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New Ratios for Scoring Electrodermal Responses[1]

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Abstract

The traditional method of analyzing the electrodermal channel is to gauge the response from the relevant question to that of the comparison question, and assign scores based on their relative magnitudes. In most 7-position scoring systems, threshold ratios of 2:1, 3:1 and 4:1 are used for the assignment of scores +/-1, +/-2, and +/-3, respectively. Based on earlier research, it was suspected that these ratios were too conservative, and that lower ratios might be used to extract additional diagnostic value from the electrodermal channel that was not captured by the traditional ratios. In two conditions, one automated and the other manual, the scores produced by the traditional ratios were compared to those from a new ratio scheme of 1.25:1, 2:1 and 3:1. In both conditions the average scores of the deceptive and nondeceptive cases were further from each other with the new threshold ratios than those produced by the traditional threshold ratios, suggesting that the new ratios captured more diagnostic information than the traditional ratios. However, the manual scoring with the new ratios showed a smaller improvement than expected. Implications are discussed.

The introduction of numerical scoring has been called a major improvement in the analysis of polygraph data over the global approaches in common practice before the 1960s (Bell, Raskin, Honts, & Kircher, 1999). The first numerical scoring system was published by Lykken (1959) for the Concealed Information Test, followed shortly thereafter by Cleve Backster's (1962) 7-position scoring system for comparison question tests (CQT). Backster's 7-position scoring system became the basis for all subsequent numerical analysis systems except rank ordering (Gordon & Cochetti, 1987; Honts & Driscoll, 1987), and 7-position scoring is the prevailing method of chart interpretation in the field today. Variations of Backster's method include the DoDPI (Swinford, 1999) and Utah (Bell, Raskin, Honts, & Kircher, 1999) scoring systems.

Many aspects of Backster's scoring system have been adopted without alteration in the variations of 7-position scoring. Among these unchanged elements are the ratios used in the scoring of the electrodermal channel. Numerical evaluation of the electrodermal channel is performed by comparing the relative amplitudes of phasic responses to relevant and comparison questions. Scores are assigned by comparing the ratio of the phasic responses between relevant and comparison questions of interest.

According to the Backster method, when the electrodermal response (EDR) to one question is twice as large as the response to the other question, the score would be either a +1 or -1, depending on which of the two questions elicited the larger reaction. In the same vein, if the response were three times as large, a +2 or -2 would be assigned, and a +3 or -3 would be given if the proportion were 4:1. If the ratio is less than 2:1, the score is 0. These ratios, 2:1, 3:1, and 4:1 are the basis for EDR scoring for all 7-position scoring systems, with few exceptions.

Two such exceptions are taught by the federal government: "Bigger is Better Concept" and the "Something versus Nothing Concept" (DoDPI Test Data Analysis, 2005). The Bigger is Better Concept addresses instances where the amplitude ratio is less than 2:1. According to this rule, any visually perceptible difference is sufficient to assign a value of +/- 1, even if it

[1]We are grateful to Rose Swinford for managing the data. This is one in a series of articles under the heading *Best Practices*. The opinions expressed in this paper are those of the authors, and do not necessarily represent those of the US Government, Department of Defense, or the Montgomery County (Texas) Sheriff's Office. Comments or reprint requests should be sent via e-mail to dkrapohl@aol.com.

falls below the 2:1 threshold ratio. The "Something versus Nothing Concept" addresses assigning values when one question is devoid of response. When such instances occur, if the question with reaction has an amplitude of between 2 and 3 chart divisions a value of +/- 2 is assigned. If the question with reaction has an amplitude of at least 3 chart divisions, a value of +/- 3 is assigned. This rule assumes the use of standard ¼" chart divisions.

There is no record for the manner in which the traditional EDR ratios were originally developed, nor the rationale for the variations, though unquestionably standardized ratios have been found to be a useful heuristic that improves inter-scorer reliability. However useful they may be, subsequent research in the development of the Objective Scoring System (OSS) has shown the traditional ratios to be less than optimum (Krapohl & McManus, 1999), and perhaps more conservative than they need to be. The OSS ratios were calculated from 300 field cases, and they survived two cross-validations. When directly compared to human scorers, the OSS threshold ratios were lower than the traditional ratios, and had more diagnostic power.

Therefore, it would seem a straightforward issue to adopt the OSS ratios for field use. However, the OSS ratios have a fatal weakness that keeps them from widespread application in the field. Unlike the simple whole numbers of the traditional system, OSS ratios are both difficult to memorize and challenging to calculate. For example, when a assigning negative value to a relevant questions in the electrodermal channel, the threshold ratios of the OSS are 1.21:1, 1.61:1, and 2.45:1, in contrast to the more elegant 2:1, 3:1 and 4:1 of the traditional method. Though the OSS has been adapted to algorithms in some of the computer polygraphs, the OSS ratios are not commonly used in manual scoring for obvious reasons.

From the available evidence it is reasonable to conclude that there are more effective EDR ratios than those used in common practice. Based on the OSS data, it would also appear that the better ratios are lower than the ones currently preferred in the 7-position scoring systems. The constraining factor in the move toward optimized ratios is whether the alternate ratios are easy to memorize and use by human scorers. Clearly polygraph examiners will be reluctant to use calipers and calculators to conduct routine manual scoring, even if the net effect is better accuracy. Therefore, it would be important to suggest that any new ratios be uncomplicated, easy to recall, and simple to calculate.

In the compromise between optimization and simplicity, we explored the use of the ratios 1.25:1, 2:1, and 3:1, and compared them against the 2:1, 3:1 and 4:1 standard. The new ratios are lower than the traditional ratios, in the direction of the OSS ratios, but still retain most of the simplicity of the traditional ratios. We conducted two comparison tests of the new and traditional ratios: one where the measurements were automated, and the other where a human scorer evaluated another data set. The expected finding was that the new ratios would provide more diagnostic information than the traditional ratios. The metric of this finding would be the movement of the average EDR scores more in the correct direction using new ratios (deceptive cases with more negative scores, and truthful cases with more positive scores). Moreover, if more diagnostic information is extracted from the electrodermal channel, the inclusion of this information should improve decision accuracy and reduce the proportion of inconclusive results.

Method 1: Automated Condition

Data Source

In the development of the OSS, 150 truthful and 150 deceptive cases were used. All cases were conducted with the Federal Zone Comparison Technique. Each case had three charts and three relevant questions. The EDR measurements for the relevant and comparison questions were used to test the two ratio systems. Measurements of the EDR amplitudes were performed automatically by a software package (Extract version 3.0, Applied Physics Laboratory). There were 1350 ratios each for the samples of deceptive and nondeceptive cases, for a total of 2700 ratios. The ratios were calculated using formulae

Table 1. Average EDR scores and (SEM) by case for deceptive and nondeceptive cases with the traditional and new ratio systems in the automated condition.

	Traditional	New	Difference
Deceptive	-5.25 (0.00)	-8.67 (0.00)	3.42
Nondeceptive	2.82 (0.00)	4.97 (0.00)	2.15
Difference	8.07	13.64	5.57

written by the authors in Microsoft Excel version 10.65.

Procedure

Scores were based on ratios of the EDR amplitudes of the relevant and comparison questions. The ratios were calculated by dividing the EDR amplitude of the larger phasic response by that of the smaller phasic response. The traditional threshold ratios of 2:1, 3:1, and 4:1 were used with the 2700 ratios for scores of +/-1, +/-2, and +/-3, respectively. Next the same data were tested with the new threshold ratios of 1.25:1, 2:1 and 3:1 for the identical score assignment. Alpha was set at .05 for all statistics.

Results

Refer to Table 1. The average case score for the electrodermal channel where traditional ratios were used with deceptive cases was -5.25, as compared to -8.67 when the new ratios were imposed. This difference was found to be significant [$t(149) = 29.47$, $p < .05$]. For traditional ratios and truthful cases the average score was +2.82, versus the +4.97 for the new ratios. This difference was also significant [$t(149) = 14.04$, $p < .05$]. On average, a deceptive case obtained three more points in the correct direction with the new ratios than with the traditional ratios. Two points in the correct direction were garnered on average for truthful cases with the new ratios. The new ratios provided an average of five additional points of separation between truthful and deceptive cases.

Discussion

The new ratios extracted additional diagnostic information from the electrodermal channel as compared to the traditional ratios. The benefit was somewhat larger for deceptive cases than for truthful cases, not an unexpected finding given the significant body of evidence showing the stronger reactions among deceptive examinees to relevant questions than the corresponding reactions of truthful examinees to comparison questions. The efficacy of the new ratios was demonstrated for the automated conditions. We next evaluated whether there was a similar effect for manual scoring.

Method 2: Manual Condition

Data Source

One hundred cases had been drawn from a database of confirmed cases, half of them deceptive cases, to be analyzed by polygraph examiners undergoing competency certification under the Marin Protocol (ASTM, 2005). All cases were conducted with the Federal Zone Comparison Technique. One Marin certification candidate who had successfully met the Marin standard agreed to rescore the electrodermal channel with the new ratios of 1.25:1, 2:1 and 3:1. This scorer had used the federal version of the traditional ratios in his original scoring, which included

Table 2. Average EDR scores and (SEM) by case for deceptive and nondeceptive cases with the traditional and new ratio systems in the manual condition.

	Traditional	New	Difference
Deceptive	-5.74 (0.77)	-6.68 (0.94)	0.94
Nondeceptive	4.08 (0.85)	5.00 (1.03)	0.92
Difference	9.82	11.68	1.86

the concepts of "Bigger is Better," and "Something versus Nothing. He was blind to ground truth and to his original scores that he had submitted six weeks previously. There were 100 cases with three relevant questions per chart, and three charts per case, for a total of 900 ratios.

Procedure

As with the automated condition, scores were assigned according to ratios. EDR scores from the traditional threshold ratios of 2:1, 3:1, and 4:1 were compared to the EDR scores that resulted from the use of the 1.25:1, 2:1 and 3:1 threshold ratios, again using the 7-position scoring system. Alpha was set at .05 for all statistics. Because the expected direction of the effect was that the new ratios would produce scores further from zero than those from the traditional ratios, one-tail *t*-tests were used.

Results

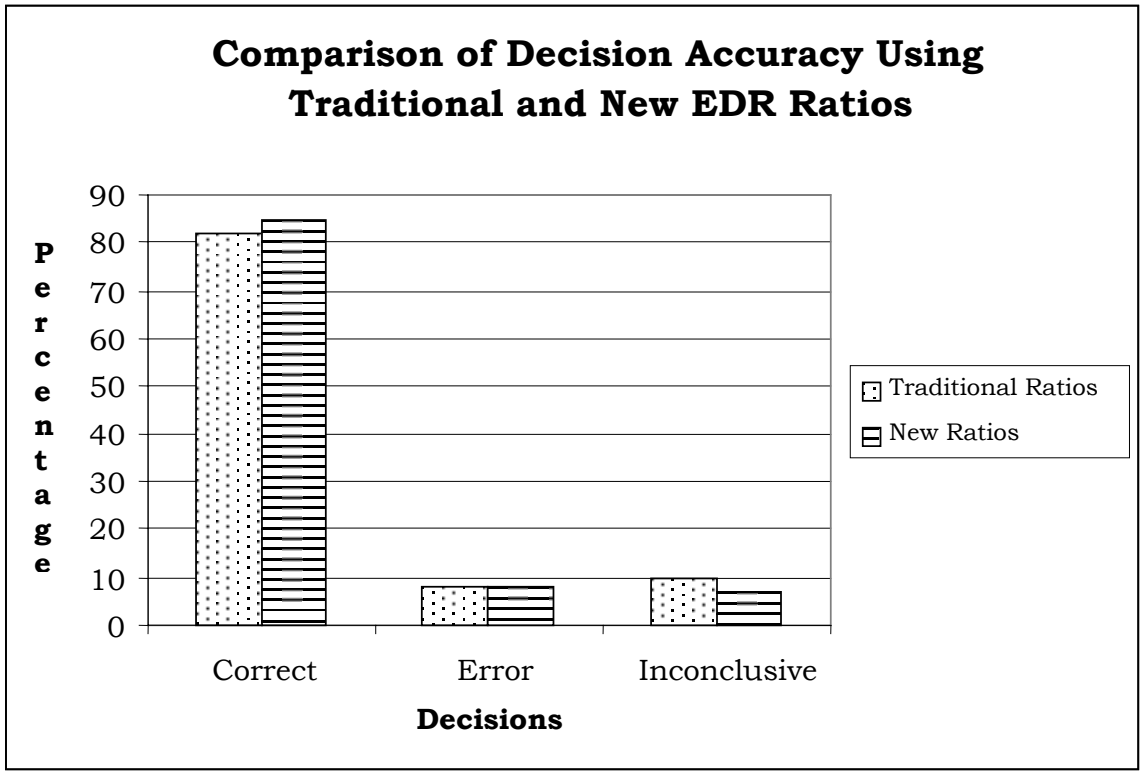
Refer to Table 2. Traditional ratios for the electrodermal channel produced an average score of -5.74 per deceptive case, and the corresponding score for the new ratios was -6.68. As predicted, the use of the new ratios resulted in lower scores for deceptive cases than did the traditional ratios [$t(49) = 1.98$, $p < .05$]. For the nondeceptive cases, the traditional ratios produced an average of +4.08 points, compared to +5.00 for the new ratios. This difference was also significant [$t(49) = 1.83$, $p < .05$]. Both deceptive and nondeceptive cases showed an increase of about one point in the correct direction more than did the traditional ratios, for a total of 1.86 points of separation between deceptive and nondeceptive cases.

The finding that the new ratios added diagnostic information suggested that there may be an improvement in the polygraph decisions if the EDR scores from the new ratios had been used. Using the data from the scorer's Marin Protocol certification cases, the original EDR scores were replaced by the EDR scores that were based on the new ratios. Figure 3 lists the results of both methods. While it would appear that the new ratios improved decision accuracy and reduced inconclusives, the differences from the accuracy produced by traditional ratios were not statistically significant.

Discussion

Consistent with the automated condition, the new EDR ratios moved the average scores from deceptive and nondeceptive cases away from each other. This finding suggests that there is additional diagnostic information in the EDA data that is not captured with the traditional ratios. The effect on polygraph decisions was only incremental and modest, however; the predicted increase in correct decisions and decrease in inconclusive decisions were

Figure 3.



evident but not large enough to be considered statistically significant.

There are two plausible reasons that may acount for the lack of significant effect on decisions. The first is that the new ratios might have only been helpful in instances where scores were already very large. If the new ratios provided a negligible benefit for the smaller scores but a large effect for the already large scores from the traditional ratios, the new system would have little or no value since they would not be helping the cases that actually needed larger scores to avoid being inconclusive. Using averages as we did as a metric for the movement of distributions of deceptive and nondeceptive scores away from one another would be insensitive to such an effect.

A second reason that manual scoring may have had a smaller effect than that of the automated condition was that the manual scorer had used the federal version of the 7-position scoring system. Recall that in the federal system used by the scorer there were two exceptions to the strict 2:1 ratio requirement for a +/-1 score: the concepts of "Bigger is Better" and "Something versus Nothing." As a result, the scorer may have been assigning +/-1 scores using something more closely approximating the new threshold ratio of 1.25:1 than the traditional 2:1. To test this possibility, we conducted a post hoc analysis of the manual scores from the original scoring. It was determined that when +/-1 scores had been assigned in the original scoring, the average score from the rescoring varied by less than 3%, a non-significant difference. In other words, it appeared that the scorer had been using something very similar to the new ratios for +/-1 scores in his original scoring rather than using the 2:1 ratio threshold. Also, +/1 scores were the most frequent of the non-zero scores the scorer had assigned. These two factors may have combined to reduce the magnitude of the effect between the traditional and new ratios.

Summary

Both data sets found that the traditional threshold ratios of 2:1, 3:1 and 4:1 do not effectively use all of the diagnostic

information available in the electrodermal channel. This was not an unexpected finding, based upon earlier research. The new threshold ratios of 1.25:1, 2:1 and 3:1 significantly improved electrodermal scores for both deceptive and nondeceptive cases. Despite the better scores, decision improvement attributed to the new ratios was small, and not statistically significant. The small effect may have been caused by an uneven distribution of large scores, favoring the already-large scores from the traditional ratios. It may have also been the result of the examiner's use of the federal version of the traditional ratios in his original scoring, whereby he had captured some of the additional diagnostic information that otherwise would have been lost by the traditional threshold ratios. This is the first report of the new ratios, and replication is required before any recommendations can be made. Because the beneficial effect of the new ratios was found in both of the present data sets raises the likelihood that it will also be found in future research.

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"Improving the Fighting Position"[1]
A Practitioner's Guide to Operational Law Support to the Interrogation Process[i]

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If there is doubt as to the legality of a proposed form of interrogation not specifically authorized in this manual, the advice of the command judge advocate should be sought before using the method in question.[v]

Introduction

The purpose of this article is to share with military practitioners the product of a recent effort spearheaded by The Judge Advocate General's Legal Center and School (TJAGLCS) to better synchronize training efforts related to legal support of the most visible area of operational law practice in the Global War on Terror (GWOT)—interrogation operations. This article summarizes the actions taken to achieve this objective, as well as a discussion of some fundamental concepts that provide the foundation for future training and legal support activities.

The International and Operational Law Department recently hosted a conference spotlighting many months of hard work by judge advocates (JA) throughout the Judge Advocate General's Corps (the Corps) related to legal support of interrogation operations. The goal of the conference was to bring these parties together to allow them to share their products and exchange ideas and expertise on interrogation operations and intelligence law. The recognized need to have comprehensive and coordinated training packages for the training of interrogators, commanders of units with interrogation or collection missions, human intelligence (HUMINT) collection teams, and the IA population in general drove an ambitious agenda and spirited discussion. Representatives from the Intelligence and Security Command (INSCOM), Office of The Judge Advocate General, International and Operation Law Division (OTJAG ILAW), the U.S. Army Intelligence Center and School (USAIC), Center for Law and Military Operations (CLAMO), the Chairman of the Joint Chiefs' Legal Staff and practitioners fresh from the field shared their collective expertise and recent experiences. The issues, however, are complicated and much hard work is left to be done.

It is not the authors' intent to provide authoritative guidance for dealing with issues related to this area of operational law practice. Indeed, the major motivation behind the efforts summarized below was the recognition that the recent scrutiny of interrogation practice, and the accordant ongoing efforts to review, refine, and publish more comprehensive and effective directives, instructions, doctrine, tactics (techniques), and procedures, has resulted in disparate and sometimes conflicting training resources. This article will not summarize the training package developed as the result of the collective efforts of military practitioners. Instead, it is intended to summarize the efforts to leverage the collective expertise of the Corps to develop an effective and synchronized resource for training both JAs and interrogators, and to discuss some of the cornerstones of this training resource.

[1]The following article is reprinted from The Army Lawyer, Department of the Army Pamphlet 27-100-series: Lieutenant Colonel Paul E. Kantwill, Captain Jon D. Holdaway, Geoffrey S. Corn, "Improving the Fighting Position" A Practitioners Guide to Operational Law Support to the Interrogation Process, Army Law., July 2005, at 12. The opinions and conclusions expressed herein are those of the individual authors, and do not necessarily represent the views of The Judge Advocate General's School, the United States Army, or any other governmental agency.

A Doctrinal "Twilight Zone"

Critical reviews of interrogation efforts in Guantanamo Bay (GTMO), Cuba, Afghanistan, and Iraq have highlighted the many significant challenges faced by personnel participating in intelligence collection and interrogation missions. One of the most fundamental and significant of those challenges still exists—personnel performing these missions often did so in what many believed to be a "doctrinal twilight zone."

This is not to deny that doctrine did and does exist. Clearly a version of *Field Manual 34-52, Intelligence Interrogations,*[vi] was in effect and utilized by personnel in Afghanistan, Iraq, and, initially, at GTMO. However, due to initial confusion regarding the status of al Qaeda and Taliban personnel taken captive in Afghanistan, and a follow-on decision that such personnel were unlawful combatants and, thus, not entitled to prisoner of war (POW) status,[vii] a determination was made that the doctrinal guidance contained in *Field Manual (FM) 34-52* regarding the treatment and interrogation of the individuals detained at GTMO would not apply.[viii] This determination led to an apparent misunderstanding concerning the continued applicability of this doctrine to the ongoing conflict in Afghanistan. The triggering events leading to this confusion unfolded at GTMO.

In the fall of 2002, during interrogations at GTMO, it became apparent that many detainees were capable of offering a greater degree of resistance to established interrogation approaches and techniques than that which had been anticipated. In response to this development, the Director of Intelligence operations for Combined Joint Task Force 170, in charge of interrogation operations, authored a memo stating that, because many of the detainees had shown great resistance to the doctrinally-sanctioned interrogation techniques in *FM 34-52,* the command was seeking approval to employ non-doctrinal counter-resistance procedures.[ix]

The request was then forwarded to the Combined Joint Task Force (CJTF) Staff Judge Advocate (SJA) for a legal review. The CJTF SJA made the following determinations: international law (and therefore the Geneva Conventions) did not apply to the situation,[x] military necessity required more stringent counter-measures, [xi] and the requested counter-measures did not violate applicable federal law.[xii] Also, significantly, the CJTF SJA requested a further legal review of certain categories of the proposed techniques by higher headquarters.[xiii]

The legal review prepared by the CJTF SJA (a seven-page comprehensive document) relied on several significant premises. First, the Geneva Conventions did not apply—the President determined in a 7 February 2002 directive [xiv] that detainees were not enemy prisoners of war.[xv] Despite this, however, the SJA opined that detainees "must be treated humanely and, subject to military necessity, in accordance with the principles of GC."[xvi] Second, the SJA noted that Army *FM 34-52* was based upon the Geneva Conventions and since the detainees were not prisoners of war and the Geneva Conventions did not apply to them, the FM was not binding. [xvii] After a lengthy discussion of many bodies and facets of international law, the SJA determined that "no international body of law directly applies."[xviii] Finally, the CJTF SM considered extensively the application of domestic law, concluding ultimately that "the proposed strategies did not violate applicable federal law."[xix]

Clearly, much of this analysis is subject to dispute. The analysis, for example, provides a debatable interpretation of the applicability of the Convention Against Torture [xx] and the implementing U.S. Torture Statute[xxi] in opining that none of the requested techniques constituted torture or cruel, inhumane, or degrading treatment in violation of these laws. Neither, unfortunately, did the analysis include consideration of what is generally deemed to be the baseline "humane treatment standard" reflected in the provisions of Common Article 3 of the Geneva Conventions.[xxii] The opinion's proposal to immunize interrogators, given that a number of the proposed techniques in issue constituted violations of the UCMJ, was not only unprecedented, but lacked any basis in law. The opinion's reasoning, however, is not the point of this reference. Rather, this historical anecdote is used to illustrate the more significant point—when the doctrinal foundation of interrogation operations—*FM 34-52*—was removed from the equation—interrogators conducting operations

at GTMO were left with a void of guidance that was filled in an ad hoc basis.

Even with the assistance of the *FM 34-52*, there remains a void. Tactics, techniques, and procedures (TTPs), standing operating procedures (SOPs), and other resources that distill doctrine into usable nuggets for those in the field were simply not available. This problem was related primarily to the individuals associated with al Qaeda and detained at GTMO, and was derivative of the overall issue of uncertainty as to the status and accordant standards applicable to these personnel. While the status and standards issue was far less complex with regard to individuals presumptively qualifying as POWs or civilian internees (Cl) in Iraq, the underlying importance of developing and disseminating comprehensive standards and TTPs related to the interrogation of such individuals cannot be overemphasized. Although *FM 34-52* is currently under review, soon to be re-published as *FM 2-22.3*, and is likely to be a more complete and functional document, there remains an apparent need for what might best be described as a "commentary" on the overall issue of interrogation operations conducted within the context of the GWOT.

Consider as proof of this requirement a dynamic cited in many of the investigations of interrogation activities: the informal migration of policies and procedures from one theater to another. The well-documented problem with this migration was that no one-size-fits-all approach could be taken when the status of the detainee in each of those theaters was often dramatically different. Certainly, if interrogators had fully complied with the existing doctrinal guidance, *AR 190-8*[xxiii] and *FM 34-52*[xxiv] the abuses in issue would have probably been averted. In many ways, failure to comprehend the pervasive applicability of these sources of authority, rather than a genuine lack of doctrine, led to the abusive behavior.[xxv] Unfortunately, a comprehensive understanding of applicable standards at the tactical level was lacking, causing well-intentioned persons charged with important missions to seek assistance wherever they could find it. As a result, individuals who had served in Afghanistan and the documents that had been used t/here were exported to GTMO, or vice versa.

Clearly, a more effective understanding of both the interrogation process, and the applicability of authorities related thereto, is required by both interrogation operations specialists and the JAs charged with legal support for these activities. Doctrine plays a vital rote in warfighting and in the many missions that contribute to operational success. Our Army is doctrine-based (*i.e.*, doctrine is the authoritative guide to how forces fight wars and conduct operations).[xxvi] While doctrine reflects a shared vision and serves as the basis for planning operations, training, and leading, it cannot be the end point. To perform their missions effectively, leaders, trainers, and practitioners need TTPs, mission essential tasks lists, and training plans to establish conditions, standards, and training objectives. In short, doctrine must be distilled in a manner that assists practitioners at the lowest tactical levels, enabling practitioners to identify what "right" looks like.

Synchronization Is Critical

All of the factors cited above clarify the requirement that the efforts of all participants in the interrogation mission must be synchronized. Indeed, the United States military has seen the effects resulting from either a lack of guidance or absolute clarity of standards. In this critical transitory time when the training mission continues at many levels involving many players, and many echelons of command continue to debate, draft, and refine doctrine, there can be no greater concern than uniformity and coordination. This is precisely why the International and Operational Law Department thought the school houses and centers most critically involved must adopt a proactive approach to reviewing, and when appropriate, contributing to, training efforts.

Another reason necessitating the involvement of JAs is their role in the legal support process, which may take several forms. The first form is that of a general operational law attorney—in essence, all JAs deployed with or serving their units. Operational law attorneys will be involved in the training of units within their sphere of influence and will assist the commander in his oversight responsibilities. A good example is the Brigade Operational Law Team (BOLT) that supports a divisional military intelligence (MI) battalion.

Sometimes, however, JAs will directly support units tasked with intelligence collection or interrogation missions. These JAs will require specialized training to provide such support. The information provided below is intended to assist all JAs to execute their respective responsibilities.

Command and Control of the Interrogation Process

Judge advocates providing legal support to interrogation operations must understand their client's mission—the interrogation process—and how that mission is executed. The unique nature of the "art" of interrogation makes this understanding essential to providing effective legal advice and effectively executing the legal support process, as this process is unlike any other activity normally associated with operational law tasks. It is the fluid nature of this process, which targets the mind and in which the battle is psychological, that renders it so unique.

Events related to recent U.S. military operations have revealed the danger of failing to identify and disseminate clear and well-defined standards—those derived from either international law or military doctrine—to regulate every approach or method that might pry critical information from detainees. This problem is compounded because what occurs in an interrogation booth causes great concern to national political leaders and the American public. Although the vast majority of interrogators conduct their activities within appropriate bounds, it is still a "dark art" in which misconduct or errors in judgment by a few can have long-lasting implications for future intelligence collection efforts.

Because of these realities, JAs must be prepared to assist interrogators in developing interrogation policy and to provide comprehensive legal support to interrogation operations. Supervising JAs need to provide on-site legal resources to interrogation facilities to ensure that interrogators and senior intelligence leaders have access to timely, competent legal advice. A small number of JAs assigned to interrogation-related units and specializing in the relevant authorities should continue to perform this function. Recent events have highlighted, however, that every operational legal advisor must be familiar with the interrogation process in order to effectively perform the much more common legal support mission.

Traditional interrogations take place in an interrogation facility. These are usually small operations located inside detention facilities. It is critical to note that an interrogation facility is not a detention facility. Doctrinally, the care, feeding, and maintenance of detainees are the responsibility of the capturing unit or, once the detainee is transferred to the first detention facility, the detention facility commander. Detainee questioning takes place within the interrogation facility, utilizing space located within the main detention facility. The physical set up of an interrogation facility will include administrative areas, life-support areas, and interrogation booths. Normally, the interrogation facility is physically separate from detention facility workspaces and is accessible only to a limited number of personnel within the intelligence community.

The following example serves to illustrate the system by which a detention or interrogation facility processes a captured detainee. A detainee is captured during a cordon and search operation based on information provided by his neighbors that he has been building improvised explosive devices (IEDs). Because the shock effect of capture is greatest at the moment of capture, the infantry unit that conducted the operation had been accompanied by an interrogator from its local interrogation facility to assist in the initial detainee questioning. If the capturing unit did not have an interrogator available, a designated Soldier, probably a senior noncommissioned officer, would have conducted the tactical questioning (TQ) of the detainee.[xxvii]

The TQ is not interrogation, but rather an expedient method of questioning conducted by non-interrogators seeking information of immediate value.[xxviii] It is not a method of answering a higher echelon's priority intelligence requirements (PIR), but is intended to provide the operational unit with a method of gathering current battlefield information important to that particular patrolling or raiding unit.[xxix] Rather than formal questioning, TQ occurs more in the form of a conversation

between the tactical unit and the detainee.[xxx] Because this initial questioning can set the stage for further interrogation and exploitation, however, leaders are advised to provide specific guidance for TQ in the operations orders issued for their missions.[xxxi] Currently, in both Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF), only the direct approach (discussed below) may be used in TQ.

Once captured, the detainee is evacuated to the capturing unit's forward operating base in accordance with established timelines. Under most task force and echelon above corps detainee and enlisted prisoner of war (EPW) policies, the detainee would subsequently be evacuated quickly to the brigade detention facility, normally administered by the brigade's military police (MP) unit.[xxxii] The brigade's MI company will conduct the initial interrogation based on the brigade's PIP, usually for a period of twenty-four to forty-eight hours. It should be noted that only trained interrogators interrogate. In the Army, a trained interrogator is a Soldier who holds the military occupational skill, 97E, Human Intelligence Collector. The detainee will then be evacuated to the division detention facility and be similarly processed by the division's MI cadre. In most cases, he will be transferred to an echelon above corps or to a joint interrogation facility. Traditionally, these latter facilities were known as either theater intelligence facilities (TIF) or joint intelligence facilities. Recent joint doctrinal changes to HUMINT collection policies, however, have created the joint interrogation and debriefing centers (JIDC), which are the final holding facilities where long term interrogations take place. Regardless of the nomenclature, this is the location at which deeper level—and inherently, more risk-prone—interrogations are conducted.

The command and control structure of the JIDC can be traced to the old TIF structure, as outlined in *FM 34-52,* but which is now also found in *Joint Publication 2-01*.[xxxiii] Doctrinally, the MDC is "managed" by the joint force's HUMINT staff (known as the HUMINT Operations Center (HOC)),[xxxiv] usually utilizing an O-5 staff officer as the officer-in-charge (OIC), rather than a commander. Manpower for the JIDC is provided by various service intelligence units, which place theft interrogators under the operational control of the JIDC, but which retain command and administrative authority.[xxxv] For instance, in the Army, the corps or theater intelligence brigade commander assigns an interrogation and exploitation battalion commander responsible for exercising administrative control over the JIDC's Soldiers; however, the JIDC OIC would effect the day-to-day management of the interrogators.

Ongoing revisions to joint doctrine will likely result in vesting the JIDC commander with full control, including disciplinary control, over JIDC personnel, to include interrogators. In addition, this will provide the JIDC commander with the full complement of staff officers and command resources necessary to better accomplish the interrogation mission. It is also possible that these revisions will require both the JIDC commander and the detention facility commander to answer to a flag officer joint task force or joint detention operations commander, who will act as the intermediary between the disparate and conflicting interrogation and detention operations being conducted in the joint operational area.

An important variant to this organizational structure is the potential role of civilian contract personnel. Operational legal advisors must be prepared to encounter contract support personnel, performing both analysis and interrogation functions. These personnel will normally be "procured" through the Army service component command responsible for providing administrative control (ADCOM) over Army personnel in the joint operational environment, and, more specifically, by the intelligence staff for that command. As a result, it is probable that the contracting officer's representative for such personnel will be associated with an intelligence staff agency. Regardless of the source of the procurement of this support, however, these contract personnel are subject to the direction and control of the commander responsible for the interrogation operation. Furthermore, pending revisions to Army and Department of Defense (DOD) doctrine will emphasize the obligation of these individuals to fully comply with the law of war and all other applicable law and policy related to interrogation operations.

The JIDC, apart from administrative support, normally consists of two sections: operations and analysis. The interrogation operations section, normally headed by a senior warrant officer and interrogator, is the heart of JIDC activity. The interrogation operations OIC is responsible for overseeing the screening process and the assignment and management of interrogators and their interrogation priorities, effecting liaison with the detention facility guards and other agencies, the approval of interrogation plans, and the general supervision of interrogation collection activities.

Analysts are also becoming more closely associated with the execution of interrogations. Unlike the traditional interrogation practice, when experienced analysts were located in the interrogation facility, but well removed from actual collection activities, analysts, today, are often integral to the execution of interrogations. Much of this shift in practice has resulted from the changing emphasis of intelligence analysis. In past operations, the focus of such analysis has been "order of battle" (OB) development—knowing the enemy's capabilities and location at any given time. In current operations against an asymmetric enemy, OB has given way to "link analysis," the identification- of individuals, networks, terrorist cells, and associations and the determination where these fit into the overall-global terrorism or local insurgency landscape. The immediate analysis of interrogation collection has become critical, as many detainees today possess information related to critical PIRs—such as the locations of IEDs or IED-manufacturing facilities, the location of insurgent cells or theft leadership, or knowledge of ongoing anti-U.S. or anti-coalition operations.

The newest organization to evolve from this analysis enhancement effort is the HUMINT Analysis and Research Center (HARC). Another important development to emerge from this enhanced process is the concept of "tiger teams"—the pairing of interrogators and analysts in the interrogation booth, with the analyst providing real-time support to the interrogator so that information might be culled in a more timely and accurate manner. None of these developments, however, justifies any deviation from the legal and doctrinal detainee treatment requirements, or alters the basic legal support requirement to be performed by JAs.

Finally, experience indicates that, in addition to the regular cadre of staff officers, most JIDCs should be staffed with a legal advisor. Designating a legal advisor to support the MDC is consistent with the concept of METT-TC (mission, enemy, troops, terrain and weather, time available, and civilian considerations) based "tailored" operational legal support described in *FM 27-100*.[xxxvi] The JIDC operations are legally intensive, and the JA is responsible for assisting in the interrogation planning process, effecting liaison with the MP community, and exercising intelligence activities oversight under *AR 381-10*.[xxxvii] The JA might be assigned to the staff of the JTF-detention operations commander and provide legal support to both interrogation and detention operations. Alternatively, he could be specifically assigned to the JIDC and provide legal support in a specific intelligence community context. Currently, there are two JA billets on the JIDC joint manning document in OIF—one Air Force and one Army billet. The Army position is filled by a captain; the Air Force billet has not been staffed.

The Interrogation Process

With an understanding of the command and control of the interrogation process, it is important to understand the interrogation process. For purposes of interrogation execution, any subject of interrogation can be regarded simply as a detainee—even if the detainee actually qualifies for a more specific status under the law of war. When a detainee is transferred to a JTF detention facility, he will be in-processed by the facility's MP personnel. This will include a medical screening and the establishment of an administrative record. The detainee will also undergo an initial intelligence screening. At every echelon, detainees are screened to determine both their level of cooperation and knowledge, as well as who among them might best satisfy the commander's PIR.[xxxviii] Not only is the detainee questioned; anything found on him at the time of capture will be reviewed. This includes "pocket litter", such as photos, identification cards, or letters. These items might later be

used as possible tools in exploiting a particular need of a detainee, or used to build trust or to provide the detainee with an incentive to provide information.

From the moment the detainee is transferred to a facility, he is observed by various facility personnel, to include the facility guards. What the MPs passively observe is noted and may prove to be helpful in building a profile of the detainee that an interrogator can use in formulating an interrogation plan. The use of MPs to observe and note detainee behavior is permissible and encouraged;[xxxix] however, they cannot engage in active intelligence activities.

Once the detainee has been screened, the OIC or senior interrogator will assign an interrogator possessing the commensurate skills dictated by the detainee's profile and the interrogation process will be initiated. This process is a five-phase sequence that enables the interrogator to effectively approach and question the detainee and serves to ensure that built-in protections are utilized. These phases are:

(1) Planning and Preparation Phase;
(2) Approach Phase;
(3) Questioning Phase;
(4) Termination Phase; and,
(5) Reporting Phase.[xl]

In our example, an Army interrogator, *Specialist (SPC) Interrogator,* has been assigned to interrogate a detainee. In the planning and preparation phase, prior to the subject being transferred from the detainee holding area to the interrogation facility, *SPC Interrogator* will obtain the detainee's file and review the capture data noted by the capturing unit, the circumstances surrounding the capture, the pocket litter found on the detainee, and any notes made by previous interrogators at subordinate interrogation facilities. She may talk to the MPs who guard the detainee in order to discuss his behavior and demeanor. She may also contact other intelligence support elements, such as the HARC, the analytical control element, or the information dominance center (IDC), and review information previously collected and data-based. With this in mind, she will then draft her interrogation plan, a document describing her interrogation objective, her observations of the detainee, her primary and alternate approach plans, and the questioning techniques she plans to use.

Once she has designed her plan, she will staff it with the operations OIC or the senior interrogator, who reviews it and authorizes her to proceed.[xli] If the interrogation plan involves any methods or techniques that are questionable, "non-doctrinal," or which require higher-level approval, the operations OIC will prepare the plan to be reviewed and approved by higher echelons and call upon legal support to assist in the planning process or provide legal support during the execution of the plan.

Once the interrogation plan is approved, *SPC Interrogator* will request the MPs to escort the detainee to her interrogation booth, usually a small room with a table and chairs for the detainee, the interrogator, and, possibly, an analyst or an interpreter. Once the detainee is present, the interrogation begins, and the interrogator executes her planned approach.

The approach is the key to a successful interrogation. When the detainee is prepared to talk, the interrogator simply has to listen and to ask appropriate follow-up questions. Judge advocates can easily liken it to the ultimate cross-examination in trial. The challenge is to have the detainee divulge information that he is inclined to withhold. The laws and policies on interrogation proscribe torture and coercive questioning (tactics which will be addressed later in this article); therefore, the approach phase must take into account these boundaries, while still providing the result that the detainee reveals information that he or she is determined to withhold.

The underlying philosophy is to make these approaches both legal and effective. The interrogator must avoid "outer" pressures and, instead, create "internal" pressures that have the effect of manipulating the detainee. For example, an interrogator cannot place the proverbial dagger on the table—which would create fear in the mind of the subject that his refusal to cooperate will result in physical harm.[xlii] The interrogator, however, can certainly exploit the inherent fear associated with the "unknown" in the mind of the detainee. The difference may appear insignificant, but it is enough of a distinction to effect a

differentiation between a legal and an illegal interrogation.

The Army has identified eighteen different ways in which an interrogator may approach an interrogation subject and apply subtle psychological pressure, without crossing over impermissible boundaries such as torture or coercion.[xliii] The interrogator will select one of these approaches, identify it in the interrogation plan, and engage the detainee. Once the detainee is willing to enter into a dialogue, the interrogation moves to the questioning phase, in which the interrogator poses questions seeking specific information.[xliv] Like the move from combat operations to sustainment operations in battle, there is no bright line between the approach and questioning phases, and frequently the process moves back and forth between the two as the subject provides small amounts of information. If the subject ceases to cooperate, the interrogator must re-engage the subject and look for exploitation opportunities that will either reestablish trust or convince the subject to continue providing information. In addition to asking direct questions regarding information the command deems important, the interrogator might also pose "order of battle" questions. He will do this in order to build a picture of enemy forces and networks using maps and map tracking to determine the location of enemy or insurgent forces.

Once the interrogator has gathered all of the information within the subject's knowledge, the interrogation moves into the termination phase. In this phase, the interrogator will reinforce successful approach strategies and advise the detainee that the accuracy or veracity of the information that he has provided will be assessed—providing the detainee with an opportunity to make amendments to his statements.[xlv]

Termination does not end the interrogation process. The interrogator must return to the administrative area and prepare an interrogation report.[xlvi] This report may include PIR information, the location of enemy forces using a SALUTE[xlvii] report, or the status of the interrogation process. This can be used for planning fixture approaches and interrogations by identifying the weaknesses and "hot buttons" inherent in the particular subject.

Operational legal advisors must be prepared to perform the legal support mission at all phases of the interrogation process. This primer will hopefully facilitate this important function. While the extensive efforts of the JAs assigned to intelligence organizations will remain critical to the legally sound execution of the interrogation mission, it is impossible for these legal advisors to provide comprehensive operational legal support during large scale joint operations. Their efforts must be augmented by operational legal advisors at every level of command, and an understanding of both the relevant law and policy, and the "client," is essential to an execution of this critical responsibility.

Regulation of Interrogation: The Relationship Between Law and Policy

How to best identify and articulate the source or sources of regulation of interrogation operations is an important aspect of legal support to these operations. There is little dispute that the baseline standard of humane treatment—traditionally understood as the prohibition against any treatment that can be reasonably regarded as cruel, inhumane, or degrading—is the "umbrella" concept under which the more specifically prohibited interrogation techniques fall. Furthermore, as noted above, this humane treatment standard is regarded as a baseline standard applicable to the armed forces of the United States by operation of Departmental pollicy and potentially as a matter of domestic law[xlviii] and customary international law.[xlix] This mandate operates to shield all individuals detained by U.S. armed forces from any act or omission considered inhumane. A more complicated matter is the identification of the existing prohibitions against specific interrogation techniques.

As noted above, law and policy establish humane treatment as a baseline standard applicable during all interrogations. The National Command Authorities and subordinate commanders, however, retain the prerogative to impose more restrictive policies on the conduct of interrogation. When such policy based restrictions are imposed by

competent authority, military necessity provides no basis for subordinate commanders to authorize deviation. Because policy considerations may result in restricting the utilization of certain techniques not prohibited by law, however, it would be potentially overly broad to characterize all "prohibited" interrogation techniques as "illegal." Although engaging in techniques prohibited by policy could certainly result in an interrogator facing criminal liability (for disobedience or dereliction), characterizing such techniques as illegal blurs the distinction between legal and policy-based constraints. Judge advocates must be able to understand and articulate the nature of the specific constraints placed on interrogation tactics. Some constraints, such as the prohibition against physical abuse of detainees, falls within the category of legal constraints; whereas others, such as the withholding of certain non-legally mandated privileges, are of a policy-based nature. Because policy-based constraints are subject to modification (as long as such modification comports with the applicable law), this blurring carries with it the risk that individuals involved in the interrogation process may lack an appreciation for why authorized techniques may be modified, or may vary, among different commands. A potential consequence of this risk is a perception that what is, or is not "legal" is malleable. This is a perception that must be vigorously guarded against, as it not only diminishes the credibility of the law, but also bolsters the view that the concept of "military necessity" should be available to override any constraint on interrogation techniques.

Humane Treatment: The Umbrella Concept under Which Legal Constraints on Specific Interrogation Techniques Fall

It is not uncommon for the term "the Geneva Conventions" to be used in the context of issues related to detention and interrogation. Judge advocates must understand that the use of this reference is often technically overly broad. Referring to "the Geneva Conventions" suggests that the provisions of these four treaties apply only collectively. While this may be true in certain situations, these treaties, and specific provisions of these treaties, may (and often do) apply individually. A specific Geneva Convention provision may be the controlling authority for an interrogation tactic in issue, based on the nature of the armed conflict or the status of the individual detainee. Additionally, principles reflected in many of these treaty provisions may also apply as a matter of customary international law.

Combat operations related to the GWOT may, as a matter of international law, fluctuate between international armed conflict and non-international armed conflict, depending upon the nature of the particular military operation in issue. For example, operations directed against former regime armed forces should fall into the category of international armed conflict whereas, operations directed against dissident groups opposing the interim government, even when conducted contemporaneously with operations directed against former regime elements, might fall into the category of a non-international armed conflict. Fortunately, from a legal support perspective, this fluctuation does not impact the obligation to treat those detained in the course of the conflict "humanely." This obligation applies across the entire spectrum of conflict.

Policy constraints on interrogation techniques may vary, based on time, location, and mission. It is also clear, however, that certain core constraints fall into the category of legal prohibitions—binding at all times and locations. The basic source of authority for these prohibitions is derived from the "humane treatment" principle reflected in Common Article 3 of the four Geneva Conventions,[l] and emphasized throughout other specific provisions of the Geneva Conventions (and Additional Protocols I [li] and II [lii]). The *Commentary to the four Geneva Conventions*,[liii] established the DOD policy,[liv] and domestic and international jurisprudence [lv] all support the conclusion that this humane treatment principle forms a baseline standard of treatment for any person affected by armed conflict who is not, or is no longer, taking part in hostilities.

Judge advocates, and the clients they advise, must recognize the applicability, scope, and significance of this baseline "benefit package" granted to all detainees or any other individual subject to interrogation. Based on the nature of an operation and the status of a

detainee, it is certainly possible that individual detainees may be vested with additional "benefits" derived from other treaty or customary international law provisions specifically applicable to them as a matter of law. It is critical to recognize, however, that the baseline standard of humane treatment, and the accordant prohibition against cruel, inhumane, or degrading treatment, is the umbrella principle under which such additional legally-based constraints fall. Accordingly, the fact that a detainee may be determined "not eligible" for additional "benefit packages" derived from the law of war in no way undermines the binding nature of prohibited interrogation techniques derived from this baseline principle.

The Distinction Between Manipulation and Coercion: Implementing the Humane Treatment Obligation

Since the initiation of the GWOT, there has been substantial debate regarding the issue of "coercion" in relation to interrogation.[lvi] While it is difficult, if not impossible, to define with precision the exact parameters of what constitutes coercion, there are several important reference points for use by JAs involved in interrogation planning, execution, or other support.

As a preliminary matter, however, the source of the prohibition against coercive measures must be determined. Detainees who qualify for status as prisoners of war under the provisions of the GPW, [lvii] or as "protected persons" under the provisions of the GC, [lviii] benefit from the express prohibition against coercion contained in those respective treaties. While there is no analogous express prohibition reflected in Common Article 3, it is appropriate to presume that interrogation tactics that would violate these express prohibitions *vis à vis* prisoners of war or protected civilians would also constitute cruel, inhumane, or degrading treatment, and therefore be prohibited *vis à vis* all detainees. It must also be noted that the approaches set forth in *FM 34-52* have been determined to comply with the law of war prohibition against coercion during interrogation, [lix] and, as a result, compliance with this doctrinal authority would almost always translate into compliance with the law of war.

The concept of coercion implies the use of physical or mental pain or intimidation to compel an unwilling detainee to provide information.[lx] While certain tactics fall squarely within this implied definition—such as beating a detainee or threatening to execute a detainee—the legality of other less severe tactics and techniques will invariably require case-by-case analysis. In conducting this analysis, the following two considerations may be useful.

First, coercion must be distinguished from the use of incentives, whereby a detainee can improve his or her comfort through cooperation. In the first instance, physical pain or mental suffering is inflicted with the objective of compelling cooperation as the result of a desire to obtain relief from the pain or suffering. In the second instance, even if a privilege is withdrawn, the consequence will be a return to a baseline standard of care and treatment, which cannot be equated to the infliction of pain or suffering.

Second, while the prohibition against inhumane treatment prohibits tactics that fall within the meaning of coercion, as this term is used in the GPW and the GC, there is no prohibition against manipulation, so long as the manipulation does not involve inhumane tactics. Indeed, interrogators should be skilled in the art of manipulating the subject of an interrogation into providing information that he may have been initially determined to withhold. Vigilance in protecting detainees against inhumane coercive tactics must be balanced against the legitimate interests of obtaining valuable information through the use of "humane manipulation." The instinct of interrogators to develop creative manipulation techniques should be encouraged, so long as such techniques are monitored to ensure that they remain within the bounds of humane treatment.

This analysis may be aided by considering the effect of the manipulation. If the manipulation deprives or jeopardizes an obligation owed to a detainee, it probably crosses the line into the realm of coercion. In contrast, if the manipulation deprives or

jeopardizes a privilege granted to a detainee, it probably does not cross this line. Certainly, physical abuse could be categorized as a form of manipulation. As noted above, however, the humane treatment obligation vests detainees with a right to be protected from physical abuse. Therefore, such abuse would not be permissible, even if characterized as a form of manipulation. A more relevant example involves rations. It is clear that adequate nutrition is an element of the humane treatment obligation owed to detainees.[lxi] Deprivation of such rations, or even the threat to deprive a detainee of adequate nutrition, would be impermissible as a form of manipulation, as it would result in inhumane treatment.[lxii] It is conceivable, however, that extra rations, in the form of an award, may be provided to detainees as a privilege that supplements the obligatory rations. The issuance or deprivation of such extra rations, if used as a form of manipulation, would not violate the humane treatment obligation.[lxiii] Additionally, no detainee has a right to be protected against trickery, deception, or manipulation through the issuance of incentives, all of which are traditional techniques utilized by interrogators to obtain cooperation.

This balance between legitimate manipulation and inhumane treatment in the form of physical or mental abuse or coercion is articulated as a key principle of interrogation operations in *FM 34-52:*

> The GWS, GPW, GC, and US policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.
>
> Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.
>
> *Limitations on the* use *of methods identified herein as expressly prohibited should not be confused with psychological ploys, verbal trickery, or other nonviolent or noncoercive ruses used by the interrogator in the successful interrogation of hesitant or uncooperative sources.*
>
> The psychological techniques and principles in this manual should neither be confused with, nor construed to be synonymous with, unauthorized techniques such as brainwashing, *physical or mental torture, or any other form of mental coercion…* [lxiv]

In summary, the obligation of humane treatment, and the more specific prohibition against coercion derived from this obligation does not operate to deprive interrogators from practicing theft craft, but only to prohibit abusive tactics that are inherently inhumane. This point is emphasized in the GPW Commentary discussion of the prohibition against using coercion to obtain information from prisoners of war:

> The authors of the new Convention were not content to confirm the 1929 text: they made it more categorical by prohibiting not only "coercion" but also "physical or mental torture… Be this as it may, a State which has captured prisoners of war will always try to obtain military information from them. Such attempts are not forbidden; the present paragraph covers only the methods to which it expressly refers [coercion].[lxv]

The Relationship Between Component Authorities and the Joint Operational Command[lxvi]

The analysis offered thus far in this article has continually emphasized the importance of understanding and applying Army regulatory and doctrinal authorities. However, one of the most perplexing issues confronting service JA's called upon to provide legal support to operations conducted within

the context of a joint operation is determining the force and effect of such service-specific regulations, policies, doctrine, tactics (techniques), and procedures. There is no definitive statutory, DOD, or Army-controlling authority that speaks to this issue. As a result, the absence of a unified and controlling position has forced legal advisors at all levels of command to resolve this issue on an *ad hoc* basis.

At its most elemental level this issue requires a determination of whether service-specific authorities remain in effect once a service provides forces to a combatant commander for the execution of operations in accordance with the statutory command and control structure established by the Goldwater-Nichols Act, [lxvii] and derivative implementing authorities.

It is doctrinally established that the command authority over service forces provided to the combatant commander for the execution of military operations vests, in that commander, the authority to issue lawful orders, directives, policies, or any other authorities that supersede and take precedence over service-specific authorities.[lxviii] While it is not uncommon for such authorities to be promulgated by the combatant command or subordinate joint commands, it would be misleading to suggest that such authorities provide comprehensive coverage of all issues related to the execution of operations.

The logical effect of the situation created is that the customary practice of the services becomes a valid source of evidence from which to derive the "implied intent" of the joint command concerning a particular subject. This justifies the conclusion that absent an express directive from the joint command controlling any specific issue, legal advisors must presume that the authorities that the component forces "bring with them to the fight" remain in effect, and retain the same force and effect as they did prior to the force being placed under the operational control of the joint command. This presumption is the logical extension of the relationship between the service component commander and the combatant commander, whereby the service component commander is responsible for providing, to the combatant commander a trained, equipped, and ready force for the execution of the operational mission. This relationship requires the combatant commander to presume that the regulations, doctrine, training, and equipment that the service forces bring to the fight are effective, and remain effective once the forces fall under combatant command (COCOM).[lxix] This presumption is clearly rebuttable, as noted above, but it allows the DOD, a COCOM, or any subordinate joint command to focus on those issues determined to be in particular need of "joint" controlling authority, without the necessity of providing for the "regulation" of every aspect of force activities.

This construct is reflected in the doctrinal relationship of COCOM and administrative control (ADCON).[lxx] The COCOM reflects the ultimate authority of the joint command to promulgate any lawful directive determined necessary for the effective execution of the operational mission. Administrative control, however, reflects the continuing responsibility of the service component commander to ensure his or her forces remain fully capable of executing the mission. For Army forces, this ADCON responsibility is often referred to as "Title 10" responsibility—a characterization apparently derived from the *U.S. Code* statutory obligation imposed upon the Army to establish forces prepared to fight and win the nation's wars.[lxxi] This results in the necessary inference that, in order to satisfy this statutory obligation, Army commanders must ensure forces are properly constituted, resourced, and trained. The doctrinal concept of ADCON more precisely establishes the continuing responsibility of the Army service component commander to ensure that component forces are well prepared to accomplish all tasks imposed upon Army forces in the joint operational area—by statute, or any other source of controlling authority.[lxxii] One aspect of satisfying this responsibility is the requirement to promulgate regulations, policies, doctrine, and other authorities to facilitate mission execution. Thus, execution of the ADCON responsibility requires that Army commanders presume the continued validity and applicability of such pre-deployment "green" authorities in the absence of superceding "purple" authorities. In the specific context of interrogation operations, this construct supports reliance on multiple

sources of authority requiring adherence to the humane treatment standard.

First, the requirement to provide humane treatment for all detainees is established by multiple sources. The National Defense Authorization Act of 2005 emphasizes the responsibility of all DOD elements to comply with this standard.[lxxiii] This standard is also derived from the international law of war in the form of the principles reflected in Common Article 3 to the four Geneva Conventions.[lxxiv] Whether applicable as a matter of binding treaty obligation, customary international law, or through the conduit of the DOD Law of War Program,[lxxv] however, this baseline treatment standard is perhaps the most clear cut example of a "fundamental principle" of the law of war. The requirement to comply with this "fundamental principle" is reinforced by instruction promulgated by the Chairman, Joint Chiefs of Staff instruction implementing the DOD Law of War Program,[lxxvi] and, with regard to the GWOT, presidential policy statements.[lxxvii]

Second, service regulation, *AR 190-8,* imposes an obligation to comply with this standard of humane treatment. [lxxviii] This regulation is a multi-service regulation promulgated by the Army pursuant to its executive agent authority for EPW and detainee affairs. [lxxix] The multi-service nature of this regulation certainly enhances its force and effect, and promulgation pursuant to executive agent authority renders *AR 190-8* binding in the operational realm. This conclusion is supported by the delegation of executive agent authority contained in *Department of Defense Directive 2310.01. DoD Enemy POW Detainee Program,*[lxxx] which establishes the scope of this authority as follows:

> 4.2. The Secretary of the Army, as the DoD Executive Agent for the administration *of* the DoD EPOW Detainee Program, shall act on behalf of the Department of Defense in the administration of the DoD EPOW Detainee Program to:
>
> 4.2.1. Develop and provide policy and planning guidance for the treatment, care, accountability, legal status, and administrative procedures to be followed about personnel captured or detained by, or transferred from the care, custody, and control of, the U.S. Military Services.[lxxxi]

The binding character of *AR 190-8* is buttressed by the terms of the Regulation itself, which indicates that

> This regulation provides policy, procedures, and responsibilities for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces.[lxxxii]

Because the regulation includes mandates directed towards the COCOMs (as noted above with regard to humane treatment), there is little doubt regarding the force and effect of *AR 190-8.* It is binding during all military operations, requiring the humane treatment of all detainees. Thus, the humane treatment mandate of *AR 190-8* would appear to be binding authority in the joint operational environment not as a matter of inference, but as an express consequence of the executive agency vested upon the Army by the DOD.

Finally, as noted above, the presumption of applicability also applies to Army doctrine and tactics (techniques) and procedures. Legal advisors providing legal support to interrogation operations planned and executed by Army forces should continue to refer to *FM 34-52* as authoritative doctrine (until this FM is superseded).

The Way Ahead

While the JA community continues to make great progress toward the goal of standardized detainee interrogation legal support training packages, pending revisions to regulations and field manuals, and the prospect of the publication of TTPs and other guidance in this area, render it difficult, if not impossible, to provide definitive guidance at this time. In the interim, however, the training requirement persists. Our Solders still deploy;

they will capture and detain the enemy, and interrogations will take place. The Corps must, therefore, continue to ensure that JAs receive the best preparation possible, guided by the azimuth points derived from current law and policy, and a common sense understanding of the relationship between the interrogation process and operational legal support. This will facilitate legal support to both training and execution.

Surely, the Corps cannot attempt to "legislate" success. The key to success is training, which combines initiative and judgment, the legal advisors "stock in trade." With this in mind, training packages will be published as soon as it is prudent. All legal personnel will be trained as they rotate through TJAOLCS. The INSCOM and USAIC will continue to effect their training mission. The CLAMO[lxxxiii] will continue its efforts to obtain and post all related materials for retrieval from the field. For example, a copy of the training package that evolved from the meeting that generated this article may be accessed from the CLAMO website.[lxxxiv] Finally, practitioners in the field must continue to advise those responsible for formulating doctrine, guidance, and training materials in this area of what they have learned, and what they require.

In the final analysis, however, the lessons of the past four years have validated several truisms related to effective legal support to interrogation operations. First, JAs must remain vigilant in ensuring understanding of and compliance with the principle of humane treatment. Second, all detainees are vested with the "benefit" of human treatment, even when they don't qualify for a more favorable "benefit package" under the Geneva Conventions. Third, JAs must understand, and ensure theft clients understand, the force and effect of "purple" and "green" authorities in the joint operational environment. Reliance on these truisms when training for or executing interrogations should minimize the risk of detainee abuse in the future.

Endnotes

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[v] U.S. DEP'T OF ARMY, FIELD MANUAL 34-52. INTELLIGENCE INTERROGATION 1-8 (Sept. 1992) [hereinafter FM 34-52). *Field Manual 34-53* is currently under revision and will be superseded by *FM 2-22.3*.

[vi] *Id.*

[vii] Memorandum, Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 January 2002), avallable at httpi/washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf [hereinafter Bybee Memo].

[viii] Memorandum, Staff Judge Advocate, JTF-170, to Commander JTF-170, subject: Legal Review of Aggressive Interrogation Techniques (Oct. 11, 2002), available at http://www.defenselink.mil/news/iun2004/d20040622doc3.pdf [hereinafter JTF 170 Legal Review]; Memorandum, Staff Judge Advocate, JTF-170, to Commander JTF-170, subject: Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002), available at httpi/www.defenselink..mil/news /Jtm2004/d20040622doc3.pdf [hereinafter JTF 170 Legal Brief].

[ix] Memorandum, Lieutenant Colonel Jerald Phifer, J2, to Commander, JTF 170, subject: Request for Approval of Counter-Resistance Strategies (Oct. 11, 2002), available at http://www.defenselink.mil/news/Jun2004/d2004062.doc3.pdf [hereinafter J2 Interrogation Request].

[x] JTF 170 Legal Brief, *supra* note 4.

[xi] *Id.*

[xii] *Id.*

[xiii] *Id.* JTF 170 Legal Brief, *supra* note 4.

[xiv] Memorandum, President of the United States, to Vice President, et al., subject: Humane Treatment of a! Qaeda and Taliban Detainees (Feb. 7, 2002), available at http'i/www2.gwu.edu/nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf [hereinafter President Bush Memo].

[xv] *Id.* JTF 170 Legal Brief, *supra* note 4.

[xvi] *Id.*

[xvii] *Id.*

[xviii] Id.

[xix] Id.

[xx] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doe. No. 100-20(1988), 1465 U.N.T.S. 113.

[xxi] 8 U.S.C. § 2340A (2000).

[xxii] Common Article 3 provides protection from, *inter alia*, murder, mutilation, torture, hostage-taking, summary executions, and irregular trial proceedings. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3,6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 3,6 U.S.T. 3217,75 U.N.T.S. 85 [hereinafter GWSS]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3,6 U.S.T. 3316,75 U.N.T.S. 135 [hereinafter GPW]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6.U.S. T. 3516,75 U.N.T.S. 287 (GC) [hereinafter GC I-IV]. Article 3 is common in all four Conventions.

[xxiii] U.S. DEP'T OF ARMY, REQ. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETA*INEES* (1 Oct. 1997) [hereinafter AR 190-8] (*Army Regulation 190-8* is a multi-service publication and is designated as *OPNAVINST 3461.6* (Navy), *AFJI 31-304* (Air Force), and *MCO 3461.1* (Marine Corps).).

[xxiv] FM 34-52, supra *note 1*.

[xxv] The only uncertainty with respect to applicable doctrine that should have arisen was that in play at GTMO—where all detainees had been classified as unlawful combatants. *See* President Bush Memo, *supra* note *10*. With respect to this category

of detainees, military practitioners do need to formulate doctrinal guidance concerning treatment and interrogation—based not on the GC. but on other clearly applicable international and domestic law.

[xxvi] *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 27-100. LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000) [hereinafter FM 27-100].

[xxvii] See FM 34-52, *supra* note 1, at 2-13.

[xxviii] *See id.* at 2-2, 2-13.

[xxix] *See, e.g., Id.* at app. C (providing a guide for tactical questioning).

[xxx] Judge advocates must ensure that all personnel who may be involved in tactical questioning, with a particular emphasis on small unit leaders, understand that the same humane treatment based obligations applicable during interrogation apply during tactical questioning. In fact, evidence gathered during recent military operations indicates that the risk of detainee abuse is greater during the tactical questioning phase of exploitation than during the interrogation phase. *See Id.* at 2-13. Leaders at all levels must remain vigilant in ensuring that detainees are treated consistently with law and policy from the moment of capture through every phase of custody.

[xxxi] ARMY INTELLIGENCE CENTER, ST 2-91.6, SMALL UNIT SUPPORT TO INTELLIGENCE (2 Mar. 2004). The INSCOM has taken the lead in creating training materials and providing JAG support to mobile training teams preparing deploying units and personnel at home station. Judge advocates advising maneuver units are encouraged to attend this training.

[xxxii] *See* FM 34-52, *supra* note 1, at 2-9, 2-l3.

[xxxiii] JOINT CHIEFS OF STAFF, JOINT PUB. 2-01, JOINT AND NATIONAL INTELLIGENCE SUPPORT TO MILITARY OPERATIONS app. G (7 Oct. 2004)

[xxxiv] *Id.*

[xxxv] See *Id.*

[xxxvi] FM 27-100, *supra* note 22, para.2.4.2.

[xxxvii] U.S.DEP'T OF ARMY, REG.381-10, US ARMY INTELLIGENCE ACTIVITIES (1 July 1984).

[xxxviii] FM 34-2, *supra* note 1, at 2-11,

[xxxix] *Id.* at 2-11.

[xl] *Id.* at 3-7 to 3-29.

[xli] *Id.* at 3-10.

[xlii] See Id.at 3-16.

[xliii] See Id. at 3-14 to 3-20. These approaches are:

a. Direct Approach. The direct approach is the basic method for interrogation and usually the first-used approach. This involves standard questioning of name, rank, unit affiliation, unit mission, etc. Past operations have shown this method to be 90-95% effective. The shock and awe of capture alone puts detainees in a state of mind where they are willing to divulge anything. However, recent anecdotal evidence suggests that detainees in current operations are savvier as to U.S. interrogation methods and have even been trained on interrogation resistance techniques, similar to our SERE training, and that the direct approach is less and less effective.

b. Incentive Approach. Traditionally, this approach involves identifying a luxury item important to the subject and either offering it in exchange for information or if they are already receiving the item, having it withdrawn. Interrogators are clearly and explicitly trained that the luxury item does not mean items or rights guaranteed by the Geneva Conventions or other applicable laws and rules. For instance, upgrading meal choices from MREs to better food, granting extra privileges, or authorizing comfort items like cigarettes in exchange for information is allowed. Withholding medical care, religious items or worship time, or withholding items the U.S. military is legally obligated to provide, however, would be unauthorized. Interrogators may also not offer incentives they deliver, such as asylum (the prerogative of the State Department) or immunity for their illegal activities (the prerogative of either the GCMCA or host-nation legal system).

c. Emotional Approach. With this approach, the intent is to identify and exploit emotional motivators, such as love, hate, revenge, etc. The key is to identify the dominant emotion and apply pressure to divulge in order to resolve the internal emotional conflict. There are two subsets of this approach: Emotional Love or Emotional Hate.

In Emotional Love approaches, the interrogator looks for something in the subject's background that implicates a love of family, comrades, or homeland. For instance, a photograph or letter from a loved-one, or an appeal to how their cooperation can save the lives of the subject's comrades or nation, combined with sincerity and genuine concern for the subject can give the subject a reason to divulge information.

In Emotional Hate, the interrogator identifies feelings of hate towards family, comrades, or country that the subject may feel. Maybe his unit or organization left him behind or gave him up. Maybe his leadership was incompetent, which led to his capture.

Some subjects have built-in racial or religious prejudices that can be discussed with a view towards channeling that hate into divulging information.

d. Fear-Up. This is the approach that needs the most monitoring. This technique is used on fragile sources, such as the young or the nervous. It is frequently (although incorrectly) used on intransigent subjects who do not respond to anything but brute power. The purpose is not (nor cannot be) to create fear of harm in the subject; rather, the purpose is to identify a fear, whether real or not, and then exploit that already-existing fear. For instance, a subject may come into the facility knowing or believing that they have committed a war crime and having been caught, will be severely punished for it (which severe punishment may have occurred had they been caught by another regime). Rather than dispel that fear initially, an interrogator can allow the subject to maintain the fear (without further feeding it) and let them know that the fear can be alleviated by cooperation. As FM 34-52 explains it, "a good interrogator will implant in the source's mind that the interrogator himself is not the object to be feared, but is a possible way out of the trap." Many times, this approach utilizes yelling and banging on tables, but cannot involve touching or harm to the subject, or event the communicated threat of actual harm. Experienced interrogators are also aware that once the Fear Up approach is used, the interrogator using this method will probably never be able to go back in the booth again with that subject because of the likelihood of a complete breakdown in the ability to create trust.

e. Fear Down. This approach works best with the subject who is so frightened that they withdraw into themselves or go into a regressed state. By using a calming, soothing voice and using incentives to build trust, the interrogator can befriend the scared subject and use that relationship to extract needed information. In essence, the subject becomes dependent on the interrogator to alleviate fear and divulges information to keep the protective relationship intact. This may involve the interrogator asking her chain of command for permission to provide luxury items, secure quarters, or other emotional "safety nets."

f. Pride and Ego. Here the interrogator appeals to a subject's ego through flattery or appeal to their superiority. This is most effective with captured senior leaders who are proud of their position in life. The reverse approach is to question their superiority despite mistakes that led to their capture. Experience holds that proud subjects will divulge a great deal of information to justify their decisions. Another way to use this approach is Pride and Ego Down, or to attack the subject's sense of self-worth by exploiting capture circumstances or by exploiting real or perceived inferiority issues. Like Fear Up, if an interrogator has to resort to a Pride and Ego Down approach and cannot succeed, there is little chance of ever rebuilding relations between that interrogator and the subject again.

g. Futility. This usually involves showing the subject that their resistance is futile by using logic to walk them through the consequences of their thoughts and actions, with the end state revealing that they are in no position to withhold information. Futility can exploit their captured situation, the battlefield situation, the idea that in the end everyone will eventually capitulate and talk, or that the past is the past and that they cannot change their circumstances. Like other approaches, the key is to help the subject know that resolution of the feelings of hopelessness that accompany futility comes through cooperation.

h. We Know All. By becoming familiar with all the data surrounding the subject, including statements made by other comrades and sources, the interrogator can walk into the booth armed with enough information to convince the subject that "the jig is up" and cooperation is the only choice. The interrogator can also use the information to test the veracity of the subject, ask questions they already know, and confront them when they lie.

i. File and Dossier. In this approach, the interrogator comes into the booth with a dossier built on the subject. By showing information already known about the subject or his organization, along with the illusion that the interrogator knows more than she stay actually know, the interrogator can create the impression that, again, resistance is futile.

j. Establish Your Identity. Here the interrogator accuses the subject of being someone infamous or wanted by higher authorities. By forcing the detainee to deny the allegations, they are more likely to provide real information in order to clear their name.

k. Repetition. Here the interrogator uses repetitious questioning or monotony to literally bore the subject into divulging information out of a desire to end the process.

1. Rapid Fire. By firing a series of questions in no particular logical order, or by using two or more interrogators asking dissimilar questions, the source has no time to use the "canned" answer, but is more likely to divulge real information or contradict themselves so badly that they begin to try to explain themselves and either divulge information or open up questioning leads for further exploitation.

m. Silent. Similar to a game of "stare-down", the interrogatorjust sits and stares at the subject until the discomfort becomes so great that the subject is willing to at least answer some questions in order to remove the discomfort. This can lead to enough information to exploit and open up further questioning.

n. Change of Scene. Used with the Incentive approach, if the interrogator and subject have been meeting with each other over a long period of time, the interrogator can use the idea of questioning taking place in another, less-hostile environment. This builds on relationships of trust established between interrogator and subject and can also be used successfully with a Pride and Ego approach, using a softer approach on senior leaders willing to cooperate with their captors for extra privileges such as a "civilized cup of tea" with their new "friend". Change of Scene is not an approach that uses a negative change in environment such as placement in isolation or involves manipulation of environmental controls such as tight or temperature. These are non.doctrinal methods that are either unauthorized or require a high level of authorization.

[xliv] *See id.* at 3-21.

[xlv] *See id.* at 3-14 to 3-28.

[xlvi] *See id.* at 3-28.

[xlvii] Size, Activity, Location, Unit, Time, and Equipment. *See id.* at app. E, 1-3.

[xlviii] See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub, L. No. 108-375, § 1Q91, 115 Stat. 1811 (2004).

[xlix] The principle of humane treatment as reflected in Common Article 3. See GC I-IV, *supra* note 18, art. 3.

[l] See GC I-IV, *supra* note 18, art. 3.

[li] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, LI 25 U.N.T.S. 3 [hereinafter Protocol I]. The United States is not a party to Protocol I. but recognizes certain of its provisions reflect principles of customary international law. The same is true for Protocol II.

[lii] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adapted, June 8, 1977. 1125 U.N.T.S. 609 [hereinafter Protocol II].

[liii] See, e.g.. COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., 1960) thereinafter COMMENTARY III].

[liv] See U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) [hereinafter DOD DIR. 5100.77].

[lv] See; e.g., Prosecutor v. Tadic, CaseNo. IT-94-1-AR72, Appeal on Jurisdiction (Oct 2, 1995), *reprinted in* 35 I.L.M. 32 (1996); Military and Paramilitary Activities (Nicar. v. U.S.). 1986 I.C.J. 14 (June 27); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (analyzing the customary international law status of Common Article 3).

[lvi] For example, there have been differing conclusions regarding techniques such as sleep deprivation, exposure to loud noise, diet manipulation, presence of dogs, hooding, etc.

[lvii] See GPW, *supra* note 18, art. 4.

[lviii] See GC, *supra* note l8,art.31.

[lix] See FM 34-52, *supra* note I, at preface.

[lx] According to FM 34-52, "Coercion is defined as actions designed to unlawfully induce another to compel an act against one's will." Examples of coercion included:

Threatening or implying physical or mental torture to the subject, his family, or others to whom he owes loyalty. Intentionally denying medical assistance or care in exchange for the information sought or other cooperation.

Threatening or implying that other rights guaranteed by the OWS, GPW, or (IC will not be provided unless cooperation is forthcoming.

Id. at 1-8.

[lxi] *See, e.g.*, GPW, *supra* note 18, art. 26 ("The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and prevent loss of weight or the development of nutritional deficiencies").

[lxii] Because the rations referenced in the text would be provided in satisfaction of the minimum legally acceptable level of nutrition and maintenance, deprivation of such rations would be prohibited by the law of war. Deprivation of such a legally mandated minimum level of nutritional maintenance would subject the subject of the interrogation to the type of physical suffering (starvation or malnutrition) expressly prohibited by the law of war.

[lxiii] The use of the qualifier "extra" in the text necessarily infers rations that are additional to the minimum legally required. Thus, because such "extra" rations would not be legally required, deprivation of such rations would not violate a legal obligation.

[lxiv] FM 34-52, *supra* note 1, at 1-8 (emphasis added).

[lxv] See COMMENTARY III, .*supra* note 49, at 163-164.

[lxvi] See JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS ch. II (10 Sept 2001) [hereinafter JP 3-0] (discussing the doctrinal relationship between combatant and component commands).

[lxvii] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433,100 Stat. 992, codified in scattered sections of 10 U.S.C.

[lxviii] JP 3-0, *supra* note 62, at II-6-7.

[lxix] *Id.* at II-6.

[lxx] *Id.* at II-10-11.

[lxxi] 10 U.S.C. § 3062 (2000).

[lxxii] GC I-IV, *supra* note 18, art. 3.

[lxxiii] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091, 115 Stat. 1811 (2004).

[lxxiv] GC I-IV, *supra* note 18, art. 3.

[lxxv] *See* DOD Dig. 5100.77, *supra* note 50; see also CHAIRMAN, JOINT CHIEFS OP STAFF, INSTR. 5810.013, IMPLEMENTATION OP THE DOD LAW OP WAR PROGRAM (25 Mar, 2002) [hereinafter CJCS INSTR. 5810.01B].

[lxxvi] *See* CJCS INSTR. 5810.01B, *supra* note 101.

[lxxvii] President Bush Memo, *supra* note 10. After finding that the Geneva Conventions did not apply, as a matter of law, to members of Al Qaeda, and that members of the Taliban did not qualify for status as prisoners of war, the Directive indicates: "of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment....*Id.* para. 3.

[lxxviii] *See* AR 190-8, supra note 19, para 1-4g (indicating that Commanders at all levels will ensure that all EPW, CI, RP, and ODs are accounted for and humanely treated, and that collection, evacuation, internment, transfers, release, and repatriation operations are conducted per this regulation.").

[lxxix] *See* U.S. DEP'T OF DEFENSE, DIR. 2310.01, DOD PROGRAM FOR ENEMY PRISONERS OF WAR (EPOW) AND OTHER DETAINEES (SHORT TITLE DOD ENEMY POW DETAINEE PROGRAM) paras. 4.2— 4.2.1 (18 Aug. 1994).

[lxxx] *See* AR 190-8, *supra* note 19, para. 1-1.

[lxxxi] *Id.*

[lxxxii] *Id.*

[lxxxiii] The CLAMO is located at the U.S. Army Judge Advocate General's Legal Center and School and serves as a resource for operational lawyers. It seeks to fulfill its mission in five ways: acting as the central repository within the JAGS for all-source data/information, memoranda, after action materials and lessons learned pertaining to legal support to operations, foreign and domestic; supporting SM worldwide by analyzing all data and information, developing lessons learned across all military disciplines, and by disseminating those lessons learned and other operational information to the Army, Marine Corps, and Joint communities through publications, instruction, training, and databases accessible to operational forces world-wide; supporting JAs in the field by responding to requests for assistance; integrating lessons learned from operations and the Combat Training Centers into emerging doctrine and into the curricula of all relevant courses, workshops, orientations, and seminars conducted at the JAG Center and School; and, in conjunction with the center and School, sponsoring conferences and symposia on topics of interest to operational lawyers.

[lxxxiv] *See* The Center for Law and Military Operations, at

https://wwwjagcnet.army.mil/JAGCNETIntranet/Databases/Operational+Law/CLAMO.nsf/(JAGCNetDocID)/HOME?OpenDocument (last visited 11July05).

Wrestling with MRE 304(G): The Struggle to Apply the Corroboration Rule

Major Russell L. Miller[i]

Therefore confess thee freely of thy sin; For to deny each article with oath Cannot remove nor choke the strong conception that I do groan withal. Thou art to die.[ii]

I. Introduction

Confessions are powerful. The admission of an accused's confession in a criminal trial carries heavy weight. Likewise, the suppression of such a confession may cause a prosecutor's case to fall apart. Given its importance, our jurisprudence affords the accused several privileges against self-incrimination. One of these important privileges is the notion that a confession or admission of a defendant or accused cannot subsequently be used against them as evidence of guilt in a criminal trial unless there is independent evidence which sufficiently corroborates the confession. This rule is commonly referred to as the corroboration rule. Its common law roots trace back to the courts of England in the mid seventeenth century.[iii] The rule was adopted throughout courts in the United States at the state and federal levels.[iv] In military practice, the corroboration rule is codified at Military Rule of Evidence (MRE) 304(g).[v] Although it seems fairly simple and straightforward, military courts-martial have, at times, struggled to apply it consistently. Simple mechanical implementation of the rule can be challenging. This article urges a fair and faithful application of this important rule and privilege by identifying recent inconsistent treatments, exploring its rational and historical underpinnings, and making a recommendation to clarify its requirements.

Specifically, this article proposes amendments to MRE 304(g).[vi] These proposed amendments require some degree of admissible evidence against the accused in determining whether the accused's confession or admission has been sufficiently corroborated. The purpose of the proposed amendments is to focus the analysis of the rule's application on the quality of the corroborative evidence with the aim of preventing the erosion of an accused's rights and privileges.

II. Background

A. The Distrust of Confessions

A criminal defendant in our system of justice receives the benefit of several forms of privilege against self-incrimination. The privileges against self-incrimination derive, in part, from distrust in American criminal jurisprudence of the confession.[vii] A reflection of this mistrust is found in a quote by Justice Goldberg: "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[viii] There are two components to this mistrust.

The first component is a concern for a potential abuse of authority that may arise during interrogation of a suspect, which may be of an oppressive nature.[ix] To address police misconduct during interrogations, the

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privilege against self-incrimination has several aspects. These include suppression of coerced confessions[x] and the requirement to advise suspects of their Fifth and Sixth amendment constitutional rights before custodial interrogation.[xi] These aspects of the privilege against self incrimination "purport to regulate interrogation in a way that reduces the incidence of false confessions, reliability concerns are collateral to the main purpose of each: to suppress all confessions, whether reliable or not, that result from the abuse of power."[xii]

The second component of the mistrust of confessions is the concern regarding the reliability of the confession. "The primary doctrinal remedy for the problem of physically uncoerced false confessions, on the other hand, has been the corroboration rule."[xiii] There are several species of the corroboration rule in American jurisprudence, and all require evidence in addition to the confession as a test of reliability.[xiv] Military Rule of Evidence 304(g) sets forth the means for corroborating a confession or admission of an accused in courts-martial.[xv] An examination of the historical development of the corroboration rule will facilitate a more complete analysis of MRE 304(g).

B. Historical Underpinnings of the Corroboration Rule

1. The Corpus Delecti Rule

a. Origins of the Corpus Delecti Rule

The corroboration rule traces its historical underpinnings back to the development of the corpus delecti rule, which is still followed in most states today.[xvi] Legal historians identify the origins of the corpus delecti rule in a 1661 English murder prosecution entitled *Perry's Case.*[xvii] *Perry's Case* was a murder trial in which the victim's body was never found. The "victim" was waylaid, kidnapped, and held as a slave in Turkey. The defendant, his servant, was implicated by his failure to return home after being sent to find his brother and mother. The three were convicted and executed on the basis of the victim's disappearance, a bloodied hat, and a confession by one of the co-defendants.[xviii] The victim later showed up alive and well after the executions of the defendants.[xix] Under English law at the time, a criminal defendant could be convicted solely on the basis of an uncorroborated confession.[xx]

In the United States, a similar case arose in which an alleged murder victim surfaced just in time to prevent the execution of the person convicted of the murder.[xxi] Thereafter, courts throughout the United States began formulating forms of the corpus delecti rule. In fact, during the eighteenth century, all U.S. jurisdictions had adopted a form of the corpus delecti rule with the exception of Massachusetts.[xxii] Moreover, while English courts applied the rule only to murder cases, U.S. courts began to apply the rule to all kinds of criminal cases.[xxiii]

b. What Is the Corpus Delecti Rule?

While there are different versions of the rule, one can discern its general aspects in defining it. The term "corpus delecti" means "the body of the crime." It is a common law doctrine that requires the prosecutor to prove that a crime was committed before allowing a defendant's extrajudicial confession to be admitted into evidence.[xxiv] "Corpus delecti does not mean dead body, as often assumed by laymen, but the body or substance of the crime. Every offense has its corpus delecti, and independent proof thereof is needed for homicide and non-homicide offenses such as arson, bribery, burglary, conspiracy, false pretenses, incest or larceny."[xxv] Under the corpus delecti rule, a defendant's extrajudicial confession was admissible only when there was independent evidence that a death had occurred, and that it resulted from an act of criminal agency.[xxvi] The corpus delecti rule was viewed as both a rule of evidence and a substantive rule. It was an evidentiary rule in that it prohibited the admission of a confession without other proof. It was substantive because it prohibited a criminal conviction if the prosecution had not proven that a crime had been committed.[xxvii]

c. The Purposes of the Corpus Delecti Rule

Formulation of the corpus delecti rule was created to preclude a person from being convicted of a crime that had not been committed and to avoid an undue reliance on confessions. Thus, it served to further three main purposes: (1) it served to protect the mentally unstable from being convicted as a result of an untrue conviction; (2) it helped to ensure people were not convicted as a result of an involuntary, coerced confession; and (3) it helped to promote more thorough law enforcement work by requiring authorities to find evidence beyond the confession.[xxviii] In requiring more thorough investigation by law enforcement and demanding the production of independent evidence of the crime, the confession is more reliable. Additionally, this requirement helps prevent the criminal justice system from becoming inquisitorial.[xxix]

A custodial interrogation is an inherently coercive environment. In his article, Corey Ayling describes the interrogation environment. "The interrogator and the defendant interact in a certain social environment. That social environment consists of a physical place—an interrogation room—and an institutional setting—imprisonment. Both coerce."[xxx] The conditions under which interrogations often occur can set the conditions for involuntary and unreliable confessions.[xxxi] The shock and self-mortification of arrest and imprisonment cause the defendant to enter the interrogation room in a badly debilitated state. The physical environment of the interrogation room intensifies the anxiety of the defendant and maximizes compliance. The interrogation environment enables the interrogator to confront a defeated, depressed, and compliant individual.[xxxii]

The coercive environment impacts the interaction between investigators and an accused. In discussing the social interaction between an investigator and an accused, Ayling refers to another study which postulates that persons being interrogated tend to respond to external stimuli.[xxxiii] When internal cues are unambiguous, the individual does not look to external cues. An accused may well resist self-persuasion because they have direct access to some very strong, unambiguous internal cues, such as the knowledge of their own innocence or fear of self-incrimination. The suspect's internal cues will be more ambiguous notwithstanding his innocence. He may suffer from guilt feelings arising from unrelated acts, the investigator may induce guilt feelings, he may be traumatized by the shock of arrest and imprisonment, or he may feel a need for approval. By manipulating these external stimuli, the investigator may induce the accused in confessing falsely.[xxxiv]

A related issue is the sociological aspect of the confession. The confession can be viewed as a ritual of social inclusion through which society reinforces its norms by first defining deviants and then restoring them to the graces of society.[xxxv] The individual comes to realize his deviance from societal norms and confesses it to others. The confession dramatizes and reinforces the importance of the individual's conscience, which in turn mirrors societal norms.[xxxvi] Western culture affirms the importance of the individual, yet manages to achieve social control over the individual by causing him to internalize societal norms in the form of an interior conscience. The social purpose of the confession then, is to restore deviants to their former social status. By doing this, the confession legitimates the correctness of the social order, shows deviance and evil to be caused by individuals—not society—and reaffirms the value of individual conscience, which in turn mirrors societal norms.[xxxvii] The suspect in an interrogation room has been defined as a deviant and excluded from society by the degradation rituals of arrest and incarceration. The social compulsion to talk is overwhelming: the individual must reaffirm his former social and individual status by either denying guilt or accepting it through confession. In extreme cases, the desire for immediate redemption through confession may outweigh the longer term consequences of a false confession and may induce the suspect to make false inculpatory statements.[xxxviii]

There are several reasons that may cause an accused to succumb during custodial interrogation. The confession may be obtained as a result of a coercive

environment in which a psychologically defeated suspect is manipulated by a trained and clever investigator or it may be based on sociological reactions derived from being deemed a deviant. Either way, the reliability as well as the voluntariness of the confession is called into question. As the Supreme Court stated in *United States v. Smith,*[xxxix] "[T]hough a statement may not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past."[xl] The consequence is a powerful piece of evidence for which stringent safeguards have been erected and must be maintained.

The corroboration rule is one of these safeguards, regardless of which variety of rule a particular jurisdiction follows. As the corpus delecti rule evolved, its primary purpose can be contrasted with the purposes of other privileges against self incrimination. Rather than testing the voluntary nature of the confession or the abuse of authority in procuring the confession, the corroboration rule tests the reliability of the confession itself.[xli] It thereby protects from "errors in conviction based upon untrue confessions alone."[xlii]

As the corpus delecti rule developed, different jurisdictions adopted the rule in varying forms.[xliii] Most jurisdictions continue to apply the traditional corpus delecti rule.[xliv] Other jurisdictions have fashioned hybrid forms of rules for corroborating a confession.[xlv] This includes the Wisconsin rule,[xlvi] the New Jersey rule,[xlvii] the Iowa rule,[xlviii] and the federal rule.[xlix] The states following the federal rule include Texas, New Mexico, Hawaii, and the District of Columbia.[l] The federal rule is also known as the "trustworthiness doctrine."[li]

2. The Trustworthiness Doctrine

a. Two Corroboration Rules in Federal Court

The development of the corpus delecti rule in federal courts led to a split in the circuit courts. In essence, the federal courts were applying two different corroboration rules.[lii] The two lines of cases following the corpus delecti rule are set forth in *Daeche v. United States*[liii] and *Forte v. United States.*[liv]

In *Daeche,* a Russian immigrant was convicted for his involvement in a conspiracy to injure insurance underwriters and a conspiracy to blow up ships.[lv] The court found ample evidence to corroborate the defendant's confession from the existence of an agreement to attack ships.[lvi] In an opinion authored by Judge Learned Hand,

> Proof of any corroborating circumstances is adequate which goes to fortify the truth of the confession or tends to prove facts embraced in the confession. There is no necessity that such proof touch the corpus delecti at all, though, of course, the facts of the admission plus the corroborating evidence must establish all elements of the crime.[lvii]

The rule in *Forte* was much different.[lviii] It was much stricter and demanded more independent corroborative evidence. In *Forte,* the defendant was convicted of transporting a motor vehicle in interstate commerce. The defendant claimed there was insufficient substantial proof of the corpus delecti because there was no evidence, independent of his confession, that he knew that the car was stolen.[lix] The court cited, a number of forms of misconduct sometimes occurring during the conduct of custodial interrogation. This included physical brutality, protracted questioning, threats and illegal detention. Due to their resultant distrust of the confession, the court reversed the conviction. They held there could be no conviction upon an uncorroborated confession and the corroboration had to embrace substantial evidence of the corpus delecti.[lx]

There can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the

weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the corpus delecti and the whole thereof.[lxi] In order to reconcile the split among the circuits regarding the application of the corroboration rule, the Supreme Court set forth a new federal rule which is referred to as the "trustworthiness doctrine."[lxii]

b. Opper v. United States

Opper was a procurement fraud case.[lxiii] Opper was tried and convicted on charges he had conspired with and induced a federal employee to accept outside compensation for services in a matter before a federal agency in which the United States had an interest.[lxiv] Opper was not a federal employee but was charged with inducing a federal employee through a conspiracy, to accept compensation for such services.[lxv] Opper was a subcontractor who supplied goggles to the Air Force as part of a contract for survival kits.[lxvi] The goggles tendered by Opper failed to comply with specifications in the contract. Opper thereafter met with Hollifield, the government contracting officer, and convinced Hollifield to recommend acceptance of the non-conforming goggles in exchange for a payment of cash.[lxvii] During the investigation conducted by the FBI, Opper admitted, in oral and written statements, he had given Hollifield the money but insisted the money was given as a loan.[lxviii]

Opper's statements did not constitute a confession, but were admissions of material facts used to convict him. The Supreme Court held corroboration was required for admissions to the same extent as confessions.[lxix] The Court then addressed the divergence within the circuit courts with respect to which corroboration rule to apply; the *Daeche* rule or *Forte* rule.[lxx] The Court held the corroboration required was that which ensured the trustworthiness of the admission or confession, rather than independent evidence that simply touched on the corpus delecti:

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

In affirming the conviction, the Court found independent evidence in the record to support Opper's statements which was sufficient corroboration as to one element of the crime charged; the payment of money.[lxxii] The government was required to prove by independent evidence the other element—the rendering of services—which was not established by Opper's statements.[lxxiii] While *Opper* was a case involving a crime with a tangible corpus delecti, the Court ruled on the application of the corroboration rule involving cases without a tangible corpus delecti in *United States v. Smith.*[lxxiv]

c. United States v. Smith

The Supreme Court applied its newly announced trustworthiness doctrine to a crime in which there is no tangible corpus delecti in *United States v. Smith.*[lxxv] In *Smith,* the appellant submitted a five-page document to investigators from the Internal Revenue Service (IRS) that represented his claimed net worth for a five year period.[lxxvi] Believing he had understated his net worth for the period, the IRS prosecuted Smith for understating his income to avoid taxation.[lxxvii] The appellant

asserted, *inter alia,* there was insufficient evidence to corroborate the document he submitted to the IRS as evidence against him.[lxxviii]

In addressing the appellant's claims regarding the insufficiency of corroboration, the Court first examined whether the corroboration requirement applied to crimes in which there is no tangible corpus delecti—such as tax fraud.[lxxix] The Court observed the corroboration requirement was formulated to prevent conviction for serious crimes of violence, such as murder, unless there was "independent proof . . . *someone* had indeed inflicted the violence, the so-called *corpus delecti."*[lxxx] Once the corpus delecti—the body of the crime—had been established, the confession of the accused could be used to convict him.[lxxxi] "But in a crime such as tax evasion there is no tangible injury which can be isolated as *a corpus delecti."*[lxxxii] The Court was faced with a choice. It could either apply the corroboration rule, which would provide the accused with greater protection than in a homicide,[lxxxiii] or the Court could find the rule wholly inapplicable because of the nature of the offense, which would strip the accused of this guarantee altogether.[lxxxiv] They chose to apply the rule, which provides greater legal protection to an accused.[lxxxv] The Court chose to apply the rule to a case in which there is no corpus delecti apparently out of a concern for the inquisitional nature of a law enforcement investigation.[lxxxvi]

Regarding the sufficiency or quantum of corroboration required, the Court addressed two questions: "(1) whether corroboration is necessary for all elements of the offense established by admissions alone . . . [and] (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged."[lxxxvii] The Court said yes to both questions, noting that "[a]ll of the elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused."[lxxxviii] From this analysis it can be said that "[t]he 'quantum of corroboration' refers to both the government's burden to corroborate the confession, as well as the government's ultimate burden regarding guilt and innocence."[lxxxix]

The Supreme Court's decisions in *Smith* and *Opper* authored the standard for determining the legal sufficiency of corroborating a confession or admission in federal courts and courts-martial.[xc] Consequently, the next logical step in determining whether amendments to MRE 304(g) are needed is by analyzing how the military developed and incorporated the *Smith-Opper* standard in conducting courts-martial.[xci] This article examines military case law to gauge judicial faithfulness to the *Smith-Opper* standard. This analysis demonstrates how recent military case law has eroded some of the protections the Supreme Court intended to erect and maintain.

III. Analysis

A. The Corroboration Rule in Military Criminal Practice

Military Rule of Evidence 304(g) is the codification of the corroboration rule in military criminal practice.[xcii] It is modeled after the corroboration rule that applies in federal courts following the Court's decisions in *Opper* and *Smith.*[xciii] Military Rule of Evidence 304(g) is both a rule of evidence and of substantive law. It is an evidentiary rule from the standpoint of ensuring admissibility of the confession. Substantively, it is designed to ensure the accused is not convicted solely on his confession alone.[xciv] The rule requires independent evidence that corroborates the essential facts admitted to justify sufficiently an inference of their truth. This is a long-standing provision in our jurisprudence that is continued in the codification of MRE 304(g), which seems to assume that corroboration has or will be independently introduced into evidence in determining the admissibility of a confession or admission.[xcv] "[T]he independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth."[xcvi]

The rule appears fairly simple and straightforward. A review of case law, however, reveals the difficulty with which military courts struggle to make its application uniform.[xcvii] The issues tending to arise often surround the weight and sufficiency of the corroborating evidence and whether the corroborating evidence must be admitted into evidence. The rule does not specifically address whether the corroborating evidence must be admitted into evidence. As a result, the Court of Appeals for the Armed Forces (CAAF) has recently rendered several inconsistent decisions in applying MRE 304(g).[xcviii] Tracing the genesis and development of MRE 304(g) will assist in grasping an understanding of these inconsistencies. It will also prove useful in determining whether amendments are required to preserve its protections.

B. The Historical Development of MRE 304(g)

Before the Supreme Court decisions in *Smith* and *Opper,* the 1951 version of the *Manual for Courts-Martial* incorporated the common law corpus delecti rule as a requirement for corroborating a confession.[xcix] It required that evidence be admissible as a precondition for sufficient corroboration:

> An accused cannot legally be convicted upon his uncorroborated confession or admission. A court may not consider the confession or admission of an accused as evidence against him unless there is *in the record* other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone . . . . Usually the corroborative evidence is introduced before evidence of the confession or admission; but the court may in its discretion admit the confession or admission in evidence upon the condition that it will be stricken and disregarded in the event that the above requirement as to corroboration is not eventually met.[c]

After the decisions in *Smith* and *Opper,* paragraph 140(a)(5) of the rules of evidence was amended to embrace the trustworthiness doctrine. The drafters' analysis for the *1968 Manual for Courts Martial* states this quite clearly.[ci] Their adoption of the trustworthiness doctrine stressed the above stated concern for reliability of the confession or admission: "The main purpose should be to corroborate the confession or admission so that one will be reasonably assured that it is not false."[cii] Under the 1984 revision of the *Manual for Courts Martial,* there was another change. The initial determination as to whether a confession was sufficiently corroborated for purposes of admissibility was transferred from the panel members to the military judge, consistent with treatment of other preliminary questions concerning admissibility of confessions.[ciii] Other than transferring the preliminary question of admissibility to the military judge, the rule of corroboration in the military was not changed but restated.[civ]

C. Applying the *Smith-Opper* Rule, not Corpus Delecti, in Courts Martial

In reviewing military cases involving the application of the corroboration rule, it appears that military courts have, at times, been reluctant to depart from a traditional application of the corpus delecti rule. This is surprising due to the rather clear pronouncement from the drafters of the rules of evidence that military courts will follow the trustworthiness doctrine instead of the older corpus delecti rule.[cv] *United States v. Loewen* illustrates this issue.[cvi]

Loewen involved a soldier convicted of forging a number of prescriptions and the larceny of the drugs prescribed.[cvii] The prescriptions were written for the soldier's wife. A special agent of The Army's Criminal Investigations Division (CID), subjected the soldier to custodial interrogation. During the interrogation, the soldier-appellant told the CID agent he had forged the prescriptions and that his wife was not involved in the forgery. His statement was used as evidence against him at trial. The soldier appealed on the basis that his inculpatory statement was not sufficiently corroborated by substantial independent evidence under MRE 304(g).[cviii] The Army Court of Military Review agreed and reversed his conviction, but their analysis reveals some confusion in applying the rule.[cix]

Initially, the court recognized the 1984 version of MRE 304(g) was substantially the same as its predecessor rule[cx] and made

reference to the *Smith-Opper* standard in the drafters' analysis of the earlier rule.[cxi] Yet, rather than simply applying the trustworthiness doctrine to the larceny and forgery charges, the court reasoned that "[t]he Supreme Court did not discard the corpus delecti rule in *Smith* and *Opper,* but instead provided an alternate method of corroboration which could be used in cases where there is no tangible corpus delecti."[cxii] Larceny and forgery are cases in which there is a tangible corpus delecti. They reasoned the trustworthiness doctrine applied only to cases without a corpus delecti. Rather than applying the *Smith-Opper* rule, they applied the old corpus delecti rule to these facts. Additionally, they held that *Smith* "extends the corroboration requirement to include the identity of the accused as the perpetrator, an element not required to be corroborated under the old corpus delecti rule."[cxiii]

United States v. Yates provides a thorough analysis of the corroboration rule in military practice.[cxiv] The analysis in *Yates* assists in resolving some of the confusion left by *Loewen.*[cxv] Yates was a sailor charged with the rape and sodomy of his infant step-daughter.[cxvi] He admitted to several instances of sexual contact with the step-daughter during custodial interrogation by the Naval Investigative Service (NIS). He also admitted that while in the Philippines he had sex with an unnamed girl he met in a bar.[cxvii] At trial, he recanted his confession. The government sought to introduce his confession into evidence.[cxviii] The corroborative evidence of his confession consisted of a labial tear on the child's vulva, the child's positive test result for gonorrhea, expert testimony concerning transmission of the disease, and medical evidence that the accused may have had gonorrhea as well.[cxix] The Navy-Marine Court of Military Review examined the same cases and drafters' analysis as the *Loewen* court. They reached a conclusion similar to that of the *Loewen* with respect to the corpus delecti rule: "[W]e conclude the Supreme Court has not abandoned the corpus delecti rule, but has provided a second approach where the corpus delecti could not be proven independently . . . ."[cxx]

The crimes charged in *Yates* had a tangible corpus delecti, but unlike the *Loewen* court, the *Yates* court did not apply the corpus delecti rule. Instead, they embraced the more flexible trustworthiness doctrine:

> We believe a persuasive argument can be made that Mil.R.Evid. 304(g) recognized that *Opper-Smith* was designed to give the federal sector more, not less, flexibility in establishing a twopronged test, and that the revised military rule is broad enough and was designed to emulate the more flexible federal rule, subject to the caveat that under either prong the linchpin consideration is whether the independent evidence corroborates the essential facts admitted sufficiently to justify an inference of their truth.[cxxi]

Misunderstanding of the corroboration rule persisted, however, as evidenced in *United States v. Baldwin.*[cxxii] In *Baldwin,* the trial judge suppressed the confession by applying the corpus delecti rule rather than the trustworthiness doctrine.[cxxiii] Air Force Staff Sergeant Baldwin was charged with committing indecent acts on his seven year old stepdaughter. The accused confessed during a custodial interrogation by Air Force investigators.[cxxiv] The evidence supplied by the government to corroborate the confession consisted of non-testimonial acts of the accused. These non-testimonial acts consisted of leaving the marital home and moving into on-post quarters, his emotional state of distress, and going to see the chaplain and a counselor.[cxxv] A review of the record from the suppression motion reveals the military judge applied the old corpus delecti rule in his decision to suppress the confession.[cxxvi] In ordering the suppression of the confession, the military judge determined the lack of evidence of a corpus delecti was a factor "in determining if the government has presented evidence that establishes an inference of truth as to the 'essential facts admitted' in the confession."[cxxvii] The Air Force Court of Criminal Appeals (AFCCA) found the military judge had abused his discretion by applying the wrong legal standard and

reversed the suppression of the confession.[cxxviii]

Military appellate courts have embraced the transformation of applying the trustworthiness doctrine, rather than the corpus delecti rule.[cxxix]

Baldwin, however, shows the corpus delecti rule may still linger in courts-martial.

Having established the trustworthiness doctrine of *Smith-Opper* as the appropriate legal standard, a review of recent applications on the issue of the weight and sufficiency of the corroborating evidence reveals its current interpretation.[cxxx] This will prove useful in determining the need, if any, for amendments to ensure faithfulness to its intended protections.

D. Recent Applications of the Corroboration Rule in Courts Martial

1. United States v. Grant[cxxxi]

This is the most recent case analyzing the quality and admissibility of evidence proffered to corroborate a confession. *Grant* was an Air Force case where an Air Force Staff Sergeant (SSG) Grant was found unconscious at the club complex on Incirlik Air Force Base in Turkey.[cxxxii] He was taken to the base hospital where Captain (Capt.) Poindexter, the physician on duty, treated SSG Grant.[cxxxiii] As part of his treatment, Capt. Poindexter ordered a drug screen in accordance with "the customary medical protocol for diagnosis and treatment."[cxxxiv] Based on the results of other tests, the appellant was treated for acute alcohol poisoning and released.[cxxxv]

Despite his release, the hospital continued to process the drug screen.[cxxxvi] Several weeks later, the physician was notified by email that the accused tested positive for cannabinoids.[cxxxvii] The hospital notified the Air Force Office of Special Investigations (AFOSI) of the test results, and interrogated the appellant.[cxxxviii] The appellant initially denied having used illegal drugs but when confronted with the results of the drug screen, the accused confessed in writing.[cxxxix] The drug screen results were hearsay under MRE 801.[cxl] The government, however, offered the drug screen results under MRE 803(6)[cxli] as a "business record" exception to the hearsay rule. The drug screen results were not offered as substantive evidence against the appellant, but only for the limited purpose of corroborating the confession.[cxlii]

The court found that, "The Government called no witnesses from either Incirlik [Air Force Base] or Armstrong [Laboratory] to testify about the chain of custody regarding appellant's urine sample. Nor did it call any witnesses to testify about the testing procedures used at Armstrong Laboratory."[cxliii] The government also did not adduce testimony from witnesses regarding the testing procedures used at Armstrong Laboratory.[cxliv] Instead, the government simply called Capt. Poindexter and another hospital employee to demonstrate the hospital's reliance on the record and to establish that the record was procured and incorporated in the hospital's records in the normal course of business.[cxlv] The trial judge, over defense objection, found the confession sufficiently corroborated and admitted the confession into evidence.[cxlvi] The sum of the evidence before the members was the confession and the foundational testimony for the drug screen results as a business record for the "limited purpose" of corroborating the confession.[cxlvii] The AFCCA affirmed the conviction.[cxlviii]

The CAAF also affirmed the conviction.[cxlix] The appellant asserted the government was required to introduce scientific testimony to interpret the drug screening results and substantiate testing procedures.[cl] The CAAF rejected this claim by reasoning the drug screen results were proffered not as substantive evidence, but only for the limited purpose of corroborating the confession. Thus, the foundational testimony which would otherwise be required was not necessary.[cli]

The appellant also argued there was insufficient evidence to corroborate the confession.[clii] The CAAF also rejected this argument, citing *United States v. Melvin,*[cliii] for the proposition that the quantum of evidence required to corroborate a confession "may be very slight."[cliv] Unlike the situation in *Grant,*

the appellant's confession in *Melvin* was corroborated by numerous items of other independently admissible evidence.[clv] The *Grant* court chose not to address this distinction.

In *Grant,* the record reflected an adequate foundation for the admission of a business record under MRE 803(6).[clvi] In affirming the foundational prerequisites, the CAAF examined how other federal courts of appeals applied the business record exception when "a document prepared by a third party is properly admitted as part of a second business entity's records if the second business integrated the document into its records and relied upon it in the ordinary course of its business."[clvii] The difficulty in this analysis lies in the nature of the record itself. Drug screen results of biochemical testing are scientific evidence. None of the cases cited by the *Grant* court dealt with the admissibility of scientific results of biochemical testing or drug screening.[clviii] The drug screen was a business record prepared by a third party, not by a testifying witness. The majority in *Grant* cited federal courts of appeal cases involving repair estimates and firearm sales invoices as business records prepared by a third party.[clix] There is a qualitative difference between routine transactions that constitute normal business records, such as invoices and receipts, and drug screen results. Drug screen results are scientific reports that demand expert testimony as a precondition to admissibility under the rules of evidence.

In the prosecution of a typical urinalysis case, the positive test results of a drug screen are admitted into evidence in one of three ways—through stipulation, judicial notice, or through the testimony of an expert witness.[clx] Under MRE 702,[clxi] an expert witness may be called to explain drug screen testing procedures for proving an accused's usage of an illegal substance. This testimony can be rather involved and complicated.[clxii] The chain of custody of the urine sample and procedures for its handling at the lab are also admissibility requirements.[clxiii]

Before *United States v. Murphy,*[clxiv] the government proved use of illegal substances by introducing the testimony of the unit alcohol and drug coordinator and the assigned urinalysis observer. The observer linked the accused to a particular urine sample, and then introduced the positive urinalysis results as a business record. The government was able to convict the accused without the testimony of an expert witness.[clxv] This practice ended with *United States v. Murphy.*[clxvi] In *Murphy,* a sailor was convicted for the wrongful use of illegal drugs. The government presented no scientific or expert testimony, but relied on testimony "from various witnesses from the command concerning the command procedures for taking the specimen from appellant, mailing it to the laboratory, its return to command, and its presence in the courtroom."[clxvii] The Court of Military Appeals (COMA) rejected this approach and required expert testimony to prove illegal use of drugs. "We are not persuaded that the scientific principles of urinalysis are matters of 'common sense' or of 'knowledge of human nature'. . . the determination of the identity of narcotics certainly is not generally within the knowledge of men of common education and experience."[clxviii]

The foundational testimony for admitting the drug screen results in *Murphy* are nearly identical to those in *Grant.*[clxix] In *Grant,* the drug screen results were admitted as a business record based on the testimony of workers at the hospital to demonstrate the hospital's reliance on the record and to establish that the record was procured and incorporated in the hospital's records in the normal course of business.[clxx] As a result of *Grant,* the government will no longer have a need to call for scientific testimony, at least when the accused confesses to use.

In their deletion of the requirement to proffer scientific testimony or testimony regarding the chain of custody as a condition precedent to the admission of drug screen results, the CAAF set the legal standard lower than the Supreme Court mandated in *Smith* and *Opper.*[clxxi] An unwanted byproduct may be lower standards in conducting the urinalysis program. Since the government now needs only an email as a business record for the purpose of corroboration of a confession, units may not be as vigilant with chain of custody procedures. The laboratories

may lower their level of oversight with handling and testing procedures. Not only does *Grant* erode the protections of the corroboration rule, it causes harm to the integrity of the urinalysis program of the Department of Defense. In effect, *Grant is* a practical reversal of *Murphy.*

Murphy was one of three cases which set forth a three part test for the admission of drug screen results.[clxxii] *United States v. Graham* articulated the three part test.[clxxiii] Judge Sullivan authored a concurring opinion in *Grant* in which he recognized the majority's opinion "erodes the holding of this Court in *[United States v.] Graham* and I join it."[clxxiv] In *Graham,* the appellant was charged with the unlawful use of marijuana when a drug screen analysis of the appellant's urine tested positive with the presence of THC metabolites.[clxxv] Four years earlier (1991), the appellant had another positive urinalysis and was court-martialed for that alleged use.

The court acquitted the appellant at the previous court-martial after he asserted an innocent ingestion defense.[clxxvi] At trial for the alleged subsequent use, the military judge allowed the government to cross examine the accused regarding the 1991 positive urinalysis. On cross examination, the evidence of the earlier urinalysis was not offered to prove the accused knowingly used illegal drugs in 1991. It was offered to rebut the appellant's trial testimony that "there is no way I would knowingly use marijuana" and that, after he was notified about the 1995 urinalysis, he was "shocked, upset, and flabbergasted."[clxxvii] The CAAF held the trial judge abused his discretion by allowing the government to admit evidence of a positive drug screen for the limited purpose of rebuttal.

The majority relied on the three part test which established the "rules by which factfinders in courts-martial may infer from the presence of a controlled substance in a urine sample that a servicemember knowingly and wrongfully used the substance."[clxxviii] To satisfy the three part test: (1) the seizure of the urine sample must be a lawful seizure; (2) "the laboratory results must be admissible, requiring proof of a chain of custody of the sample, i.e., proof that proper procedures were utilized;" and (3) "last, but importantly, there must be expert testimony or other evidence in the record providing a rational basis for inferring that the substance was knowingly used and that the use was wrongful."[clxxix]

The court found none of these rules had been observed by the military judge in admitting the evidence for the limited purpose of rebuttal and the military judge had abused his discretion admitting it to the material prejudice of the appellant.[clxxx] The court concluded as follows:

> Our dissenting colleagues seem to forget, once again, that our service personnel, who are called upon to defend our Constitution with their very lives, are sometimes subject to searches and seizures of their bodies, without probable cause, for evidence of a crime. We should zealously guard the uses of these results and hold the Government to the highest standards of proof required by law.[clxxxi]

Judge Sullivan observed the holding in *Grant* eroded the finding in *Graham.*[clxxxii] In both, evidence of a positive urinalysis was not offered to prove substantively the appellant used illegal drugs. In *Grant* it was offered under the business record exception to the hearsay rule for the limited purpose of corroborating the confession of the accused.[clxxxiii] In *Graham* it was offered for the limited purpose of rebuttal on crossexamination.[clxxxiv] In neither case was evidence adduced regarding the chain of custody nor the compliance with proper procedures in the handling of the specimen. Neither case included scientific or expert testimony to validate the results. *Grant* did not follow any of the three "rules by which factfinders in courts-martial may infer from the presence of a controlled substance in a urine sample that a servicemember knowingly and wrong fully used the substance."[clxxxv]

Grant appears to be the only military case in which the CAAF upheld a conviction

based solely on a confession that is corroborated on evidence admitted strictly for the limited purpose of corroborating the appellant's confession.[clxxxvi] The drug screen results in *Grant* admitted under the business record exception to the hearsay rule to corroborate the confession, fell short of the legal standards of *Graham* and *Murphy*.[clxxxvii] As such, the results should have been considered inadmissible hearsay.[clxxxviii] As inadmissible hearsay, this information was not evidence at all. This information constituted neither direct nor circumstantial evidence for showing the accused was guilty of the crime charged. Military Rule of Evidence 304(g) requires that "[a]n admission or confession of the accused may be considered as evidence against the accused only if independent evidence, *either direct or circumstantial,* has been introduced that corroborates the essential facts admitted sufficiently to justify sufficiently an inference of their truth."[clxxxix] Direct evidence is defined as "[e]vidence in the form of testimony from a witness who actually saw or touched the subject of questioning."[cxc] Circumstantial evidence is "[t]estimony not based on personal actual knowledge or observation of the facts in controversy, but other facts from which deductions are drawn, showing indirectly the facts sought to be proved."[cxci]

The evidence admitted for the limited purpose of corroborating the appellant's confession in *Grant* meets neither of these definitions. As Judge Sullivan points out in his concurrence,

> [E]vidence of a prior positive test result (in the form of a business record entry) was admitted for a purpose other than to directly show the charged offense. It was admitted to corroborate appellant's confession to all the charged misconduct by proving some of the more recently charged drug misconduct included in that confession.[cxcii]

United States v. Grant is troubling. The CAAF essentially allowed the military judge to forge a single piece of admissible evidence from among several forms of inadmissible hearsay.[cxciii] The accused's confession was not admissible as evidence against him unless corroborated. The drug screen results were not admissible against the accused as a matter of direct evidence under *Graham* and *Murphy*.[cxciv] Yet, the court allowed the judge to bootstrap one onto the other to create a single piece of admissible evidence and convict the accused on that basis. According to Black's Law Dictionary, inadmissible material is not evidence at all. It defines evidence as "[t]hat probative material, *legally received,* by which the tribunal may be lawfully persuaded of the truth or falsity of a fact in issue."[cxcv] The facts of *Grant*[cxcvi] are analogous to those in *United States v. Duvall,*[cxcvii] in which the opposite result was found.

2. United States v. Duvall

In *Duvall,* the CAAF reversed the conviction of an Air Force appellant who was convicted solely on the basis of his confession.[cxcviii] Airman Duvall, the appellant, was charged with the unlawful use of marijuana. He had allegedly used the marijuana with a buddy, Airman First Class (A1C) McKague. Airman First Class McKague confessed to smoking marijuana with the appellant to Senior Airman (SrA) Brents.[cxcix] Information regarding the use of illegal drugs came to the attention of Air Force investigators, who took the appellant into custody and questioned him.[cc] The appellant confessed in a written statement.[cci] Before trial, the court held an Article 39(a)[ccii] session at which A1C McKague invoked his privilege against self-incrimination and stated he would not testify as to the merits of the allegations against appellant. The unavailability of McKague's testimony left the government only with the testimony of SrA Brents.[cciii] Brents' testimony consisted only that McKague had told him the appellant had used illegal drugs with him (McKague).[cciv] The military judge ruled that, while Brents' testimony was inadmissible hearsay,[ccv] he could nevertheless consider Brents' testimony on the issue of corroboration. At the close of the government's case, the only evidence against the accused was the confession.[ccvi] "The 'net' result of the military judge's ruling was Brents' corroborative testimony was not introduced during trial on the merits."[ccvii]

In *Duvall,* the CAAF determined there was a requirement that corroborative evidence of a confession be admissible: "[t]he text of the Rule continues the longstanding requirement that a confession cannot be considered on the issue of guilt or innocence unless corroborating evidence 'has been introduced.'"[ccviii] The CAAF reversed the conviction noting that MRE 304(g) has two parts: (1) a determination that the confession is admissible based on sufficient corroboration, and (2) a determination by the trier of fact that the confession *plus* the corroborating evidence establish guilt beyond a reasonable doubt.[ccix] The CAAF held the AFCCA ignored the second part of this analysis and reversed the conviction.[ccx] The CAAF reasoned that "[t]he role of the members in deciding what weight to give a confession would be undermined if the corroborating evidence were produced only at an out-of-court session under Article 39(a) but not introduced before the members during their consideration of guilt or innocence."[ccxi]

3. United States v. Faciane[ccxii]

Unlike *Grant* and *Duvall, Faciane* was not an Air Force drug case but the facts lend themselves to a similar legal analysis.[ccxiii] Airman First Class Faciane was convicted of committing indecent acts on his three-year old daughter.[ccxiv] After the appellant divorced the child's mother in February 1991, he was granted visitation rights. Several months later, the mother observed the child's aberrant behavior after returning from visitation with the appellant.[ccxv]

By October, the child's behavior worsened.[ccxvi] The child's day care provider also observed and testified to the child's worsening behavior.[ccxvii] The mother took the child to the hospital. Before going to the hospital, she told the child that she was "going to see a doctor and there would be a lady there for her to talk to."[ccxviii] The "lady" who interviewed the child was Mrs. Cheryl Thornton, a member of the Child Protective Committee at Children's Memorial Hospital in Oklahoma City.[ccxix] As a result of the interview, Mrs. Thornton reported the matter to the Del City, Oklahoma, police department, who referred the matter to the AFOSI.[ccxx]

Special Agent (SA) Gardner of AFOSI conducted a custodial interrogation of the appellant. Appellant waived his rights and provided a written statement. In his written statement appellant admitted touching his daughter's vaginal area on three occasions.[ccxxi] His written statements revealed the appellant's motive for touching the child's vaginal area was "sexual arousal."[ccxxii]

At trial, appellant moved to suppress his statement as uncorroborated. He also moved to suppress Mrs. Thornton's testimony as inadmissible hearsay. The government's response was that Mrs. Thornton's testimony was admissible as a statement for the purpose of obtaining medical diagnosis in accordance with MRE 803(4)[ccxxiii] and her testimony was corroborative of the appellant's confession.[ccxxiv] The military judge ruled that the child's statements to Mrs. Thornton were admissible under MRE 803(4) and were sufficient to satisfy the corroboration requirement of MRE 304(g).[ccxxv] The Air Force Court of Military Review affirmed the conviction, but the COMA overturned it.[ccxxvi]

The COMA noted the following two-pronged test to satisfy the requirements of MRE 803(4): "first, the statements must be made for the purposes of 'medical diagnosis or treatment;' and second, the patient must make the statement 'with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought.'"[ccxxvii] The court held the testimony failed to satisfy the second prong of the test: "[t]here is no evidence indicating that the child knew that her conversation "with a lady" in playroom surroundings was in any way related to medical diagnosis or treatment. Mrs. Thornton testified that she did not present herself as a doctor or do anything medical."[ccxxviii] Having found Mrs. Thornton's testimony to be inadmissible hearsay, the court further held that it was insufficient to corroborate the appellant's confession.[ccxxix]

There was independent evidence that the appellant had exclusive custody of the child and, that the accused had, an opportunity to commit the offense. The court, however, found this insufficient to corroborate the confession: "we are unwilling to attach a

criminal connotation to the mere fact of a parental visit."[ccxxx]

4. Reconciling Grant with Duvall and Faciane

All three of these cases involved a confession which was the result of custodial interrogation. In *Duvall* and *Faciane,* the courts held the evidence proffered to corroborate the confession was inadmissible hearsay, and therefore, insufficient as corroborative evidence.[ccxxxi] Indeed, after *Duvall,* the issue as to whether inadmissible hearsay could be the basis for corroborating a custodial confession seemed to be settled.

Duvall affirms the traditional protection afforded to an accused under the corroboration rule. The court mandates that the prosecution present admissible corroborating evidence to the trier of fact when introducing the accused's confession. The Air Force court's significant departure from the traditional application of the corroboration rule required the CAAF to resolve the issue to ensure the rule's uniform application. The message is now clear: to convict using an out-of-court statement from the accused, the fact-finder must base its decision on a corroborated confession—that is, a confession plus corroborative evidence. To satisfy this requirement, the government must introduce *admissible* corroborative evidence.[ccxxxii]

In *Grant,* the evidence used to corroborate the confession was an emailed drug screen result,[ccxxxiii] which under *Murphy* and *Graham,* constituted inadmissible hearsay.[ccxxxiv] The CAAF upheld its admission "for the limited purpose of corroborating the appellant's confession"[ccxxxv] and affirmed the conviction solely on the basis of the confession. Bearing in mind the historical distrust of confessions and the concerns involving abuse of power, reliability, and the aspiration for skillful and thorough law enforcement investigation, it cuts against the rights of the accused and endangers the urinalysis program. It is the quality of the corroborative evidence which ensures the protection of the accused's rights. Yet, the quality of the corroboration also helps to preserve the integrity of the urinalysis program. Military Rule of Evidence 304(g) must demand only evidence of a sufficient quality to serve these ends be operative to corroborate a confession.

E. The Quality of Corroborative Evidence

Appellate issues surrounding the corroboration rule frequently involve the weight and sufficiency of the corroborative evidence. Often, the debate is a determination of whether there exists a sufficient quantum of evidence to ensure the reliability of the confession. As the Supreme Court stated in *Smith:*

> There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty.[ccxxxvi]

This article postulates the quality of the corroborative evidence is of equal, if not greater, importance to the reliability of the confession than the quantum of corroboration. In *Grant,*[ccxxxvii] the CAAF relied on *United States v. Melvin*[ccxxxviii] in noting the quantum of evidence needed to corroborate "may be very slight."[ccxxxix] A closer review of *Melvin,* however, shows that the assertion of *Melvin* as a means to minimize the sufficiency of corroboration may be misplaced.

In *Melvin,* an Army sergeant and his wife were stopped by German police who found cigarettes in the car containing a white powdery substance and three drinking straws with white adhesions on them later identified them as heroin.[ccxl] As a result of subsequent custodial interrogation, the appellant confessed to the use of heroin and provided

information about his supplier.[ccxli] At trial, the appellant redacted his confession. He claimed his wife had used the drugs. His wife corroborated his testimony. There was chemical analysis showing he had not used heroin.[ccxlii]

The COMA granted review on the following issue: "Whether appellant's conviction for the offense of wrongful use of heroin can stand solely upon appellant's uncorroborated confession."[ccxliii] Having certified this issue for review, it is revealing that the court decided the issue on other grounds. "We hold that appellant's confession was adequately corroborated by other evidence presented in this case and conclude that his conviction was proper."[ccxliv] The court did not affirm the conviction based on the legal issue as to whether the conviction could stand solely on the basis of an uncorroborated confession. Instead, they determined there existed sufficient independent admissible evidence sufficient to corroborate his confession. Specifically, the court noted the fact that:

> [I]ndependent evidence in the record shows that at the time of his arrest, appellant was in possession of heroin, the very drug he confessed to using earlier. Moreover, the heroin was contained in cigarettes, the very method of consumption he admitted to employing on the earlier dates. Also, the straws found in his car clearly suggest a familiarity with the drug culture consistent with the number of acts he admitted. Finally, evidence of his friendship with Dudu, a known drug dealer, and his leaving Dudu's apartment at the time of his arrest dovetails with his description of the situs and circumstances of his earlier acts.[ccxlv]

The record revealed numerable items of evidence, independent of the confession, directly admissible against the accused. The court commented in dicta the evidence "may be very slight," but was referring to the drafter's analysis in making this conclusion.[ccxlvi] As regards the quantum of evidence, the drafter's analysis provides, "The corroboration rule requires only that evidence be admitted which would support an inference that the essential facts admitted in the statement are true."[ccxlvii] The drafter's analysis can be read to mandate the admissibility of the corroboration.

Another case often cited for the proposition that the quantity of corroboration is "slight" is *United States v. Yeoman.*[ccxlviii] In *Yeoman,* a young Marine was charged with larceny for stealing a brown case that contained a number of audio cassettes. Private (Pvt.) Yeoman found the cassette case among some personal items left in a common area. After taking the case, he secreted himself to examine its contents. Inside were twenty-four cassettes, several personal letters and an airline ticket. Yeoman threw sixteen of the cassettes in a dumpster and secured the case in a locker.[ccxlix] Once the larceny was reported, Yeoman was taken to the provost marshal's office for interrogation. In the course of custodial interrogation, Yeoman confessed to the larceny in writing.[ccl]

On appeal, defense counsel argued the confession had not been sufficiently corroborated for its admission into evidence. The COMA, citing the *Military Rules of Evidence Manual,*[ccli] stated, "the quantum of evidence" needed to raise such an inference is "slight."[cclii] The corroborative evidence consisted of testimony that Yeoman had missed morning formation,[ccliii] recovery of eight cassette tapes from his locker, recovery of the cassette case, and his fingerprint on the cassette case. The court found this to be sufficient corroboration.[ccliv]

In *Yeoman,* the corroborative evidence consisted of several items of physical evidence that were independently admissible against the accused. Both the quantity and the quality of the corroborative evidence were substantial. This is precisely the type of corroborative evidence contemplated in *Smith* and *Opper*.[cclv] Given the relative quality of the corroborative evidence, it is ironic that *Yeoman is* cited most often for the simple

proposition, in dicta, that the quantum of corroboration need only be "slight."[cclvi]

United States v. Harjak[cclvii] presents an analysis of the corroboration rule which illuminates the role of hearsay testimony as corroboration. In *Harjak,* the appellant faced charges of sodomy and indecent acts upon his ten year-old daughter.[cclviii] The appellant had divorced the victim's mother when the child was three years old. The mother re-married. Several years later, the State of Iowa took the child-victim out of the mother's custody and granted custody to the appellant when it determined the child-victim's stepfather had sexually molested her.[cclix] Four months after the child-victim had moved into the appellant's home, she was again removed. She was placed in foster care when allegations surfaced to the Naval Investigative Service (NIS) that the appellant had sodomized her and engaged in indecent acts with her.[cclx]

An NIS agent interviewed the child-victim at the foster home. The agent recorded the interview. The interview was later transcribed and sworn to by the child-victim. After this interview, another NIS agent interviewed the appellant, who confessed in writing twice.[cclxi]

At trial, the government moved *in limine* to get a ruling on the admis-sibility of the confessions.[cclxii] The proffered corroborating evidence was the interview between the NIS agent and the child-victim. The child-victim did not testify. The government sought admission of the interview for the purpose of corroborating the confessions. As a basis for admissibility, the government cited the unavailability of the child-victim and the residual hearsay exception, MRE 804(b)(5)[cclxiii] and 803(24).[cclxiv] Determining the child-victim to be unavailable and the interview to possess sufficient particularized guarantees of trustworthiness, the military judge admitted the transcript over defense objeciton, as corroboration of the appellant's two confessions.[cclxv] The defense contended that the appellant's Sixth Amendment right to confrontation of witnesses had been violated and that there was insufficient corroborating evidence.[cclxvi]

On appeal, the government conceded to the appellant's assertion the military judge improperly found the victim unavailable to testify at trial. The *Harjak* court then examined the interview for particularized guarantees of trustworthiness to determine its admissibility under MRE 803(24). Citing *Idaho v. Wright,*[cclxvii] the court noted the trustworthiness of hearsay statements under MRE 803(24), can only be determined by examining of the totality of the circumstances surrounding the making of the statement. These circumstances must eliminate the possibility of fabrication, coaching, or confabulation and, by revealing the declarant to be particularly worthy of belief, render adversarial testing of those statements superfluous.[cclxviii]

The *Harjak* court examined the findings of the military judge and found them insufficient to guarantee the trustworthiness of the statements. The statements in the interview lacked the reliability of admissible evidence, and therefore, "should not have been considered as corroborating evidence of appellant's confessions to sodomizing and committing indecent acts with his daughter."[cclxix] Thus, it was not the quantity but the quality of the corroborative evidence that was lacking.

Harjak stands for the proposition that to satisfy the constitutional requirements, the evidence furnished to corroborate a confession must show "particularized guarantees of trustworthiness" or fall within a firmly rooted hearsay exception. In other words, evidence proffered to corroborate a confession must be as reliable as evidence admitted under any other hearsay exception.

Another case that is illuminating on the issue of the quality of the corroborating evidence is *United States v. Rounds*.[cclxx] Senior Airman Rounds was charged with illegally using marijuana and cocaine during the Thanksgiving and New Year's holidays. A female civilian reported his drug use to the AFOSI. The AFOSI interrogated SrA Rounds. After submitting two written statements which were exculpatory, SrA Rounds prepared a third handwritten statement in which he confessed.[cclxxi] On appeal, the appellant asserted "this independent evidence

was insufficient corroboration because it did not directly show that he consumed, ingested, or otherwise used drugs as he confessed."[cclxxii] The court found sufficient independent corroborative evidence of confession pertinent to the drug use at the New Year's Eve party, but insufficient corroboration as to his drug use during Thanksgiving. The testimony of two witnesses "dovetail[ed] with the time, place, and persons involved in the criminal acts admitted by appellant in his confession. More importantly, their testimony concerning these two incidents clearly shows that the appellant had both access and the opportunity to ingest the very drugs he admitted using in his confession."[cclxxiii] Testimony from the only government witness as to the Thanksgiving incident was able to ascertain the appellant's presence at the place and time charged but he saw no drugs. The court found this insufficient to corroborate the confession.[cclxxiv]

In *Melvin* and *Rounds,* circumstantial evidence placing the appellant at the place and time of the events charged, combined with the presence of illegal drugs, was held to be sufficient corroboration.[cclxxv] The circumstantial testimonial evidence in both cases was independently admissible showing "indirectly the facts sought to be proved."[cclxxvi] This differs from *Faciane,* in which the government sought to supply corroborative testimony under MRE 803(4) as a statement for the purpose of obtaining medical diagnosis or treatment.[cclxxvii] There was independent evidence that Faciane had exclusive custody of the child and, thus, an opportunity to commit the offense. But the court found this insufficient to corroborate the confession, deciding, "we are unwilling to attach a criminal connotation to the mere fact of a parental visit."[cclxxviii] In all three cases, the government provided circumstantial evidence to supply the required corroboration. Reconciliation lies in the quality of the corroborative evidence, rather than in the quantum of the corroboration.

The differing roles of the military judge and the panel members is another important factor in the corroboration-rule analysis. The *Duvall* court, in citing *Faciane* as authoritative on the sufficiency of evidence required to corroborate the appellant's confession, states "[b]ecause the military judge's ruling in this case precluded the members from considering any corroborating evidence in deciding what weight to give appellant's confession, the findings that are based solely on the confession must be set aside."[cclxxix]

F. The Role of the Judge and the Role of the Members

Military Rule of Evidence 304(g) assigns to the military judge the role of determining whether there is adequate corroboration of the confession. "The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration."[cclxxx] The drafters legislated this assignment directly in response to *United States v. Seigle,*[cclxxxi] which gave the panel members the decision regarding the admissibility of the confession.[cclxxxii] This change made the determination of corroboration consistent with the military judge's role in determining the voluntariness of confession under MRE 304(d).[cclxxxiii] The rules generally call upon the military judge to decide preliminary questions on issues as to the admissibility of evidence.[cclxxxiv] Hearings on the admissibility of statements of the accused are required to be outside the hearing of the members when the case is being tried before a panel.[cclxxxv]

A determination as to the adequacy of the corroborative evidence speaks to the sufficiency of the evidence as a whole, in addition to admissibility of the confession. This reflects the rule's dual role as a rule of admissibility of evidence and a rule of substantive law. It is because of this duality there can be a blur with the respective roles of the military judge and the panel members as it involves determinations of fact as well as determinations of law.

A finding of corroboration is a finding of law because it governs the admissibility of evidence—the confession. Yet in two respects the finding is also a finding of fact. First, in order to decide whether a confession is corroborated one must make a judgment

about facts. Second, this preliminary finding corresponds with the ultimate issue in the case: whether the confession is believable.[cclxxxvi]

An amendment to MRE 304(g) requiring admissible evidence to serve as corroboration of a confession or admission would aid in clearing up these blurred roles. This was precisely the situation the court faced in *Duvall.*[cclxxxvii] In *Duvall,* the government sought to admit the testimony of SrA Brents. Brents' testimony consisted only that McKague had told him that appellant had used illegal drugs with him (McKague).[cclxxxviii] The military judge found Brents' testimony was inadmissible hearsay. The military judge, however, allowed Brents to testify during the Article 39(a) session outside the presence of members to corroborate the confession, but he would not permit the government to present Brents' testimony to the members during the trial on the merits.[cclxxxix] Based on Brents' testimony at the Article 39(a) session, the military judge found the confession adequately corroborated and admitted it into evidence.[ccxc]

Out of the hearing of the members, the military judge made a qualitative finding of fact that the confession was sufficiently reliable. While it is true that MRE 104(a) assigns to the judge the task of determining preliminary issues of the admissibility of evidence, the ultimate issue was the reliability of the confession. This provides an explanation for the necessity of having evidence admitted independently of the confession. This was the Supreme Court's intent in formulating the trustworthiness doctrine, as stated in *Opper:*

> Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.[ccxci]

In Grant, the situation before the court was similar, but there was a procedural difference that changed the result. There, the government offered the report of the positive drug screen as a business record exception to the hearsay rule. It was offered for the limited purpose of corroborating appellant's confession.[ccxcii] The real issue, however, was the reliability and admissibility of the accused's confession.

Military Rule of Evidence 104(c) mandates that "the admissibility of statements of an accused under Mil. R. Evid. 301-306 shall in all cases be conducted out of the hearing of the members."[ccxciii] The admissibility of the confession in *Grant* was debated in open court despite the clear language of MRE 104(c) requiring consideration of admissibility of the confession in an Article 39(a) session.[ccxciv] The quality of evidence in each case was similar. This begs the question as to whether the CAAF would have decided *Duvall* differently if the military judge would have allowed SrA Brents' hearsay for the limited purpose of corroborating the confession in open court rather than only in an Article 39(a) session.[ccxcv]

An amendment to MRE 304(g) requiring that corroborative evidence of a confession be independently admissible, would enable us to square Grant with Duvall. It would also clarify the requirements of the corroboration rule for military judges and counsel in its implementation. Most importantly, such an amendment would ensure the preservation of this aspect of the privilege against self-incrimination and faithfulness to the rationale for the creation of the rule.

IV. Conclusion

Military Rule of Evidence 304(g), the military version of the corroboration rule, may seem simple. Our review of its interpretive case law, reminds us that while the rule seems straightforward, its application to a

particular set of facts in a case may be difficult. In its current form, it has led to some inconsistent results. The rule's most recent application in *Grant* endangers its role as a privilege against self-incrimination and could harm the integrity of our urinalysis program.

Military Rule of Evidence 304(g) should be amended to clarify its requirements in order to facilitate its fair and consistent application without eroding the protections it was formulated to provide. Accordingly, the rule should be amended to read as follows (proposed amendments emphasized):

> (g) Corroboration. An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced *into evidence* that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. *Independent evidence employed to supply corroboration of the admission must include evidence that is admissible against the accused. Statements of facts constituting otherwise inadmissible hearsay cannot be the sole basis for a finding of sufficient corroboration of the confession or admission.* If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.
>
> (1) Quantum of evidence needed. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and *quality* of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.
>
> (2) Procedure. The military judge alone shall determine when adequate evidence of corroboration has been received. *In determining the admissibility of the confession or admission, the military judge must ensure there is some evidence admissible against the accused apart from the confession.* Corroborating evidence usually is to be introduced *into evidence* before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

These proposed amendments are consistent with the historical distrust of confessions and the rationale of the Supreme Court in *Smith* and *Opper.* As Senior Judge

Pearson wrote in his dissent in *Duvall* before the AFCCA, "I conclude the trier of fact may use a confession as evidence to support a conviction only when the evidence used for corroboration is otherwise admissible in evidence before it . . . The majority gives no meaning to words of those great justices who created the corroboration rule."[ccxcvi]

The proposed amendment simplifies the requirements of the rule and provides clarification. It is consistent with the interpretation given in the majority of military cases. The proposed amendment precludes the erosion of the rule's purpose by preventing the military judge from synthesizing items of inadmissible hearsay in the creation of a single piece of evidence to supply as corroboration, as was the case in *Grant.* The proposed amendment would preserve the precedental value of case law, such as that in *Graham* and *Murphy,* protecting the integrity of our urinalysis program. Most importantly, these proposals strengthen and preserve the corroboration rule as a critical component in self-incrimination jurisprudence.

Endnotes

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[ii] WILLIAM SHAKESPEARE, OTHELLO THE MOOR OF VENICE act 5, sc. 2.

[iii] *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Univ. of Chicago Press 1979).

[iv] *See* Opper v. United States, 348 U.S. 84, 93 (1954) (adopting corroboration rule for federal courts); *see generally 3* G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987).

[v] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(g) (2002) [hereinafter MCM].

[vi] *Id.*

[vii] Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions,* 1984 WIS. L. REV. 1121, 1122 (1984).

[viii] Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964) (Goldberg, J., concurring).

[ix] Ayling, *supra* note 7, at 1123.

[x] Payne v. Arkansas, 356 U.S. 560 (1958). In *Payne,* a mentally dull nineteen-year-old African American with a fifth-grade education, was convicted in a state court of first degree murder and sentenced to death.

At his trial, there was admitted in evidence, over his objection, a confession shown by undisputed evidence to have been obtained in the following circumstances: He was arrested without a warrant and never taken before a magistrate or advised of his right to remain silent or to have counsel, as required by state law. After being held for three days without counsel, advisor or friend, and with very little food, he confessed after being told by the Chief of Police that "there would be 30 or 40 people there in a few minutes that wanted to get him" and that, if he would tell the truth, the Chief of Police probably would keep them from coming in.

Id. The Supreme Court reversed the conviction finding from the totality of the circumstances that the confession was coerced and did not constitute an expression of free choice. *Id.* at 568. Even though there may have been sufficient evidence to support his conviction apart from the coerced confession, the judgment was voided because it violated the Due Process Clause of the Fourteenth Amendment. Id.

[xi] Miranda v. Arizona, 384 U.S. 436 (1966). The Court held:

Prosecution may not use statements from custodial interrogation of a defendant unless it shows procedural safeguards secured the privilege against selfincrimination. Defendant must be warned that he has the right to remain silent and anything he says may be used against him. He must be clearly informed he has the right to consult with a lawyer and to have the lawyer with him during interrogation.

Id.

[xii] Ayling, *supra* note 7, at 1124.

[xiii] *Id.*

[xiv] Other forms of the corroboration rule will be discussed *infra* as we examine its origin and development. For a more

comprehensive listing of jurisdictions and the form of the corroboration rule they follow, *see generally E. H.* Schopler, Annotation, *Corroboration of Extrajudicial Confession or Admission, 45* A.L.R. 2d 1316 (1956).

[xv] MCM, *supra* note 5, MIL. R. EVID. 304(g).

[xvi] Bruce A. Decker, People v. McMahan: *Corpus Delecti Rule or Trustworthiness Doctrine?,* 1997 DET. C.L. REV. 191 (1997).

[xvii] 14 HOW. ST. TR. 1312 (1660).

[xviii] *Id.;* Note, *Construed in Proof of the Corpus Delecti Aliunde the Defendant's Confession,* 103 U. PA. L. REV. 638, 639 (1955).

[xix] Tom Barber, *Young Lawyers Division: The Anatomy of Florida's Corpus Delecti Doctrine,* 74 FLA. B.J. 80 (2000).

[xx] Ayling, *supra* note 7, at 1126.

[xxi] Rollin M. Perkins, *The Corpus Delecti of Murder,* 48 VA. L. REV. 173, 175 (1962) (construing *The Trial of Stephen and Jesse Boorn,* 6 AM. ST. TR. 73 (1819)).

[xxii] Ayling, *supra* note 7, at 1126. In declining to adopt the corpus delecti rule, the Massachusetts Supreme Court reasoned the jury was competent to evaluate the probative value of an uncorroborated confession and the "trend of modern decisions is in the direction of eliminating quantitative tests of the sufficiency of evidence." Commonwealth v. Kimball, 73 N.E.2d 468, 470 (1947) (quoting Commonwealth v. Gale, 57 N.E.2d 918, 920 (1944)).

[xxiii] Barber, *supra* note 19, at 81.

[xxiv] *Id.* at 80.

[xxv] *Id.* (citing Perkins, *supra* note 21, at 179).

[xxvi] Decker, *supra* note 16.

[xxvii] Barber, *supra* note 19, at 80.

[xxviii] Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delecti as a Condition of Admitting an Extrajudicial Confession,* 27 U.S.F. L. REV. 385, 408 (1993).

[xxix] Ayling, *supra* note 7, at 1128-29.

[xxx] *Id.* at *1162.* In his analysis, Ayling references research at the University of Stanford in which twenty-four male students were divided into two groups. Half were assigned as "guards" and the other half as "prisoners." The prisoners were assigned to "cells" within the psychology building. Other than issuance of appropriate garb and a prohibition on physical force, they were given little guidance. In a very short period of time,

[t]he guards quickly began to relish their power and increasingly subjected the prisoners to verbal abuse and harassing rules and rituals. Five of the ten prisoners had to be released early because of extreme depression, crying, rage, and acute anxiety; the pattern of symptoms began as early as the second day of imprisonment. On the whole, the prisoners behaved with increasing passivity and complied, after a brief rebellion, with the guards' orders. The prisoners also began to internalize the guard's negative attitudes towards themselves.

Id.

[xxxi] *See generally* Edwin D. Driver, *Confessions and the Social Psychology of Coercion, 82* HARV. L. REV. *42 (1968)* (citing Miranda v. Arizona, *384 U.S. 436 (1966))* (collecting social psychological literature and concluding that *Miranda* warnings fail to provide safeguards against the social psychological rigors of arrest and interrogation).

[xxxii] Ayling, *supra* note *7.*

[xxxiii] *Id.* at *1174-75* (citing Daryl Bem, *When Saying Is Believing, 1* PSYCHOLOGY TODAY *21* (June *1967)).*

[xxxiv] *Id*

[xxxv] *Id.* at 1177-79 (citing MIKE HEPWORTH, CONFESSION: STUDIES IN DEVIANCE AND RELIGION 175 (Routledge, Kegan and Paul ed., 1982)).

[xxxvi] *Id.*

[xxxvii] *Id.*

[xxxviii] *Id.*

[xxxix] 348 U.S. 147 (1954). Along with *United States v. Opper*, 348 U.S. 84 (1954), *Smith* was one of two cases that established the so-called trustworthiness doctrine, the current federal standard for corroboration of confessions. *Smith*, 348 U.S. at 147. Both cases are discussed in more detail *infra*.

[xl] *Smith*, 348 U.S. at 153.

[xli] Ayling, *supra* note 7, at 1127.

[xlii] *Id.* (citing Warszower v. United States, 312 U.S. 342, 347 (1941)). In *Warszower,* a Russian immigrant gave false statements to obtain a passport in the United States. The Supreme Court held, "the rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist." Thus, admissions made by the defendant before the crime did not need to be corroborated. *Warszower,* 312 U.S. at 347.

[xliii] *See E.* H. Schopler, Annotation, *Corroboration of Extrajudicial Confession or Admission, 45* A.L.R. 2d 1316 (1956) (providing a somewhat exhaustive listing of the rule followed all states, with the exception of Massachusetts, which has not adopted any form of the corroboration rule).

[xliv] Ayling, *supra* note 7, at 1145. The corpus delecti jurisdictions are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Id.*

[xlv] *Id.* at 1148-51.

[xlvi] The Wisconsin rule provides that a confession may be corroborated by "any significant fact in order to produce a confidence in the truth of the confession." Holt v. State, 17 Wis. 2d 468, 480 (1962). This rule is similar to the federal rule.

[xlvii] The New Jersey Supreme Court rule requires: (1) proof of loss or harm associated with the crime; and (2) other proof "tending to establish that when the defendant confessed he was telling the truth." State v. Lucas, 30 N.J. 37, 58 (1959).

[xlviii] The Iowa rule is the most strict. It requires independent proof of both the corpus delecti and the defendant's link to the crime. State v. White, 319 N.W.2d 213, 214 (Iowa 1982).

[xlix] The federal rule was the product of two Supreme Court cases decided in 1954. *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).

[l] Ayling, *supra* note 7, at 1149.

[li] *See generally* Decker, *supra* note 16, at 191; Schopler, *supra* note 43.

[lii] *Opper,* 348 U.S. at 92-3; *see* Lieutenant Colonel R. Wade Curtis, *Trial Judiciary Note: Military Rule of Evidence 304(g)—The Corroboration Rule,* ARMY LAW., July 1987, at 35.

[liii] 250 F. 566 (2d Cir. 1918).

[liv] 94 F.2d 236 (D.C. Cir. 1937).

[lv] *Daeche,* 250 F. at 569.

[lvi] *Id.*

[lvii] *Id.* at 571.

[lviii] *Forte,* 94 F.2d at 236.

[lix] *Id.*

[lx] *Id.* at 241.

[lxi] *Id.* at 240.

[lxii] United States v. Opper, 348 U.S. 84, 86 (1954) (stating "Certiorari was granted because of asserted variance or conflict between the legal conclusion reached in this case—that an extrajudicial, exculpatory statement of an accused, subsequent to the alleged crime, needs no corroboration—and other cases to the contrary.").

[lxiii] *Id.*

[lxiv] *Id.* at 85.

[lxv] *Id.*

[lxvi] *Id.* at *87.*

[lxvii] *Id.*

[lxviii] *Id.* at *88.*

[lxix] *Id.* at *91* (acknowledging that admissions differ from confessions in that "confessions are only one species of admissions" but the Court concluded that the admissions "call for corroboration to the same extent as other statements").

[lxx] *Id.* at *92.*

[lxxi] *Id.*

[lxxii] *Id.* at 94.

[lxxiii] The Court found the corroborative evidence which established the truthfulness of Opper's admissions did not establish a corpus delecti for the entire crime. "Rather it tends to establish only one element of the offense—payment of money. The Government therefore had to prove the other element of the *corpus* delecti—rendering of services by the government employee—entirely by independent evidence." Id.

[lxxiv] 348 U.S. 147 (1954).

[lxxv] To say a case has no tangible corpus delecti does not mean there is corpus delecti or body of the crime. It simply means there is no direct tangible victim, such as in a murder case. A case with no tangible corpus delecti can be thought of as a so-called victimless crime, such as tax fraud or drug usage.

[lxxvi] *Smith,* 348 U.S. at 149.

[lxxvii] *Id.*

[lxxviii] *Id.* at 151.

[lxxix] *Id.* at 153.

[lxxx] *Id.* at 153-4.

[lxxxi] *Id.*

[lxxxii] *Id.* at 154.

[lxxxiii] *Id.* (citing Evans v. United States, 122 F.2d 461 (10th Cir. 1941); Murray v. United States, 288 F. 1008 (D.C. Cir. 1923)).

[lxxxiv] *Id.*

[lxxxv] *Id.*

[lxxxvi] *Id.* (stating, "We hold the rule applicable to such statements, at least where, as in this case, the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces an element vital to the Government's case.").

[lxxxvii] *Id.* at 156.

[lxxxviii] *Id.*

[lxxxix] Curtis, *supra* note 52, at 38.

[xc] *Smith, 348 U.S. at 147; United States v. Opper, 348 U.S. 84, 86 (1954).*

[xci] MCM, *supra note 5,* MIL. R. EVID. *304(g).*

[xcii] *Id.* The text of MRE 304(g) is as follows:

(g) Corroboration. An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(1) Quantum of evidence needed. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(2) Procedure. The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

Id.

[xciii] *Smith,* 348 U.S. at *147; Opper,* 348 U.S. at 84.

[xciv] STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 189 (4th ed. 1997).

[xcv] *Id.*

[xcvi] *Opper,* 348 U.S at 109.

[xcvii] SALTZBURG, SCHINASI & SCHLUETER, *supra* note 94.

[xcviii] *See supra* notes 106-30, and accompanying text; *see also* MCM, *supra* note 5,

MIL. R. EVID. 304(g).

[xcix] MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. iv, ¶ 140(a) (1951) [hereinafter 1951 MCM] (emphasis added).

[c] Id.

[ci] MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. xxvii, ¶ 140(a)(5) (1968) [hereinafter 1968 MCM] (analysis of contents). It provided:

Corroboration of confessions and admissions. This subparagraph contains the new rule pertaining to corroboration of confessions and admissions adopted by the Supreme Court in Opper v. United States, 348 U.S. 84 (1954), and Smith v. United States, 348 U.S. 147 (1954). The *Opper* case is authority for the proposition that the corroborating evidence need only raise a "jury inference" of the truth of the essential facts admitted, and the *Smith* case is authority for the principle that if the prosecution desires to use the accused's statement as evidence to establish a particular essential fact, the essential fact must be corroborated by independent evidence. Although both cases involved offences in which there was no tangible corpus delecti, the Court did not, in announcing its new rule, state that the rule applied only to this type of offense–that is, it did not indicate that the old "corpus delecti" rule would continue to be applied to offenses in which there was a "tangible" corpus delecti, if there is, in fact, any distinction to be drawn. The new rule is entirely different from the corpus delecti rule found in the former Manual. Under the *Opper* and *Smith* rule, all that is required is that there be independent evidence raising a "jury inference" of the truth of the matters stated in the confession or admission, in other words, actual corroboration of the statement; whereas, under the so-called "corpus delecti" rule the confession or admission is completely disregarded until such time as it is shown independently that the offense in question has "probably been committed by someone."

Id.

[cii] 102. Id.

[ciii] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(g) (1984) (drafter's analysis) [hereinafter 1984 MCM]. The drafter's analysis reveals the change requiring the military judge, rather than the members, to decide the initial determination as to whether a confession was sufficiently corroborated for purposes of admissibility was a result of *United States v. Seigle,* 47 C.M.R. 340 (1973). The drafter's analysis provides:

Rule 304(g) restates the present law of corroboration with one major procedural change. At present, no instruction on the requirement of corroboration is required unless the evidence is substantially conflicting, self contradictory, uncertain, or improbable and there is a defense request for such an instruction. United States v. Seigle, 22 U.S.C.M.A. 403, 47 C.M.R. 340 (1973). The holding in *Seigle is* consistent with the present Manual's view that the admissibility may be decided by the members, but it is inconsistent with the position taken in Rule 304(d) that admissibility is the sole responsibility of the military judge. Inasmuch as the Rule requires corroborating evidence as a condition precedent to admission of the statement, submission of the issue to the members would seem to be both unnecessary and confusing. Consequently, the Rule does not follow *Seigle* insofar as the case allows the issue to be submitted to the members. The members must still weigh the evidence when determining the guilt or innocence of the accused, and the nature of any corroborating evidence is an appropriate matter for the members to consider when weighing the statement before them.

1984 MCM, at A22-12. The analysis quoted above is identical to the current *Manual* at page A22-13. MCM, *supra* note 5, at A22-13.

[civ] 1984 MCM, *supra* note 103.

[cv] 1968 MCM, *supra* note 101, analysis of contents.

[cvi] 14 M.J. 784 (1982).

[cvii] *Id.* at 785.

[cviii] *Id.* at 785-6.

[cix] *Id.*

[cx] 1968 MCM, *supra* note 101, ¶ 140(a)(5).

[cxi] *Id.*

[cxii] *Loewen,* 14 M.J. at 784.

[cxiii] *Id.*

[cxiv] 23 M.J. 575 (N.M.C.M.R. 1986).

[cxv] *Id; see Loewen,* 14 M.J. at 787; Curtis, *supra* note 52.

[cxvi] *Yates,* 23 M.J. at 575.

[cxvii] *Id.* at 575-76.

[cxviii] *Id.* at 575.

[cxix] *Id.* at 576.

[cxx] *Id. at 578.*

[cxxi] *Id. at 579.*

[cxxii] *54 M.J. 551 (A.F. Ct. Crim. App. 2000).*

[cxxiii] *Id.*

[cxxiv] *Id. at 552.*

[cxxv] *Id. at 553.*

[cxxvi] *Id.* The dialog on the suppression motion went as follows:

MJ: Okay. Let me ask you this, back in law school the common law rule concerning this was that before an admission or confession is admissible the prosecution has to prove *corpus delecti.* That is, that there was a crime committed. That is, a person can't confess to something where there's no evidence that there was a crime committed. Okay.

For instance, defendant one goes into the police and confesses that he killed somebody last year on the side of the road. There's no other evidence indicating that anybody's missing, anybody's dead, you know, anything to indicate that what he's saying is correct. Now, of course there are people that can testify that from time to time there are people on the side of the road, but that's all.

My question is, can the prosecution prosecute defendant one for murder where there's no indication whatsoever of *corpus delecti?* Part B of that is, what evidence do we have in this case that there is any *corpus delecti* and, Part C is, what case do you have to support your legal position where there was no evidence presented by the prosecution of a *corpus delecti?*

Id. at 553.

[cxxvii] *Id.*

[cxxviii] The AFCCA rebuked the military judge's employment of the wrong legal standard:

The existence of a corpus delecti is not required by the rule. Despite his acknowledgement that this was the law, the military judge's ruling was based upon the absence of any evidence that the accused was seen committing the acts or that the child-victim exhibited physical or mental injury. So, while eschewing the requirement, he virtually demanded that trial counsel present evidence of the body of the crime, the corpus delecti.

Id. at 555.

[cxxix] *See* United States v. Maio, *34* M.J. *215 (C.M.A. 1992)* (finding sufficient independent evidence corroborated appellant's voluntary confession, which was shown to be sufficiently trustworthy for admission at his court-martial. In confirming the trustworthiness doctrine as the appropriate legal standard the court announced that "it can be realistically said in the Federal sector that the 'corpus delecti' corroboration rule no longer exists.").

[cxxx] *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).

[cxxxi] 56 M.J. 410 (2002).

[cxxxii] *Id.* at 412.

[cxxxiii] *Id.*

[cxxxiv] *Id.*

[cxxxv] *Id.*

[cxxxvi] *Id.*

[cxxxvii] *Id.*

[cxxxviii] *Id.*

[cxxxix] *Id.*

[cxl] MCM, supra note 5, MIL. R. EVID. 801.

[cxli] Id. MIL. R. EVID. 803(6), which provides that:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilation normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

Id.

[cxlii] *Grant*, 56 M.J. at 413.

[cxliii] *Id.*

[cxliv] *Id.*

[cxlv] *Id.*

[cxlvi] *Id.*

[cxlvii] *Id.*

[cxlviii] United States v. Grant, 2001 C.C.A. LEXIS 22 (A.F. Ct. Crim. App. Jan. 18, 2001).

[cxlix] *Grant*, 56 M.J. at 410.

[cl] *Id.* at 416. The appellant cited *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987). *Murphy* was part of a trilogy of cases that set forth a three-part test for the admissibility of drug screen results proffered by the government in a court martial. As will be discussed infra, the three elements are: (1) the seizure of the urine sample must be a lawful seizure; (2) the laboratory results must be admissible, requiring proof of a chain of custody of the sample, that is, proof that proper procedures were utilized; and (3) there must be expert testimony or other evidence in the record providing a rational basis for inferring that the substance was knowingly used and that the use was wrongful. Id. The other two cases are *United States v. Harper*, 22 M.J. 157 (1986) and *United States v. Ford*, 23 M.J. 331 (1987). The three cases are summarized into a three-part test in *United States v. Graham*, 50 M.J. 56 (1999).

[cli] *Grant*, 56 M.J. at 416.

[clii] *Id.*

[cliii] *Id.* (citing 26 M.J. 145 (C.M.A. 1988) (finding sufficient independent evidence had been introduced to support the confession of the accused)).

[cliv] *Id.*

[clv] *Id.* In *Melvin*, the COMA listed a variety of independently admissible evidence in the record to corroborate the appellant's confession. We will examine this case in greater detail *infra*. The following describes the quantum of corroboration in *Melvin:*

> In the instant case, independent evidence in the record shows that at the time of his arrest, appellant was in possession of heroin, the very drug he confessed to using earlier. Moreover, the heroin was contained in cigarettes, the very method of consumption he admitted to employing on the earlier dates. Also, the straws found in his car clearly suggest a familiarity with the drug culture consistent with the number of acts he admitted. Finally, evidence of his friendship with Dudu, a known drug dealer, and his leaving Dudu's apartment at the time of his arrest dovetails with his description of the situs and circumstances of his earlier acts.

United States v. Melvin, 26 M.J. 145, 147 (C.M.A. 1986). *See Grant*, 56 M.J. at 416.

[clvi] *Grant*, 56 M.J. at 416; see MCM, supra note 5, MIL. R. EVID. 803(6).

[clvii] *Grant*, 56 M.J. at 414.

[clviii] *Id.* (citing Air Land Forwarders, Inc. v. United States, 172 F.3d 1338 (Fed. Cir. 1999); MRT Constr., Inc. v. Hardrives, 158 F.3d 478 (9th Cir. 1998); United States v. Doe, 960 F.2d 221 (1st Cir. 1992); United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992); United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978); United States v. Carranco, 551 F.2d 1197 (10th Cir. 1977)).

[clix] *Grant*, 56 M.J. at 414.

[clx] Captain David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer,* ARMY LAW., Sept. 1988, at 7.

[clxi] MCM, *supra* note 5, MIL. R. EVID. 702.

[clxii] Captain Fitzkee's article describes the scientific testimony required of the expert:

After establishing the witness as an expert, the trial counsel should use the expert's testimony to: explain how the laboratory receives, processes, and tests urine samples; explain the scientific principles behind the radioimmunoassay (RIA) test and the gas chromatography/mass spectrometry (GC/MS) test that the laboratory uses; explain the results of the tests of the accused's sample; explain the meaning of the results; explain the internal and external quality control procedures that guarantee that the result is accurate; and introduce into evidence the accused's urine bottle and the laboratory reports pertaining to that sample.

Fitzkee, *supra* note 160, at 13.

[clxiii] Captain Fitzkee's article also describes the procedural aspects of the drug screen:

Urine samples typically arrive by registered mail in the laboratory's mail room. The unopened boxes are thereafter transferred to the receiving and processing section. A technician inspects each sealed box, which contains up to twelve urine samples, to ensure that the box is sealed with tape. If the box is not sealed, or there are other signs of tampering, the samples in that box are rejected, and not tested. If everything is in order, the processing technician opens the box and compares the social security number and specimen number on each bottle with the numbers on the DA Form 5180-R that accompanied the box. Each number must exactly correspond. The technician assigns each accepted sample a laboratory accession number, by which the sample is tracked throughout the laboratory. The technician places this number on the urine bottle and on the DA Form 5180-R. The samples are then configured into batches for testing, and are put into temporary storage in a secure, limited-access area. Other technicians later conduct tests by removing aliquots from the bottles kept in temporary storage. All tests are documented to establish a proper chain of custody. The bottles remain in temporary storage until the sample is determined to be negative and is discarded, or until it is determined to be positive and is transferred to long-term storage. The laboratory determines that a sample is negative when the sample contains no drug or drug metabolites or contains drug or drug metabolites at threshold levels below those established by Department of Defense ("DOD"). The laboratory determines that a sample is positive when two separate tests by RIA and GC/MS confirm that it contains drugs or drug metabolites at levels exceeding the DOD thresholds.

Id.

[clxiv] 23 M.J. 310 (C.M.A. 1987).

[clxv] Fitzkee, *supra* note 160, at 12.

[clxvi] *Murphy,* 23 M.J. at 310.

clxvii *Id.* at 311.

clxviii *Id.*

clxix *Compare id., and* United States v. Grant, 56 M.J. 410 (2002).

clxx *Grant*, 56 M.J. at 413.

clxxi *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).

clxxii *See* United States v. Ford, 23 M.J. 331 (1987); United States v. Murphy, 23 M.J. 310 (1987); United States v. Harper, 22 M.J. 157 (1986).

clxxiii 50 M.J. 56 (1999).

clxxiv *Grant*, 56 M.J. at 418. Judge Sullivan also authored the dissent in *United States v. Graham*, 50 M.J. 56, 59-64 (1999).

clxxv *Graham*, 50 M.J. at 57.

clxxvi *Id.*

clxxvii *Id.*

clxxviii *Id.* at 58.

clxxix *Id.* at 58-9.

clxxx *Id.* at 59.

clxxxi *Id.* at 60.

clxxxii *Graham*, 50 M.J. at 56 (citing United States v. Grant, 56 M.J. 410 (2002)).

clxxxiii MCM, *supra* note 5, MIL. R. EVID. 803(6); *Grant,* 56 M.J. at 413.

clxxxiv *Graham,* 50 M.J. at 57.

clxxxv *Id.* at 58.

clxxxvi *Grant,* 56 M.J. at 414-15.

clxxxvii *Id.* at 417; *see* United States v. Murphy, 23 M.J. 310 (1987).

clxxxviii "Hearsay is not admissible except as provided by these rules or by any act of Congress applicable in trials by court-martial." MCM, *supra* note 5, MIL. R. EVID. 802.

clxxxix *Id.* MIL. R. EVID. 304(g) (emphasis added).

cxc BLACK'S LAW DICTIONARY 576 (7th ed. 1999).

cxci *Id.* at 243.

cxcii *Grant*, 56 M.J. at 418.

cxciii *Id.* at 410-17.

cxciv *See id.*; United Stated v. Graham, 50 M.J. 56 (1999); United States v. Murphy, 23 M.J. 310 (C.M.A. 1987).

cxcv BLACK'S LAW DICTIONARY, *supra* note 190, at 555 (emphasis added).

cxcvi 56 M.J. at 410-18.

cxcvii 47 M.J. 189 (1997).

cxcviii *Id.*

cxcix *Id.* at 190.

cc *Id.*

cci *Id.*

ccii UCMJ art. 39(a) (2002).

cciii *Duvall*, 47 M.J. at 190.

cciv *Id.*

ccv MCM, *supra* note 5, MIL. R. EVID. 802.

ccvi *Duvall*, 47 M.J. at 190.

[ccvii] *Id.* at 191.

[ccviii] *Id.* at 192.

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

[ccx] See Major Martin H. Sitler, *Widening the Door: Recent Developments in Self Incrimination Law*, ARMY LAW., Apr. 1998, at 93.

[ccxi] *Duvall*, 47 M.J. at 192.

[ccxii] 40 M.J. 399 (C.M.A. 1994).

[ccxiii] *Compare id., with* United States v. Grant, 56 M.J. 410 (2002), *and* United States v. Duvall, 47 M.J. 189 (1997).

[ccxiv] *Faciane*, 40 M.J. at 399.

[ccxv] *Id.* at 400. The facts of the case provide the mother "noticed that her daughter would wet the bed, have nightmares, would not eat, and would be withdrawn after visiting appellant." *Id.*

[ccxvi] The mother described her daughter's behavior as "extremely withdrawn and extremely angry. She could not relax. She was running around the house and throwing her toys. When I put her to bed, she would not relax enough to go to sleep. She was hiding under her bed and crying." The mother testified having observed the child inserting a toothbrush inside her vagina. *Id.*

[ccxvii] *Id.* "Ms. Fancher testified that in October the child's behavior became 'three times worse.' She would throw toys, hit younger children, refuse to use the bathroom, and refuse to eat." *Id.*

[ccxviii] *Id.*

[ccxix] *Id.*

[ccxx] *Id.* at 402.

[ccxxi] *Id.*

[ccxxii] *Id.*

[ccxxiii] MCM, *supra* note 5, MIL. R. EVID. 803(4). It provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Id.

[ccxxiv] *Faciane*, 40 M.J. at 402.

[ccxxv] *Id.*

[ccxxvi] *Id.*

[ccxxvii] *Id.* at 403.

[ccxxviii] *Id.*

[ccxxix] *Id.*

[ccxxx] *Id. Duvall* cites Faciane as authoritative on the sufficiency of evidence required to corroborate the appellant's confession. *Id.* "Because the military judge's ruling in this case precluded the members from considering any corroborating evidence in deciding what weight to give appellant's confession, the findings that are based solely on the confession must be set aside." United States v. Duvall, 47 M.J. 189, 192 (1997).

[ccxxxi] *See* United States v. Duvall, 47 M.J. 189 (1997); United States v. Faciane, 40 M.J. 399 (C.M.A. 1994).

[ccxxxii] Sitler, *supra* note 210, at 103 (emphasis in original).

[ccxxxiii] United States v. Grant, 56 M.J. 410, 412 (2002).

[ccxxxiv] *See* United Stated v. Graham, 50 M.J. 56 (1999); United States v. Murphy, 23 M.J. 310 (1987).

[ccxxxv] *Grant,* 56 M.J. at 411.

[ccxxxvi] United States v. Smith, 348 U.S. 147, 156 (1954).

[ccxxxvii] 56 M.J. at 416.

[ccxxxviii] 26 M.J. 145, 146 (C.M.A. 1988).

[ccxxxix] *Grant*, 56 M.J. at 416 (citing *Melvin*, 26 M.J. at 146).

[ccxl] *Melvin*, 26 M.J. at 146.

[ccxli] *Id.*

[ccxlii] *Id.*

[ccxliii] *Id.*

[ccxliv] *Id.*

[ccxlv] *Id.* at 147.

[ccxlvi] *Id.* at 146.

[ccxlvii] 1984 MCM, *supra* note 103, MIL. R. EVID. 304 (g), A22-13.

[ccxlviii] 25 M.J. 1 (C.M.A. 1987).

[ccxlix] *Id.* at 3.

[ccl] *Id.* at 2-3.

[ccli] SALTZBURG, SCHINASI & SCHLUETER, *supra* note 94.

[cclii] *Yeoman*, 25 M.J. at 4.

[ccliii] Private Yeoman was also charged with unauthorized absence from his appointed place of duty. *Id.*

[ccliv] *Id.* at 5.

[cclv] *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).

[cclvi] *Yeoman,* 25 M.J. at 4.

[cclvii] 33 M.J. 577 (N.M.C.M.R. 1991).

[cclviii] *Id.* at 580.

[cclix] *Id.*

[cclx] *Id.*

[cclxi] *Id.* at 581.

[cclxii] *Id.*

[cclxiii] MCM, *supra* note 5, MIL. R. EVID. 804(b)(5).

[cclxiv] *Id.* MIL. R. EVID. 803(24). Both MRE 804(b)(5) and MRE 803(24) are currently codified under MCM, *supra* note 5, MIL. R. EVID. 807. It provides as follows:

Residual Exception. A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

[cclxv] United States v. Harjak, 33 M.J. 577, 581 (1991).

[cclxvi] U.S. CONST. amend. VI; Maryland v. Craig, 497 U.S. 836 (1990) (upholding a state-court procedure that permitted a child-victim to testify by one way closed circuit television as satisfying the Confrontation Clause of the Sixth Amendment).

[cclxvii] 497 U.S. 805 (1990). The Court held that incriminating statements admissible under an exception to the hearsay rule are not admissible under the Confrontation Clause unless the prosecution produces, or demonstrates the unavailability of, the declarant whose statement it wishes to use and unless the statement bears adequate indicia of reliability. Id. The reliability requirement can

be met when the statement either falls within a firmly rooted hearsay exception or is supported by a showing of "particularized guarantees of trustworthiness." *Id.* The residual hearsay exception is not a firmly rooted hearsay exception for Confrontation Clause purposes. *Id.*

[cclxviii] *Harjak, 33* M.J. at 582.

[cclxix] *Id.*

[cclxx] *30* M.J. 76 (C.M.A. 1990).

[cclxxi] *Id.* at 78.

[cclxxii] *Id.* at 80.

[cclxxiii] *Id.* (citing United States v. Melvin, 26 M.J. 145 (C.M.A. 1988)).

[cclxxiv] *Id.*

[cclxxv] *See* United States v. Rounds, 497 U.S. 805 (1990); *Melvin*, 26 M.J. at 145.

[cclxxvi] BLACK'S LAW DICTIONARY, *supra* note 190.

[cclxxvii] United States v. Faciane, 40 M.J. 399 (C.M.A. 1994).

[cclxxviii] *Id.* at 403.

[cclxxix] United States v. Duvall, 47 M.J. 189 (1997).

[cclxxx] MCM, *supra* note 5, MIL. R. EVID. 304(g).

[cclxxxi] 47 M.J. 340 (C.M.R. 1973).

[cclxxxii] For a discussion of this issue *see supra* note 92.

[cclxxxiii] MCM, *supra* note 5, MIL. R. EVID. 304(d).

[cclxxxiv] *Id.* MIL. R. EVID. 104(a):

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

Id.

[cclxxxv] *Id.* MIL. R. EVID. 104(c):

(c) *Hearing of members.* Except in cases tried before a special courtmartial without a military judge, hearings on the admissibility of statements of an accused under Mil. R. Evid. 301–306 shall in all cases be conducted out of the hearing of the members. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

Id.

[cclxxxvi] Ayling, *supra* note 7, at 1137.

[cclxxxvii] 47 M.J. 189, 191 (2002).

[cclxxxviii] *Id.*

[cclxxxix] *Id.*

[ccxc] *Id.* at 191.

[ccxci] United States v. Opper, 348 U.S. 84 (1954).

[ccxcii] United States v. Grant, 56 M.J. 410 (2002).

[ccxciii] MCM, supra note 5, MIL. R. EVID. 104(c).

[ccxciv] *Id.*; *Grant*, 56 M.J. at 410.

[ccxcv] Duvall, 47 M.J. at 189.

[ccxcvi] United States v. Duvall, 44 M.J. 501, 506-507 (A.F. Ct. Crim. App. 1996) (Pearson, J., dissenting) (citing United States v. Faciane, 40 M.J. 399 (C.M.A. 1994)).