IN THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

MICHAEL C. MCPHERSON
Senior Airman (E-4), USAF,
Appellee / Cross-Appellant.

Crim. App. No. S32068
USCA Dkt. No. 14-0348/AF

ANSWER TO THE CERTIFIED ISSUE

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UNITED STATES, *Appellant,*	)	**Answer to the Certified Issue**
v.	)	
	)	USCA Dkt. No. 14-0348/AF
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TO THE HONORABLE, THE JUDGES OF THE COURT OF APPEALS FOR THE ARMED FORCES

Issue Certified

WHETHER ARTICLE 12, UCMJ, APPLIES TO THE CIRCUMSTANCE WHERE AN ACCUSED AND/OR CONVICTED MEMBER OF THE ARMED FORCES IS CONFINED IN IMMEDIATE ASSOCIATION WITH FOREIGN NATIONALS IN A STATE OR FEDERAL FACILITY WITHIN THE CONTINENTAL UNITED STATES.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFFCA) reviewed this matter pursuant to Article 66, UCMJ. *United States v. McPherson,* ACM No. S32068, 72 M.J. 862 (A.F. Ct. Crim. App. 2013) Accordingly, this Court has jurisdiction to review this certified issue pursuant to Article 67(a)(2), UCMJ.

Statement of Proceedings

The government's statement of the case is accepted.

Statement of Facts

The facts necessary to the resolution of the matter are included in the argument below.

Argument

ARTICLE 12, UCMJ, APPLIES WITHIN THE CONTINENTAL UNITED STATES.

Standard of Review

Interpreting Article 12 is an issue of statutory interpretation which this Court reviews *de novo*. *United States v. Wise*, 64 M.J. 468, 474 (C.A.A.F. 2007), *citing United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005).

Law and Analysis

The government's position that Article 12 does not apply to facilities within the continental United States rests on two arguments: 1. a flawed understanding of statutory construction; and 2. the assumption the United States does not have any enemies inside its borders.

1. The government's flawed understanding of statutory construction

The government argues that Articles 12 and 58, UCMJ, are in conflict and that because Article 58 came later in time and is a "specific" statute, it trumps Article 12. Gov. Brief at 6-7. The government cites the unpublished decision of *Webber v. Bureau of Prisons*, 2002 WL 31045957 (D.C. Cir., September 12, 2002) as its only legal support for its proposition.

The first problem with the government's argument is its reliance on *Webber*. *Webber* is a half-page unpublished decision by the D.C. Circuit Court of Appeals. A review of the D.C. Circuit

Court of Appeals' rules regarding unpublished decisions, however, reveals that "[w]hile unpublished dispositions may be cited to the court in accordance with FRAP 32.1 and Circuit Rule 32.1(b)(1), **a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition**." *See* Circuit Rules of the United States Court of Appeals for the District of Columbia, Circuit Rule 36(e)(2), Circuit Rules Effective January 1, 1994, as amended through December 1, 2013 (emphasis added).[1] Accordingly, this Court should decline the government's invitation to see value where the actual authors of the opinion do not.

The next area in which the government errs in its analysis is the view that Article 58 and Article 12 are in conflict. In looking at statutes, "[w]e begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission vs. GTE Sylvania, Inc.*, 447 U.S. 2051, 2056 (1980). To that end, "in interpreting a statute, a court should always turn first to one, cardinal canon before all

[1] Available at: http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Circuit%20Rules/$FILE/Rules%20December%202013%20LINKS%20and%20BOOKMARKS%20final2.pdf, (last accessed on 31 March 2014).

others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Because of that, this Court cannot "resort to legislative history to cloud a statutory text that is clear" (*Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994)), and "[w]here the language of [a law] is clear, we are not free to replace it with unenacted legislative intent." *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

Additionally, the rule of *ejusdem generis* is firmly established. *Gooch v. United States*, 297 U.S. 124, 128 (1936). *See also United States v. Willfon*, 274 F.3d 1397 (9th Cir. 2001). This rule, meaning "of the same kind," states that "where general words follow the enumeration of particular classes or persons or things, the general words shall be construed as applicable only to persons or things of the same general nature or kind as there enumerated." *Walling v. Peavey-Wilson Lumber Co.*, 49 F. Supp. 843, 859 (D.C. La. 1949), citing SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 268) (now § 47:17). Put simply, "[t]he doctrine of *ejusdem generis* is an attempt to reconcile an incompatibility between specific and general words so that all words in a statute and other legal instruments can

be given effect, all parts of a statute can be construed together and no words will be superfluous." SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 47:17 (citations omitted).

Here, the government contends that Articles 12 and 58 are in conflict. However, firmly entrenched canons of construction show they are not. Instead, by applying the doctrines of plain meaning and *ejusdem generis*, the statutes at issue should be read to mean that Article 58 applies with the limitations articulated in Article 12. Put differently, persons confined by the military or in a federal prison are subject to the same discipline and treatment as civilians with the exception that they may not be housed in immediate association with foreign nationals. This reading is wholly consonant with the above canons of construction and avoids finding conflict where none exists.

Finally, even if this Court were to move past the plain language of Article 12 to the legislative history, it should be noted that the history also belies the government's position. As articulated in the Hearings on H.R. 2498, Congress ultimately deleted the words "'outside the continental limits' and made [Article 12] apply everyplace[.]" J.A. 61. Accordingly, Congress was fully aware of what it was doing (deleting language) and what the effect of that deletion would be (that

Article 12 would apply everywhere). Under such circumstances, this Court should afford the Congress full deference.

2. The government's argument assumes the United States does not have any enemies inside its borders.

The government's second argument for the inapplicability of Article 12 domestically is that it was intended to apply solely to *enemy* foreign nationals. Again, a review of the plain language and legislative history of the statute show that this assertion is on shaky footing.

Article 12, UCMJ, states that "[n]o member of the armed forces may be held in confinement in immediate association with enemy prisoners or other foreign nationals *not members of the armed forces*" (emphasis added). One must ask why Congress chose to modify "foreign nationals" to include only foreign nationals who are "not members of the armed forces." If Article 12 only applied to *enemy* foreign nationals, this modification would be redundant - *enemy* foreign nationals would already not be members of the United States' armed forces – negating the need for the modification.

Additionally, by this modification, Congress made two (and only two) categories – foreign nationals who are part of our military and foreign nationals who are not, leaving out entirely the word enemy. Indeed, to read the statute the way the government contends would be to ascribe at least three drafting

errors in a 27-word statute, to include a third unarticulated category, enemy foreign nationals.

However, even if this Court finds Article 12 only applies to enemy foreign nationals, to then state that Article 12 does not apply domestically is to implicitly hold that the United States does not have enemy foreign nationals within our borders. This Court need look no further than recent reports of Al Qaeda recruiting in Mexico to know that when a military member is held in confinement with a foreign national, we simply don't know the allegiances of that foreign national. *See* Kyle A. Myatt, *New Alliance in Mexico's Drug War*, GLOBAL SECURITY STUDIES, Volume 4, Issue 1, pg. 51 (Winter 2013).[2] And while there is no question that Article 12 was passed in light of the treatment military members received during previous conflicts, it cannot be said that Article 12 was not intended to confer a benefit to the national security of the United States. Indeed, to have a person, freshly convicted by the United States, be confined with a foreign national might well present an opportunity for that foreign national to gain information he or she might not otherwise have access to. To keep the member segregated, even if housed in the same facility, would limit the possibility of

[2] Available at: http://globalsecuritystudies.com/Myatt%20Mexico%20Drug%20FINAL.pdf, (last accessed on 31 March 2014.)

potential intentional treason or simply inadvertent divulgence of intelligence.

Wherefore, Appellant asks this Court to hold that the requirements of Article 12, UCMJ, apply within the continental United States.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 3 April 2014.

Respectfully submitted,

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