GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

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| UNITED STATES<br><br>v.<br><br>Frank D. Wuterich<br>XXX-XX-3312<br>Staff Sergeant<br>U.S. MARINE CORPS | GENERAL COURT-MARTIAL<br><br>**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF TO DISMISS ALL CHARGES AND SPECIFICATIONS**<br><br>13 September 2010 |

## I. FACTS.

1. In January of 2007, Lieutenant Colonel Colby Vokey and Major Haytham Faraj were detailed as defense counsel.
2. On 1 February of 2007, LtCol Vokey and Maj Faraj requested voluntary retirement under 10 USC §6323, on 1 April 08 and 1 May 08 respectively.
3. The Article 32, UCMJ investigations for the Accused occurred on 30-31 August 2007 and 5-6 September 2007.
4. Maj Faraj requested and was approved for two modifications to his original retirement, from 1 May 08 to 1 June 08 and 1 June 08 to 1 August 08.
5. LtCol Vokey requested and was approved for three modifications to his original retirement, from: 1 April 08 to 1 May 08, 1 May 08 to 1 August 08, and 1 August 08 to 1 November 08.
6. Maj Faraj took no further actions to cancel or modify his retirement pursuant to paragraphs 2004.8 and 2013 of MCO 1900.16F. He retired from active duty and went into private practice on 1 August 2008.

7. LtCol Vokey took no further actions to cancel or modify his retirement pursuant to paragraphs 2004.8 and 2013 of MCO 1900.16F. He retired from active duty and went into private practice on 1 November 2008.

8. The email from Colonel Patrick Redmon to LtCol Vokey, dated 19 May 2008 is a confirmation of LtCol Vokey's second retirement modification to 1 August 2008 not a rejection of additional retirement modifications as characterized by the defense motion. (Def. at 2). Subsequent to that email, LtCol Vokey requested and was approved for a third modification to 1 November 2008.

9. Neither defense attorney had previously requested release from the attorney client relationship from the military court pursuant to R.C.M. 506(c) prior to their retirement. Mr. Vokey only recently requested R.C.M. 506(c) release due to an alleged conflict. Mr. Faraj has never requested release.

10. Neither defense attorney has been released by their client pursuant to R.C.M. 506(c).

11. The accused has retained the services of Mr. Vokey and Mr. Faraj as defense counsel throughout the course of the proceedings.

## II. DISCUSSION.

### 1. UNLIKE THE FACTS IN *HUTCHINS*, SSGT WUTERICH'S ATTORNEY CLIENT RELATIONSHIP (ACR) WITH MR. VOKEY AND MR. FARAJ HAS NEVER BEEN SEVERED, RENDERING THE RULING OF *HUTCHINS* INAPPLICABLE TO THE PRESENT CASE.

The defense motion incorrectly conflates the issue of Mr. Faraj and Mr. Vokey's change in status from "detailed" to "civilian" defense counsel with an actual severance of the Attorney Client Relationship (hereinafter ACR). The Accused's ACR with Mr. Faraj

and Mr. Vokey has never been severed as both counsel have continued to serve as defense counsel for the Accused throughout this litigation since their detailing and even continuing after their retirement from USMC. Mr. Faraj has appeared personally, or his presence has been waived at every Article 39a session to date. Mr. Vokey appeared on 22 March 2010, at an Article 39a session. When the Court inquired whether Mr. Vokey had made a written notice of appearance in compliance with the Western Judicial Circuit Rules, Mr. Vokey replied, "no Sir, I just continue to represent Staff Sergeant Wuterich since active duty." (Record, 22 March 2010, p. 65). Mr. Vokey appeared again at an Article 39a session on 27 August 2010.

The issue of an attorney's status as "detailed" or "civilian" defense counsel is entirely distinct from the precedent set in *Hutchins* establishing that the end of active service is not, under the facts of that case, "good cause" pursuant to R.C.M. 506(c) for severing the ACR. *United States v. Hutchins*, 68 M.J. 623 (N.M.Ct.Crim.App. 2010). A *Hutchins* analysis, in the context of the facts and circumstances of this case, is entirely misplaced because the Accused in this case "was further assured by both officers that they would not abandon him but that the relationship would not be as detailed counsel." (Def. at 5). Their assurances to the Accused can only be interpreted as an intention to continue to maintain their ACR, which they **have** done as evidenced by Mr. Vokey and Mr. Faraj's continued appearances at Article 39a Sessions. Another critically distinguishing fact between this case and *Hutchins* is that the detailed defense counsel in *Hutchins* **did not** continue to represent the accused as civilian defense counsel after his separation as did Mr. Faraj and Mr. Vokey. Indeed, in *Hutchins*, Captain Bass was absent from trial entirely. Here, unless properly released by the Court or the Accused, the

evidence suggests that both Mr. Vokey and Mr. Faraj will be present at the Accused's trial in November 2010.

Nearly two years after the retirement of both Mr. Vokey and Mr. Faraj, their ACR with the Accused continues to survive. Mr. Vokey may seek to withdraw from his representation of the Accused for "good cause" in accordance with R.C.M. 506(c), but if he does so, it will be for reasons separate and apart from his retirement. Mr. Faraj continues to actively represent the Accused, and it appears he will continue to do so for the future of the case. Mr. Vokey and Mr. Faraj have continued to represent the Accused after their respective retirements. The attorney client relationships they enjoy with the Accused survive, are active and alive. There has simply been no severance event.

The issue is not status as "detailed" counsel but whether the ACR was severed. Here, the ACR has never been severed. The defense's reliance on *Hutchins*, *Iverson*, and *Baca* to support their position that the Accused has a right to keep his chosen detailed counsel in "detailed" status, despite survival of the ACR, is misplaced. *See id.*; *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988); *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978). All three cases pertain to the right of the accused to continue an **established attorney-client relationship**. The main holding in *Hutchins*, in accordance with R.C.M. 506(c), is that the ACR with detailed counsel can *only* be severed by the client or the military judge for "good cause" *and* that the good cause must be based on a circumstance that renders the continuation of the established relationship virtually impossible. *Hutchins*, 68 M.J. at 631. *Hutchins* never addressed the issue of losing detailed counsel status. *Hutchins* dealt with the complete and total loss of Captain Bass as counsel two weeks prior to the docketed dates of trial due to EAS and separation from active duty.

Applying *Hutchins* to this case is inappropriate because the ACR has survived the defense counsels' retirements and separation from active duty.

The defense contends that Mr. Vokey and Mr. Faraj were erroneously denied "detailed" counsel status when they were, allegedly, "forced" to retire. The facts, *infra*, do not support their contention that they were forced out of active duty or from continued representation of the Accused. Based on the evidence, it appears that every request to modify their respective retirement dates was approved. Further, it appears that Mr. Vokey and Mr. Faraj stopped submitting requests to modify their retirement dates in the summer of 2008, well before the appellate litigation related to the government's subpoena of the "outtakes" of the Accused interview with CBS was complete.

**2. EVEN ASSUMING THAT THE DEFENSE COUNSELS' TRANSITION FROM DETAILED COUNSEL STATUS TO CIVILIAN COUNSEL STATUS WAS THE RESULT OF ERRONEOUS GOVERNMENTAL ACTION, DENIAL OF DETAILED STAUTS IS HARMLESS ERROR WHILE THE UNDERLYING ACR REMAINS INTACT.**

In *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009), the convening authority erroneously denied recognition of one of the Accused's two detailed counsel. Before the military judge restored the unrecognized counsel's "detailed" status on the eve of trial, that counsel was denied detailed counsel status during several critical pretrial stages. However, the ACR was never severed and the unrecognized counsel continued to provide his services to the defense team on all pretrial matters. On appeal, the defense argued that LtCol Wiechmann's Sixth Amendment right to counsel had been violated by the refusal of the convening authority to recognize his counsel's detailed status. *Wiechmann* held that even an erroneous denial of detailed status is harmless error under the circumstances of an uninterrupted ACR. *United States v. Wiechmann*, 67 M.J. 456,

464-5 (C.A.A.F. 2009). Judge Ryan, filing a separate opinion concurring in the judgment explains, "[t]he core of this [Sixth Amendment right to counsel] has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare for trial,'" therefore, the Sixth Amendment does not rest upon the counsel's particular status. *Id.* at 465 citing *Kansas v. Ventris*, --- U.S. ---, 129 S.Ct. 1841, 1844-45 (2009). A defendant's Sixth Amendment right to counsel is *also* not violated every time these opportunities are restricted. *Id.* citing *Morris v. Slappy*, 461 U.S. 1, 11, 13-14 (1983). Therefore, even the negative implications of an attorney's erroneous denial of status, such as lack of access to the defendant or files, is not a per se violation of the Sixth Amendment.

Similarly situated to *Wiechmann*, the Accused has a continuing relationship with Mr. Vokey and Mr. Faraj even after their retirement. The Accused has benefited continuously from the services of Mr. Vokey and Mr. Faraj since their detailing in 2007 and will continue to receive their services throughout the litigation unless released by the Military Judge or waived by the Accused pursuant to R.C.M. 506(c). Under *Wiechmann*, **even** an erroneous denial of a counsel's detailed status is harmless error while the ACR survives. Here, there has been no error: both defense counsel voluntarily retired, it appears that every requested modification of their respective retirement dates was granted, and, even if a modification request was denied, there is no evidence that either LtCol Vokey, or Major Faraj pursued other available remedies to delay their retirement dates, such as requesting to rescind their retirement requests. Further, there is no evidence that either Mr. Vokey, or Mr. Faraj sought redress of any adverse modification request with the convening authority or the Court.

3. THE DEFENSE'S CONTENTION OF DISPARATE TREATMENT IS WITHOUT MERIT AS THE ATTORNEYS ARE NOT SIMILARLY SITUATED, THERE IS NO EVIDENCE OF DISPARATE TREATMENT, AND THERE IS A PRESUMPTION OF REGULARITY IN GOVERNMENTAL ACTIONS ABSENT CLEAR EVIDENCE TO THE CONTRARY.

The defense's comparison of the circumstances of the active duty defense counsel with those of the retired counsel is without merit as the attorneys are not similarly situated. Mr. Vokey and Mr. Faraj submitted voluntary requests to retire from active duty, a process with entirely different statutes and administrative procedures from LtCol Sullivan's application for sanctuary as a reservist. A request to retire is a request to leave active duty. A request for consideration of sanctuary is a request to remain on active duty, as opposed to leave active duty. Furthermore, once it became apparent that this case would be stayed pending appeal in February of 2008, it appears that the defense counsel only minimally availed themselves of the administrative and judicial options for modifying or canceling their retirements while LtCol Sullivan properly applied for an orders extension via the appropriate chain of command.

In the situation of voluntary retirement, a service member may apply for modifications of their retirement date for "any duration." However, as a general rule the requested modification should not exceed 14 months. *See* Paragraph 2004.8(c) of MCO P1900.16F. While both Mr. Vokey and Mr. Faraj requested and were approved for several modifications to their original retirement dates, they did so in an atypical fashion, choosing to modify the dates by smaller rather than larger, more realistic, intervals. It appears that Mr. Vokey was granted four modifications to his original retirement date of 1 April 08, from: 1 April 08 to 1 May 08, 1 May 08 to 1 June 08, 1 June to 1 August 08 and, 1 August 08 to 1 November 08. All four modification requests stated the Accused's

trial as the determining factor in Mr. Vokey's need to modify his retirement and, pursuant to such reasons, all four were fastidiously granted.

The defense has argued that the email from Col Patrick Redmon to LtCol Vokey, dated 19 May 2008 was an admonishment, and denial of a modification request. However, a plain reading of that email suggests that it was a confirmation of LtCol Vokey's third retirement modification to 1 August 2008; not a rejection of additional retirement modifications as characterized by the defense motion. (Def. at 2) Subsequent to that email, it appears that LtCol Vokey requested and was approved for a fourth modification to 1 November 2008. The "admonition" referenced in the defense motion addresses an approval of LtCol Vokey's request for an extension through 1 August 2008 which also happened to discourage his continued month to month extension request methods. It appears that Col Redmon was concerned that the attorneys would "nickel and dime" the USMC for "30 days at a time" instead of asking for a realistic retirement date.

Similarly, Mr. Faraj requested two brief modifications from 1 April 08 to 1 June 08 and, 1 June 08 to 1 August 08. There is no evidence to suggest that Mr. Vokey or Mr. Faraj would have been denied the option to modify their retirement dates up to the "normally" permitted 14 months had they requested such modifications from MMSR at the time of their original, or later, requests. Paragraph 2004.8(c) of MCO P1900.16F. However, it is impossible to know for sure, as neither counsel requested a 14 month modification. There is also no reason why the circumstances would not have warranted modifications beyond the "normally" permitted time frame had the defense counsel requested such relief through their chain of command, the convening authority, or an

appropriate motion to this Court. Instead, it appears that both counsel completely halted their efforts to voluntarily remain on active duty and immediately began private practice in August 2008 for Mr. Faraj, and November 2008 for Mr. Vokey, after having been granted two and four retirement date modifications respectively. It also appears that neither attorney availed themselves of the option to cancel their retirements pursuant to paragraph 2004.8(c) of MCO P1900.16F.

Requests for modification or cancellation of voluntary retirement are granted under the following criteria: bona fide humanitarian or hardship circumstances, a critical need existing for the officer's grade and MOS, the needs of the service, and selection for promotion. *Id.* at 2004.8(a). As evidenced by the multiple requests granted by MMSR to modify Mr. Faraj and Mr. Vokey's retirement, the circumstances of their established attorney client relationships with the Accused clearly fall under the regulation's criteria for granting modifications and cancellations. There is no evidence to suggest that defense counsel could not have obtained further relief under this regulation had they actually requested additional modification or cancellation, particularly with the assistance of their command, the convening authority, or this Honorable Court.

Conversely, LtCol Sullivan properly initiated his sanctuary request via the chain of command. Reserve Marines must submit an administrative action (AA) form, requesting a high active duty time waiver to MMFA, through the chain of command. MCO 1800.11 at 2-1. LtCol Sullivan submitted the appropriate AA form via his chain of command, to MMFA, before procuring sanctuary. Importantly, he did so well after Mr. Vokey and Mr. Faraj had already left active duty as a result of their voluntary retirement requests. LtCol Sullivan initiated his sanctuary request in March 2009.

Finally, the implication by the defense that there has been misconduct on behalf of the Government in their treatment of the defense and trial counsel teams is completely without merit. The two parties are distinguishable in three respects: status, conduct and time. Their status differs in that Mr. Vokey and Mr. Faraj requested to leave active duty, approximately one month after being detailed as defense counsel. LtCol Sullivan requested to remain on active duty. Their conduct was different in that it appears that Mr. Faraj and Mr. Vokey made several successful modification requests, and then they ceased efforts to postpone their respective retirements. LtCol Sullivan on the other hand, simply followed the established procedure for making a sanctuary request. Finally, the two differ in time as well. Mr. Vokey and Mr. Faraj made their respective retirement requests in February 2007, less that one month after being detailed to the case. The several modification requests made by Mr. Vokey and Mr. Faraj were made in the summer of 2008. LtCol Sullivan made his sanctuary request on 4 March 2009. Nearly one year later. Thus, the notion that the sanctuary request and the retirement date modifications were being considered at the same time is not supported.

In the absence of clear evidence showing the contrary, the court must follow the long standing presumption that there is regularity in the conduct of governmental affairs. *U.S. v. Hilton*, 29 M.J. 1036, 1040 (1991). The defense has produced no evidence of misconduct or a scheme by the Government to treat the defense counsel differently than the trial counsel and as such the court should properly apply the presumption of regularity to this case. If anything, these defense counsel actively sought to separate themselves from active duty, despite R.C.M. 506(c) and Rule 1.16 of JAGINST 5803.1C, instead of seeking any of the numerous administrative and judicial remedies available to keep them

on active duty as detailed counsel had they chosen to do so. Here, the Government's "hands" are clean.

## III. CONCLUSION.

The Government respectfully requests that this Honerable Court deny the defense motion in its entirety. The ACR between Mr. Vokey and the Accused, as well as that of Mr. Faraj and the Accused remains in tact. This fact renders that CCA resent opinion in Hutchins inapplicable. And, even if there was an erroneous denial of the defense counsels' detailed status, under *Wiechmann,* the error is harmless. Finally, the notion that there was disparate treatment of defense and trial counsel is not supported and without merit.

## ATTACHMENTS

1. Timeline

2. Paragraphs 2013 and 2004.8 from the "Marine Corps Separations and Retirement Manual," MCO P1900.16F.

3. Retirement Materials, LtCol Vokey and Maj Faraj.

4. Defense Petition CAAF.

5. Detailing Documents

6. CAAF Log Print Out

7. LtCol Sullivan Sanctuary Request

8. May 19 Email Col Redmon

9. Defense Consent To Delay Attendant to Appellate Process (1 Nov 2009).

M.L. Gannon
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MAJOR, USMC
TRIAL COUNSEL

# U.S. v. SSgt Wuterich; Timeline of Key Events

(Modification Approvals indicated by bold print)

21 Dec 06: Preferral

11 Jan 07: LtCol Vokey detailed to case (Encl 5)

17 Jan 07: Maj Faraj detailed to case (Encl 5)

1 Feb 07: LtCol Vokey submits request for voluntary retirement for retirement date o f 01 April 2008 (Encl 3)

5 Mar 07: Maj Faraj submits request for voluntary retirement for retirement date of 01 May 2008 (Encl 3)

30-31 Aug 07: Article 32 investigation (See Court Records)

5-6 Sep 07: Article 32 investigation continues (See Court Records)

2 Oct 07: Article 32 Investigating Officer's report submitted (See Court Records)

21 Dec 07: Referral (See Court Records)

6 Feb 2008: Maj Faraj states trial will be complete by 01 5 May 2008 (Encl 8)

12 Feb 2008: LtCol Vokey's 1st request for modification (Mod) to retirement date approved by Col Redmon for 1 May 2008 to 1 Jun 2008 (Encl 3)

**18 Feb 2008: Maj Faraj's 1st request for Mod to retirement date approved (LtCol Eric M. Mellinger) by Manpower for 1 May 2008 to 1 Jun 2008 (Encl 3)**

15 Apr 2008: Maj Faraj's 2nd Request to Mod to retirement date of 1 Jun 2008 to Aug 2008 (Encl 3)

16 Apr 2008: LtCol Vokey's 2nd request to Mod retirement date of 1 Jun 2008 to 1 Jul 2008 (Encl 3)

7 May 2008: Mr. Vokey's 2nd request to Mod retirement date is in Manpower's system for routing (Encl 3)

7 May 2008: Maj Faraj's 2nd request to Mod retirement date is in Manpower's system for routing (Encl 3)

**14 May 2008: Maj Faraj's 2nd request to Mod retirement date approved by Manpower (LtCol Mellinger via Michael T. Dowling) from 1 Jun 2008 to 1 Aug 2008 (Encl 3)**

**15 May 2008: LtCol Vokey's 2nd request to Mod retirement date is approved by Col Redmon from 1 Jun 2008 to 1 Jul 2008 (Encl 3)**

16 May 2008: LtCol Vokey's 3rd request to Mod retirement of 1 Jul 2008 to 1 Aug 2008 (Encl 3)

17 May 2008: LtCol Vokey represents to Col Redmon case should be complete by 1 August 2008 (LtCol Vokey e-mail to Col Redmon) (Encl 3)

**19 May 2008: LtCol Vokey's 3rd request to Mod retirement date approved by Col Redmon via email traffic from 1 Jul 2008 to 1 Aug 2008 (Encl 3)**

30 June 2008: Defense Petition Filed With CAAF. (Encl 4)

2 July 2008: CAAF sets schedule- Defense Supplement Brief Due 21 July 2008, Government answer due 31 July 2008. (Record)

5 Jul 2008: CAAFLOG posts article stating that the interlocutory process will go on for months and months in a piece called "an article 62 timeline." (Encl 6)

21 Jul 2008: Defense files notice to CAAF to submit brief (Record)

21 Jul 2008: LtCol Vokey's 4th request to Mod retirement date of 1 Aug 2008 to 1 Nov 2008 (Encl 3)

23 Jul 2008: LtCol Vokey's 4th request to Mod retirement date in Manpower system for routing (Encl 3)

23 July 2008: CAAF Orders Oral Argument for (Wuterich II) sets for 17 September 2008. (Record)

**24 Jul 2008: LtCol Vokey's 4th request to Mod retirement date approved for 1 Aug 2008 to 1 Nov 2008 (Stephen G. Nitzschke) (Encl 3)**

1 Aug 2008: Maj Faraj voluntarily retires under 10 USC 6323 with 22 yrs, 2 days active duty
Aug 2008: LtCol Vokey leaves Camp Pendleton area (Defense Brief)

Oct 2008: LtCol Vokey offered position with Fitzpatrick, Hagood, Smith, & Uhl, LLP (Defense Brief)

1 Nov 2008: LtCol Vokey voluntarily retires under 10 USC 6323 with 20 yrs, 7 mos. active duty.

Dec 2008: CAAF remands issue of CBS Outtakes back to Trial Judge

11-12 Mar 2009: Art. 39(a): LtCol Tafoya appeared for the first time as DDC

4 March 2009: LtCol Sullivan submits request for 3 year orders and Sanctuary (Encl 7)

1 Nov 2009: Defense submits "Consent to Delay Attendant to Appellate Process" wherein defense states ". . . any and all delay resulting from Government's (appeal) would not prejudice the accused in any way." (Encl 9)

22 March 2010: Mr. Vokey makes an appearance as civilian counsel. Record p. 65

26-27 Aug 2010: Art. 39(a) Mr. Faraj and Mr. Vokey appear as counsel. (Record)

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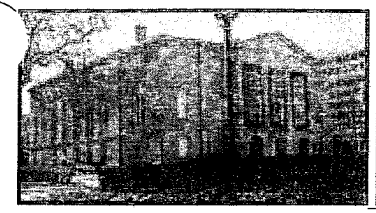

CAAFLOG
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# SSgt Wuterich petitions CAAF

By Dwight Sullivan, July 2, 2008

We previously discussed NMCCA's ruling reversing a military judge's quashing of a subpoena issued to CBS News in *United States v. Wuterich*, a prosecution arising from the Haditha incident. *United States v. Wuterich*, __ M.J. ___, No. NMCCA 200800183 (N-M. Ct. Crim. App. June 20, 2008). On Monday, SSgt Wuterich's counsel filed a petition at CAAF. *United States v. Wuterich*, __ M.J. ___, No. 08-0681/MC (C.A.A.F. June 30, 2008). This has the effect of cutting off NMCCA's ability to sua sponte reconsider *Wuterich* either in panel or en banc.

On Tuesday, CAAF redocketed *Wuterich*, noting that it is a petition seeking review of an Article 62 appeal. CAAF renumbered the case 08-6006/MC and, under Rule 21(b), ordered that the supplement be filed no later than 21 July 2008 and the government's answer be filed no more than 10 days after the supp is filed. *United States v. Wuterich*, __ M.J. ___, No. 08-6006/MC (C.A.A.F. July 1, 2008).

Uncategorized

## 5 Responses to "SSgt Wuterich petitions CAAF"

1. *Anonymous* says:
   July 2, 2008 at 9:31 pm (Quote)

   Ahhh…the dust settles on Lopez de Victoria. CAAF, I have no sympathy for you and your piecemeal litigation (isn't that disfavored?). Many said it wouldn't congest CAAF's selective docket…Dossey and Wuterich in a matter of weeks.

   Reply
2. *CAAFlog* says:
   July 2, 2008 at 9:40 pm (Quote)

   While I thought the Lopez de Victoria dissent was more persuasive than the majority, concern about overwhelming CAAF's docket shouldn't be an issue. Either Congress did provide CAAF with jurisdiction or it didn't. If it did (as CAAF determined), then CAAF can choose whether to review an individual petition from an Article 62 appeal. CAAF hardly could have reasoned that Congress intended to give it jurisdiction to review Article 62 appeals but it would decline to do so because it's too much work.

   Nor is there any reason to fear that CAAF will be overwhelmed. Since 1983, CAAF has been exercising jurisdiction over Article 62 appeals. So Lopez de Victoria didn't expand CAAF's jurisdiction as applied; rather, it continued it. If CAAF wasn't overwhelmed by Article 62 appeals

Encl 4 Pg. 1