

## Green on Blue: Government Searches of Military Defense Counsel

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[T]here is an enhanced privacy interest underlying the attorney-client relationship which warrants a heightened degree of judicial protection and supervision when law offices are the subject of a search for client files or documents.<sup>1</sup>

### I. Introduction<sup>2</sup>

The mission: to secure a cell phone. On order, the Marines leave the assembly area, cross the line of departure, and stack up outside the door of the target building.<sup>3</sup> Armed personnel quickly secure the exits, the occupants are detained, and site exploitation starts. A phone matching the description of the target cell phone is quickly found. Unable to confirm with certainty that the correct phone was seized,<sup>4</sup> an exhaustive search continues for two hours, including “all case files, folders, books, drawers, clothes, ceiling tiles, trash bags, food, and furniture.”<sup>5</sup> This search did not take place in Iraq, Afghanistan, or the Horn of Africa; this was a command

authorized search of military defense counsel offices conducted at Marine Corps Base Camp Pendleton, California, on May 2, 2014.<sup>6</sup>

The Military Rules of Evidence (MRE) should be amended specifically to address searches of military defense counsel. Government searches of military defense counsel spaces involve nuanced attorney-client privilege issues, are ripe for abuse, and have the potential to undermine military justice. This article will analyze the aforementioned search, as well as *United States v. Calhoun*,<sup>7</sup> an Air Force case involving a search of a military defense counsel’s office, to provide real-world examples of government searches of military defense counsel office spaces and the ensuing fallout. This article then flushes out the legal issues implicated in searches of military defense counsel offices and assesses the current regulatory scheme governing them. Last, the conclusion proposes to modify MRE 315 to address searches involving military defense counsel.

### II. Background

While searches of military defense counsel spaces are rare, they are not unprecedented. The two cases below illustrate circumstances in which military defense counsel office spaces were searched and the messy aftermath of those searches. The potential collateral damage from searches of defense counsel offices can vary widely. *Calhoun*<sup>8</sup> involved a narrow search of one case file in one attorney’s office. *United States v. Betancourt* involved approximately one hundred cases and twelve defense attorneys.<sup>9</sup> An analysis of the legal issues created by searches of military defense counsel offices adequately demonstrates the need to modify the MRE to address these searches.

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<sup>1</sup> *Law Offices of Bernard D. Morley v. MacFarlane*, 647 P.2d 1215, 1222 (Colo. 1982).

<sup>2</sup> The assertions in the introduction are based on the author’s recent professional experience as a defense attorney at Camp Pendleton from November 2012 to June 2014, as well as the actual search conducted on May 2, 2014 [hereinafter Professional Experience] (The author was not detailed to Sergeant (Sgt) Rico J. Betancourt’s case; however, the author was detained and his office was searched.).

<sup>3</sup> Transcript of Record at 34, *United States v. Salinas* (May 22, 2014) (Article 39a session opened at 0916, May 22, 2014) (on file with author) [hereinafter Transcript]. (“[DC] Q. I want to talk about how, essentially, when you crossed the line of departure here. When you leave from downstairs to where you come upstairs and started the search; could you please walk through that? [STC] A. Sure. So the camera had arrived. Everybody was clear on what was about to happen. We walked up the front ladder well to the defense spaces.”).

<sup>4</sup> *Id.* at 36. (“[Assistant Defense Counsel] Q. Once you found the phone up in the office . . . was there anybody else consulted . . . ? [Agent] A. I don’t believe that anybody was called. I think we just continued on and made that decision ourselves to continue on.”).

<sup>5</sup> *United States v. Miramontes*, General Court-Martial Abbreviated Court Ruling (Unlawful Command Influence—Search of DSO offices), June 10, 2014 (on file with author) [hereinafter Ruling].

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<sup>6</sup> Phil Cave, *Unclassified-breaking story*, CAAFLOG, (May 2, 2014), <http://www.caaflg.com/2014/05/02/unclassified-breaking-story/>.

<sup>7</sup> *United States v. Calhoun*, 49 M.J. 485 (C.A.A.F 1998).

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

<sup>9</sup> Professional Experience, *supra* note 2.

A. *United States v. Calhoun*<sup>10</sup>

Air Force Technical Sergeant (TSgt) Clinton Calhoun was tried by a special court-martial on October 12–14, 1995, for driving on base with revoked privileges and disobeying the order of a policeman.<sup>11</sup> Technical Sergeant Calhoun's witnesses committed perjury to corroborate his alibi defense.<sup>12</sup> The prosecution caught TSgt Calhoun in the lie; he switched his plea to guilty and was convicted.<sup>13</sup> The focus turned to whether TSgt Calhoun's military defense attorney, Captain (Capt) K, had aided or abetted TSgt Calhoun's perjury.<sup>14</sup> During the government's investigation, agents came into possession of a letter between Capt K and TSgt Calhoun's civilian defense counsel.<sup>15</sup>

This letter provided probable cause to search Capt K's office and TSgt Calhoun's case file for evidence of subornation of perjury.<sup>16</sup> Recognizing the sensitivity of the search, the Air Force took several precautionary steps prior to its execution.<sup>17</sup> First, a neutral and detached military magistrate issued the authorization.<sup>18</sup> Second, the search authorization limited the scope of the search to documents pertaining to the representation of TSgt Calhoun within Capt K's office.<sup>19</sup> Third, an Air Force Office of Special Investigations agent and a field grade judge advocate, both of whom were from a different base, conducted the search.<sup>20</sup> Last, a military judge examined the seized items to determine what was privileged.<sup>21</sup>

Captain K was cleared of any wrongdoing; however, (now) Airman Basic (AB) Calhoun was charged and convicted of obstruction of justice, subornation of perjury, and conspiracy to commit perjury.<sup>22</sup> Prior to AB Calhoun's second trial, he refused to form an attorney-client relationship with his new Air Force defense counsel

and filed a motion to compel the government to pay for a civilian defense counsel.<sup>23</sup> The court denied the motion; AB Calhoun elected to continue pro se and was convicted.<sup>24</sup>

On appeal, AB Calhoun's assignment of error asserted the government denied him effective assistance of counsel.<sup>25</sup> Airman Basic Calhoun's petition for extraordinary relief read in part:

Because of the outrageous Government invasion of his relationship with his former ADC [Area Defense Counsel], Petitioner understandably finds the entire Air Force defense program untrustworthy. More specifically, he fears that the Air Force might well again intrude upon an ADC workspace to steal his confidences. In short, he reasonably views the entire ADC program as vulnerable to continuing Government intrusions. . . . As a result, petitioner insists that an inherent conflict exists between himself and the Air Force ADC entity. It has proved powerless to resist Air Force intrusions; ergo, he cannot entrust it with his confidences.<sup>26</sup>

The Air Force Court of Criminal Appeals found that the government's search had denied AB Calhoun effective assistance of counsel.<sup>27</sup> The government appealed to the Court of Appeals for the Armed Forces (CAAF) which reversed the decision, holding AB Calhoun would have had to demonstrate that all counsel from all bases were tainted by the government search before the government would be required to pay for a civilian counsel.<sup>28</sup> In the opinion, the CAAF reluctantly endorsed the procedural safeguards enacted by the Air Force.<sup>29</sup>

The acting Judge Advocate General of the Air Force subsequently issued guidance on the conduct of searches of defense counsel spaces.<sup>30</sup> The Air Force guidance adopted the

<sup>10</sup> *United States v. Calhoun*, 49 M.J. 485 (C.A.A.F. 1998).

<sup>11</sup> *United States v. Calhoun*, 47 M.J. 520 (A.F. Ct. Crim. App. 1997).

<sup>12</sup> *Id.* at 522.

<sup>13</sup> *Id.* (Technical Sergeant Calhoun received a dishonorable discharge and confinement for 30 months).

<sup>14</sup> *Id.*

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

<sup>16</sup> *United States v. Calhoun*, 49 M.J. 485, 488 (C.A.A.F. 1998).

<sup>17</sup> *See id.*

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

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

<sup>20</sup> *United States v. Calhoun*, 47 M.J. 520 (A.F. Ct. Crim. App. 1997).

<sup>21</sup> *Id.* at 522.

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

<sup>23</sup> *Id.*

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

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

<sup>26</sup> *Id.* at 524.

<sup>27</sup> *United States v. Calhoun*, 49 M.J. 485, 488 (C.A.A.F. 1998).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* The court indicated that these searches are generally frowned upon. However, if they are going to be conducted, the manner in which the Air Force searched in *Calhoun* serves as the model. *Id.*

<sup>30</sup> Policy Memorandum, Military Justice – 2, The Judge Advocate General, U.S. Air Force, subject: Searches and Seizures Involving Air Force Defense Personnel (17 Aug. 2005) [hereinafter AF TJAG Memo].

safeguards that had been highlighted by the CAAF.<sup>31</sup> The fallout from the *Calhoun* search was ugly, but limited in scope to one case. As the case below demonstrates, searches of military defense counsel offices are capable of affecting many more clients and case files.

#### B. Camp Pendleton Search (*United States v. Sergeant Rico J. Betancourt*)<sup>32</sup>

The government preferred a number of charges against Sergeant (Sgt) Rico J. Betancourt, including sexual assault, drug use, and affiliation with an outlaw biker gang.<sup>33</sup> Sergeant Betancourt provided his cell phone to his military defense counsel before he was placed in pretrial confinement.<sup>34</sup> Aware that the cell phone existed and was not in the possession of the government, the Senior Trial Counsel (STC) escalated efforts to obtain it during the Article 32 pretrial investigation.<sup>35</sup> Discussions between trial counsel, defense counsel, and their respective chains of command did not reach an amicable resolution.<sup>36</sup> The defense asserted that state bar rules prohibited them from turning over the phone absent a judicial order.<sup>37</sup>

The Marine Corps Criminal Investigation Division (CID) sought a command authorized search and seizure (CASS) from the area commander.<sup>38</sup> After consulting with two attorneys, the officer in charge of the Legal Services Support Section West,<sup>39</sup> and the STC,<sup>40</sup> the area commander issued the CASS. When the STC presented the defense with the CASS, the phone was not voluntarily

relinquished.<sup>41</sup> Once again, the defense cited the lack of a judicial order and an opposing view of state bar requirements as the basis for refusal.<sup>42</sup> The CID agents then executed the CASS by securing the building and commencing a search of the detailed defense counsels' offices.<sup>43</sup> After finding a phone in the office of a detailed defense counsel that matched the description on the CASS, CID requested verbal confirmation that the phone was in fact the one they were seeking.<sup>44</sup> The detailed defense counsel asserted privilege and refused to confirm the phone was the one sought.<sup>45</sup> The search party then proceeded to search the office of every defense counsel in the building.<sup>46</sup> The non-detailed defense attorneys remained detained for two hours as CID searched their files and personal belongings.<sup>47</sup>

Marines from CID handled every case file stored within the building during the search.<sup>48</sup> The search in *Betancourt* led to ongoing litigation on apparent unlawful command influence and prosecutorial misconduct,<sup>49</sup> as well as reassignment of senior personnel,<sup>50</sup> disqualification of counsel,<sup>51</sup> requests for severance,<sup>52</sup> and an inquiry directed by the Staff Judge Advocate to the Commandant

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

<sup>32</sup> In April of 2015 Sergeant Betancourt was convicted and received 5 years confinement, a dishonorable discharge, total forfeitures, and reduction to E-1.

<sup>33</sup> Telephone interview with Captain Thomas Friction, Defense Counsel, U.S. Marine Corps (Nov. 5, 2014).

<sup>34</sup> *See* Professional Experience, *supra* note 2.

<sup>35</sup> *See id.*

<sup>36</sup> Transcript, *supra* note 3, at 23-24.

<sup>37</sup> This article does not address the ethics of accepting or holding potential evidence as a defense attorney.

<sup>38</sup> Affidavit, [Area Commander] (June 3, 2014) (on file with author) [hereinafter Affidavit].

<sup>39</sup> 10 U.S.C. §§801(4) "'Officer in Charge' [OIC] means a member of the Navy, the Marine Corps or the Coast Guard designated as such by appropriate authority."; U.S. MARINE CORPS ORDER P5800.16A, Legal ADMINISTRATION MANUAL, subsec. 1103(3) (26 Sept. 2011) "The [Legal Services Support Sections (LSS)] . . . provide services, including military justice services, to supported commands within their Legal Services Support Area. The LSSS OIC is ultimately responsible to the regional installation commander for the provision of trial services within the LSSA." The LSSS OIC is a colonel.

<sup>40</sup> Affidavit, *supra* note 39 (by nature of their billets, the two attorneys consulted have a professional interest in the prosecution of the case.).

<sup>41</sup> *See* Professional Experience, *supra* note 2.

<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.* The CASS was issued for the entire second floor of the building. While continuing the search was not incorrect per the CASS, judges subsequently ruled that the search was overbroad as applied to the disinterested attorneys' offices. *Id.*

<sup>47</sup> It is objectively reasonable to discern elements of harassment and intimidation in an unrestrained search of all defense attorneys and files after locating the object of the search authorization.

<sup>48</sup> *See* Professional Experience, *supra* note 2. The agents asserted that while the files were physically handled and sifted through, nothing was read. *Id.*

<sup>49</sup> *See id.*

<sup>50</sup> Letter from the OIC of the LSSS West to Senior Trial Counsel Legal Services Support Team (STC LSST) Camp Pendleton, TEMPORARY REASSIGNMENT OF DIRECT SUPERVISORY RESPONSIBILITIES FOR THE LIMITED PURPOSE OF LITIGATING MOTIONS RELATED TO THE SEARCH OF CAMP PENDLETON DEFENSE COUNSEL SPACES THAT OCCURRED ON 2 MAY 2014 (May 13, 2014) (on file with the author); Mike "No Man" Navarre, *Developing Story—Marine Corps Prosecutor Sacked Over Defense Office Raid*, CAAFLOG, June 13, 2014, <http://www.caaflog.com/2014/06/13/developing-story-marine-corps-prosecutor-sacked-over-defense-office-raid/>.

<sup>51</sup> E-mail from Lieutenant Colonel Elizabeth Harvey, Judge, *United States v. Salinas* abbreviated ruling, to author, (June 2, 2014 15:53:35 PST) (on file with author) [hereinafter Abbreviated Ruling].

<sup>52</sup> *See* Professional Experience, *supra* note 2.

of the Marine Corps.<sup>53</sup> This unfortunate situation could have been avoided, had a well crafted MRE clearly defined procedural safeguards and provided appropriate consequences for violations of those safeguards.<sup>54</sup>

### III. Legal Issues Involved in Searches of Military Defense Counsel Offices

Government searches of military defense counsel office spaces are a thorny issue. During these searches, opportunities abound to violate the Fourth, Fifth, and Sixth Amendment rights of defendants and for attorneys to run afoul of Rules of Professional Conduct.<sup>55</sup>

In the military context, the thorns are even sharper. Consider the optics: military defense attorneys are paid by the same entity as the prosecutors and command, wear the same uniform as the prosecutors and the command, utilize the same phone, computer, and e-mail systems, and are located on the same installation.<sup>56</sup> Attorneys from across the aisle participate in the same physical, military, and legal training, and are cordial with each other.<sup>57</sup> Military attorneys also switch between prosecution and defense over the course of a career. It is entirely possible that a defense attorney was a prosecutor in a previous assignment. Whereas the indicators in the civilian sector reinforce the concept of an independent defense bar, the military justice system blurs context clues that assure clients a line of demarcation exists between military defense attorneys and the prosecuting authorities. A client

relies on assurances provided by the detailed military defense attorney that they will act in his best interests,<sup>58</sup> a concept that is wholly incongruent with a government “invasion of the defense camp.”<sup>59</sup> Searches of military defense counsel reinforce a perception of dominion and control by the government. This perception gives rise to the additional military-specific issue of unlawful command influence. When unpacking the issues involved in a search of military defense counsel offices, it is best to start with the genesis of all search and seizure law, the Fourth Amendment.

#### A. Fourth Amendment Search Authorizations

The Fourth Amendment to the United States Constitution states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . .”<sup>60</sup> A servicemember does not forfeit constitutional protections upon enlistment;<sup>61</sup> however, the Supreme Court “has long recognized that the military is, by necessity, a specialized society separate from civilian society.”<sup>62</sup> Differences in application of the Constitution between the military and civilian communities can be attributed to the recognition that “the primary business of armies and navies [is] to fight or be ready to fight . . . .”<sup>63</sup> Issued under civilian authority, an authorization to search is termed a “warrant,” under military authority, a “search authorization.”<sup>64</sup> “The change in terminology reflects the unique nature of the armed forces and of the role played by commanders.”<sup>65</sup> “[Military Rule of Evidence] 315 defines

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<sup>53</sup> See, Letter from the Staff Judge Advocate to the Commandant of the Marine Corps, INQUIRY INTO SEARCH OF DEFENSE COUNSEL OFFICES (May 13, 2014) [hereinafter Inquiry Order] (on file with author); Letter from [Inquiry Officer] to Staff Judge Advocate to the Commandant of the Marine Corps, INQUIRY INTO SEARCH OF DEFENSE COUNSEL OFFICES (June 11, 2014) [hereinafter Inquiry] (on file with author); Letter from the Staff Judge Advocate to the Commandant of the Marine Corps, FIRST ENDORSEMENT OF INQUIRY INTO SEARCH OF DEFENSE COUNSEL OFFICES (June 19, 2014) [hereinafter Inquiry Endorsement] (on file with author).

<sup>54</sup> Inconsistent and varying service policies would lead to arbitrary results. A Department of Defense service regulation is an inappropriate forum in which to make a sweeping modification to the Uniform Code of Military Justice. A change to Military Rule of Evidence (MRE) 315 that protects the constitutional rights of defendants while providing the government with a process to search defense counsel offices when required will protect all stakeholders and ensure the swift administration of justice. *Infra* Appendix A.

<sup>55</sup> U.S. DEP’T OF NAVY, 5803.1D, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, SEC 3, R. 3.8, (MAY 1, 2012), [hereinafter JAGINST 5803.1D]. (While Model Rule of Professional Conduct 3.8 may be implicated in government searches of military defense counsel, JAGINST 5803.1D, R. 3.8, is specifically implicated by those searches. Without a uniform governing policy or MRE, military attorneys are unnecessarily subjected to direct ethical jeopardy when these searches are conducted.)

<sup>56</sup> See Professional Experience, *supra* note 2.

<sup>57</sup> See *id.*

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<sup>58</sup> Basic tenets of professional responsibility require a defense attorney to act in the best interests of his clients. JAGINST 5903.1D, R. 1.3. However, it is more likely that a Lance Corporal rely on perceptions generated from personal observation than on the reality of a professional regulatory scheme when assessing his attorney’s independence.

<sup>59</sup> See Inquiry, *supra* note 53, at 5.

<sup>60</sup> U.S. Const. Amend. IV.

<sup>61</sup> See United States v. McGraner, 13 MJ 408, 414 (C.M.A. 1982) “In defining the rights of military personnel, Congress was not limited to the minimum requirements established by the Constitution, and in many instances, it has provided safeguards unparalleled in the civilian sector.” See, e.g., Francis A. Gilligan, *The Bill of Rights and Service Members*, Army Law., Dec. 1987 (servicemembers’ rights broader than constitutionally required). “The broad constitutional rights that the servicemembers enjoy spring from the fundamental principal that they do not lay aside the citizen when they assume the soldier.” United States v. Manuel, 43 M.J. 282, 286 C.A.A.F. (1995).

<sup>62</sup> United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

<sup>63</sup> *Id.*

<sup>64</sup> Stephen A. Salzburg, Lee D. Schinasi & David A. Schlueter, MILITARY RULES OF EVIDENCE MANUAL, §315.03[2][a-b], at 3-502 (7th Ed., Matthew Bender & Co. 2011).

<sup>65</sup> *Id.*

'authorization to search' as an express permission to search issued by proper military authority, whether commander or judge."<sup>66</sup> Under current military law, a commander, with minimal understanding of the legal issues involved, can authorize a search of military defense counsel offices.<sup>67</sup> The military setting presents the only contemporary circumstance in which a non-lawyer can authorize a probable cause search—authority that exists even when such a search involves areas containing materials subject to a claim of privilege.<sup>68</sup>

For a government search to be unlawful under the Fourth Amendment, there must be a reasonable expectation of privacy in the area searched.<sup>69</sup> "[T]he court will ask whether the person exhibited a subjective expectation of privacy in the place or object, and second, whether objectively it can be said that that expectation, if any, was one that society would accept as being reasonable."<sup>70</sup> "The military courts have recognized "a reasonable expectation of privacy in his or her person, electronic communications, personal property, living quarters, office or work area and vehicles."<sup>71</sup> The military courts have not specifically addressed the expectation of privacy in attorneys' files, but the United States Court of Appeals for the Ninth Circuit has. "[E]xpectation of privacy in an attorney's client files thus has roots in federal and state statutory and common law and in the United States Constitution, among other sources. Indeed, there is no body of law or recognized source of professional ethics in which this 'source' or 'understanding' is lacking."<sup>72</sup> Normally, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."<sup>73</sup> However, the Ninth Circuit Court of Appeals authorized vicarious assertion of Fourth Amendment rights stemming from a search of defense counsel files.<sup>74</sup> A reasonable expectation of privacy exists in files kept in an attorney's office; therefore, an unlawful government search of a client's file in an attorney's office may entitle a defendant to relief.<sup>75</sup>

<sup>66</sup> *Id.* at 3-501-2.

<sup>67</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315 (d)(1-2) (2012) [hereinafter MCM].

<sup>68</sup> *See* Fed. R. Crim. P. 41(b).

<sup>69</sup> *United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring) (requiring the expectation of privacy be both objectively and subjectively reasonable).

<sup>70</sup> SALZBURG, SCHINASI, & SCHLEUTER, *supra* note 64, at 3-295.

<sup>71</sup> *Id.* at 3-295-6 (citations omitted).

<sup>72</sup> *Demassa v. Nunez*, 770 F.2d 1505, 1506 (9th Cir. 1985).

<sup>73</sup> *Id.* at 1507 (citations omitted).

<sup>74</sup> *Id.* at 1506.

<sup>75</sup> *See Demassa*, 770 F.2d 1505 at 1506; *Mapp v. Ohio*, 367 U.S. 643 (1961).

## B. Attorney-Client Privilege

While the Fourth Amendment implications of government searches of military defense counsel are fairly apparent, government intrusion on the attorney-client privilege also has constitutional ramifications under the self-incrimination and due process clauses of the Fifth Amendment<sup>76</sup> as well as the Sixth Amendment right to counsel.<sup>77</sup> The attorney-client privilege is "the client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney."<sup>78</sup> Cases upholding the attorney-client privilege appear as early as 1577,<sup>79</sup> with one court going so far as to state, "The first duty of an attorney is to keep the secrets of his clients."<sup>80</sup> The policy behind this privilege is logical:

[T]he purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.<sup>81</sup>

For the same policy reasons, the military justice system requires the privilege to operate effectively. State bar rules and service regulations impute the requirement to ensure client confidences onto military attorneys.<sup>82</sup> This

<sup>76</sup> U.S. Const. Amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .")

<sup>77</sup> U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.")

<sup>78</sup> BLACK'S LAW DICTIONARY 1317 (9th ed. 2009).

<sup>79</sup> *See Berd v. Lovelace*, 21 Eng. Rep. 33 (1577); *Dennis v. Codrington*, 21 Eng. Rep. 53 (1580).

<sup>80</sup> *Taylor v. Blacklow*, 132 Eng. Rep. 401, 406 (C.P. 1836).

<sup>81</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>82</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.6, U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, APP. B, R. 1.6 (MAY 1, 1992) [hereinafter AR 27-26], JAGINST 5803.1D, *supra* note 55, U.S. AIR FORCE, RULES OF PROFESSIONAL CONDUCT, CH. 1, R. 1.6, (AUG. 17, 2005) [hereinafter AFRPC], U.S. COAST GUARD, COMMANDANT INSTR. M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM, ENCL 1, R. 1.6 (JUNE 1, 2005) [hereinafter CGCI M5800.1] ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).")

privilege is so sacrosanct in American jurisprudence that government interference with it may have constitutional implications.

### 1. Fifth Amendment

#### a. Self-Incrimination Clause

The government, in execution of a search authorization of defense counsel spaces, could come across incriminating information disclosed to an attorney. The potential for such a search renders the attorney-client privilege a bait-and-switch.<sup>83</sup> Published safeguards must be in place prior to any search of defense counsel offices to maintain faith and transparency in the judicial process; subsequent remedial measures designed to “cure” the ills of these searches cannot undo damage already caused.

#### b. Due Process Clause

Due process is “such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.”<sup>84</sup> The settled maxims of criminal law do recognize the need to potentially search defense counsel office spaces<sup>85</sup> because “the Sixth Amendment does not provide sanctuary for criminal wrongdoing, nor may a client house his criminal enterprises in his lawyer’s office.”<sup>86</sup>

The Article III courts balance the due process requirements of the Fifth Amendment with the government’s need to investigate in two ways. The first is the requirement that a magistrate judge make a probable cause determination,<sup>87</sup> and the second is implementation of statutes and rules to govern these searches.<sup>88</sup> These two layers of

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<sup>83</sup> A bait-and-switch is created when the government provides a defense attorney for an accused, assures them of confidentiality, and then breaches those confidences; *but see* *United States v. Tanksley*, 54 M.J. 169, at 172 (2000) (“While privileged communication with counsel may be the essence of the Sixth Amendment guarantee of effective assistance of counsel, the Supreme Court has rejected any *per se* rule that finds a Sixth Amendment violation when otherwise privileged, confidential information is overheard or read.”(internal citations omitted)).

<sup>84</sup> BLACK’S LAW DICTIONARY, *supra* note 78, at 575 (quoting Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 356 (1868)).

<sup>85</sup> *See* *Andresen v. Maryland*, 427 U.S. 463 (neither Fourth nor Fifth Amendment *per se* prohibits search of real estate attorney’s office); *see also* U.S. Attorneys Manual [hereinafter USAM] R. 9-13.420 (Searches of Premises of Subject Attorneys).

<sup>86</sup> *United States v. Calhoun*, 47 M.J. 520, 526, (A.F. Ct. Crim. App. 1997).

<sup>87</sup> Fed. R. Crim. P. 41(b).

<sup>88</sup> *See* 42 U.S.C. §§ 2000aa-11(a)(3) (Attorney General must recognize “special concern for privacy interests in cases in which a search or seizure for such documents would intrude upon a known confidential relationship

protection do not exist in concert within any branch of the military under current law or policy.

The rights to due process also intersect with the Sixth Amendment right to counsel. “When the government interferes in a defendant’s relationship with his attorney to the degree that counsel’s assistance is rendered ineffective, the government’s misconduct may violate the defendant’s Fifth Amendment right to due process as well as his Sixth Amendment right to counsel.”<sup>89</sup>

### 2. Sixth Amendment Right to Counsel

To provide effective assistance, a lawyer and client must be able to communicate freely without fear that advice and legal strategy will be seized and used against the client in a criminal proceeding.<sup>90</sup> At a minimum, searches of defense counsel office spaces will have a chilling effect on communications between the client and attorney. This chilling effect could render defense counsel services ineffective, thereby depriving the servicemember of his Sixth Amendment right to counsel.

## C. Professional Responsibility

Under the current regulatory scheme, government attorneys conducting searches of military defense counsel, either personally or through their representatives, are unnecessarily exposed to ethical liability in the conduct of their duties. The spirit of Model Rule of Professional Responsibility 3.8 is implicated by the conduct of defense counsel searches:

The prosecutor in a criminal case . . . (e) shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

- (1) the information sought is not protected from disclosure by any applicable privilege;
- (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and,

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such as that which may exist between . . . lawyer and client.”); 28 CFR 59.4(b) (provisions governing the use of search warrants that may intrude upon professional, confidential relationships); USAM R. 9-13.410 (Guidelines for Issuing Grand Jury or Trial Subpoena to Attorneys for Information Relating to the Representation of Clients); USAM R. 9-13.420 (Searches of Premises of Subject Attorneys); USAM R. 9-19.221 (Request for Authorization to a Deputy Assistant Attorney General).

<sup>89</sup> *United States v. Marshank*, 777 F. Supp. 1507, 1519 (N.D. Cal. 1991) (citing *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980)).

<sup>90</sup> *See* *United States v. Levy*, 577 F.2d 200, 209 (3rd Cir. 1978).

(3) there is no other feasible alternative to obtain the information.<sup>91</sup>

While not directly relating to searches of defense counsel offices, Model Rule 3.8 is an informative lens through which to view professional responsibility implications in searches of defense counsel. Applying the logic of the rule to searches involving attorney-client privilege: professional duties of an attorney require showing that the item sought is not protected from disclosure, that it is essential to the completion of an ongoing investigation or prosecution, and that there are no other alternatives to obtaining the information.

The Army, Air Force, and Coast Guard's rules of professional conduct are not specifically implicated by searches of military defense counsel. However, the Department of the Navy's Rules of Professional Conduct specifically contemplates searches that may implicate attorney-client privilege.<sup>92</sup> The Judge Advocate General's Instruction 5803.1D (JAGINST), rule 3.8(b) reads:

Trial counsel and other government counsel shall exercise reasonable care to avoid intercepting, seizing, copying, viewing, or listening to communications protected by the attorney-client privilege during investigation of a suspected offense (particularly when conducting government-sanctioned searches where attorney-client privileged communications may be present), as well as in the preparation or prosecution of a case. . . . Trial counsel and other government counsel must not infringe upon the confidential nature of attorney-client privileged communications and are responsible for the actions of their agents or representatives when they induce or assist them in intercepting, seizing, copying, viewing, or listening to such privileged communications.<sup>93</sup>

Theoretically, a Department of the Navy attorney could be subject to an ethics complaint for improperly conducted searches of military defense counsel whether conducted personally or through agents. However, the lack of guidance on the correct manner in which to search military defense counsel, absence of case-specific remedies, and the opportunity for many parties (not all of whom are subject to the JAGINST) to play a role in any such search render the JAGINST wholly inadequate to deal with government searches of military defense counsel. The Army, Air

Force, and Coast Guard do not have a similar modification to Model Rule 3.8.<sup>94</sup>

#### D. Unlawful Command Influence

Military-specific legal implications arise from the concept of unlawful command influence. Rule for Courts-Martial 104 (2) states: "No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case . . . ."<sup>95</sup> Rule for Courts-Martial 104 leaves the courts to determine what constitutes unauthorized influence of a court-martial.<sup>96</sup> The courts have established three types of unlawful command influence: actual, apparent, and perceived/implied.<sup>97</sup> Since "unlawful influence on the military justice system can be a problem at virtually every level [of the process]," timing of the influence is moot.<sup>98</sup>

##### 1. Actual Unlawful Command Influence

"Actual unlawful command influence occurs when, under the totality of the circumstances, the evidence would lead a reasonable person to conclude that command influence affected the disposition of a case and prejudiced the accused."<sup>99</sup> A search conducted with the intent to pressure an attorney or a client to pursue or abandon a particular course of action is unlawful command influence.<sup>100</sup> Obtaining privileged information beyond the scope of a narrowly tailored search authorization would also amount to actual unlawful command influence. When actual unlawful command influence and prejudice can be demonstrated, application of the exclusionary rule, case-specific remedies (to include dismissal), and 18 U.S.C. §241 are sufficient remedies to ensure protection of servicemembers' rights.<sup>101</sup> Established law is reasonably well-equipped to handle actual unlawful command

<sup>91</sup> MODEL RULES OF PROF'L CONDUCT, R. 3.8 (2013).

<sup>92</sup> See JAGINST 5803.1D, *supra* note 55, R. 3.8.

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

<sup>94</sup> See AR 27-26 R. 3.8, AFRPC R. 3.8, CGCI. M5800.1 R. 3.8, *supra* note 83.

<sup>95</sup> MCM, *supra* note 67, R.C.M. 104 (2012).

<sup>96</sup> See *id.* (silent on the issue).

<sup>97</sup> David A. Schlueter, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE, §6-3[D], at 391 (Matthew Bender & Co. 2012).

<sup>98</sup> *Id.* at 392.

<sup>99</sup> *Id.* at 390.

<sup>100</sup> See *United States v. Fisher*, 45 M.J. 159 (C.A.A.F. 1996).

<sup>101</sup> 18 U.S.C. §241 ("If two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . . They shall be fined under this title or imprisoned not more than ten years, or both . . . .").

influence resulting from the search of an attorney's office. Effective remedies are more elusive when apparent unlawful command influence is at issue.

## 2. Apparent and Perceived Unlawful Command Influence

“Actual unlawful command influence affects the actual fairness of a trial, while the appearance of unlawful command influence merely affects the level of ‘public’ confidence in the military justice system.”<sup>102</sup> “Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an ‘intolerable strain on public perception of the military justice system.’”<sup>103</sup> The optics of government intrusion into attorneys’ files are bad.<sup>104</sup> The optics of unfettered intrusion are worse.<sup>105</sup> “[A]pppearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.”<sup>106</sup> “Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with ‘eliminating even the appearance of unlawful command influence at courts-martial.’”<sup>107</sup>

Perceived unlawful command influence can be actual or apparent.<sup>108</sup> Perceived unlawful command influence “focuses on how the recipient of command influence perceives that influence.”<sup>109</sup> “If the recipient is a sufficiently large group of servicemembers, and members of that group perceive that the command influence affects the overall fairness of the system, then apparent unlawful command influence has occurred.”<sup>110</sup> The perception by

<sup>102</sup> Schlueter, *supra* note 97, at 391 (citing United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985)).

<sup>103</sup> United States v. Simpson, 58 M.J. 368, 374 (C.A.A.F. 2003).

<sup>104</sup> Calhoun, *supra* note 7, at 532 (Pearson, dissenting) (“This case leaves a bad taste in my mouth, from its outset with the government’s search of a military defense counsel’s office to appellant’s self representation at trial.”).

<sup>105</sup> Cave, *supra* note 6; Sam Adams, *Hitting the Fan*. . . , CAAFLOG (May 9, 2014), <http://www.caaflog.com/2014/05/09/hitting-the-fan/>.

<sup>106</sup> *Simpson*, 58 M.J. at 374 (quoting United States v. Stoneman, 57 M.J. at 42-43 (C.A.A.F. 2002)).

<sup>107</sup> United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979)).

<sup>108</sup> Schlueter, *supra* note 97, at 391.

<sup>109</sup> *Id.* (citing Bower, “Unlawful Command Influence: Preserving the Delicate Balance,” 28 A.F. L. Rev. 65, 81 (1988)).

<sup>110</sup> *Id.* (citing Gaydos & Warren, “What Commanders Need to Know about Unlawful Command Control,” *ARMY LAW.*, Oct. 1986, at 9-10); *cf.* United States v. Lowery, 18 M.J. 695 (A.F.C.M.R. 1984) (admonishing witness for one trial likely to have a “chilling effect” on judicial system).

the recipient must be reasonable in light of the circumstances.<sup>111</sup>

The extraordinary writ filed in *Calhoun* asserted that AB Calhoun was unable to receive adequate representation by a military attorney as a result of the government intrusion into his attorney-client relationship.<sup>112</sup> *Calhoun* was a narrow search of Capt K’s case file. At the other end of the collateral damage spectrum is the search in *Betancourt*. “Camp Pendleton attorneys estimate the searched offices contained paperwork related to scores of cases, including that of Marine Sgt. Lawrence Hutchins III, who faces retrial in his high-profile war crimes case . . . .”<sup>113</sup> In litigation resulting from the *Betancourt* search, a trial judge ruled, “Undoubtedly, such a heavy-handed and overly intrusive raid by CID sponsored by the STC would further exacerbate concerns about the fairness of these proceedings.”<sup>114</sup> As a group, Marine Corps defendants represented by defense attorneys in the searched offices perceived that the command influence affected the overall fairness of the system.<sup>115</sup> As demonstrated by the *Betancourt* rulings, the trial courts believed this perception to be reasonable.<sup>116</sup>

## IV. Current Regulatory Scheme

There are two procedural safeguards that will protect all stakeholders in searches of military defense counsel as well as bring the practice of military law in line with the practice of civilian criminal law. First, the approval authority for a search authorization should be a judge or a magistrate.<sup>117</sup> Second, the protections enumerated in

<sup>111</sup> *Id.* (citing United States v. Johnson, 34 C.M.R. 328 (C.M.A. 1964)).

<sup>112</sup> United States v. Calhoun, 47 M.J. 520, 524 (A.F. Ct. Crim. App. 1997).

<sup>113</sup> Hope H. Seck, *Senior Marine Prosecutor Reassigned After Judge Rules ‘Apparent UCI’ On Pendleton Office Raid*, THE MARINE CORPS TIMES, June 12, 2014.

<sup>114</sup> Ruling, *supra* note 6.

<sup>115</sup> Professional Experience, *supra* note 2 (This inference is drawn from a totality of the circumstances and based on the number of motions filed, the press received, and the notification letters provided to all defense clients.).

<sup>116</sup> Ruling, *supra* note 5; Abbreviated Ruling, *supra* note 51; Professional Experience, *supra* note 2.

<sup>117</sup> Such a magistrate should be qualified and certified under Article 27(b) and sworn under Article 42(a) of the UCMJ. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 8-1f (3 Oct. 2011). This requirement will ensure that any probable cause determination is made by an attorney. *Id.* There are wide variances in the magistrate programs and qualifications of magistrates among the services. See U.S. DEP’T OF THE AIR FORCE INSTR. 51-201, *Administration of Military Justice*, at 3.1 (Sept 25, 2014) (Air Force magistrates issue search authorizations but are not attorneys); MARINE CORPS BASE CAMP PENDLETON, ORDER 5000.2K, BASE REGULATIONS, sec. 3, (Jun. 30, 2010) (Marine Corps magistrates administer base traffic and service of process but are not attorneys and do not issue search authorizations); UNITED STATES ARMY TRIAL

*Calhoun* should be made applicable to all branches of the service.<sup>118</sup> To illustrate the current difference between the military and civilian landscape in this realm, comparing the U.S. Attorneys' regulatory framework with each service's current policy is both informative and sobering.

#### A. U.S. Attorneys

The U.S. Attorney's office operates under the traditional Fourth Amendment construct whereby every search warrant is issued by a magistrate judge.<sup>119</sup> In addition to this systemic guarantee of judicial oversight in probable cause searches, the Department of Justice has recognized that searches of attorney office spaces require a heightened sensitivity.<sup>120</sup> The U.S. Attorneys' Office Rule 9-13.420 states in pertinent part,

Because of the potential effects of this type of search on legitimate attorney-client relationships and because of the possibility that, during such a search, the government may encounter material protected by a legitimate claim of privilege, it is important that close control be exercised over this type of search.<sup>121</sup>

The U.S. Attorneys' Manual requires that any searches of attorney work spaces be approved by a U.S. Attorney or Assistant Attorney General in coordination with their Criminal Division, and only then as an action of last resort.<sup>122</sup> In these searches, the U.S. Attorneys' rules also require that the search warrant be narrowly tailored, that a "taint team" execute the search, and that specific review procedures are in place to screen out privileged material before it is compromised.<sup>123</sup>

#### B. Navy

The Navy Judge Advocate General's Ethics Instruction does contemplate searches of attorneys in Rule 3.8 which cautions attorneys conducting searches to protect

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JUDICIARY, STANDARD OPERATING PROCEDURES FOR MILITARY MAGISTRATES, (1 Sept. 2013) [hereinafter Army Magistrate SOP] The Army has an attorney magistrate program but has not abrogated the right of a commander to issue search authorizations. *Id.*

<sup>118</sup> United States v. Calhoun, 49 M.J. 485, 488 (C.A.A.F. 1998).

<sup>119</sup> Fed. R. Crim. P. 41(b).

<sup>120</sup> USAM R. 9-13.420 (Searches of Premises of Subject Attorneys).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

privileged material.<sup>124</sup> Such contemplation is also evident in that the Navy ethics instruction is the only service ethics instruction that deviated from Model Rule 3.8.<sup>125</sup> Aside from potential implications of Rule 3.8 of the Navy ethics instruction, the Department of the Navy is silent as to when a search of military defense counsel offices is appropriate and the procedures to utilize while conducting one.<sup>126</sup>

#### C. Army

Army Regulation 27-26 has not expanded Model Rule 3.8 in the same manner as the Navy. The Army also has no published guidance on the conduct of searches of military defense counsel office spaces.<sup>127</sup> However, the Army does provide a modicum of protection via its magistrate program,<sup>128</sup> under which most (but not all) search authorizations will be issued by an attorney.<sup>129</sup>

#### D. Marine Corps

No Marine Corps-specific guidance exists on how to conduct searches of military defense counsel offices.<sup>130</sup> While Rule 3.8 of the Navy ethics instruction is also applicable to Marine Corps attorneys, the absence of appropriate circumstances and procedures for searches of military defense counsel within the Department of the Navy and the Marine Corps set the conditions for the *Betancourt* search.<sup>131</sup>

In the aftermath of the Camp Pendleton search, the Staff Judge Advocate to the Commandant of the Marine Corps ordered an inquiry.<sup>132</sup> The purpose of the inquiry was to determine, in part, "(1) whether there are adequate procedures and training programs in place to guide such searches . . . ." <sup>133</sup> The Staff Judge Advocate to the Commandant of the Marine Corps noted in his endorsement of the inquiry that "there is an absence of

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<sup>124</sup> JAGINST 5803.1D, *supra* note 55, R. 3.8.

<sup>125</sup> See AR 27-26, JAGINST 5803.1D; AFRPC, CGCI M5800.1, *supra* note 82.

<sup>126</sup> Inquiry Endorsement, *supra* note 53 ("I note that there is an absence of policies or procedures in the Manual of the Judge Advocate General . . . or in the military justice directives of the other Services, with the exception of the Air Force, to cover the search of defense counsel or their spaces.").

<sup>127</sup> *Id.*

<sup>128</sup> See Army Magistrate SOP, *supra* note 117.

<sup>129</sup> *Id.*

<sup>130</sup> Inquiry Endorsement, *supra* note 53, at 8.

<sup>131</sup> JAGINST 5803.1D, *supra* note 55.

<sup>132</sup> Inquiry Order, *supra* note 53.

<sup>133</sup> *Id.*

policies or procedures in the Manual of the Judge Advocate General . . . or in the military justice directives of the other Services, with the exception of the Air Force, to cover the search of defense counsel or their spaces.”<sup>134</sup>

The officer conducting the inquiry made several recommendations to the Staff Judge Advocate to the Commandant of the Marine Corps, to include establishing a protocol for obtaining a CASS for an area containing materials subject to a claim of privilege.<sup>135</sup> This protocol would require consideration of alternatives, consultation with the prosecutorial chain of command, notification of Judge Advocate Division, a narrowly tailored CASS, and use of a “taint team.”<sup>136</sup> The Staff Judge Advocate to the Commandant of the Marine Corps approved the recommendation with modification,<sup>137</sup> and tasked the Deputy Director of Community Development Strategy and Plans to recommend a Marine Corps-wide policy for the conduct of searches subject to a claim of privilege.<sup>138</sup>

#### E. Air Force

*Calhoun* forced the Air Force to address government searches of military defense counsel. The mess created by the *Calhoun* search directly led to the Air Force Judge Advocate General providing guidance for the future conduct of similar searches.<sup>139</sup> The guidance promulgated by the Air Force requires these types of searches be an option of last resort, and even then, requires notification of the chain of command and implementation of “taint team” procedures.<sup>140</sup> Despite these protections, the approval authority for a search of military defense counsel within the Air Force remains a non-lawyer.<sup>141</sup> With differing and inadequate regulatory schemes, all branches of the service are unprepared to handle searches of military defense counsel offices, and implementation of varied programs yields arbitrary results.

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<sup>134</sup> *Id.* at 8.

<sup>135</sup> Inquiry, *supra* note 53, at 5 (applying to all searches involving a claim of privilege).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 9.

<sup>138</sup> Inquiry Endorsement, *supra* note 53.

<sup>139</sup> Policy Memorandum, Military Justice – 2, The Judge Advocate General, U.S. Air Force, subject: Searches and Seizures Involving Air Force Defense Personnel (17 Aug. 2005).

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

<sup>141</sup> See AFI 51-201, *supra* note 117, at 28 (requiring an Air Force magistrate possess “judicial temperament,” not that they are a judge advocate).

#### V. Recommendation<sup>142</sup>

To preserve the balance between the rights of an accused and the rare need for the government to search military defense counsel office spaces, MRE 315(d) should be modified to withhold search authorization authority from commanders when a search involves military defense counsel office spaces. Next, subsection (h) to MRE 315 should be added to codify the safeguards utilized in *Calhoun* and promulgated in the Air Force Judge Advocate General Instruction to ensure the protection of privileged material.<sup>143</sup> Last, a modified rule needs to make clear the enforcement mechanism for violations. The primary remedy for violations of MRE 315 is exclusion.<sup>144</sup> The discussion portion of MRE 315(h) should explicitly state that vicarious assertion of 4th Amendment rights and application of the exclusionary rule apply to searches of military defense counsel offices. The application of vicarious rights assertion and exclusionary rule to searches involving military defense counsel offices ensures that the government has an incentive to minimize collateral damage: expand the scope of a search of defense counsel offices; the exclusionary rule expands in kind. These three modifications to MRE 315 will not significantly erode the authority of a commander to issue search authorizations in the vast majority of circumstances, would only apply to probable cause searches, and would serve as an appropriate deterrent to government overreach.<sup>145</sup>

A modified MRE 315 will protect all stakeholders; investigators, judges, and prosecutors, as well as military defense counsel and the Soldiers, Sailors, Marines, and Airmen they represent. Uniform and explicit procedures for government searches of military defense counsel are needed to keep the fairness of the military justice system beyond reproach.

#### VI. Conclusion

Currently, every service is ill-equipped to conduct searches of military defense counsel. These searches can easily undermine the military defense bar and the entire military justice system. No fair system can place a defendant “dependent for the preservation of his rights upon the integrity and good faith of the prosecuting

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<sup>142</sup> While outside the scope of this article, it may be beneficial to apply this recommendation to all searches of areas known to contain materials subject to any claim of privilege.

<sup>143</sup> AF TJAG Memo, *supra* note 30.

<sup>144</sup> Exclusion is a sufficient remedy to address searches such as *Calhoun* that are limited to one case and are narrow in scope. In cases such as *Betancourt*, traditional exclusion does not address the government intrusion into the attorney-client privilege of every other client served by the office.

<sup>145</sup> Draft language of a modified MRE 315 is included *infra* Appendix A.

authorities.”<sup>146</sup> Service-specific, piecemeal policies add some protections for defendants and attorneys, but fall short of a comprehensive solution.<sup>147</sup>

Even with service-specific policies, many issues will likely remain unresolved. Attorneys may still remain at odds with the Model Rule 1.6 duty of confidentiality.<sup>148</sup> Defendants will continue to perceive that preservation of their rights is dependent on the integrity and good faith of the prosecuting authorities.<sup>149</sup> Last, a hodge-podge of service regulations will force judges to carve out ad hoc procedures and remedies as they attempt to reconcile service policies with constitutional rights, established judicial norms, and MRE 315. *Calhoun* and *Betancourt* highlight the issues inherent in these searches and the need for an updated rule to govern.<sup>150</sup> The President should provide uniform guidance to the services in the form of a modified MRE 315.<sup>151</sup> If nothing else, a servicemember is entitled to a fair process: “A man who is good enough to shed his blood for his country is good enough to be given a square deal afterwards. More than that no man is entitled to, and less than that no man shall have.”<sup>152</sup>

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<sup>146</sup> *United States v. Boyd*, 27 MJ 82, 85 (C.M.A. 1998) (citing *Kastigar v. United States*, 406 U.S. 442, 460 (1972)).

<sup>147</sup> See AF TJAG Memo, *supra* note 30. The existence of this memo did not prevent a similar issue within the Marine Corps.

<sup>148</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6. A presidential rule passed pursuant to statute would carry more weight with a state bar than a service policy citing a military need for an exception despite the absence of any clear exigency. *Id.*

<sup>149</sup> *Kastigar v. United States*, 406 U.S. 442,460 (1972).

<sup>150</sup> See *United States v. Calhoun*, 47 M.J. 520, 524 (A.F. Ct. Crim. App. 1997); Professional Experience, *supra* note 2.

<sup>151</sup> 10 U.S.C. § 836 (b) (“All rules and regulations made under this article shall be uniform insofar as practicable.”) [emphasis added]. *Id.*

<sup>152</sup> President Theodore Roosevelt, Speech at Springfield, Illinois (4 July 1903), available at <http://www.toinspire.com/author.asp?author=Theodore+Roosevelt> (last visited June 11, 2015).

## Appendix A. Proposed Military Rule of Evidence 315 Language

The below draft only addresses excerpts of MRE 315 that would require a change to ensure searches of military defense counsel office spaces do not abrogate the attorney-client privilege and have an appropriate degree of deterrence and judicial oversight. Proposed language is in **bold**. As discussed above, it may be beneficial to extend these protections to every probable cause search involving an area known to contain materials subject to a claim of privilege. Sample language for this course of action is also provided.

Rule 315. Probable cause searches

... (d) Who May Authorize. A search authorization under this rule is valid only if issued by an impartial individual in one of the categories set forth in subdivisions (d)(1) and (d)(2) **with the exception of searches conducted pursuant to paragraph (h) of this rule.**

... (h) Searches involving (military defense counsel) (a claim of privilege).

(1) Searches of (military defense counsel)(areas known to contain materials subject to a claim of privilege) may only be authorized by a judge or magistrate qualified and certified under Article 27(b) and sworn under Article 42(a) of the Uniform Code of Military Justice.

(2) Searches conducted pursuant to a search authorization obtained under subsection (h) (1) will be narrowly tailored and supervised by a disinterested attorney. All seized materials will be sealed for an in camera privilege review by a military judge prior to being turned over to the government.

(3) A military judge that conducts an in camera review pursuant to (h) (2) of this rule shall not sit as military judge in the case that is the subject of the search or any subsequent case involving screened materials.

The discussion section of MRE 315 should be amended as follows:

... (d) Who May Authorize. **Unless limited by section (h) of this rule**, Rule 315(d) grants power to authorize searches to impartial individuals of the included classifications. **The limitation in section (h) has been placed on the power to grant searches in recognition of the enhanced privacy interest underlying the (attorney-client relationship)(privileges) which warrants a heightened degree of judicial protection and supervision when (law offices)(areas subject to a claim of privilege) are the subject of a search for client files or documents.** The closing portion of the subdivision clarifies the decision of the Court of Military Appeals in *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979), by stating that the mere presence of an authorizing officer at a search does not deprive the individual of an otherwise neutral character. This is in conformity with the decision of the United States Supreme Court in *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979), from which the first portion of the language has been taken. The subdivision also recognizes the propriety of a commander granting a search authorization after taking a pretrial action equivalent to that which may be taken by a federal district judge. For example, a commander might authorize use of a drug detector dog, an action arguably similar to the granting of wiretap order by a federal judge, without necessarily depriving himself or herself of the ability to later issue a search authorization. The question would be whether the commander has acted in the first instance in an impartial judicial capacity. . . .

... (h) Searches of (military defense counsel)(areas known to be subject to a claim of privilege). **This section was added to address government searches of (military attorney office spaces) (areas known to be subject to a claim of privilege). See United States v. Calhoun, 49 M.J. 485 (C.A.A.F. 1998); United States v. Calhoun, 47 M.J. 520 (A.F. Ct. Crim App. 1997). All individuals with privileged information present in the area to be searched have standing to raise a motion for unlawful search. Violations of this section may render a search unlawful and evidence encountered during the conduct of the search inadmissible. See Demassa v. Nunez, 770 F.2d 1505 (9th Cir. 1985).**