66 M.J. 31, 32 (C.A.A.F. 2008).

[70] United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (military judge's decision to accept guilty plea is reviewed for abuse of discretion and "questions of law arising from the guilty plea [are reviewed] de novo"); United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996).

[71] United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991).

[72] United States v. Hays, 62 M.J. 158, 167 (C.A.A.F. 2005).

[73] *See* MCM, *supra* note 6, pt. IV, ¶ 1(b) (liability as a perpetrator or other party).

[74] United States v. Frederick, 23 M.J. 561, 563 n.4 (A.C.M.R. 1986) ("We believe that trial counsel, who have a continuous duty to protect the record, should remain alert throughout a providence inquiry, and respectfully bring to the military judge's attention any areas which counsel believe have not been sufficiently covered and could result in a plea of guilty subsequently being found improvident.").

[75] United States v. Mitchell, 66 M.J. 176 (C.A.A.F. 2008); MCM, *supra* note 6, R.C.M. 910(e).

[76] United States v. Jordan, 57 M.J. 236, 239 (C.A.A.F. 2002) (accused agreement with legal conclusions by the military judge will not support the necessary factual predicate to uphold a plea); United States v. Outhier, 45 M.J. 326, 331 (C.A.A.F. 1996); MCM, *supra* note 6, R.C.M. 910(d).

[77] *Mitchell*, 66 M.J. at 178; MCM, *supra* note 6, R.C.M. 910(c), (d).

One method to secure the factual and legal predicates necessary to sustain a guilty plea is to insist upon a stipulation of fact as part of any pretrial agreement.[78] The stipulation should be incorporated into the terms of the pretrial agreement and the parties should agree that the evidence contained in the stipulation would be admissible or the accused, with the advice of counsel, affirmatively waives any objection to the stipulation or the information contained therein.[79] Counsel must exercise due diligence to ensure that the otherwise inadmissible evidence sought to be included within the stipulation of fact is subject to waiver by the accused and will not be challenged on appeal as plain error.[80] Within the stipulation, counsel should address the way in which the prosecution, sentencing authority, convening authority, and appellate courts may use the information.[81] This includes: (1) during the providence inquiry to determine the sufficiency and basis of the accused's pleas;[82] (2) as part of the Government's case-in-chief if the Government elects to go forward as to a greater offense or other offenses that rely on the facts in the stipulation;[83] (3) as matters in aggravation by the Government;[84] (4) to approve the findings and sentence by the convening authority and deny or grant clemency as appropriate; and, (5) as part of the review process by the appellate courts.[85] Counsel must ensure that the military judge addresses the specific uses of the stipulation and clarifies any ambiguities on the record.[86] Parties should also make clear that the military judge's acceptance of the stipulation is a material term of the pretrial agreement. That way, if the judge refuses to accept any part of the stipulation or the accused objects or seeks to withdraw from the stipulation, either at trial or on appeal, the pretrial agreement will become void.

The stipulation of fact should also clearly state that the agreement and execution of the stipulation by the accused does not amount to the beginning of performance under Rule for Court-Martial (RCM) 705(d)(4)(B), which would otherwise prematurely bind the convening authority to the agreement.[87] Rather, it should be agreed for the purposes of the stipulation that the beginning of performance occurs when the military judge accepts it.

From the trial counsel's perspective, a well-written stipulation of fact can act as both a sword and a shield. It ensures that all necessary elements are addressed, provides evidence in aggravation, protects the record by securing a factual basis for the plea, and incorporates facts necessary to negate possible defenses. Further, unlike a stipulation of expected testimony,[88] stipulations of fact bind the parties to the facts stipulated and neither party may introduce contradictory information.[89] While this limits the defense, it also serves as a trap for the unwary trial counsel and may restrict some aspect of the Government's

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[78] MCM, *supra* note 6, R.C.M. 705(c)(2)(A) (permissible term of a pretrial agreement includes a promise to enter into a stipulation of fact regarding the offense to which the accused will plead guilty).

[79] United States v. McCrimmon, 60 M.J. 145, 154 (C.A.A.F. 2004) ("This Court has stated, assuming no overreaching by the Government, evidence of uncharged misconduct, otherwise inadmissible evidence, may be presented to the court by stipulation and may be considered by the court."); United States v. Clark, 53 M.J. 280, 282 (C.A.A.F. 2000) (adding that evidence otherwise inadmissible may be admitted through a stipulation if the "military judge finds no reason to reject the stipulation 'in the interest of justice.'"); United States v. Rivera, 46 M.J. 52, 54 (C.A.A.F. 1997); United States v. Gibson, 29 M.J. 379, 382 (C.M.A. 1990); MCM, *supra* note 6, R.C.M. 811(b) ("The military judge may, in the interests of justice, decline to accept a stipulation.").

[80] *Clark*, 53 M.J. 280, 282–83 (finding plain error, under MRE 707, when the accused's stipulation, entered pursuant to a pretrial agreement, contained a reference that the accused failed a polygraph); United States v. Goldberg, No. 200601093, 2007 CCA LEXIS 8 (N-M. Ct. Crim. App. Jan. 24, 2007) (finding, in dicta, that despite the accused's agreement to enter into a stipulation the military judge has a duty to determine admissibility to ensure the interests of justice are served).

[81] MCM, *supra* note 6, R.C.M. 910 (f)(4) (the military judge had the obligation to ensure that the accused understands and consents to the terms of the pretrial agreement); *see id.* R.C.M. 811(c), prior to accepting stipulation the military judge must be satisfied that the parties consent to its admission.

[82] United States v. Aleman, 62 M.J. 281, 283 (C.A.A.F. 2006); United States v. Redlinski, 58 M.J. 117, 122 (C.A.A.F. 2003) (finding factual basis for guilty plea may be satisfied by stipulation); United States v. Sweet, 42 M.J. 183, 185 (C.A.A.F. 1995) (relying on stipulation of fact to provide factual basis necessary for military judge to accept a guilty plea).

[83] United States v. Resch, 65 M.J. 233 (C.A.A.F. 2007) (during a guilty plea to an lesser included offense to the charged offense, finding the military judge's failure to advise accused that stipulation of fact could be used as part of the Government's case-in-chief to the greater offense was error).

[84] United States v. Gogas, 58 M.J. 96, 98 (C.A.A.F. 2003) (finding matters in aggravation may be presented through stipulation of fact).

[85] United States v. Thomas, 65 M.J. 132 (C.A.A.F. 2007) (finding a plea improvident, the court used the stipulation of fact to affirm conviction to a lesser included offense).

[86] *Resch*, 65 M.J. at 237 (finding error in using the stipulation of fact as part of Government's case-in-chief to prove the greater offense, after accused plea of guilty to the less included offense, given the ambiguity concerning how the stipulation of fact would be used).

[87] *See* United States v. Williams, 60 M.J. 360, 363 (C.A.A.F. 2004) (questions raised whether the accused's execution of a stipulation of fact is beginning performance that would prevent the convening authority from withdrawing from the agreement except on other grounds set out in RCM 705 (d)(4)(B)); *see also* United States v. Bray, 49 M.J. 300 (C.A.A.F. 1998) (finding convening authority's ability to withdraw from a pretrial agreement more limited than that of the accused, if a proper withdrawal, convening authority is not bound by prior agreement).

[88] MCM, *supra* note 6, R.C.M. 811 (e).

[89] *Id.*; United States v. Fisher, 58 M.J. 300, 303 (C.A.A.F. 2003).

case, especially during presentencing.[90] Astute counsel, however, knows that there is a distinction between evidence that "goes beyond" the stipulated facts and evidence that contradicts those facts: the former is not prohibited.[91] "Stipulations of fact do not prohibit proof of facts which are neither designated nor necessarily implied in the stipulation."[92] Thus, in *United States v. Terlep*, the court found that victim's pre-sentencing testimony[93] describing rape did not contradict the stipulation of fact, which supported the guilty plea to the lesser included offense of assault consummated by a battery, since the stipulation did not, expressly or implicitly, rule out the possibly of a rape.[94]

Stipulations of fact are not without limits. A confessional stipulation,[95] which admits to all elements of a charged offense and amounts to a de facto plea of guilty,[96] required as part of a pretrial agreement, must be done with care. If the accused cannot or will not plead to certain charges and the Government intends to go forward on those charges, using a confessional stipulation to prove the contested charges must fulfill certain procedural safeguards. A confessional stipulation will not be accepted unless the record reflects: (1) that the accused understands the right not to stipulate; (2) that the stipulation will not be accepted unless the accused consents; (3) that the accused understands the content and effect of the stipulation; (4) that there exists a factual basis for the stipulation; and, (5) that the accused, in consultation with counsel, consents to the stipulation.[97] While confessional stipulations that follow procedural safeguards are not prohibited, it is error to couple a confessional stipulation with an agreement that prevents the defense from raising any defenses or motions.[98] Along with the confessional stipulation inquiry, the military judge must also ascertain if there are any agreements between the parties in connection with the stipulation and, if so, the terms of such agreements.[99]

Inconsistencies with the Plea: Mental Responsibility Issues

A common challenge to a guilty plea arises when the accused raises an issue during trial that is inconsistent with his plea of guilty, such as the existence of a defense.[100] Once raised the military judge has the duty to inquire further into the inconsistency in order to resolve the conflict or otherwise reject the plea.[101]

This often happens when the defense infuses an issue of mental responsibility into the trial, usually in the form of testimony regarding a possible mental disorder during defense's case in extenuation and mitigation.[102] This is especially salient given the court's historically preferential treatment of mental responsibility issues[103] and the mental disorders arising from current combat operations in Iraq and Afghanistan.[104] When confronted with such evidence, if the military judge does

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[90] United States v. Gerlach, 37 C.M.R. 3 (C.M.A. 1966) (finding trial counsel's argument during presentencing, which contradicted facts contained in the stipulation of fact, was error and required setting aside the sentence).

[91] United States v. Terlep, 57 M.J. 344, 348 (C.A.A.F. 2002).

[92] *Id.*

[93] MCM, *supra*, note 6, R.C.M. 1001(b).

[94] *Terlep*, 57 M.J. at 348.

[95] *See* MCM, *supra* note 6, R.C.M. 811(c) discussion. A confessional stipulation is a statement of facts "equivalent of a guilty plea, . . . establish[ing] directly or by reasonable inference, every element of a charge offense and when the defense does not present evidence to contest any potential remaining issue of the merits." *Id.*

[96] United States v. Bertelson, 3 M.J. 314, 316 n.2 (C.M.A. 1977) ("[A] 'confessional stipulation' is a stipulation which practically amounts to a confession. We believe that a stipulation can be said to amount 'practically' to a judicial confession when, for all facts and propose, it constitutes a *de facto* plea of guilty, *i.e.*, it is the equivalent of entering a guilty plea to the charge."); MCM, *supra* note 6, app. 21, R. 811(c) ("[A] stipulation practically amounts to a confession when it amounts to a "*de facto*" plea of guilty, rather than simply one which makes out a *prima facie* case.").

[97] MCM, *supra* note 6, R.C.M. 811(c) discussion.

[98] United States v. Davis, 50 M.J. 426, 430 (C.A.A.F. 1999).

[99] *Id.*; *see* MCM, *supra* note 6, R.C.M. 910(f).

[100] *See, e.g.*, United States v. Garcia, 44 M.J. 496, 498 (C.A.A.F. 1996).

[101] *Id.*; United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991); MCM, *supra* note 6, R.C.M. 910(h)(2).

[102] MCM, *supra* note 6, R.C.M. 1001(c).

[103] United States v. Young, 43 M.J. 196, 197 (C.A.A.F. 1995).

[104] Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13, 14 (2004) ("Given the ongoing military operations in Iraq and Afghanistan, mental disorders are likely to remain an important health care concern among those who serving there."); *see* United States v. Shaw, 64 M.J. 460, 462 (C.A.A.F. 2007) (finding mental health issues enjoy special status in the military owing in part to the recognition that combat operations may "generate or aggravate" such conditions, especially post-traumatic stress disorder).

not reopen providence in order to address the issue or does so but is insufficient in the *Care*[105] inquiry,[106] on appeal the accused will assert that his pleas were not provident because they were not knowingly made.[107] The court has acknowledged the validity of this challenge stating:

> We do not see how an accused can make an informed plea without knowledge that he suffered a severe mental disease or defect at the time of the offense. Nor is it possible for a military judge to conduct the necessary *Care* inquiry into an accused's pleas without exploring the impact of any mental health issue on those pleas.[108]

Against the underlying presumptions that the accused is sane[109] and the defense counsel is competent,[110] when reasonably raised the military judge has a duty to inquire into the possibility of a mental health defense.[111] The existence of a defense, unless noted and disavowed, is inconsistent with a knowing and voluntary plea.[112] When, in the context of a guilty plea, a possible mental responsibility defense is raised, the military judge must inquire further.[113] If, however, the evidence raises only a "mere possibility" of a defense further inquiry is not necessary.[114] Where the line is drawn between "a possible" defense and "a mere possibility" of a defense is less than finite and depends on the facts of each case and the quality of evidence presented on the issue.[115] Further inquiry is required when there is evidence that a mental disorder may have influenced the accused's pleas, which then raises concerns about the accused's mental capacity to plead, or raises questions about whether the accused was able to appreciate the nature and quality or wrongfulness of the acts.[116] How much evidence is necessary to raise such inconsistency is a matter of debate.[117]

United States v. Inabinette[118] represents the CAAF's latest attempt to clarify the issue.[119] Inabinette challenged the providence of his guilty pleas alleging that a diagnosis of bipolar disorder raised a defense that was inconsistent with his plea.[120] The CAAF rejected the challenge finding that despite psychiatric testimony on behalf of the accused, the military judge's questions to the psychiatrist and the accused properly resolved any inconsistency between a potential mental

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[105] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

[106] United States v. Zachary, 63 M.J. 438, 444 (C.A.A.F. 2006) ("This Court has held that a military judge has a duty under Article 45, UCMJ, to explain to the accused the defenses that an accused raises during a providence inquiry. . . . '[I]nconsistencies and apparent defenses must be resolved by the military judge or the guilty pleas must be rejected.' Where an accused is misinformed as to possible defenses, a guilty plea must be set aside.") (citations omitted).

[107] United States v. Glenn, 66 M.J. 64 (C.A.A.F. 2008); United States v. Harris, 61 M.J. 391 (C.A.A.F. 2005).

[108] *Harris*, 61 M.J. at 398.

[109] MCM, *supra* note 6, R.C.M. 916(k)(3)(A).

[110] United States v. Scott, 24 M.J. 186, 188 (C.M.A. 1987) (competence of counsel presumed).

[111] United States v. Phillippe, 63 M.J. 307, 310–11 (C.A.A.F. 2006) ("[W]hen, either during the plea inquiry or thereafter, and in the absence of prior disavowals . . . circumstances raise a possible defense, a military judge has a duty to inquire further to resolve the apparent inconsistency.").

[112] United States v. Shaw, 64 M.J. 460, 462 (C.A.A.F. 2007).

[113] *Id*.

[114] United States v. Glenn, 66 M.J. 64, 66 (C.A.A.F. 2008); United States v. Prater, 32 M.J. 433, 436–37 (C.M.A. 1991).

[115] *Shaw*, 64 M.J. at 464 ("Whether further inquiry [by the military judge] is required as a matter of law is a contextual determination."). *Compare* United States v. Harris, 61 M.J. 391, 398 (C.A.A.F. 2005) (conflicting evidence of mental health professionals concerning the accused's mental state gave rise to finding that the accused who did not know that he suffered from a mental disease or defect could not render an informed waiver of constitutional protection necessary for a provident guilty plea), *with Glenn*, 66 M.J. at 66 (finding accused sworn statement and the assessment of a social worker regarding the accused possible mental disorders—cyclothymic disorder—raised only a "mere possibility"), *and Shaw*, 64 M.J. at 462 (unsworn testimony of accused during sentencing that he was assaulted and beaten with a lead pipe leading to a coma, skull fractures, bruising and bleeding of the brain, deafness in one ear, blindness in one eye with a diagnosis of "bi-polar" syndrome amounted to only a "mere possibility" of a defense that did not warrant further inquiry by the military judge).

[116] *Shaw*, 64 M.J. at 462–64.

[117] *Id.* at 464 (Effron, J., dissenting) (contrary to the majority's opinion, finding the unsworn statement of the accused raising bi-polar disorder triggered the military judge's responsibility to inquiry into the matter in order to resolve the inconsistency, since the inconsistency need not rise to the level of a complete defense, only a possible defense).

[118] 66 M.J. 320 (C.A.A.F. 2008).

[119] *Id.* at 322 (applying a de novo standard to review to determine whether the record raised a mere possibility of a defense or a possible defense, i.e., whether the facts on the record triggered the military judge's duty to make further inquiries).

[120] *Id.* at 321.

responsibility defense and the guilty pleas.[121] This questioning was done "against the backdrop of consistent R.C.M. 706 board findings [that the accused was able to appreciate the nature and wrongfulness of his behavior]."[122] A reading of *Inabinette* in the context of the court's comparison with two other cases involving bipolar disorder, *United States v. Harris*[123] and *United States v. Shaw*,[124] further illustrates the subjective approach the CAAF takes in distinguishing a mere possibility of a defense against a possible defense, which defines the military judge's duty to make further clarifying inquiries.[125]

Harris is instructive when attempting to determine what the military judge is required to do to reconcile inconsistencies between possible defenses and a guilty plea. *Harris* dealt with the inconsistency between an RCM 706[126] sanity board inquiry, done pre-trial and finding no mental disease or defect, and a post-trial psychiatric diagnosis, finding that the accused's bipolar disorder rendered him unable to control his actions or appreciate the wrongfulness of his conduct.[127] The convening authority appropriately ordered a post-trial Article 39(a), UCMJ, hearing "'to determine whether the accused's pleas of guilty were provident and should have been accepted' in light of [the post-trial] diagnosis."[128] The military judge conducted a post-trial inquiry, questioning the doctors who authored the conflicting reports, and found that while the accused was suffering from bipolar disorder he was able to appreciate the wrongfulness of his actions and was competent to stand trial, therefore his pleas remained provident.[129] Thereafter, the convening authority ordered another RCM 706 sanity board inquiry, which found that the accused was suffering from a severe mental disease, bipolar disorder, at the time of the offenses but was able to appreciate the wrongfulness of his conduct.[130]

Although *Harris* was largely a case involving the applicable standards for a new trial under Article 73, UCMJ, and RCM 1210,[131] the court did address the providence of the accused's pleas.[132] The court found a substantial basis to question Harris's pleas asserting that he could not make an informed plea without knowing that he suffered from a mental disease or defect and the military judge could not engage in an adequate plea inquiry without exploring the impact the mental disease had on the accused's pleas.[133] Apparently, what the military judge failed to do, despite his post-trial hearings and findings, was ask the accused whether he still wished to plead guilty despite the possible mental responsibility defense.[134] *Harris* is both instructive and troubling for the same reason. The holding invites gamesmanship since defense counsel could have petitioned the convening authority for a rehearing [135] based upon the results of RCM 706 sanity boards and the psychiatric diagnosis, if he thought the accused had a viable mental responsibility defense. Instead, the defense chose to use the post-trial diagnosis as part of their request for clemency.[136] Thus, despite an intentional decision or, perhaps, negligence by the

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[121] *Id.* at 323.

[122] *Id.*

[123] 61 M.J. 391 (C.A.A.F. 2005).

[124] 64 M.J. 460 (C.A.A.F. 2007).

[125] *Id.* at 464–65 (Effron, J., and Erdmann, J., dissenting).

> Appellant's assertion that he suffered from bipolar disorder raised an apparent inconsistency with respect to his plea, thereby triggering the military judge's duty to conduct further inquiry.
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> . . . .
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> A statement by the accused's triggers the military judge's responsibility . . . when it raises the possibility that a defense may apply. The accused's statement need not assert a complete defense.

Id.

[126] MCM, *supra* note 6.

[127] *Harris*, 61 M.J. at 393.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 394.

[131] MCM, *supra* note 6.

[132] *Harris*, 61 M.J. at 398.

[133] *Id.*

[134] *Id.* at 398 n.13 ("He could have inquired whether Appellant still wished to plead guilty, now aware of the possible affirmative defense based on mental illness. Alternatively, the military judge could have advised the convening authority that a substantial basis in law and fact now existed to question whether Appellants pleas were provident.").

[135] *See* MCM, *supra* note 6, R.C.M. 1107(e).

[136] *Id.* R.C.M. 1105.

defense counsel, not to petition for a rehearing, it is ultimately the command that will have to resolve the issue. While the court never addresses the defense counsel's obligations, *Harris* is instructive for trial counsels and staff judge advocates. When a mental health issue could have: (1) influenced the accused's pleas; (2) affected his capacity to plead; or, (3) rendered the accused unable to appreciate the nature and quality or wrongfulness of his acts,[137] trial counsels and staff judge advocates have a responsibility to ensure that any inconsistencies between possible defenses and the guilty pleas are resolved on the record and that the guilty pleas remain knowing and voluntary.

In *Shaw*, the CAAF confronted the issue of whether a mental responsibility defense was raised during Shaw's unsworn statement when he said that he was diagnosed with "bipolar syndrome" after being beaten with a lead pipe that left him in a coma for several days.[138] Under these circumstances, the court found that the military judge did not have a duty to inquire further into the matter because the accused's statement alone only raised the "'mere possibility' of a defense."[139] Reading *Inabinette*, where the military judge's duty to inquiry into a possible defense was apparently triggered by testimony of the forensic psychiatrist, with *Harris* and *Shaw*, one would draw the conclusion that a "possible defense" is triggered only when evidence beyond the accused's statement raises the issue.[140] This, of course, is not true. Courts have held that evidence beyond the accused's statements may not lend sufficient weight beyond a mere possibility of a defense,[141] while others have found that the accused's statements alone trigger further inquiry.[142] Thus *Inabinette* adds nothing new to the analysis except to recognize that the subtle distinction between a possible defense and a mere possibility of a defense remains case specific and incorporates both evidence introduced at trial and matters raised post-trial. Due to this uncertainly, both trial counsels and staff judge advocates should be vigilant when confronted with a possible mental health defense.

Lessons to be Learned: Whether the appellate court will view, in the context of a guilty plea, a reference to a mental or emotional ailment as raising a possible defense or as a mere possibility of a defense is subject to uncertainty. What is certain is that an appellate issue will exist if the military judge does not: (1) address the matter by "clearly and concisely explain[ing] the elements of the defense in addition to securing a factual basis to assure that the defense is not available";[143] and, (2) ascertain that both the accused and his counsel have explored the possibility of such defense and agree that it does not exist,[144] thus disclaiming the issue. This is especially true since during appellate review since, "to determine whether 'the providence inquiry provides facts inconsistent with the guilty plea, [the court will] take the accused's version of the facts "at face value.'"'"[145] As a prophylactic measure, trial counsel should treat all mental health related concerns as raising a possible defense. Counsel must ensure that the military judge makes a factual record that resolves any ambiguity concerning possible defenses.[146] During a guilty plea, it is not unusual for the accused to attempt to minimize or rationalize his guilt. This element of humanness is recognized by the court.[147] Despite these attempts, the plea will be provident provided the military judge makes a factual record not only satisfying the elements of the offenses to which the accused pleads but also the factual elements that negate possible defenses, with appropriate disavowals from the accused and counsel.[148] Furthermore, beyond the availability of a viable mental health defense, the record should clearly resolve the *Harris/Shaw* question: what effect, if

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[137] United States v. Shaw, 64 M.J. 460, 462–63 (C.A.A.F. 2007).

[138] *Id.* at 461.

[139] *Id.* at 464.

[140] United States v. Inabinette, 66 M.J. 320, 323 (C.A.A.F. 2008) (Conceding that the accused raised the issue of bipolar disorder after "suffering a severe brain injury," Shaw did not "offer any further evidence of his bipolar condition, nor did he assert that his condition implicated his mental responsibility for his offense.") (citations omitted); *Shaw*, 64 M.J. at 462 ("[U]nlike . . . *United States v. Harris*, . . . there was no factual record developed during or after the trial substantiating Appellant's statement or indicating whether and how bipolar disorder may have influenced his plea.").

[141] United States v. Glenn, 66 M.J. 64 (C.A.A.F. 2008) (during sentencing, accused's sworn testimony concerning diagnosed personality disorder, testimony by a forensic counselor that a doctor had diagnosed accused with cyclothymic disorder, and testimony of the accused's sister concerning a family history of bipolar disorder, did not raise any inconsistency with the accused's guilty plea that triggered military judge's duty to reopen providence).

[142] United States v. Phillippe, 63 M.J. 307 (C.A.A.F. 2006) (in a guilty plea to unauthorized absence, the accused's claims during sentencing that he attempted to return to military control earlier than the termination date plead to triggered military judge's duty to reopen providence and resolve inconsistency in guilty plea for unauthorized absence).

[143] United States v. Jemmings, 1 M.J. 414, 418 (C.M.A. 1976).

[144] MCM, *supra* note 6, R.C.M. 916(k)(3)(B) (military judge may direct an inquiry into the mental status of the accused under RCM 706).

[145] United States v. Heitkamp, 65 M.J. 861, 863 (A. Ct. Crim. App. 2007) (citations omitted).

[146] *Phillippe*, 63 M.J. at 310.

[147] United States v. Penister, 25 M.J. 148, 153 (C.M.A. 1987) (Cox, J., concurring) ("One aspect of human beings is that we rationalize our behavior and, although sometimes the rationalization is 'inconsistent with the plea,' more often than not it is an effort by the accused to justify his misbehavior.").

[148] United States v. Garcia, 44 M.J. 496, 498 (C.A.A.F. 1996).

any, does a mental health issue have on the accused's decision[149] or capacity to enter guilty pleas[150] and the knowing and voluntary nature of the plea?[151]

Voir Dire

Implied Bias

An area of recent frustration, for the court as well as appellate counsel, is the failure of military judges to address the issue of implied bias when confronted with a challenge for cause by the defense counsel. Pursuant to RCM 912(f)(1)(N), "A member shall be excused for cause whenever it appears that the member . . . . Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[152] This provision for challenge encompasses both actual and implied bias.[153]

Actual bias is a firmly held belief that will not yield to the military judge's instruction or the evidence presented at trial.[154] In reviewing a military judge's decision to deny a defense challenge on actual bias grounds, the appellate court affords the military judge broad discretion and will accept the judge's findings concerning the demeanor and sincerity of the member's disclaimers of bias.[155]

Implied bias, however, is governed by a different standard. Implied bias is subject to an objective test that requires the court to view the circumstance through the eyes of the public in order to determine whether there would be substantial doubt as to the fairness or impartiality of the proceedings given the member's presence on the panel.[156] The amount of deference given a military judge's decision under an implied bias analysis depends on whether the facts present a "close" case and whether the military judge applied the three part test expressed in *United States v. Clay*: (1) whether the military judge recognized, on the record, the existence of implied bias concern; (2) whether he applied the court's mandate that instructs the military judge to grant defense challenges liberally (the liberal grant mandate); and, (3) whether the military judge articulated the facts relied upon that negated the appearance of implied bias.[157] A member's affirmation of impartiality and the military judge's finding that such declarations are sincere, unlike under an actual bias analysis, carry little weight.[158]

Where the military judge fails to address all three elements on the record, the court will review the matter with less deference than if he had applied these elements to the challenge.[159] If the court finds the military judge abused his discretion, and the defense preserved the issue on appeal, it is likely the case will be overturned.

When a case is "close" in order to invoke the *Clay* factors is a matter of debate.[160] When the facts presented amount to a "close case" it is clear that the application of the *Clay* factors is required to avoid overturning the case on appeal. When a

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[149] United States v. Shaw, 64 M.J. 460, 462–63 (C.A.A.F. 2007).

[150] *Id.*

[151] United States v. Harris, 61 M.J. 391 (C.A.A.F. 2005).

[152] MCM, *supra* note 6, R.C.M. 912(f)(1), (f)(1)(N).

[153] *See id.* R.C.M., 912(f) discussion.

[154] United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987).

[155] United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996).

[156] United States v. Bragg, 66 M.J. 325 (C.A.A.F. 2008); United States v. Armstrong, 54 M.J. 51 (C.A.A.F. 2000).

[157] United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007).

[158] United States v. Strand, 59 M.J. 455, 460 (C.A.A.F. 2004) ("[D]isclaimers of bias, . . . are not dispositive with regard to implied bias . . . . Nonetheless, a 'member's unequivocal statement of a lack of bias can . . . carry weight' when considering the application of implied bias.") (citing United States v. Youngblood, 47 M.J. 338, 341 (C.A.A.F. 1977)).

[159] *Clay*, 64 M.J. at 274.

[160] United States v. Townsend, 65 M.J. 460 (C.A.A.F. 2008) (dispute among the justices as to what constitutes a close case when applying the implied bias standard); *see* United States v. Briggs, 64 M.J. 285 (C.A.A.F. 2007).

case is not close, the *Clay* factors are less relevant.[161] The court, however, does not provide any specific guidance on the issue. Rather, *Clay* appears to invite a prophylactic approach to the issue.[162]

Lessons to be Learned. Until the court provides definitive guidance,[163] trial counsel should ensure that when a defense's challenge for cause is denied, the military judge applies the *Clay* analysis. Specifically, the military judge should recognize his duty to address the challenge under the implied bias standard and the court's liberal grant mandate. The military judge should state on the record what facts, other than the member's assurances of impartiality and the credibility of such assertions, he relied upon it determining that a member of the public, who is familiar with military justice matters, would not substantially doubt the fairness or impartiality of the court-martial given the members' presence on the panel.

Hypothetical Questions

A relatively new area, but one that will provide some level of appellate review now that the court has addressed the matter, is the propriety of hypothetical questions during voir dire.[164]

Hypothetical questions, while not per se impermissible, are improper if they present the member with case-specific facts and seek to commit the member to a particular verdict based upon those facts or to commit the member to resolving certain "aspects of the case in a specific way."[165] In *United States v. Nieto*, the court found that such questions by the trial counsel did not amount to plain error in absence of an objection by trial defense counsel, given that the court had not previously provided guidance on the issue.[166] Nieto was charged with wrongful use of cocaine, in violation of Article 112a, UCMJ.[167] The Government's case relied upon the results of a urinalysis, which was the product of faulty urine collection process.[168] During individual voir dire, in an attempt to explore the effects the case-specific deviation would have on a member's decision, the trial counsel designed hypothetical questions that incorporated the case-specific collection error, e.g., "And so it wouldn't necessarily be per se invalid if the coordinator didn't put his initials on the bottle . . . ."[169] The intent of the questions was to ascertain whether the member would convict despite the collection error. While not holding that such "commitment" questions were per se impermissible, it is clear from the court's analysis that they are "disfavored" and, in subsequent cases, likely to be error on appeal.[170]

Lessons to be Learned: A question is appropriate if it furthers the stated purpose of voir dire; i.e., the opportunity to "obtain information for the intelligent exercise of challenges"[171] and a "tool" used to preserve the right to an impartial trial.[172] Questions may not to be used as a means of arguing the case[173] or gaining some tactical advantage at trial. Provided counsel

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[161] *Id*.; United States v. Downing, 56 M.J. 419 (C.A.A.F. 2002) (finding no abuse of discretion in denying accused's challenge despite absence on the record of the military judge's consideration of the liberal grant mandate).

[162] *Townsend*, 65 M.J. at 467 (Baker, J., *dubitante*) ("Why would a military judge take a chance, where, in fact, the accused has objected to the member sitting on his court and preserved the issue? Why take the chance that an appellate court will disagree and reset the clock after years of appellate litigation?").

[163] The CAAF's application of the implied bias analysis is inconsistent. *Compare* United States v. Elfayoumi, 66 M.J. 354 (C.A.A.F. 2008) (in a male-on-male forcible sodomy and indecent assault case, finding no implied bias when member expressed strong moral and religious objections to homosexuality and pornography), *with Clay*, 64 M.J. at 278 (in a rape and indecent assault case, finding implied bias when a member expressed a "moral conviction" regarding the crime of rape).

[164] United States v. Nieto, 66 M.J. 146 (C.A.A.F. 2008).

[165] *Id*.; United States v. Rolle, 53 M.J. 187, 191 (C.A.A.F. 2000) ("[N]either side 'is entitled to a commitment' during *voir dire* about 'what they will ultimately do." (quoting United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987)); United States v. Rockwood, 52 M.J. 98, 114 (C.A.A.F. 1999) (Gierke, J., concurring) (finding improper voir dire questions asking for a sentencing commitment).

[166] *Nieto*, 66 M.J. 146.

[167] *Id*.

[168] *Id*. at 148.

[169] *Id.*

[170] *Id*. at 150 (Stucky, J., concurring).

[171] MCM, *supra* note 6, R.C.M. 912(d) discussion.

[172] United States v. Belflower, 50 M.J. 306, 308–09 (C.A.A.F. 1999) (citing Morgan v. Ill., 504 U.S. 719 (1992)); United States v. Jefferson, 44 M.J. 312, 318 (C.A.A.F. 1996).

[173] MCM, *supra* note 6, R.C.M. 912(d) discussion.

can provide a nexus between his voir dire question and the proper purpose of voir dire (determining whether grounds for challenge exist under RCM 912 or exposing a member's bias or prejudice)[174] the question should be allowed. Trial counsel should avoid hypothetical questions that seek to commit a member to a particular verdict or sentence or to resolve a disputed factual matter in the case.

Argument

Another fertile ground for appeal arises from counsel's improper argument. Three of the most frequent grounds for challenge on appeal are arguments alleged to inflame the passions and prejudices of the members; those that play upon the sheer number of charges to infer guilt; i.e., spillover, and those that comment on the accused's exercise of a constitutional right.[175]

Inflaming the Passions and Bias of the Members

An argument designed to unduly inflame the passions or prejudices of members or divert the members from their duty to decide the case on the evidence presented at trial is improper.[176] For example, it would be improper to compare the accused to a known terrorist, third-world dictator, or mass murder.[177] Counsel should also carefully review the propriety of drawing analogies during argument, especially if the analogy attempts to draw some relevance between the accused's offenses and offenses committed by others, especially those in the public eye.[178]

Defining exactly where an argument crosses over the line of propriety and inflames passions or prejudices is often difficult to establish[179] and depends upon the context in which the comments were made.[180] A common error is counsel's arguments that rely on "irrelevant matters, such as personal opinions and facts not in evidence."[181] Improper opinions injected into counsel's argument include the counsel's personal opinions concerning the truth or falsity of testimony or evidence,[182] the accused's guilt or character,[183] or the character or style of the defense counsel.[184] Note that the impropriety stems from counsel's personal opinions and not from the state of the evidence as presented by the Government or the Government's theory of the case. Improper personal opinions also arise when counsel vouch for the credibility or veracity of Government witnesses or evidence,[185] or engage in personal attacks against the accused.[186]

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[174] *See Jefferson*, 44 M.J. at 318 (implying voir dire questions designed to develop rapport with members, indoctrinate members to the facts and law, and provide counsel with a basis for exercising peremptory challenges is proper) (citing *Morgan*, 504 U.S. at 729).

[175] *See* MCM, *supra* note 6, R.C.M. 919(b) discussion (listing examples of improper argument).

[176] United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976).

[177] United States v. Erickson, 65 M.J. 221 (C.A.A.F. 2007) (references to Hitler, Saddam Hussein, and Osama bin Laden, during sentencing argument are improper but did not amount to plain error); United States v. Nelson, 1 M.J. 235, 237 (C.M.A. 1975) (comparing defense witness' tactics with those of Hitler is an improper argument).

[178] United States v. Clifton, 15 M.J. 26 (C.M.A. 1983) (argument making the analogy between adultery and heroin use improper); United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005) (referencing celebrities is not per se improper, especially if it involves matters within common knowledge and not designed to inflame passions, yet comparisons by trial counsel during argument to cases involving Jesse Jackson, Jerry Falwell, Jim Bakker, Dennis Quaid, Matthew Perry, and Robert Downy Jr. improperly introduced inflammatory facts not in evidence into accused's court-martial); *Nelson*, 1 M.J. at 238 ("It is also improper to associate the accused with other offensive conduct or persons, without justification of evidence in the record.") (citations omitted).

[179] *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION, Standard 3-5.8, Argument to the Jury (1993); United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977) (Fletcher, J., concurring).

[180] United States v. Young, 470 U.S. 1, 16 (1985) (requiring a contextual analysis of counsel's comments); United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000) (members are asked to make their decision based upon an unemotional application of the facts to proper sentencing principles, not on "blind outrage and visceral anguish.") (citations omitted); *Clifton*, 15 M.J. at 30 (calling accused a "lair" is "a dangerous practice").

[181] United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007) (citation omitted).

[182] *Fletcher*, 62 M.J. 175.

[183] *Id*. at 181 (citing United States v. Modica, 663 F.2d 1173, 1181 (2d Cir. 1981)); United States v. Barrazamartinez, 58 M.J. 173, 176 (C.A.A.F. 2003) ("almost a traitor" during sentencing argument potentially inflammatory).

[184] *Fletcher*, 62 M.J. at 181.

[185] *Id*. at 180 (citing *Young*, 470 U.S. 1).

[186] United States v. Clifton, 15 M.J. 26 (C.M.A. 1983); United States v. Knickerbocker, 2 M.J. 128, 129–30 (C.M.A. 1977).

During argument counsel should not go beyond the facts introduced at trial, with the exception of "contemporary history or matters of common knowledge within the community."[187] "Going beyond" includes attempts to draw comparisons or analogies to other cases.[188] Error also occurs when counsel invokes the "Golden Rule," asking the members to "place themselves in the shoes of the victim."[189] What is permissible is to invite the members to consider the circumstances of the victim during the crime, imagining the victim's pain, fear, anguish or suffering.[190] What is improper is to ask the members to place themselves in the victim's place.[191] Counsel must be aware of the distinction and carefully walk that fine line in order to avoid creating appellate issues and jeopardizing a case on appeal.

One of the more troubling aspects of improper argument is the use, during argument, of "uncharged misconduct" evidence introduced during trial under Military Rule of Evidence (MRE) 404(b), 413, or 414. Under MRE 404(b),[192] counsel cannot use the uncharged misconduct evidence to argue propensity.[193] Provided counsel limit the use of the "other crimes, wrongs, or acts,"[194] to the purpose for which the evidence was admitted, and appropriate instructions are given to the members, there should be no issue on appeal.[195]

When the charge involves sexual assault or child molestation as defined by MRE 413 or 414,[196] the risk of raising an appellate issue is greater. This is because the prior uncharged acts of sexual assault or child molestation are admissible and can be used "for its bearing on any matter to which it is relevant,"[197] including that which would be barred by MRE 404(b), i.e., to prove a propensity to commit the charged offenses.[198] The caveat is that while the members may use the "uncharged" acts as bearing on the accused's propensity to commit the charged offense, they may not convict the accused of the charged offenses solely because they believe he committed the uncharged acts or because they believe he has a propensity to commit such acts.[199] This fine distinction remains a trap for the unwary trial counsel during the fervor of argument. The burden of establishing each element of the charged offense rests with the Government. The Government may not relieve itself of that burden merely because the members believe the accused has a propensity to commit such offenses.[200] This means the trial counsel must walk a fine line when using the uncharged acts of sexual assault or child molestation during argument.[201]

In *United States v. Schroder*, the court found that the trial counsel's argument asking for justice for a victim of the uncharged misconduct along with that for the victims of the charged offenses was error.[202] "The MRE 414 safeguards[203] could be undermined if trial counsel's comments were permitted to range outside the realm of legally 'relevant matters' and express a sense of outrage and injustice for the victims of the uncharged misconduct."[204] In other words the trial counsel

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[187] *Fletcher*, 62 M.J. at 183 (providing a list of examples of matters within the common knowledge of the community).

[188] *Clifton*, 15 M.J. at 29–30 (drawing such comparisons violates the precept that counsel's argument is not evidence and that the accused may only be convicted on evidence introduced at his court-martial).

[189] United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2007) (finding "golden rule" argument improper because it "'encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence'") (citations omitted).

[190] *Id*. at 238.

[191] *Id*.; United States v. Shamberger, 1 M.J. 377, 379 (C.M.A. 1976) (finding improper trial counsel's argument asking members to place themselves in the position of the victim's husband who was held down while the accused and others raped the victim).

[192] MCM, *supra* note 6, MIL. R. EVID. 404, 413, 414.

[193] *See* United States v. Franklin, 35 M.J. 311, 316 (C.M.A. 1992) (evidence of acts admitted under MRE 404(b) may not be used to prove criminal disposition or propensity).

[194]MCM, *supra* note 6, MIL. R. EVID. 404(b).

[195] United States v. Levitt, 35 M.J. 114, 119 (C.M.A. 1992) (setting forth the elements of a proper MRE 404(b) limiting instruction).

[196] MCM, *supra* note 6, MIL. R. EVID. 413, 414.

[197] *Id*.

[198] United States v. Wright, 53 M.J. 476 (C.A.A.F. 2000).

[199] United States v. Schroder, 65 M.J. 49, 55 (C.A.A.F. 2007).

[200] *Id*.

[201] *See* United States v. Sentance, No. 34693, 2004 CCA LEXIS 27 (A.F. Ct. Crim. App. Jan. 7, 2004) (in a sexual assault case, military judge prohibited trial counsel from arguing that the accused had a propensity to commit sexual assault).

[202] *Schroder*, 65 M.J. at 58.

[203] *Id*. at 52–56 (citing *Wright*, 53 M.J. at 482) (finding proper safeguards include special instructions on the use of the MRE 414 uncharged acts, proper threshold findings, and application of MRE 403 balancing factors specific to MRE 414 evidence).

[204] *Id*. at 58.

could use the uncharged misconduct evidence as evidence of propensity as long as it was clear that the members could not bootstrap that evidence and convict the accused merely because they believed he committed the uncharged misconduct or because they believed he had a propensity to commit such offenses. Trial counsel's request to provide justice for the victim of the uncharged misconduct was unduly inflammatory and invited the members to convict on the charge offenses in order to punish the accused for the uncharged misconduct.[205]

Spillover

When separate offenses are charged together for a single trial there exists a danger that members will use the evidence of one offense "to infer a criminal disposition on the part of an accused in regard to other crime(s) charged."[206] This may result in a verdict based upon the character of the accused rather than the proof at trial.[207] This is commonly referred to as "spillover."[208] In order to overcome the presumption of innocence, due process requires the prosecution prove each element of the charged offense beyond a reasonable doubt.[209] To ensure the members understand and abide by the constitutional requirement, the standard spillover instruction is often given.[210]

The risk of improper spillover is especially prevalent in courts-martial separately charging several similar offenses. The temptation during argument to link two or more similar offenses together is especially compelling, natural, and likely to lead to appellate relief.[211]

Lessons to be Learned: Trial counsel should structure his argument to ensure that the evidence for each offense is compartmentalized thus avoiding the spillover effect. When counsel takes steps to separate the presentation of evidence during trial and argument, and ensures the military judge instructs the members appropriately, it is unlikely that spillover will be an issue.[212] Furthermore, if there is the potential for impermissible spillover, the trial counsel should request that the spillover matter be addressed during voir dire[213] and the spillover instruction be given at several appropriate times during the trial.[214]

Infer Guilt-Based upon Accused's Exercise of Constitutional Rights

Any reference during argument that directly, indirectly, or by innuendo, comments on the accused's exercise of his constitutional rights is impermissible.[215] It is error for trial counsel to comment on the accused's failure to plead guilty;[216] the

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[205] *Id*.

[206] United States v. Myers, 51 M.J. 570, 579 (N-M. Ct. Crim. App. 1999).

[207] *Id*.

[208] The "where there is smoke there is fire" analogy is used to describe the spillover effect. Thus, the quantity of evidence or number of charges is used to infer guilt regardless of whether the evidence is sufficient to satisfy the elements of each offense beyond a reasonable doubt. *See* United States v. Ryan, 2007 CCA LEXIS 111, at *10 (N-M. Ct. Crim. App. Mar. 29, 2007), *aff'd in part*, *rev'd in part*, 65 M.J. 328 (C.A.A.F. 2007). *But see* MCM, *supra* note 6, R.C.M. 601(e)(2) ("Ordinarily all know charges should be referred to a single court-martial.").

[209] Estelle v. McGuire, 502 U.S. 62, 78 (1991); *see* United States v. Southworth, 50 M.J. 74 (C.A.A.F. 1999) (applying a three prong test to determine if a manifest injustice occurred to the detriment of the accused due to the effect of spillover).

[210] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK 877 (15 Sept. 2002) (C2, 1 July 2003) ("Each offense must stand on its own and you must keep the evidence of each offense separate. The burden is on the prosecution to prove each element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.").

[211] *Myers*, 51 M.J. at 581–52 ("[T]he Governments' cases regarding the separate offenses [of rape against two different victims] were weak . . . . When joined together, the temptation of the member to apply 'where there's smoke there must be fire' logic simply cannot be discounted or ignored. We additionally note that the prosecution could not resist the temptation to make the compelling 'similarity' argument to the members . . . .").

[212] United States v. Duncan, 53 M.J. 494, 498 (C.A.A.F. 2000); United States v. Hogan, 20 M.J. 71, 73 (C.M.A. 1985) (finding curative spillover instructions would have substantially diminished any prejudicial effect on the trial).

[213] United States v. Will, No. 9802134, 2002 CCA LEXIS 218, at *20 (N-M. Ct. Crim. App. Sept. 27, 2002) ("A number of measures may serve to limit impermissible spillover. Prospective members may be question during voir dire whether they can keep the evidence separate.").

[214] United States v. Sentance, No. 34693, 2004 CCA LEXIS 27, at *9 (A.F. Ct. Crim. App. Jan. 7, 2004) (finding defense requested spillover instruction given during voir dire, after an evening recess, and during instructions on finding was a proper prophylactic measure); *Will*, No. 9802134, 2002 CCA LEXIS, at *20.

[215] United States v. Moran, 65 M.J. 178, 186 (C.A.A.F. 2007); United States v. Mobley, 31 M.J. 273, 279 (C.M.A. 1990).

[216] United States v. Edwards, 35 M.J. 351, 355 (C.M.A. 1992).

exercise of his right to remain silent;[217] the refusal to consent to a consent search;[218] or, the request to speak with an attorney.[219] It is also improper to ask the members to infer guilt or draw an adverse inference from the accused's constitutional exercise of his right to challenge the Government's case or from his reliance on the reasonable doubt standard.[220] Finally, it is improper to use the accused's failure to produce witnesses or evidence on his behalf as evidence against him.[221] These caveats apply during argument on findings as well as sentencing.[222]

A common error occurs when trial counsel attempts to shift the burden of proof or otherwise refers to the lack of evidence that only could come from the accused, thus commenting indirectly on the accused's right to remain silent. In *United States v. Carter*, the court found the trial counsel's repeated reference to the Government's "uncontroverted" and "uncontradicted" evidence to be error when the defense presented no evidence during the case-in-chief.[223] While it is proper for the Government to comment on the defense's failure to refute the Government's case or to support claims made by the defense, "a constitutional violation occurs [] if either the defendant alone had the information to contradict the Government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as comment on the failure of the accused to testify."[224] Airman First Class Carter was charged, among other things, with indecent assault.[225] The Government's case consisted of one witness, the victim of the assault, and the defense presented no witnesses or evidence during their case-in-chief.[226] Since the only witnesses to the contested offense were the accused and the victim, the trial counsel's repeated comment that the Government's evidence was "uncontroverted" and "uncontested" was an impermissible reference to the accused's right to remain silent and an impermissible attempt to shift the burden of proof by inferring that the accused had the obligation to produce evidence to contradict the Government's case.[227] In *Carter* the court analyzed the trial counsel's argument against the doctrine of "invited reply,"[228] which would allow the prosecution to rebut matters otherwise prohibited when first introduced by the defense.[229] The trial counsel's comments were not specifically tailored to address matters first introduced by the defense either during their case-in-chief or as a result of cross-examination. Without a carefully crafted nexus that ties the substance of trial counsel's argument to matters introduced by the defense, any reference that appears to shift the burden of proof or inferentially comment on the accused's right to testify will be challenged on appeal.

A careful examination of the evidence at trial may allow trial counsel to comment on that which would otherwise be prohibited. Within the context of the evidence presented and the issues raised,[230] a matter interjected into the trial by the

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[217] United States v. Toro, 37 M.J. 313, 318 (C.M.A. 1993).

[218] *Moran*, 65 M.J. at 186–87.

[219] United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001).

[220] United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983) ("What [trial counsel] in fact conveyed is clear: An innocent man has nothing to hide, no reason to exercise his rights; the fact that appellant sought refuge behind his rights suggests he was not innocent.").

[221] United States v. Mobley, 31 M.J. 273, 279 (C.M.A. 1990); United States v. Swoape, 21 M.J. 414 (C.M.A. 1986).

[222] United States v. Johnson, 1 M.J. 213, 215 (C.M.A. 1975) (trial counsel's argument on sentencing that the members use the fact that the accused did not plead guilty as evidence in aggravation is an improper comment on the accused's right to be presumed innocent, plead not guilty, and have the Government prove his guilt with competent evidence beyond a reasonable doubt).

[223] 61 M.J. 30, 32–33 (C.A.A.F. 2005).

[224] *Id.* at 33 (quoting United States v. Coven, 662 F.2d 162, 171 (2d Cir. 1981) (citations omitted)); *see* United States v. Saint John, 48 C.M.R. 312 (C.M.A. 1974). Unless the contradiction could only have come from the accused, "there is 'considerable authority indication that a bare statement that the prosecution's evidence, or some designated part of it, is uncontradicted, does not per se involve an impermissible reference to the defendant's failure to testify." *Id.* (citation omitted).

[225] The accused in *Carter* had pled guilty to several offenses unrelated to the contested charge of indecent assault. *Carter*, 61 M.J. at 31.

[226] *Id.* at 31–32.

[227] *Id*. at 33–34. *But see* Lockett v. Ohio, 438 U.S. 586 (1978) (prosecution's reference to the Government's evidence as uncontradicted was not error when made in response to the defense's statement before the jury that the defendant would be called as a witness and never was).

[228] *Carter* refers to "invited reply" or "invited response" as a doctrine that would allow trial counsel to comment properly on matters otherwise improper because of the actions or remarks by the defense counsel. *Carter*, 61 M.J. at 33. However, in *United States v. Young*, 470 U.S. 1 (1985), the Court notes that the terms "invited response" or "invited reply" have evolved from the Court's original intent. Originally envisioned the "invited response" or "invited reply" doctrine was not intended to suggest judicial approval of a prosecutor's remarks or actions that were in response to remarks first made by the defense. Rather, the doctrine was a means to determine whether an otherwise improper response by the prosecution unfairly prejudiced the defendant. *Young*, 470 U.S. at 11–12.

[229] *Carter*, 61 M.J. at 33–34.

[230] *Id.* at 33 ("A prosecutorial comment must be examined in light of its context within the entire court-martial."); *Young*, 470 U.S. 1 (court must determine whether the prosecution's remarks, in context and taking into account the actions and remarks by the defense, unfairly prejudice the defendant).

defense would allow trial counsel rebuttal under the doctrine of "invited reply" or "invited response."[231] Trial counsel should ensure that the comments are in response to proper evidence introduced at trial and the fair inferences that can be draw therefrom.[232] In *United States v. Haney*, the court cautioned trial counsel to be careful when commenting on the accused's invocation of his rights under Article 31, UCMJ, even though it found that the counsel's references were in response to the defense's coerced confession theory, first introduced into the trial by the accused.[233]

Likewise, in *United States v. Gilley*, the court found no material prejudice under the doctrine of invited reply.[234] The trial counsel's comments referencing Gilley's request for counsel and his refusal to sign a written confession were in response to the defense's theme, first introduced by the defense counsel during opening statement, that the accused never read the confession and refused to sign it because law enforcement agents fabricated the statement.[235] Again, the court is cautious about opening the rebuttal door too wide. It will closely scrutinize the text of the trial counsel's argument to ensure that there is a direct nexus between the rebuttal comments and the facts raised by the defense.[236] Even if the comments during argument are fair rebuttal, counsel must ensure not to draw too much attention to the invocation of constitutional rights since repetition may lead "the members to attach a significance to such invocation that went beyond fair rebuttal of appellant's allegation."[237]

One final note regarding common errors during argument: counsel must be careful about interjecting personal pronouns into the argument as this often gives rise to claims of improper vouching for the veracity of a witness, evidence, or status of the case.[238] The court addressed this issue in *United States v. Fletcher*, offering counsel some acceptable terms to replace the personal pronouns, to include: "'you are free to conclude,' 'you may perceive that,' 'it is submitted that,' or 'a conclusion on your part may be drawn.'"[239] As awkward as these rote phrases are, counsel should modify them to fit one's own style while avoiding personal pronouns.

Lessons to be Learned: Argument should be a well-reasoned, logical explanation of the Government's theory of the case based upon the evidence introduced at trial and the inference that reasonably could be drawn from the facts. Trial counsel must remember that they represent the United States, thus they have a duty to ensure that justice is done and must "refrain from improper methods calculated to produce a wrongful conviction."[240] Trial counsel should suppress the impulse to reference personal opinions,[241] religious views,[242] or invoke the name of mass murders, evil dictators,[243] or known terrorist no matter how clever and brilliant the analogy may seem at the time. The goal is not only "[t]o seek justice, not merely to convict,"[244] but also preserve the finding and sentence on appeal.

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[231] United States v. Robinson, 485 U.S. 25, 32–33 (1988) ("fair response" doctrine); *see* United States v. Paxton, 64 M.J. 484 (C.A.A.F. 2007) (finding proper trial counsel's argument concerning lack of rehabilitative potential, based upon the testimony of a defense expert, however, cautioning counsel not to tie such remarks to the accused's failure to testify or admit guilt); United States v. Nelson, 1 M.J. 235, 237 (C.M.A. 1975) (finding proper trial counsel's comment during argument on the failure of the accused to mention an alibi defense during his testimony at the Article 32, UCMJ hearing); *see also* Walder v. United States, 347 U.S. 62, 65 (1954) ("It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.").

[232] United States v. White, 36 M.J. 306, 308 (C.M.A. 1993) ("This Court has consistently cautioned counsel to 'limit' arguments on findings or sentencing 'to evidence in the record and to such fair inferences as may be drawn therefrom.'").

[233] United States v. Haney, 64 M.J. 101, 105–06 (C.A.A.F. 2006).

[234] United States v. Gilley, 56 M.J. 113 (C.A.A.F. 2001).

[235] *Id.* at 121–22

[236] *Id.* at 123.

[237] *Id*.

[238] United States v. Fletcher, 62 M.J. 175, 180 (C.A.A.F. 2005) ("Improper vouching can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed. Prohibited language includes 'I think it is clear,' 'I'm telling you,' and 'I have no doubt.'") (internal citations omitted).

[239] *Id*.

[240] *Id.* at 179 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

[241] *Id.* at 179–81.

[242] Bains v. Cambra, 204 F.3d 964, 974–75 (9th Cir. 2000).

[243] *But see* United States v. Wernecke, 138 F.2d 561 (7th Cir. 1943) (finding prosecution's reference to Hitler during argument proper given the defendant's affiliation with various National Socialist activities).

[244] *Fletcher*, 62 M.J. at 182 (citations omitted).

If the defense's objection to counsel's argument is sustained or the military judge interjects sua sponte, trial counsel should ensure that corrective instructions are given immediately and then again during the instruction phase of trial. In order to cure any potential taint, curative instructions must focus on the impropriety and be given at a time when the curative instruction would have its intended effect.[245] Trial counsel should not repeat the same error thus negating the curative nature of the instruction.[246]

If the trial counsel does comment, under the "invited response" doctrine, two essential factors should be present: (1) counsel should ensure that the record contains clear and unmistakable defense evidence or comment that would justify the invited reply doctrine or, in a Article 39(a), UCMJ, session, place on the record exactly what defense claim or evidence the comments seek to rebut; and, (2) trial counsel should ensure that the military judge gives the proper limiting instructions, subject to the objection of the defense,[247] in order to avoid any allegation that the members placed improper or undue significance to the remarks.[248]

Conclusion

While not a complete list of common appellate issues, the matters identified in this article represent frequent and easily avoided appellate issues. Trial counsel must understand that the case is not complete when the military judge announces final adjournment.[249] Rather, it is merely the end of one process and the beginning of another that includes post-trial processing and appellate review. With that in mind, competent counsel protect the record to ensure that the case is as "bulletproof" as possible for appeal.

[245] *Id.* at 185 (curative instructions at an early point in the proceeding may dispel taint); United States v. Knickerbocker, 2 M.J. 128, 129 (C.M.A. 1977).

[246] United States v. Carter, 61 M.J. 30, 35 (C.A.A.F. 2005).

[247] Lakeside v. Or., 435 U.S. 333, 345 (1978) (Stevens, J., dissenting) (commenting on the adverse effects of giving a cautionary instruction regarding the accused right to remain silent over the defense's objection).

[248] *Id*. at 340 ("It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. . . . We hold only that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments."); United States v. Charette, 15 M.J. 197, 201 (C.M.A. 1983) (no error if military judge fails to provide a cautionary instruction regarding the accused's right to remain silent on the express request by defense counsel not to give such instruction).

[249] MCM, *supra* note 6, R.C.M. 1011.

State of Denial: Bush at War, Part III[1]

REVIEWED BY MAJOR DANIEL A. WOOLVERTON[2]

[I also want to speak to] those of you who did not support my decision to send troops to Iraq: I have heard your disagreement, and I know how deeply it is felt. Yet now there are only two options before our country—victory or defeat. And the need for victory is larger than any president or political party, because the security of our people is in the balance. I don't expect you to support everything I do, but tonight I have a request: Do not give in to despair, and do not give up on this fight for freedom.[3]

I. Introduction

Bob Woodward did it again. An editor at *The Washington Post* and a reporter for thirty-five years, Woodward "has authored or coauthored ten #1 national non-fiction bestsellers."[4] This time, in *State of Denial*, Woodward provides an inside look into the Bush Administration with a focus on its actions in post war Iraq.[5] As the title suggests, Woodward describes President George W. Bush and his Administration as being in denial concerning the military and political progress being made in post war Iraq.[6]

The inside look into the Bush Administration during this critical time period is the greatest attribute of this book. In addition to this unique perspective, Woodward offers his readers a view of the unity of command issues during Operation Iraqi Freedom along with the top military leaders points of view concerning the Chairman of the Joint Chiefs of Staff (CJCS), both of which should be important to military readers. However, there are three issues that hamper the book's excellence. First, the author mistakes President Bush's optimism for the success of the military in Iraq for denial. Secondly, the book's format is awkward. Lastly, the credibility of some of the assertions made by sources in the book is questionable.

II. The Book's Strengths

State of Denial is a great addition to any professional development reading list for several reasons.[7] First, and most importantly, Woodward gives his readers an insider's view of the Bush Administration. Secondly, for those who study the military profession, this book provides a case study into the importance of unity of command. Lastly, this book reveals what military leaders think of the effectiveness of the CJCS.

The tremendous strength of this book is Woodward's unparalleled behind-the-scenes access into the highest levels of the Bush Administration. This inside view provides readers not only a glimpse into the personalities of the Administration members, but also exposes the personal relationships between key players. While the American public only sees these figures at press conferences and public appearances, this book goes beyond the public personas to reveal the true characters.

The real personalities of those within the Bush Administration are the most entertaining aspect of this book. For example, the book discloses that President Bush has a sense of humor and enjoys the occasional "frat-boy prank."[8] In addition, one personality stood out from the rest—Colonel Steve Rotkoff.[9] Colonel Rotkoff was an intelligence officer in

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[1] BOB WOODWARD, STATE OF DENIAL: BUSH AT WAR, PART III (2006).

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[3] WOODWARD, *supra* note 1, at 435 (quoting President George W. Bush, Address from the Oval Office (Dec. 18, 2005) (transcript available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_ documents&docid=pd26de05_txt-10).

[4] *Id.* at inside back cover.

[5] WOODWARD, *supra* note 1.

[6] *See id*. at 488–89.

[7] The book provides two examples of the value and importance of reading for professional development from the highest levels of military command. First, Admiral Clark, Chief of Naval Operations, is depicted as an avid read reader, whose favorite book is *Good to Great* by Jim Collins. *Id*. at 55. Secondly, General Shelton, Chairman, Joint Chiefs of Staff, insisted that each of the service Chiefs read *Dereliction of Duty: Lyndon Johnson, Robert McNamara, the Joint Chiefs of Staff, and the Lies That Led to Vietnam*, by H. R. McMaster. *Id*. at 61.

[8] *Id*. at 402.

[9] *See id*. at 98–99.

Iraq at the start of the conflict and would display his sense of humor through the use of his colorful, yet insightful, haikus.[10] However, the real interest of the book lies with the interaction between the many personalities working together behind the scenes. Often times, the public sees only the positive spin coming from government officials during news conferences and may not be able to see the tension between certain officials or what created that tension.[11] This book provides a more realistic view of the relationships exposing how members of the Administration feel about one another.[12] The revelation of the real relationships, as well as the personalities within the Bush Administration, provide an insight that many other books lack.

A must read for Soldiers, this book illustrates the importance of unity of command during an operation. Unity of command is a principle of war, which means, "a single commander directs and coordinates the actions of all forces toward a common objective."[13] In this book, Woodward describes a lack of unity of command with regard to the conflict in Iraq.[14] When it is not possible to have unity of command, those in charge should cooperate with one another to ensure the mission is conducted in an effective and efficient manner.[15] As the book reveals, however, there wasn't always cooperation between those in charge in Iraq, either.[16]

Soldiers will also benefit from learning what the top military leaders really thought of the U.S. military's top position, the CJCS.[17] While the CJCS is supposed to be the principal military advisor to the President, Secretary of Defense, and the National Security Council,[18] *State of Denial* reveals that some of the top military leaders feel that the power of the CJCS has diminished since 1991[19] and in some cases, provides no real value to the country.[20] According to General Jones[21], "Military advice is being influenced on a political level."[22] In fact, according to Woodward, General Jones believes the Goldwater-Nichols Act needs to be amended to reempower the service chiefs.[23] The perspectives of the nation's top military leaders, especially on this issue, may be of interest to Soldiers.

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[10] An example of Colonel Rotkoff's sense of humor is revealed in the following haiku that he wrote while in Iraq:

> Where is WMD?
>
> What a kick if he has none
>
> Sorry about that

Id. at 192; *see also id*. at 98, 102, 147–48, 154, 210–11.

[11] A great example is the relationship between Lieutenant General (LTG) (Ret.) Jay Garner and Paul Bremer. At a press conference held on 18 June 2003, Jay Garner praised Bremer saying, "I think all the things he's doing are absolutely the right things." *Id*. at 221. When in reality, LTG (Ret.) Garner vehemently disagreed with Bremer and even informed Secretary Rumsfeld of the mistakes that Bremer made in Iraq. *Id*. at 219–21.

[12] For example, Steve Herbits thinks that Douglas Feith is worthless. *Id.* at 208. General Abizaid admires Secretary Rumsfeld but doesn't really like him. *Id*. at 115.

[13] U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 4-4 (14 June 2001) [hereinafter FM 3-0].

[14] General Keane tells LTG (Ret.) Garner that there is an issue with unity of command. WOODWARD, *supra* note 1, at 142. Secretary of State Powell tells President Bush that there is an issue with unity of command. *Id*. at 145.

[15] FM 3-0, *supra* note 13, para. 4-45 (Unity of command isn't always possible in multinational or interagency operations.).

[16] WOODWARD, *supra* note 1, at 265, 269, 276–77.

[17] "The Chairman, while so serving, holds the grade of general or, in the case of an officer of the Navy, admiral and outranks all other officers of the armed forces. However, he may not exercise military command over the Joint Chiefs of Staff or any of the armed forces." 10 U.S.C. § 152(c) (2000).

[18] *Id*. § 151.

[19] WOODWARD, *supra* note 1, at 404–05.

[20] According to Woodward, General Jones had stated, "The Joint Chiefs have been systematically emasculated by Rumsfeld." *Id*. at 404. In addition, the book states that General Myers, CJCS, at times wondered why he was even around because Secretary Rumsfeld was so hands on, requiring Myers to "adapt[] his mind to match Rumsfeld's." *Id*. at 72.

[21] General (Ret.) James L. Jones was the Commandant of the Marine Corps before becoming the North Atlantic Treaty Organization (NATO) Supreme Allied Commander and the U.S. Combatant Commander for Europe in 2003. *Id*. at 53, 104.

[22] *Id*. at 404.

[23] *Id*.

III. The Book's Downfalls

State of Denial presents three weaknesses. First, Woodward misinterprets President Bush's optimism regarding the progress of the conflict in Iraq for denial. Second, the format of the book is awkward, presenting the story as essentially a daily chronicle of events. Lastly, the sources Bob Woodward lists, and more importantly does not list, leaves the reader questioning the credibility of his assertions.

A. Denial or Optimism?

Bob Woodward asserts that the strategy used by the Bush Administration in answering to the American people about the status of both the military situation and political stability of Iraq was denial.[24] Woodward goes on to emphasize that by using this denial strategy, President Bush was not telling the American public "the truth about what Iraq had become."[25] Woodward was wrong. He mistakes the President's optimism for denial.

Woodward uses several examples throughout the book to illustrate his claim that the Bush administration was in denial about the lack of military and political progress being made in post war Iraq.[26] First, he cites a meeting between the President and Lieutenant General (LTG) (Ret.) Jay Garner in which LTG (Ret.) Garner failed to tell the President of the mistakes[27] that occurred in Iraq.[28] Woodward states:

> It was only one example of a visitor to the Oval Office not telling the president the whole story or the truth. Likewise, in these moments where Bush had someone from the field there in the chair beside him, he did not press, did not try to open the door himself and ask what the visitor had seen and thought. The whole atmosphere too often resembled a royal court, with Cheney and Rice in attendance, some upbeat stories, exaggerated good news, and a good time had by all.[29]

Secondly, Woodward cites Vice President Dick Cheney's interview on CNN's *Larry King Live*. The Vice President stated: "I think they're in the last throes, if you will, of the insurgency."[30] Lastly, the author cites his personal interview with President Bush on 11 December 2003, in which the President wanted to qualify a yes or no answer concerning whether U.S. forces found any weapons of mass destruction (WMD) in Iraq.[31]

These examples and others in the book are not denial at all. Rather, they are examples of optimism by an administration motivating the nation to stay the course until a successful solution can be achieved in Iraq. History has shown that when a nation loses the support of its people it can lose an otherwise successful war.[32] According to Former Secretary of State Henry Kissinger, a routine advisor to President Bush,[33] having seen the population withdraw their support during Vietnam, and watching that same scenario unfold with the conflict in Iraq, caused him to write in 2005, "Victory over the insurgency is the only meaningful exit strategy."[34] In order for President Bush to achieve victory in Iraq, he needed to ensure that the public

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[24] *Id*. at 491.

[25] *Id*.

[26] *See id*. at 226, 397, 488–89.

[27] Lieutenant General (Ret.) Garner felt that Bremer had made three major mistakes in Iraq: de-Baathification, disbanding of the army, and the dumping of the Iraqi governing group. *Id*. at 224.

[28] *Id*. at 226.

[29] *Id*.

[30] *Id*. at 397 (quoting Interview by Larry King with Dick Cheney, Vice President of the United States, in Atlanta, Ga. (May 30, 2005)). However, according to the author, "[t]he overall insurgent attacks in April had been about 1,700 and 52 Americans dead. In May, the attacks went up to 2,000, and 82 Americans had died." *Id*. at 397–98.

[31] *Id*. at 488–89. Woodward states, "[The President's] unwillingness to acknowledge that no WMD had been found was making him less the voice of realism." *Id*. at 489.

[32] "In his writing, speeches and private comments, Kissinger claimed that the United States had essentially won the war in 1972, only to lose it because of weakened resolve by the public and Congress." *Id*. at 407.

[33] *Id*. at 406–07.

[34] *Id*. at 408 (quoting Henry Kissinger, *Lessons for an Exit Strategy*, WASH. POST, Aug. 12, 2005).

and Congress didn't lose their resolve for completing the mission.[35] Contrary to Woodward's belief, President Bush was not in denial; rather, he was being optimistic in the hope of keeping the interest of the American people.

Despite Woodward's assertions, President Bush was well aware of the cost of America's involvement in Iraq. President Bush visited wounded Soldiers from Operation Iraqi Freedom thirty-four times.[36] In addition, President Bush knew the number of troops who had been killed in Iraq.[37] Clearly, the President was not in denial.

Woodward also claims that, "with all Bush's upbeat talk and optimism, he had not told the American public the truth about what Iraq had become."[38] On the contrary, with media embedded with the troops, the American public had enormous access to what was going on in Iraq.[39] Woodward then contradicts himself by acknowledging the efforts of the thousands of reporters in Iraq, helping to bring the truth to the American people.[40] The American public was learning the truth from the media; President Bush was just trying to maintain the nation's motivation to help ensure victory in Iraq. Without the President's optimism, the American people may have lost their interest in Iraq; similar to how the American people and Congress lost their interest in Vietnam.[41]

B. Awkward Format

Another issue with Woodward's book is the awkward format.[42] *State of Denial* reads more like a journal than a completed work.[43] The method of using a daily chronicle of events is awkward for the reader to follow because when a chapter is completed, the topic discussed during that chapter is often times left unresolved. That same topic may then be revisited several times in subsequent chapters, awkwardly slipped in between other substantive topics.

A perfect example of this is the way Woodward treats the United States' search for WMD.[44] The allegations of Saddam Hussein's WMD was a major reason behind the United States decision to enter the War on Terror in Iraq.[45] The topic of WMD certainly deserves its own chapter; however, Woodward only mentions WMD sporadically throughout the book.[46] For instance, on page 92, Woodward introduces Major General (MG) James "Spider" Marks, the intelligence officer responsible for the search of WMD in Iraq.[47] Woodward continues to discuss MG Mark's search for WMD for the next twelve pages, despite the fact that a new chapter began on page 97.[48] Woodward then jumps to a new topic and begins discussing the concerns that Steve Herbits, a consultant to Secretary Rumsfeld, had with the post-Iraq planning.[49] The topic then switches

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[35] *Id*. at 435 (citing President George W. Bush, Address to the Nation on Iraq and the War on Terror (Dec. 18, 2005)) (transcript available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd26de05_txt-10).

[36] *Id*. at 437.

[37] During a speech President Bush made in Philadelphia on 12 December 2005, the President responded to a question concerning the number of lives lost by saying that, "we've lost about 2,140 of our own troops in Iraq." *Id*. at 431 (quoting President George W. Bush, Remarks to the World Affairs Council. (Dec. 12, 2005)) (transcript available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd19de05_txt-5).

[38] *Id*. at 491.

[39] Message, 101900Z Feb 03, Dep't of Defense, subject: Public Affairs Guidance (PAG) on Embedding Media During Possible Future Operations/Deployments/in the U.S. Central Commands (CENTCOM) Area of Responsibility (AOR), *available at* http://www.defenselink.mil/news/Feb2003/d20030228pag.pdf. For example, Judith Miller, a reporter for the *New York Times*, was embedded with the Exploitation Task Force (XTF), a unit charged with the search for WMD. WOODWARD, *supra* note 1, at 147.

[40] *Id*. at 523.

[41] *Id*. at 407.

[42] *See* Walter Shapiro, "*State of Denial*," Salon.com, http://www.salon.com/books/review/2006/10/03/woodward/print.html, Oct. 3, 2006 (reviewing WOODWARD, *supra* note 1). The author warns that "readers must pan their own gold." *Id*.

[43] *See* WOODWARD, *supra* note 1.

[44] *See id*. at 90, 92, 93, 98–99, 132, 159–60, 165.

[45] *Id*. at 97.

[46] *See id*. at 90–132.

[47] *Id*. at 92.

[48] *Id*. at 92–104.

[49] *Id*. at 103. Steve Herbits concern was that due to interagency squabbling the planning for what to do with Iraq after the invasion was not progressing smoothly. Herbits felt that Secretary Rumsfeld should step in to get the planning process back on track. *Id*. at 104.

in mid-chapter to General Jones's disinterest in interviewing for the job of CJCS.[50] Finally, the subject jumps back to postwar planning.[51] The subject of WMD reemerges on page 115, where LTG Abizaid asked MG Marks what he thought about the WMD sites.[52] Woodward's style of jumping between topics to maintain the chronological order, leaves the reader uncertain about the finality of any particular topic.

C. The Reliability of Some Statements is Questionable

The last issue with *State of Denial* is the reliability of some of the statements made by sources that the author used or by the author himself. The recollection of word for word conversations and detailed thoughts, months after an interview took place, is questionable at best. For example, Woodward interviewed LTG (Ret.) Garner regarding conversations that he had with Robin Rachel and Paul Bremer back in 2003.[53] The interview occurred on 16 October 2005, more than two years since LTG (Ret.) Garner had the conversations, and yet he claims to remember details with stark clarity.[54] Remembering the essence of a conversation two years after the fact, purely from memory, is one thing, but remembering a conversation word for word is something very different.

In addition Woodward makes statements that he does not support with evidence. One such example is Woodward's discussion of Congressman Jack Murtha's emotional plea on the House floor during his attempt to bring U.S. troops home from Iraq.[55] Woodward states, "informed military officers knew he was speaking for many more than himself,"[56] yet he fails to name any of the said military officers. The lack of evidence to support this statement leads the reader to question the credibility or reliability of the assertion itself.

IV. Conclusion

Bob Woodward's book, *State of Denial: Bush at War, Part III*, has a lot to offer readers.[57] This interesting book provides the reader an inside look into the Bush Administration. It also provides a case study for unity of command and reveals the personal thoughts of some of the military leadership regarding the joint staff and its effectiveness. However, the book does have its weaknesses. First, Woodward misinterprets President Bush's optimism for denial. Secondly, the journalistic format is awkward. Lastly, the credibility of some of the assertions is questionable. Readers should be able to look beyond the awkward formatting and should also be able to decide for themselves what they chose to believe as fact, pure speculation, or self-serving inflation of the facts.

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[50] *Id.*

[51] *Id.* at 105.

[52] *Id.* at 115.

[53] *See id.* at 193–94, 200–01 (quoting Interview with LTG (Ret.) Jay Garner, in Orlando, Fl. (Oct. 16, 2005)).

[54] *Id.* at 225.

[55] *Id.* at 423–24.

[56] *Id.* at 424.

[57] WOODWARD, *supra* note 1.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	176th JAOBC/BOLC III (Ph 2)	18 Jul – 1 Oct 08
5-27-C20	177th JAOBC/BOLC III (Ph 2)	7 Nov 08 – 4 Feb 09
5-27-C20	178th JAOBC/BOLC III (Ph 2)	20 Feb – 6 May 09
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	204th Senior Officer Legal Orientation Course	20 – 24 Oct 08
5F-F1	205th Senior Officer Legal Orientation Course	26 – 30 Jan 09
5F-F1	206th Senior Officer Legal Orientation Course	23 – 27 Mar 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F3	15th RC General Officer Legal Orientation	11 – 13 Mar 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09
5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09

5F-F55	2009 JAOAC (Ph 2)	5 – 16 Jan 09
5F-JAG	2008 JAG Annual CLE Workshop	6 – 10 Oct 09
NCO ACADEMY COURSES		
5F-F58	27D Command Paralegal Course	2 – 6 Feb 09
600-BNCOC	1st BNCOC Common Core (Ph 1)	6 – 27 Oct 08
600-BNCOC	2d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	3d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	4th BNCOC Common Core (Ph 1)	9 – 27 Mar 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 26 Sep 08
512-27D30	1st Paralegal Specialist BNCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	1 Apr – 5 May 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	5th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 26 Sep 08
512-27D40	1st Paralegal Specialist ANCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr – 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
WARRANT OFFICER COURSES		
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
7A-270A3	9th Senior Warrant Officer Symposium	2 – 6 Feb 09
ENLISTED COURSES		
512-27D/20/30	20th Law for Paralegal Course	23 – 27 Mar 09
512-27D-BCT	27D BCT NCOIC/Chief Paralegal NCO Course	20 – 24 Apr 09
512-27D/DCSP	18th Senior Paralegal Course	15 – 19 Jun 09
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC5	28th Court Reporter Course	26 Jan – 27 Mar 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	8th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC7	10th Redictation Course	5 – 16 Jan 09
512-27DC7	11th Redictation Course	30 Mar – 10 Apr 09

ADMINISTRATIVE AND CIVIL LAW		
5F-F202	7th Ethics Counselors Course	13 – 17 Apr 09
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F23	63d Legal Assistance Course	27 – 31 Oct 08
5F-F23	64th Legal Assistance Course	30 Mar – 3 Apr 09
5F-F23E	2008 USAREUR Legal Assistance CLE	3 – 7 Nov 08
5F-F24	33d Administrative Law for Installations Course	16 – 20 Mar 09
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F24E	2009 USAREUR Administrative Law CLE	14 – 18 Sep 09
5F-F26E	2008 USAREUR Claims Course	20 – 24 Oct 08
5F-F28	2008 Income Tax Law Course	8 – 12 Dec 08
5F-F28E	2008 USAREUR Tax CLE Course	1 – 5 Dec 08
5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F28P	2009 PACOM Tax CLE	6 – 9 Jan 09
CONTRACT AND FISCAL LAW		
5F-F10	161st Contract Attorneys Course	23 Feb – 3 Mar 09
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F103	9th Advanced Contract Law Course	16 – 20 Mar 09
5F-F11	2008 Government Contract Law Symposium	2 – 5 Dec 08
5F-F12	79th Fiscal Law Course	20 – 24 Oct 08
5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-F13	5th Operational Contracting Course	4 – 6 Mar 09
5F-F14	27th Comptrollers Accreditation Fiscal Law Course	13 – 16 Jan 09
5F-F15E	2009 USAREUR Contract/Fiscal Law Course	2 – 6 Feb 09
8F-DL12	1st Distance Learning Fiscal Law Course	19 – 22 May 09
CRIMINAL LAW		
5F-F301	13th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	14th Military Justice Managers Course	25 – 29 Aug 08
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09

5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	30th Criminal Law Advocacy Course	15 – 26 Sep 08
5F-F34	31st Criminal Law Advocacy Course	2 – 13 Feb 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F35	32d Criminal Law New Developments Course	3 – 6 Nov 08
5F-F35E	2009 USAREUR Criminal Law CLE	12 – 16 Jan 09
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F45	8th Domestic Operational Law Course	27 – 31 Oct 08
5F-F47	51st Operational Law Course	23 Feb – 6 Mar 09
5F-F47	52d Operational Law Course	27 Jul – 7 Aug 09
5F-F47E	2008 USAREUR Operational Law CLE	9 – 12 Sep 08
5F-F47E	2009 USAREUR Operational Law CLE	27 Apr – 1 May 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	14 Oct – 12 Dec 08 26 Jan – 27 Mar 09 26 May – 24 Jul 09 3 Aug – 2 Oct 09
0258	Senior Officer (070) Senior Officer (010) (Newport) Senior Officer (020) (Newport) Senior Officer (030) (Newport) Senior Officer (040) (Newport) Senior Officer (050) (Newport) Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	22 – 26 Sep 08 (Newport) 20 – 24 Oct 08 (Newport) 26 – 30 Jan 09 (Newport) 9 – 13 Mar 09 (Newport) 4 – 8 May 09 (Newport) 15 – 19 Jun 09 (Newport) 27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)
2622	Senior Office (Fleet) (010) Senior Office (Fleet) (020) Senior Office (Fleet) (030) Senior Office (Fleet) (040) Senior Office (Fleet) (050)	3 – 7 Nov 08 (Pensacola) 12 – 16 Jan 09 (Pensacola) 2 – 6 Mar 09 (Pensacola) 23 – 27 Mar 09 (Pensacola) 27 Apr – 1 May 09 (Pensacola)

	Senior Office (Fleet) (060) Senior Office (Fleet) (070) Senior Office (Fleet) (080) Senior Office (Fleet) (090) Senior Office (Fleet) (100) Senior Office (Fleet) (110)	27 Apr – 1 May 09 (Naples, Italy) 8 – 12 Jun 09 (Pensacola) 15 – 19 Jun 09 (Quantico) 22 – 26 Jun 09 (Camp Lejeune) 27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)
BOLT	BOLT (010) BOLT (010) BOLT (020) BOLT (020) BOLT (030) BOLT (030) BOLT (040) BOLT (040)	6 – 9 Oct 08 (USN) 6 – 9 Oct 08 (USMC) 15 – 19 Dec 08 (USN) 15 – 19 Dec 08 (USMC) 30 Mar – 3 Apr 09 (USMC) 30 Mar – 3 Apr 09 (USN) 27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	14 – 15 Feb 09 (Yokosuka) 27 – 28 Apr 09 (Naples, Italy)
961F	Coast Guard Judge Advocate Course (010)	6 – 10 Oct 08
900B	Reserve Lawyer Course (020) Reserve Lawyer Course (010) Reserve Lawyer Course (020)	22 – 26 Sep 08 22 – 26 Jun 09 21 – 25 Sep 09
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	11 – 22 May 09 20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
4046	SJA Legalman (010) SJA Legalman (020)	23 Feb – 6 Mar 09 (San Diego) 11 – 22 May 09 (Norfolk)
4048	Estate Planning (010)	31 Aug – 4 Sep 09
627S	Senior Enlisted Leadership Course (Fleet) (010) Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090 Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	12 – 14 Nov 08 (Norfolk) 12 – 14 Nov 08 (San Diego) 12 – 14 Jan 09 (Mayport) 2 – 4 Feb 09 (Okinawa) 9 – 11 Feb 09 (Yokosuka) 17 – 19 Feb 09 (Norfolk) 17 – 19 Mar 09 (San Diego) 23 – 25 Mar 09 (Norfolk) 13 – 15 Apr 09 (Bremerton) 27 – 29 Apr 09 (Naples) 26 – 28 May 09 (Norfolk) 26 – 28 May 09 (San Diego) 30 Jun – 2 Jul 09 (San Diego) 10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (020) Law of Naval Operations (010)	15 – 19 Sep 08 14 – 18 Sep 09

748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09
748K	USMC Trial Advocacy Training (040) USMC Trial Advocacy Training (010) USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	15 – 19 Sep 08 (San Diego) 20 – 24 Oct 08 (Camp Lejeune) 11 – 15 May (Okinawa, Japan) 18 – 22 May 09 (Pearl Harbor) 14 – 18 Sep 09 (San Diego)
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	23 – 27 Mar 09 20 – 24 Apr 09
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
846M	Reserve Legalman Course (Ph III) (010)	4 – 15 May 09
850V	Law of Military Operations (010)	1 – 12 Jun 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
961D	Military Law Update Workshop (010) (Officer) Military Law Update Workshop (020) (Officer)	TBD TBD
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
961J	Defending Complex Cases (010)	11 – 15 May 09
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	20 – 24 Oct 08 (Mayport) 6 – 10 Apr 09 (San Diego)
525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	29 Sep – 12 Dec 08 12 Jan – 27 Mar 09 11 May – 24 Jul 09
03TP	Prosecution Trial Enhancement Training (010)	TBD
049N	Reserve Legalman Course (Ph I) (010)	6 – 17 Apr 09
056L	Reserve Legalman Course (Ph II) (010)	20 Apr – 1 May 09
2205	Defense Trial Enhancement (010)	TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)

5764	LN/Legal Specialist Mid-Career Course (010) LN/Legal Specialist Mid-Career Course (020)	14 – 24 Oct 08 4 – 15 May 09
7485	Classified Info Litigtion Course (010)	5 – 7 May 09 (Andrews AFB)
7487	Family Law/Consumer Law (010)	6 – 10 Apr 09

7878	Legal Assistance Paralegal Course (010)	6 – 11 Apr 09
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 09 6 – 9 Apr 09 6 – 9 Jul 09
NA	Legal Specialist Course (010) Legal Specialist Course (020) Legal Specialist Course (030) Legal Specialist Course (040)	12 Sep – 14 Nov 08 5 Jan – 5 Mar 09 30 Mar – 29 May 09 26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (010) Speech Recognition Court Reporter (020) Speech Recognition Court Reporter (030)	27 Aug – 6 Nov 08 5 Jan – 3 Apr 09 25 Aug – 31 Oct 09
NA	Leadership Training Symposium (010)	27 – 31 Oct 08 (Washington, DC)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (080) Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	8 – 26 Sep 08 20 Oct – 7 Nov 08 1 – 19 Dec 08 26 Jan –13 Feb 09 2 – 20 Mar 09 30 Mar – 17 Apr 09 27 Apr – 15 May 09 1 – 19 Jun 09 13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (070) Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050 Legal Clerk Course (060) Legal Clerk Course (070))	8 – 19 Sep 08 20 – 31 Oct 08 1 – 12 Dec 08 26 Jan – 6 Feb 09 2 – 13 Mar 09 20 Apr – 1 May 09 13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	17 – 21 Nov 08 12 – 16 Jan 09 23 – 27 Feb 09 23 – 27 Mar 09 18 – 22 May 09 10 – 14 Aug 09 14 – 18 Sep 09
4046	Military Justice Course for Staff Judge Advocate/ Convening Authority/Shipboard Legalmen	TBD

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (080) Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	8 – 26 Sep 08 20 Oct – 7 Nov 08 1 – 19 Dec 08 5 – 23 Jan 09 23 Feb – 13 Mar 09 4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (080) Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	8 – 18 Sep 08 14 – 24 Oct 08 1 – 12 Dec 08 5 – 16 Jan 09 30 Mar – 10 Apr 09 4 – 15 May 09 8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	6 – 10 Oct 08 (San Diego) 2 – 6 Feb 09 (Okinawa) 9 – 13 Feb 09 (Yokosuka) 30 Mar – 3 Apr 09 (San Diego) 13 – 17 Apr 09 (Bremerton) 27 Apr – 1 May 09 (San Diego) 1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)
NA	Military Justice Course for Staff Judge Advocate/ Convening Authority Shipboard Legalmen	TBD

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08
Area Defense Counsel Orientation Course, Class 09-A	6 – 10 Oct 08
Defense Paralegal Orientation Course, Class 09-A	6 – 10 Oct 08
Judge Advocate Staff Officer Course, Class 09-A	6 – 12 Oct 08

Paralegal Apprentice Course, Class 09-01	7 Oct – 20 Nov 08
Paralegal Craftsman Course, Class 09-01	14 Oct – 20 Nov 08
Reserve Forces Judge Advocate Course, Class 09-A	25 – 26 Oct 08
Advanced Environmental Law Course, Class 09-A (Off-Site, Wash DC)	27 – 29 Oct 08
Federal Employee Labor Law Course, Class 09-A	8 – 12 Dec 08
Deployed Fiscal Law & Contingency Contracting Course, Class 09-A	15 – 18 Dec 08
Trial & Defense Advocacy Course, Class 09-A	5 – 16 Jan 09
Paralegal Apprentice Course, Class 09-02	6 Jan – 19 Feb 09
Air National Guard Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Air Force Reserve Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Advanced Trial Advocacy Course, Class 09-A	26 – 30 Jan 09
Interservice Military Judges Seminar, Class 09-A	27 – 30 Jan 09
Pacific Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	2 – 5 Feb 09
Homeland Defense/Homeland Security Course, Class 09-A	2 – 6 Feb 09
Legal & Administrative Investigations Course, Class 09-A	9 – 13 Feb 09
European Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	17 – 20 Feb 09
Judge Advocate Staff Officer Course, Class 09-B	17 Feb – 17 Apr 09
Paralegal Craftsman Course, Class 09-02	24 Feb – 1 Apr 09
Paralegal Apprentice Course, Class 09-03	3 Mar – 14 Apr 09
Area Defense Counsel Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Defense Paralegal Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Environmental Law Course, Class 09-A	20 – 24 Apr 09
Military Justice Administration Course, Class 09-A	27 Apr – 1 May 09
Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Reserve Forces Judge Advocate Course, Class 09-B	2 – 3 May 09
Advanced Labor & Employment Law Course, Class 09-A	4 – 8 May 09
CONUS Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	11 – 15 May 09
Operations Law Course, Class 09-A	11 – 21 May 09
Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09

Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:
American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA:
American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL:
Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA:
American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI:
American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

ASLM:
American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227

LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA:	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 ((703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421

TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at https://jag.learn.army.mil. The new course is expected to be open for registration on 1 April 2008.

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University. The new course is expected to be open for registration on 1 April 2008. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC resident phase. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to Judge Advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the DTIC. An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB)

Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. TJAGSA Legal Technology Management Office (LTMO)

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5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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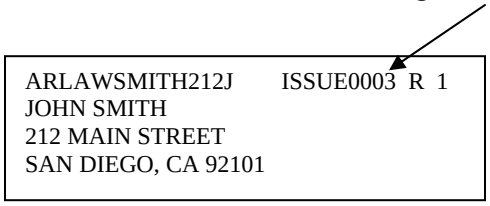

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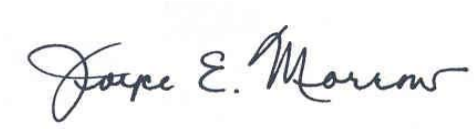

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