**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| U N I T E D S T A T E S,<br>Appellee<br><br>v.<br><br>First Lieutenant (O-2)<br>**RICHARD L. EASTON**<br>United States Army,<br>Appellant | ) FINAL BRIEF ON BEHALF OF<br>) APPELLEE<br>)<br>)<br>) USCA Dkt. No. 12-0053/AR<br>)<br>) Crim. App. Dkt. No. 20080640<br>)<br>)<br>) |


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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

## Granted Issue

**WHETHER THE ARMY COURT ERRED IN HOLDING APPELLANT'S TRIAL DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY BECAUSE JEOPARDY DID NOT ATTACH AND EVEN IF IT DID, MANIFEST NECESSESSITY JUSTIFIED THE CONVENING AUTHORITY'S DECISION TO WITHDRAW CHARGES**

## Summary of the Argument

This Court need not decide whether Article 44(c) is constitutional because manifest necessity and military exigency required the convening authority to withdraw and dismiss the charges. An appellate court generally should not decide a constitutional issue if there are non-constitutional grounds to decide a case. If this Court finds it necessary to decide the Article 44's constitutionality then it must employ an appropriate balancing test.

## Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ).[1] This Court has jurisdiction under Article 67(a)(3), UCMJ.[2]

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[1] 10 U.S.C. § 866 (2008); JA 11 (*United States v. Easton*, 70 M.J. 507, 513 (Army Ct. Crim. App. 2011).
[2] 10 U.S.C. § 867(a) (2008).

## Statement of the Case

A military judge convicted appellant, contrary to his plea,[3] of missing movement by design (two specifications) in violation of Article 87, UCMJ.[4] The military judge sentenced appellant to 18 months confinement and a dismissal.[5] The convening authority approved ten months confinement but otherwise approved the sentence as adjudged.[6]

## Statement of Facts

Appellant was a physician's assistant (PA) assigned to the 3d Infantry Division.[7] In February 2007, the 3d Infantry Division was preparing for a fifteen month deployment as part of the President's "surge" to quell the growing violence in Iraq.[8] Appellant was twice ordered to deploy and twice through design missed movement.[9]

On 18 April 2007, the government charged appellant with two specifications of missing movement in violation of Article 87, UCMJ, and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ.[10] Appellant was arraigned on 12

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[3] R. at 279.
[4] R. at 515.
[5] R. at 554.
[6] Action.
[7] JA at 32-33.
[8] JA at 2.
[9] JA at 13; R. at 554.
[10] JA at 13.

June 2007[11] and a motions hearing was held on 29 June 2007 whereupon the government requested oral depositions.[12] Apparently, the military judge ordered those depositions which were taken sometime afterwards.[13]

The next session was held on 16 July 2007, where the military judge noted for the record that during the recess both parties reviewed the videotaped depositions.[14] After viewing the video, "[b]oth counsel agreed that the tape was useless, that there was no visual image on the videotape and that the audio was incomprehensible."[15] The Government stated that they still wished to proceed to trial on 19 July 2007.[16] The panel was then assembled and sworn.[17] On 18 July 2007, after the court-martial panel was sworn but prior to the admission of any evidence, the convening authority withdrew and dismissed the charges without prejudice.[18]

On 26 March 2008, the Government re-preferred charges for missing movement by design.[19] Trial defense counsel moved to

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[11] JA at 22.
[12] JA at 25.
[13] JA at 52-53.
[14] JA at 52.
[15] JA at 52.
[16] JA at 52.
[17] JA at 53.
[18] JA at 54-55.
[19] JA at 56-57. The Government also charged appellant with willfully disobeying a lawful command from a superior officer and adultery. The military judge dismissed the adultery charge

dismiss the new charges on double jeopardy grounds.[20] Initially, the military judge found that the convening authority withdrew the charges before evidence was taken, thus jeopardy did not attach per the plain reading of Article 44(c).[21]

The military judge also found that the convening authority's decision to withdraw and dismiss "was for a proper purpose."[22] The military judge found that LTC O and MAJ E had firsthand knowledge of appellant's case but they were deployed to Iraq during the first court-martial and thus, unavailable to testify.[23] Specifically, the military judge further found that "[t]he unavailability was based on the operational need for them to be in Iraq, an operational need that was not totally foreseeable at the time of deployment or the time of preferral, and also the failure of the mechanics of logistics of getting the depositions back to Fort Stewart."[24] Those additional facts necessary for the disposition of the assigned error are set forth in the argument below.

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prior to findings and found appellant not guilty of willful disobedience.

[20] JA at 68.
[21] JA at 76-77.
[22] JA at 117.
[23] JA at 115-16.
[24] JA at 116.

## Standard of Review

This Court applies a clearly erroneous standard when reviewing a military judge's findings of fact, and a *de novo* standard when reviewing conclusions of law.[25] Therefore, when reviewing mixed questions of fact and law, "a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect."[26]

## Argument

### I. A Brief History of Double Jeopardy in Courts-Martial.

The Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb."[27] The parameters of the double jeopardy clause's prohibitions have evolved in Anglo-American jurisprudence since its ancient beginnings at common law.[28] Likewise, the double jeopardy clause's guaranty against being twice tried for the same offense has also existed in military courts-martial for a very long time,[29] and the moment

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[25] *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).
[26] *Id.*
[27] U.S. CONST, amend V.
[28] *See generally, United States. v. Wilson,* 420 U.S. 332, 339-43 (1975) (discussing the history and premise of double jeopardy principles); Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 303-15 (1957).
[29] *See* Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 273-74

when it is said to attach has shifted throughout military justice history.

In the early 20th century, the 102nd Article of War succinctly stated that, "[n]o person shall be tried a second time for the same offence."[30] However, the 102nd Article was silent as to when double jeopardy attached. At the time it was understood that the common law principles of *autrefois acquit* and *autrefois convict* applied in military courts-martial, meaning double jeopardy did not attach until the accused was "tried" and "*duly prosecuted . . . to a legal conviction or acquittal.*"[31]

In 1920, Congress shifted the moment when double jeopardy attached beyond *autrefois acquit* and *autrefois convict* in some cases when it deemed that a "trial" was not complete until the

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(1958). A provision that "no officer, non-commissioned officer, soldier, or follower of the army shall be tried a second time for the same offence" appears in Article 87 in the 1806 Articles of War. *Id.*

[30] William Winthrop, MILITARY LAW AND PRECEDENTS 259 (2d ed. 1920 reprint) (1896) (quoting S. Rep. No. 130, at 6 (1916)).

[31] *Id.* at 260. Winthrop further concluded, "at military law, neither a mere arraignment, nor an arrest, followed by a discharge without trial, nor a service of charges withdrawn or dropped without prosecution, nor a withdrawal of the charges after arraignment or pending the trial, *nor a discontinuance of the proceedings, by the order of the convening authority, for any cause before a finding*, nor a permanent interruption of the same by reason of war or other exigency, nor a failure of the court to agree upon a finding, followed by a dissolution-will amount to an acquittal or a " trial " of the accused." *Id.* at 263 (emphasis added).

"confirming authority" took final action. The updated 40th Article of War stated:

> No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.[32]

When the UCMJ was signed into law, the new Code continued to echo the 40th Article's charge that some trials would not be considered complete until final action.[33] That language remains today within Article 44(b).[34] Article 44(b) was left unchanged because the drafters felt its provisions were necessary to ensure that automatic appeals would remain workable under the UCMJ.[35] "[T]he prevailing view at the time, based on Fifth Amendment jurisprudence, [was] that double jeopardy only authorized rehearings after successful appeal because the

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[32] 40th Article of War (revised June 4, 1920).
[33] 64 Stat. 122 (Art. 44) ch. 169 (1950). Today Article 44(b) still reads that: "No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed."
[34] 10 U.S.C. § 844(b) (1956).
[35] *See* Major Daniel J. Everett, *Double, Double Toil and Trouble: An Invitation for Regaining Double Jeopardy Symmetry in Courts-Martial,* ARMY LAW., April 2011 15-18; S. Rep. No. 486, at 19-20 (1949).

accused 'waived' his double jeopardy rights by voluntarily appealing his case."[36]

As a compromise, Congress enacted Article 44(c) to counter the literal possibility "that until the reviewing authority acts, a man can be tried any number of times."[37] According to Article 44(c): "A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article."[38] Congress has not substantially changed the language in Article 44(c) since its adoption.

**II. This Court Need Not Review the Constitutionality of Article 44(c) to Decide This Case.**

Appellant argues that insofar that Article 44(c) is contrary to the Supreme Court's holding in *Crist v. Bretz*[39], it violates the constitution and cannot be enforced.[40] As a

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[36] *Id.* at 16-17.
[37] *Id.* (quoting statement of Franklin Riter, *Uniform Code of Military Justice: Hearings on S.857 and H.R. 4080 Before Subcomm. of the Subcomm. on the Armed Servs.*, 81st Cong. 168 (1949).
[38] 10 U.S.C. § 844(c).
[39] *Crist,* 437 U.S. 28, 37-38 (1978) (holding that the federal rule attaching jeopardy to when the jury is empanelled and sworn is an integral part of the constitutional guaranty against double jeopardy).
[40] Appellant's Brief at p. 17.

cautionary note, this Court should refrain from addressing the constitutional question inherently present in this case. This is not to say that the Court should keep its head in the sand or that Congress is free to disregard the Constitution when it acts in the area of military affairs.[41] However, an appellate court generally should not decide "a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[42] "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."[43] In view of the argument that manifest necessity existed in this case, the Court should not feel compelled to address the constitutionality of Article 44(c).[44]

**III. This Court Should Apply an Appropriate Balancing Test if it Reviews Congress' Action.**

Should this Court decide that it is imperative to address the constitutionality of Article 44(c), an appropriate balancing test will be necessary. The Court should not blithely conclude

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[41] *See United States v. Graf*, 35 M.J. 450, 461 (C.A.A.F. 1992).
[42] *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 347 (1936) (J. Brandeis concurring).
[43] *Id. See also United States v. Wilcox*, 66 M.J. 442, 452 (2008) (J. Baker dissenting).
[44] *Cf. United States v. Serianne*, 69 M.J. 8, 11 (C.A.A.F. 2010) (declining to decide the case upon the inbuilt constitutional issue).

that the holding in *Crist is* automatically applicable here, especially considering that the rationale and mechanism behind the Supreme Court's holding is inapposite to courts-martial.[45] Therefore, whether a constitutional right is permitted to apply differently to courts-martial requires a balancing test of some kind.

Constitutional rights identified by the Supreme Court generally apply to servicemembers unless they are plainly inapplicable to the military by text or scope.[46] But this seems to indicate that the constitutional right in question must be balanced against other considerations before it can be said to apply to servicemembers. One possible test that the Court can employ is set forth in *Middendorf v. Henry*.[47] In *Middendorf*, the Supreme Court addressed whether servicemembers have a constitutional right to counsel in summary court-martial proceedings.[48] Given the traditional deference to Congress's

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[45] *See Crist,* 437 U.S. at 38 (holding that jeopardy attaches after the empanelling of the jury because it protects the right to maintain a particular jury.) The fact that the Supreme Court applied this principle to the states through incorporation alone is not dispositive in deciding whether the principle applies to courts-martial.

[46] *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004). *See also Graf,* 35 M.J. at 460 (stating that "[T]he protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of the armed forces").

[47] 425 U.S. 25, 44 (1976).

[48] *Id.* at 33-34.

authority to regulate the land and naval forces, the *Middendorf* Court concluded that it was only necessary to "decide whether the factors militating in favor of counsel at summary courts-martial are so extraordinarily weighty as to overcome the balance struck by Congress."[49] Thus, if the Court employed the *Middendorf* test here, the standard would be whether the factors militating in favor of attaching jeopardy when the panel is assembled are so extraordinarily weighty as to overcome the balance struck by Congress.

The *Middendorf* test has customarily been utilized to decide whether specific aspects of the military justice system sufficiently comply with the Due Process Clause of the Fifth Amendment.[50] Although appellant does not claim a Due Process

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[49] *Id.* at 43-44.

[50] Both the Supreme Court and this Court have often applied the *Middendorf* standard to decide whether certain Bill of Rights principles equally apply to military members or courts-martial. *See Weiss v. United States,* 510 U.S. 163, 177-78 (1994) (applying *Middendorf* standard to determine whether military judges must have a fixed term of office); *United States v. Gray,* 51 M.J. 1, 50 (C.A.A.F. 1999) (denying relief for failure to proffer an analysis of the *Middendorf* standard); *United States v. Breeding,* 44 M.J. 345, 355 (C.A.A.F. 1996) (J. Sullivan concurring and noting that Appellant must show that "the factors militating in favor" of a civilian procedure "are so extraordinarily weighty as to overcome the balance struck by Congress" in Article 46 and RCM 703); *United States v. Graf,* 35 M.J. 450, 461-62 (C.A.A.F. 1992) (applying *Middendorf* standard to decide whether fixed terms for military judges are required in courts-martial); *United States v. Mitchell,* 39 M.J. 131, 137 (C.A.A.F. 1994) (applying *Middendorf* standard to decide whether

violation, his appeal certainly implicates some due process concerns.[51] In the absence of another test, the test set forth in *Middendorf* or a test akin to it is most appropriate here. Either way, the Court's analysis must take Congress's previous balancing and the different nature of military courts-martial into account.

**A. This Court has already examined Congress' balancing in *United States v. Wells*.**

In *United States v. Wells*, this Court addressed precisely the same question of timing that is presented in this case, namely: whether Congress's determination that "the introduction of evidence" is the earliest point that jeopardy may attach in courts-martial.[52] At the time Congress passed Article 44(c) and when this Court decided *Wells*, the generally recognized times when jeopardy attached in federal civilian practice were no different than they are today. During that time, jeopardy attached when the court began to hear evidence if the trial was before a judge alone.[53] If the trial was before both judge and

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military judge's fitness reports deprive an accused of an independent judge).

[51] *See Crist*, 437 U.S. 28, 38 (1978) (holding the federal rule as to when jeopardy attaches in a jury trial applies to the states through the Fourteenth Amendment's Due Process clause).

[52] *See United States v. Wells*, 26 C.M.R. 289, 292 (C.M.A. 1958).

[53] *See id.* at 291 (citations omitted).

jury, jeopardy attached when the jury was "impaneled and sworn."[54]

The *Wells* Court acknowledged the difference between how the federal courts interpreted the Fifth Amendment and the application of Article 44(c) to the military.[55] However, this Court also recognized that Congress had to strike some kind of balance between two well-established alternatives when it decided when jeopardy would attach in courts-martial.[56] Consequently, Congress "singled out the introduction of evidence" as the time when jeopardy should attach in courts-martial.[57] According to this Court, it was clear and apparent that "Congress intended that jeopardy in the courts-martial system would attach upon the hearing of evidence, and thus conform to one of the alternatives of the general rule."[58]

*Wells* concluded that the Congress's approach was not inappropriate given the unique nature of military courts-martial.[59] Unlike civilian courts, "[i]n some respects a court-martial functions as both a judge and a jury."[60] The *Wells* Court did not elaborate on this unique characteristic of courts-

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[54] *Id* (citations omitted).
[55] *Id.* at 291-92.
[56] *See id.*
[57] *Id.* at 292.
[58] *Id.*
[59] *Id.*
[60] *Id.*

martial. Indeed, the court-martial is an exceptional forum and unique trial body. There is nothing else like it in American jurisprudence. It is not a standing court. Each court-martial is convened anew with each new case and there is no jury to decide the facts. Interestingly, under Article 16 a special court martial can still be convened with only three panel members; truly one body serving as both judge and jury.[61]

It is not known whether *Wells* was referring to Article 16 or some other general understanding of courts-martial. But there is no doubt that the court-martial is a unique trial body and that Congress took this into account when it enacted Article 44(c). Given the unique characteristics of courts-martial, the balance that Congress struck could be seen as reasonable.

Though our system is not in lock step with the other courts, this Court should remain particularly careful not to substitute its judgment for Congress', especially when Congress has already undertaken the delicate task of balancing the rights of servicemembers against the needs of the military.[62] Congress is given wide power "[t]o make Rules for the Government and Regulation of the land and naval forces."[63] "The constitutional power of Congress to raise and support armies and to make all

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[61] 10 U.S.C. § 816 (2001)
[62] *Rostker v. Goldberg,* 453 U.S. 57, 67-68 (1981).
[63] U.S. CONST. art I, § 8, cl. 14.

laws necessary and proper to that end is broad and sweeping."[64] Accordingly, reviewing the constitutionality of an act of Congress is one of the gravest and most delicate duties an appellate court performs.[65]

Understandably, this Court generally cannot disregard Supreme Court precedent applying constitutional principles to criminal trials.[66] But when Congress has already acted in the area of military affairs, the Constitution requires appellate courts to act most carefully.[67] Since Congress has primary responsibility for the delicate task of balancing the rights of servicemembers with the needs of the military, appellate courts have always adhered to a principle of high deference.[68] This is why judicial deference is "at its apogee when reviewing Congressional decisionmaking in this area."[69]

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[64] *Rostker*, 453 U.S. at 65 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968).
[65] *Id.* at 64.
[66] *United States v. Witham*, 47 M.J. 297, 300 (C.A.A.F. 1997). *See also Graf*, 35 M.J. at 460 (C.A.A.F. 1992) (stating that, "[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces) (citations omitted)).
[67] *Rostker*, 453 U.S. at 64.
[68] *See Graf*, 35 M.J. at 462 (noting that the Supreme Court has repeatedly emphasized the broad deference that should be afforded Congress in providing for a servicemember's rights); *Rostker*, 453 U.S. at 66-67 (recounting Supreme Court precedent that shows "a healthy deference to legislative and executive judgments in the area of military affairs).
[69] *Weiss v. United States*, 510 U.S. 163, 177 (1994) (citing *Rostker*, 453 US. at 70).

Despite the fact that *Crist* was not decided when Congress passed Article 44(c), Congress was presented with a choice to attach jeopardy at two appointed times. And it is that same choice that is before this Court today. The Government does not disagree that jeopardy can one day attach when the panel is assembled. However, it is equally well established that a servicemember's Constitutional rights may not be the same as his civilian counterpart.[70] But that proclamation must come from Congress when appellant has failed to show why this Court must substitute Congress' judgment for its own.[71]

**B. The Primary Rationale Behind *Crist v. Bretz* is Inapplicable to Military Courts-Martial.**

The Supreme Court's decision in *Crist v. Bretz*[72] is not dispositive because the primary rationale for the holding is at odds with the text and scope of the convening authority's ability to alter the composition of the panel for reasons of military exigency. The impetus behind the Supreme Court's

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[70] *United States v. Mitchell*, 39 M.J. 131, 136 (C.M.A. 1994). *See also Parker v. Levy*, 417 U.S. 733, 758 (1974) "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Id.*

[71] *Cf. Mitchell*, 39 M.J. at 137 (holding that appellant's constitutional argument failed because he did not meet his "heavy burden" to show the Constitutional invalidity of the balance struck by Congress).

[72] 437 U.S. 28 (1978).

decisions in *Crist* and *United States v. Downum*[73] lies in safeguarding an accused's interest in retaining a chosen jury[74] - an unrecognized or limited right under the UCMJ. Therefore, if this Court is to hold that Article 44(c) is unconstitutional, it must be for reasons other than those discussed in *Crist* or *Downum*.

The *Crist* majority expressly held that "[t]he reason for holding that jeopardy attaches when the jury is empanelled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury."[75] This too was the rationale for the holding in *United States v. Downum*, hence *Crist* established that the interest in retaining a chosen jury is a constitutional principle applicable to the states.[76] Ultimately, the *Crist* majority held:

> Regardless of its historic origin, however, the defendant's "valued right to have his trial completed by a particular tribunal" is now within the protection of the constitutional guarantee against double jeopardy, since it is that 'right' that lies at the foundation of the federal rule that

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[73] 372 U.S. 734 (1963).
[74] *Crist*, 437 U.S. at 35.
[75] *Id. But see id at* 38-39 (Blackmun, J. concurring). Justice Blackmun was not content to rely solely upon the defendant's valued right to have his trial completed by a particular tribunal. He noted that "repetitive stress and anxiety, continuing embarrassment, and the possibility of prosecutorial overreaching in the opening statement" were also important considerations. *Id.*
[76] *Id.* at 35.

> jeopardy attaches when the jury is empanelled and sworn.[77]

By holding that the long-standing federal practice of attaching jeopardy at empanelling applied to the States through incorporation, the Supreme Court instituted a rule that "both reflects and protects the defendant's interest in retaining a chosen jury."[78]

Contrary to civilian criminal trials, a military accused does not have a coextensive right to retain a particular panel. Under Article 29, after a panel is sworn and assembled, the convening authority may still excuse any panel member for "good cause."[79] According to R.C.M. 505(f), "good cause" includes physical disability, military exigency, and other extraordinary circumstances which render the member unable to proceed with the court-martial within a reasonable time.[80] Civilian judges also have the ability to remove individual jury members for "good cause."[81] But the ability of a convening authority to remove one, few, or all panel members for military exigencies is

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[77] *Id.* at 36.
[78] *Id.* at 38.
[79] 10 U.S.C. § 829 (2001). *See also* Manual for Courts-Martial, United States, Rules for Courts-Martial 505(c)(2)(A)(i) (2008) [hereinafter R.C.M.].
[80] R.C.M. 505(f) (2008).
[81] *See generally* FED. R. CRIM. P. §24(c). A federal judge must generally replace dismissed jurors. Under Article 29, a convening authority need only replace panel members if the numbers fall below quorum. *United States v. Colon*, 6 M.J. 73, 74 (C.M.A. 1978).

inherently unique to the military justice system. What constitutes "good cause" to a convening authority goes well beyond the traditional notions of "good cause" in civilian courts. The convening authority is not one of the participants within the trial itself. Yet, he possesses the ability to act as an invisible hand from the outside if he deems it necessary to do so. Furthermore, the convening authority's determination that a military exigency exists will rarely be questioned.[82]

Article 29 is a rule that acknowledges that military exigencies may take priority over an accused's interest in retaining a particular panel. Furthermore, R.C.M. 505's expanded definition of "good cause" relative to civilian courts contemplates that the special needs of the military may require removing or substituting members without requiring a continuance or mistrial. Because the foundational principle behind *Crist* and *Downum* are inapplicable to servicemembers, it cannot be said that these holdings must apply to courts-martial.[83]

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[82] *See United States v. Taylor*, 41 C.M.R. 749, 752 (N.M.C.M.R. 1969) (holding that the convening authority's release of one of the court members for transfer to duty in Vietnam constituted good cause pursuant to Article 29); *United States v. Friedhoff*, 33 C.M.R. 573, 576-77 (A.B.R. 1963) (holding good cause existed when the convening authority released two members because of mandatory retirement and helicopter school).

[83] *See also* R.C.M. 907(b) analysis at A21-57 (discussing why *Crist* was not incorporated into the R.C.M.).

**IV. Even if Jeopardy Attached, Manifest Necessity Required the Convening Authority to Withdraw and Dismiss the Charges.**

Trial courts are vested with the discretionary authority of discharging a jury from giving any verdict whenever in their opinion, there is a manifest necessity for such an act, or the ends of public justice would be defeated.[84] The concept of "manifest necessity" was first employed in *United States v. Perez*[85] and characterizes the magnitude of circumstances that justify discontinuing a trial without terminating jeopardy.[86]

> [T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . .[87]

In *Wade v. Hunter*, the Supreme Court extended the doctrine beyond the courtroom by holding that convening authorities may also terminate a trial for manifest necessity.[88] Taking all of the circumstances into account, the *Wade* majority concluded that

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[84] *Arizona v. Washington*, 434 U.S. 497, n. 18 (1978).
[85] 22 U.S. 579, 9 Wheat. 579 (1824).
[86] J.A. at 8.
[87] *Perez*, 22 U.S. at 580.
[88] 336 U.S. 684, 691-92 (1949).

the record was "sufficient to show that the tactical situation" on the ground was adequate grounds for the convening authority to withdraw the charges in order to secure other needed witnesses.[89] The Supreme Court unequivocally deferred to the commanding general's decision to withdraw the charges reasoning that the tactical situation required such deference. Thus, the court could not "assume that these court-martial officers were not needed to perform their military functions" elsewhere.[90] The Court then set forth the rule that should be the guiding principle in this case: In the absence of bad faith on the part of a convening authority, courts should not attempt to review a commanding general's estimation that wartime exigencies necessitated the withdrawal of charges.[91]

Unlike *Wade*, the convening authority and commanding general in this case are different people. The convening authority was with the rear detachment stateside, while the Division Commander was deployed forward to combat operations in Iraq. Still, the convening authority was undoubtedly at the mercy of a combat operation and tactical situation miles away all the same and his reaction was reasonable under the circumstances.

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[89] *Id.* at 686-87, 691.
[90] *Id.* at 692.
[91] *Id.*

Here, as in *Wade*, the government sought to introduce the testimony of two key witnesses but the tactical situation made it impossible to do so in a timely fashion. The military judge made the following findings of fact regarding the convening authority's withdrawal of charges at the first court-martial:

> On 16 July 2007, the court was assembled in the original case in these proceedings. At the time, two witnesses with firsthand knowledge, Lieutenant Colonel [ (LTC) O.] and Major [ (MAJ) E.], both were stationed in Iraq. [LTC O.] was unavailable because he was involved in the operational planning and execution of an offensive mission by the division that lasted from June until September. [MAJ E.'s] position in Iraq was as a [p]hysician's [a]ssistant, which required her continual presence there to provide care for [s]oldiers who may have been injured even if she was not involved in the particular planning process. As such, the judge at the time, and under reasonable conditions, found both witnesses unavailable. As a result, the judge ordered depositions of both witnesses.
>
> Immediately prior to the trial after the depositions, it was discovered that the depositions somehow did not make it back from Iraq. As such, on 16 July, after empanelling the members, two witnesses' testimony were unavailable to the government. The unavailability was based on the operational need for them to be in Iraq, an operational need that was not totally foreseeable at the time of deployment or the time of preferral, and also the failure of the mechanics of logistics of getting the depositions back to Fort Stewart.

> Two days later, the convening authority withdrew and dismissed without prejudice the charges against the accused.[92]

Specifically, LTC O testified that he was unavailable at the first court-martial because he was engaged "in combat" at the time and that as the battalion commander he was also planning and preparing for an important offensive operation.[93] Previously, when explaining his unavailability to testify, LTC O said that he was responsible for "day-to-day operations at the Division headquarters" which included sending out daily combat patrols.[94] LTC O surmised that leaving his post would have an "immeasurable" effect on the mission.[95]

Similarly, MAJ E testified that she was unavailable at the first court-martial because of operational needs. At the time she was the senior PA at Camp Victory, Baghdad, Iraq, and oversaw approximately 35 other PAs in theater.[96] MAJ E characterized that period of time as "busy" and that her duties required her to be on call to provide emergency care, including treating injuries from Improvised Explosive Devices (IEDs).[97]

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[92] JA at 115-16.
[93] JA at 84-85.
[94] JA at 43.
[95] *Id.*
[96] JA at 96, 100.
[97] JA at 97.

The military judge at the first court-martial ordered depositions to be taken due to the witnesses' unavailability.[98] Unfortunately, the videotaped depositions were incomprehensible and useless.[99] However, the exact same operational concerns that made depositions necessary still existed when the convening authority withdrew the charges.

In sum, this is the same type of scenario envisioned in *Wade* where "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."[100] This is not a situation where the government proceeded at its own peril without key witnesses. Rather, despite the Government's efforts to obtain witness testimony by deposition or live testimony, the witness issues remained beyond its control due to tactical and operational realities. Additionally, this case is unique in that the nature of appellant's actions created a geographic chasm that created unforeseeable difficulties for both parties. Appellant is not entitled to a windfall that would defeat the ends of public justice.

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[98] JA at 52, 116
[99] JA at 52.
[100] *See Wade*, 336 U.S. at 689.

Important in this analysis is the absence of any bad faith on the parts of the government, convening authority, or the commanding general. As in *Wade*, this case too presents extraordinary reasons why the judgment of the commanding general and convening authority should be accepted by the courts.[101] Given that the military judge's findings were not clearly erroneous and the absence of any evidence showing bad faith this Court's review must be tempered by the tactical situation that prevented these witnesses from being available.

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[101] *Cf. id.*

## Conclusion

Wherefore, the Government respectfully requests this Honorable Court affirm the decision of the Army Court of Criminal Appeals.


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**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing brief on behalf of appellee was electronically filed with the Court to efiling@armfor.uscourts.gov on February 27, 2012 and contemporaneously served electronically on military appellate defense counsel, Captain Meghan Poirier.

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