

WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

1
2
3 UNITED STATES

GENERAL COURT-MARTIAL

4 v.

5 CALEB P. HOHMAN
6 XXX XX 6203
7 SERGEANT
8 U.S. MARINE CORPS

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION ON WHETHER THE
ACCUSED'S ATTORNEY-CLIENT
RELATIONSHIP WITH DETAILED
DEFENSE COUNSEL WAS TERMINATED
FOR GOOD CAUSE

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10 STATEMENT OF THE CASE

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12 The accused is charged with Involuntary Manslaughter in
13 violation of UCMJ Article 119 for allegedly shooting a fellow
14 Marine on 30 October 2006 during a training exercise in which he
15 allegedly loaded his weapon with live rounds instead of blank
16 rounds. He is also charged with two violations of UCMJ Article
17 92 (violation of a general order and dereliction of duty) for
18 failing to ensure his magazines were loaded with blank
19 ammunition. Charges were preferred on 18 April 2007 and on 19
20 March 2008 the convening authority referred the charges to a
21 General Court-Martial for trial.

22
23 The major issue litigated in this case during the period from
24 the initial court session on 5 May 2008 until January 2010 was
25 whether the government could be compelled to release documents

1 about the alleged training incident that were retained by the
2 Naval Safety Center. In January 2010, the court, after
3 inspecting the documents and holding hearings on the issue,
4 ruled that the Naval Safety Center Documents did not have to be
5 turned over to the defense as the statements were never adopted
6 by the witnesses and, in any event, the statements were
7 identical to statements already possessed by the defense. This
8 cleared the way for the case to continue through the motions
9 phase.

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11 On 22 April 2010, however, the United States Navy-Marine Corps
12 Court of Criminal Appeals issued its decision in United States
13 v. Hutchins, 68 M.J. 623 (N.M.Ct.Crim.App., 2010). The court
14 held, among other things, that where the military judge severed
15 an attorney-client relationship (ACR) because the detailed
16 defense counsel had to leave active duty because he reached his
17 End of Active Service (EAS) date, such severance was not for
18 good cause. Based on that conclusion, the Hutchins court set
19 aside the findings and sentence in that case.

20
21 On 23 April 2010, the court in this case directed the parties
22 to read the Hutchins opinion and be ready to discuss how that
23 decision affected the current case. The reason for the concern
24 was that in December 2009, this court severed the ACR involving
25 the detailed defense counsel, Captain Muth, because he reached

1 his EAS and the Marine Corps refused to grant his second
2 extension request to allow him to remain on active duty in the
3 Marine Corps and to continue his representation of the accused.
4 Based on an R.C.M. 802 conference held on 27 April 2010, the
5 court ordered a UCMJ Article 39a session be held on 25 May 2010
6 to establish the facts surrounding Captain Muth's departure from
7 active duty and to determine whether it would be possible to
8 return him to active duty.

9
10 The hearing was held as scheduled, and as a result, on 5 June
11 2010 the court ordered the government to return Mr. Muth to the
12 defense team and further ordered that if he were not returned to
13 the defense team by 1 July 2010, the court would hold a second
14 Article 39a session to determine whether the proceedings must be
15 abated in accordance with the Hutchins decision or whether the
16 facts in this case could be sufficiently distinguished from
17 those in Hutchins to allow the case to proceed without Mr. Muth.

18
19 The government did not return Mr. Muth to the defense team by
20 1 July 2010, but instead requested three more weeks to allow the
21 government to comply with the court's order. The trial counsel
22 was optimistic that if given more time, the government would
23 offer orders to Mr. Muth returning him temporarily to active
24 duty. Rather than rely on an e-mail to grant the three week
25 extension, the court ordered a 39a session to be held on 9 July

1 2010 to require the trial counsel to state on the record what
2 actions the government was taking to return Mr. Muth to the
3 defense team. At the hearing, the trial counsel represented
4 that Mr. Muth could be returned to active duty within twenty-
5 four hours if he would accept the orders. He could not,
6 however, be ordered back to active duty involuntarily.¹

7
8 On 14 July 2010, Mr. Muth sent an e-mail to the court and
9 counsel assigned to the case. He made the following pertinent
10 representations:

11
12 a) Since leaving active duty in the Marine
13 Corps, he was hired at a law firm in Orange
14 County, California and moved his family 100
15 miles from his original home near Camp
16 Pendleton, California. He currently represents
17 clients through his firm.

18 b) Mr. Muth does not wish to voluntarily return
19 to active duty to represent the accused in this
20 case because doing so would compromise his
21 ability to represent his current clients for an
22 issue wholly caused by the Government.

23 c) Mr. Muth would gladly represent the accused,
24 in his civilian capacity, if the government
25 would pay for the representation at a rate of
\$300.00 per hour.²

23 ¹ According to the trial counsel, the only option for involuntary orders would be
24 if Captain Muth were called up and deployed in the war effort. In any event,
the court never considered an involuntary return to active duty to complete this
case.

25 ² No sooner did Mr. Muth suggest that he be retained at \$300/hr than Mr. Low,
the original retained Civilian Defense Counsel, informed the court that he would
now bill the government for his services. This issue never developed further.

1
2 Until receiving this email, the court was under the impression
3 that it was just a matter of time until the administrative
4 wheels were set in motion and that Mr. Muth would be offered
5 orders and temporarily return to the Marine Corps to complete
6 this case. After receiving Mr. Muth's e-mail, however, it
7 became clear that Mr. Muth would not voluntarily return unless
8 he were retained as a civilian counsel at government expense.
9 The court surmised the government would not agree to pay for his
10 services.

11
12 The court issued an order on 21 July 2010 to hold a final 39a
13 session to develop the record on two points: 1) The reason for
14 the government's disapproval of Captain Muth's second extension
15 request; and 2) The extent of Captain Muth's involvement in the
16 case. Although the court ordered that the hearing be held on 6,
17 7, or 9 August 2010 to issue a ruling as soon as possible, the
18 civilian defense counsel was scheduled for another trial during
19 the first two weeks of August and the military judge was
20 scheduled for trial out of state from 10 through 20 August 2010.
21 Therefore, a hearing was held on the earliest date available to
22 all parties - Saturday, 21 August 2010. In the 21 July Order,
23 the court directed both parties to submit briefs on the two
24 issues presented and develop the record accordingly. On 3
25 August 2010 the government submitted their brief. In it they

1 indicated that there was no way to return Mr. Muth to the
2 defense team as a contract attorney. In fact, according to the
3 government, doing so would violate Rule 1.5(c) of Judge Advocate
4 General Instruction 5803.1B as well as 18 U.S.C. § 203.

5
6 Mr. Muth must have interpreted this assertion as an accusation
7 of criminal conduct because he retained counsel and never
8 appeared before the court on this matter or answered any
9 questions, but rather dealt with the through his civilian
10 counsel whose efforts prevented any development of the issue of
11 Mr. Muth's involvement in the case. The final hearing on this
12 matter was held on 21 August 2010.

13
14 ISSUE

15
16 Where an attorney client relationship is severed because the
17 attorney has reached the end of his active service date and the
18 government refuses to extend his EAS date, is such severance for
19 good cause?

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21 FINDINGS OF FACT

22
23 1. Mr. Joseph Low III was retained by the accused in this case
24 in November 2006 and filed his notice of appearance on 17 April
25 2007.

1

2 2. Captain Muth was detailed to this case on 17 April 2009.³

3 His EAS was 1 October 2009. On 25 August 2009 he requested an
4 extension of his EAS date until 31 December 2009. On 16

5 September 2009 his request was partially approved by the Deputy

6 Commandant, Manpower and Reserve Affairs, Manpower Management

7 Officer Assignments Branch (MMOA-3) in that his EAS was extended

8 to 1 December 2009.

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10 3. On 23 November 2009, Captain Muth requested a second

11 extension to his EAS in order to continue his representation of

12 the accused. This request was strongly supported by the Officer

13 in Charge, Legal Services Support Section. In fact, the OIC,

14 LSSS personally called MMOA-3 to argue for approval of Captain

15 Muth's EAD request.

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17 4. On 27 November 2009, without stating a reason, MMOA-3 denied

18 Captain Muth's request for EAD.

19

20 5. On 1 December 2009 Captain Muth left active duty.

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25 ³ Other military counsel were detailed and released by the accused both before
and after referral of charges. Those counsel, and the reasons for their
release, are not relevant to this ruling.

1 6. From 17 April 2009 through 1 December 2009, Captain Muth
2 represented his client in court sessions litigating the Naval
3 Safety Center portion of the case.⁴

4
5 7. The accused stated on the record that he objected to Captain
6 Muth being removed from his case.

7
8 8. After Captain Muth left active duty, the court determined
9 that the attorney client relationship between Captain Muth and
10 the accused had been severed, that the severance was without the
11 accused's consent, and that the severance was made for good
12 cause, i.e., Captain Muth had reached his EAS.

13
14 9. On 3 December 2009, Captain Kunce, USMC was detailed as
15 defense counsel in this case.

16
17 10. Prior to requesting his first EAD, Captain Muth had denied
18 Career Designation. Acceptance of Career Designation would have
19 given Captain Muth a Regular Commission in the USMC and an
20 Indefinite EAS date. By denying Career Designation, Captain

21
22
23 ⁴ While he may have participated in more than just the Naval Safety Center
24 portion of the litigation, the defense impeded development of facts in this
25 area. Mr. Muth was served a subpoena to appear at the 39a session, but his
attorney claimed the service was improper. The government also sent a list
of eleven interrogatories to Mr. Muth, but through counsel, he did not
answer. The court will not surmise what additional work Captain Muth may
have completed on behalf of his client.

1 Muth retained a definite EAS date and signaled that he planned
2 on leaving active duty.⁵

3
4 11. Although Marine Corps policy does not favor granting EADs
5 to officers who have denied Career Designation, waivers may be
6 granted to allow EADs. The decision whether to grant or deny
7 EADs is made by the Deputy Commandant, Manpower and Reserve
8 Affairs (DC, M&RA). That decision has apparently been delegated
9 to the Officer Assignments Section of the Manpower Management
10 Section of M&RA.

11
12 12. At a UCMJ Article 39a session, MMOA-3 gave two reasons for
13 denial of Captain Muth's second extension request: 1) Marine
14 Corps policy does not favor waiver of the extension policy for
15 officers who have denied Career Designation; and 2) Force
16 management concerns.

17
18 13. One of the criteria for granting an extension to an officer
19 who has denied Career Designation is "The extension of an
20 officer is critical to meet a specific operational commitment."⁶

21
22 ⁵ While Denial of Career Designation pertains solely to active duty service, and
23 an officer who denies Career Designation may still pursue a Reserve career, Mr.
24 Muth suggested he did not want to incur further obligation in the Individual
25 Ready Reserve (IRR). Returning to active duty may have extended Mr. Muth's IRR
date. In effect, Mr. Muth wanted to cut all ties - active and reserve - to the
Marine Corps as early as possible.

⁶ Paragraph 4(b)(2)(a)(3)(a) of MCO 1001.45J of 9 July 2008, Career
Designation, Retention, and Return to Active Duty...of Officers into the
Marine Corps and ROT at UCMJ Article 39a session of 21 August 2010.

1
2 14. No federal statute denies the Commandant of the Marine
3 Corps the discretion to grant an EAD to an officer who has
4 denied Career Designation.⁷
5

6 15. While the military departments must be cognizant of active
7 duty officer strength limits prescribed by statute and by the
8 Secretary of Defense, the distribution of officers by Military
9 Occupational Specialty (MOS) is left to the discretion of the
10 military departments. The Marine Corps could choose to retain
11 more officers in one MOS than another.
12

13 16. The Officer Assignments Section of M&RA, MMOA-3, was free
14 to exercise, and did exercise, considerable discretion in
15 granting Captain Muth's first extension request and denying his
16 second. MMOA-3 provided no reason, other than policy and
17 planning concerns, for having denied Captain Muth's extension
18 request. If MMOA-3 had approved the extension, the only
19 consequence of that administrative action would be that one
20 Marine captain would have been extended for some months on
21 active duty. MMOA-3 could point to no additional actions that
22 would have had to have been taken to compensate for an approval
23 of Captain Muth's extension request.
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25 ⁷ ROT at UCMJ Article 39a session of 21 August 2010: MJ questions to LtCol
Davis, formerly of MMOA-3.

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17. On 3 August 2010, Mr. Muth's civilian attorney contacted the court by email to inform that all correspondence would have to be sent through him. From that date forward, Mr. Muth never personally communicated with the court or trial counsel again.

18. Mr. Muth was served with interrogatories in August 2010. These interrogatories were prepared in an effort to develop the record on the issue of Mr. Muth's participation on the case. The trial counsel prepared them in a way that would provide general information to the court, but not invade the attorney-client privilege. On 2 September 2010, Mr. Muth's civilian attorney stated, in effect, that his client would not answer the interrogatories.⁸

STATEMENT OF THE LAW

1. Rule for Court-Martial 505 states in pertinent part:

Rule 505. Changes of members, military judge, and counsel

...

(d) *Changes of detailed counsel.*

⁸ I say, "in effect", because although Mr. Muth's attorney used different words than mine, his emails, which are attached to this ruling, on the whole, can be fairly be read as an attempt to impede development of the record on this issue.

1 military counsel of the accused's own selection,
2 if reasonably available. The accused is not
3 entitled to be represented by more than one
4 military counsel.

5
6 ...

7 (c) *Excusal or withdrawal.* Except as otherwise
8 provided in R.C.M. 505(d)(2) and subsection
9 (b)(3) of this rule, defense counsel may be
10 excused only with the express consent of the
11 accused, or by the military judge upon
12 application for withdrawal by the defense counsel
13 for good cause shown.

14 ...

15 3. The Uniform Code of Military Justice provides an accused
16 with rights to counsel that exceed Constitutional standards. The
17 President has gone further to require-in very direct and
18 extraordinary terms not found elsewhere in the Manual for
19 Courts-Martial-that release of a defense counsel in situations
20 such as this occur only with the approval of the military judge
21 for good cause, or with the "express consent" of the accused.
22 Hutchins at 628.

23 4. In the absence of the accused's consent or an approved
24 application for withdrawal by the defense counsel, severance of
25 the relationship can only be proper when good cause is shown on
the record. Allred, 50 M.J. at 799-800. Convenience of the

1 Government is not a sufficient basis to establish good cause,
2 Id. at 800 (citing United States v. Murray, 42 C.M.R. 253, 254
3 (C.M.A.1970)). Good cause must be based on a "truly
4 extraordinary circumstance rendering virtually impossible the
5 continuation of the established relationship." United States v.
6 Iverson, 5 M.J. 440, 442-43 (C.M.A.1978) (footnote omitted). Id.

7
8 5. "Good cause" is defined to include, "physical disability,
9 military exigency, and other extraordinary circumstances which
10 render the ... counsel ... unable to proceed with *629 the
11 court-martial within a reasonable time. 'Good cause' does not
12 include temporary inconveniences which are incident to normal
13 conditions of military life." RULE FOR COURTS-MARTIAL 505(f),
14 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).^{FN9} See also
15 United States v. Morgan, 62 M.J. 631
16 (N.M.Ct.Crim.App.2006) (finding error in the severance of the
17 trial defense counsel from taking part in the post-trial
18 processing due to counsel's change of commands). We distinguish
19 Allred based on the underlying context of the severance.

20 ^{FN9}. While this standard is actually applicable to excusal for
21 good cause by the authority who detailed the counsel to the
22 case, and the proper standard for good cause excusal is the
23 R.C.M. 506 standard as explained in Iverson, infra, our
24 conclusion is the same under either standard of good cause. Id.
25 at 628-29.

1
2 6. "Good cause" must be assessed on a sliding scale which
3 considers the contextual impact of the severance on the client.
4 Severance of an attorney/client relationship early in a case
5 will have significantly less impact on an accused's
6 representation rights than severance after work has been done on
7 the defense case. Id. at 629.

8
9 7. It is error for a military judge to allow proceedings to
10 continue after a detailed defense counsel ceases representation
11 of the accused without either the accused's knowing release or a
12 finding of good cause by the military judge. Id. at 624

13
14 **ANALYSIS**

15
16 The court in this case severed the attorney-client
17 relationship ostensibly for good cause because Captain Muth had
18 passed his EAS date and the Marine Corps denied his request to
19 extend on active duty. The court reasoned that Captain Muth's
20 end of active duty contractual service obligation constituted
21 good cause to terminate the relationship. After the United
22 States Navy-Marine Corps Court of Criminal Appeals (NMCCA)
23 decision in United States v. Hutchins, the court realized that
24 EAS might not have amounted to good cause. The court
25 immediately attempted to facilitate Mr. Muth's return to the

1 case. During the first months after the Hutchins decision, and
2 under the direction of the court, the trial counsel spent
3 considerable time in legal research and administrative
4 maneuvering in attempting to return Mr. Muth to active duty.
5 When the trial counsel finally reached the point where Mr. Muth
6 would be offered orders to temporarily return to active duty to
7 complete his representation of the accused in the case, Mr. Muth
8 indicated he did not desire to return to active duty, but
9 rather, would agree to represent the accused in his civilian
10 capacity at \$300 per hour at government expense. Since the
11 government refused that arrangement, the court focused on two
12 issues: 1) Was the Marine Corps compelled to deny Captain Muth's
13 second extension request?; and 2) Notwithstanding the reason for
14 the Marine Corps' decision, did Captain Muth's involvement in
15 the case distinguish this case from Hutchins?, i.e. was Captain
16 Muth involved so minimally on the "sliding scale" and would his
17 severance have minimal impact on the client when considered in
18 the entire context of the case?

19 Addressing the good cause issue first, the Officer
20 Assignments Section (MMOA) of Manpower and Reserve Affairs
21 exercised considerable discretion in granting the first
22 extension and in denying the second. The action officer who
23 testified at the final UCMJ Article 39a session, a Lieutenant
24 Colonel who had served at MMOA-3 during this period, indicated
25 there was no statutory authority that denied a second extension.

1 When pressed on the reason for denying the extension request, he
2 cited *policy concerns* of permitting an officer who denied Career
3 Designation to extend his EAS date and *planning concerns* in not
4 retaining too many officers on active duty and in "messing up"
5 the grade pyramids of the officer ranks. While these concerns
6 are real in the manpower management arena, they do not amount to
7 a "truly extraordinary circumstance rendering virtually
8 impossible the continuation of the established relationship."
9 Neither do they amount to "physical disability ... [or] military
10 exigency." MMOA could have easily granted the extension request
11 and there would not have been any adverse consequences to that
12 decision. In effect, MMOA could have approved Captain Muth's
13 extension request without taking any extraordinary actions or
14 suffering any extraordinary consequences.⁹ Had there existed a
15 federal statute that prohibited approval of Captain Muth's
16 extension or operational issues that limited the ability to
17 extend Captain Muth, those facts may have constituted "good
18 cause" to terminate the attorney-client relationship. The
19 policy concerns present in this case do not rise to the level of
20 good cause as defined in the Hutchins decision.

21
22 Moving next to assessing the impact to the accused of the
23 severance, the NMCCA directed that "good cause must be assessed

24
25 ⁹ As NMCCA stated in Hutchins, "EAS standing alone, cannot be used as a basis
to sever an existing attorney client relationship in this case after nearly a
year of preparatory work and mere weeks before commencement of a general
court-martial for murder." Id. at 629.

1 on a sliding scale which considers the textual impact of the
2 severance on the client." "Severance of an ACR early in a case
3 will have significantly less impact on an accused's
4 representation rights than severance after work has been done on
5 the defense case." This formula may leave an out where,
6 although good cause did not exist for severance of an ACR, the
7 contextual impact to the accused of the severance was slight.¹⁰
8 In the present case the court attempted to completely develop
9 the record in this area to preclude the necessity for a Dubay
10 hearing at a later date.¹¹ Perhaps Captain Muth was so minimally
11 involved in the case that it could be argued that his removal
12 would have minimal impact on the accused's representation
13 rights. In this case though, Captain Muth, the only military
14 counsel detailed at the time, had been assigned to the case for
15 nine months and had argued the Naval Safety Center issue during
16 multiple court sessions. Unlike the detailed defense counsel in
17 Hutchins, Captain Muth fought to remain on active duty and
18 continue his representation of his client. Also, the accused
19 clearly stated that he objected to losing Captain Muth.
20

21
22 ¹⁰ This language sounds like another means of assessing prejudice, an undertaking
23 the NMCCA refused in Hutchins and has previously held would not be assessed
24 unless the error in severing the ACR resided with the defense or appellant. In
25 cases where an improper severance resides with the government, the NMCCA
requires reversal. Hutchins at 630 citing U.S. v. Dickinson, 65 M.J. 562, 566
(N.M.Ct.Crim.App. 2006). Nevertheless, I have attempted to follow the court's
mandate in assessing good cause in the entire context of the case.

¹¹ As already indicated, due to Mr. Muth's stance on this issue, the only
facts available regarding his participation in this case, must be gathered
solely from reading the ROT covering his appearances on the record in 2009.

1 Conversely, in Hutchins, the detailed defense counsel was one of
2 three counsel assigned to the case. After that counsel's
3 motions dealing with the constitutionality of mandatory minimum
4 sentences were denied, his role was relegated to pre-sentencing
5 preparation. After he left the case, the accused still had the
6 benefit of two military counsel and his civilian counsel. The
7 two military counsel who were left on the case in Hutchins were
8 far more experienced in terms of total years of practice, as
9 well as in complex criminal litigation and in capital litigation
10 than the counsel whose representation was terminated. Even on
11 those facts, the NMCCA in Hutchins ruled that good cause did not
12 exist to terminate that relationship. There are only two areas
13 in which the present case may be distinguished from Hutchins.
14 First, the civilian defense counsel in this case, whose
15 extremely tight trial calendar made him the long pole in the
16 tent when attempting to order trial dates, had indicated he
17 could go to trial in June 2010, whereas the improper severance
18 in Hutchins occurred on the "eve of trial."¹² Second, one might
19 argue that Mr. Muth dealt only with a procedural issue in this
20 case, whereas the counsel at issue in Hutchins argued
21 substantive motions. The breadth and clarity of the language in
22 the Hutchins decision, however direct otherwise. On these
23
24

25 ¹² Even so, the Hutchins case was ultimately tried after that counsel's EAS date.

1 facts, analogizing to Hutchins, Sergeant Hohman's
2 representational rights can only be considered greater.

3 Severance of Sergeant Hohman's representational rights this late
4 in the case and nine months into the ACR, impact his rights in
5 more than a minimal way.

6
7 CONCLUSIONS OF LAW

8 1. Where an attorney-client relationship, involving a defense
9 counsel who is detailed to an involuntary manslaughter case for
10 nine months and made court appearances on behalf of his client,
11 is severed because the government, citing mere policy concerns
12 that were subject to discretionary interpretation, denied the
13 attorney's request to extend his EAS date to continue the
14 representation, such severance is not based on good cause.

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16
17 2. The accused's representational rights in this case, when
18 assessed in the entire context of the case, have been impacted
19 in more than a minimal way.

20
21 3. This court has no judicial remedies available to return Mr.
22 Muth, either as a civilian or as a Marine, to the case.

23
24 4. While allowing the accused to avoid trial altogether for
25 serious allegations of misconduct involving the death of another

1 Marine could be considered an injustice, the current state of
2 the case law clearly directs it would be error to allow this
3 case to proceed after Captain Muth ceased representation of the
4 accused.

5
6 ORDER

7
8 The proceedings in this case shall be abated until Mr. Muth is
9 returned to the defense team.

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11
12 SO ORDERED, this 15th day of September.

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14 
15 Thomas J. Sanzi
16 LtCol, U.S. Marine Corps
17 Military Judge