31 March 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant,*	)	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED
v.	)	
	)	USCA Dkt. No. 14-5003/AF
Technical Sergeant (E-6) JIMMY L. WILSON, USAF *Appellee.*	)	Crim. App. No. 37897

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31 March 2014

IN THE UNTIED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant,* v. Technical Sergeant (E-6), JIMMY L. WILSON, USAF, *Appellee.*	)))))))))	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED USCA Dkt. No. 14-5003/AF Crim. App. Dkt. 37897

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES 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 LIMITS OF THE UNITED STATES.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

On 19-21 January 2011, Appellee was tried by general court-martial at Moody Air Force Base, Georgia, by officer and enlisted members. Appellee was charged with two violations of Article 92, UCMJ, failure to obey orders; and two violations of Article 120, UCMJ, abusive sexual contact and indecent acts. Contrary to his pleas, Appellee was convicted of a single

specification of failure to obey orders in violation of Article 92, UCMJ. Appellee was sentenced to reduction to E-2, confinement for three months, and a bad conduct discharge. On 5 April 2011, the convening authority approved the sentence as adjudged.

On 12 October 2012, the Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and the sentence in an unpublished opinion. United States v. Wilson, ACM 37897 (A.F. Ct. Crim. App. 12 October 2012. (J.A. at 1.) On 11 December 2012, Appellee filed his petition and supplement with this Court.[1] In response to the petition, this Honorable Court remanded Appellee's case back to AFCCA to consider the following specified issue:

> WHETHER ARTICLE 12, UCMJ, APPLIES TO CIRCUMSTANCES 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 LIMITS OF THE UNITED STATES; AND, WHETHER THE RECORD IN THIS CASE PERMITS SUCH A CONCLUSION TO BE DRAWN WITHOUT THE NECESSITY OF FURTHER FACT-FINDING.[2]

(J.A. at 4.) On 30 January 2014, in a published decision, AFCCA

[1] On 11 December 2012, the United States filed a waiver letter asserting its general opposition to Appellee's petition.

[2] This Court's specified issue is substantially the same as the issue certified by The Judge Advocate General (TJAG). Similarly, the certified issue in this case is exactly the same as the certified issue in United States v. McPherson, Dkt. No. 14-5002/AF which was filed with this Court on 3 February 2014. The United States views this case as a companion case to McPherson and that the Court's decision in McPherson will similarly resolve the issue in Wilson.

determined that Article 12 did apply to "members of the armed forces 'everyplace,' to include confinement facilities within the continental United States in a published opinion. United States v. Wilson, 73 M.J. 529 (A.F. Ct. Crim. App. 2014)(J.A. at 5). On 28 February, the United States filed TJAG's certificate of review in this case.

STATEMENT OF FACTS

On or about 21 January 2012, after his conviction, Appellee was confined in the Cook County Jail near Moody Air Force Base. (J.A. at 16-21.) While being confined with Cook County, Appellee submitted his clemency matters and complained that he was being held in segregation to ensure that he was not confined in immediate association with foreign nationals. (J.A. at 16-18.) Additional facts necessary for the resolution of this case are referred to in the arguments below.

SUMMARY OF ARGUMENT

Articles 12 and 58, UCMJ, create a conflict involving the treatment of military confinees. In harmonizing these two provisions, Article 58's specificity as to same-treatment within civilian confinement facilities trumps Article 12's lack of location specificity. The D.C. Circuit Court of Appeals recognizes this distinction in Webber v. Bureau of Prisons, 2002 WL 31045957 (D.C. Cir. 12 Sep 2002), and this Court should reach the same conclusion. Therefore, consistent with statutory

construction principles, Article 12 does not apply to situations involving civilian confinement.

The legislative history of the UCMJ supports the conclusion that Article 12 does not apply to civilian confinement facilities. Article 12, UCMJ, was enacted to protect service members from confinement with enemy prisoners and enemy nationals that had occurred during World War II. However, Article 58, UCMJ, was also enacted to expand the practice of confining military prisoners in civilian confinement facilities, specifically federal prisons. The drafting of Article 58 was seen as a positive step to expand rehabilitation opportunities. Further, Article 58 contained no prohibition on confining military members with foreign nationals in these civilian institutions. Therefore, Article 12 was intended to apply solely to military confinement situations like those occurring in World War II.

This Honorable Court has never addressed the applicability of Article 12 to civilian confinement facilities. The Air Force began applying Article 12 credit to civilian confinement facilities in 2008. Since that time, the Air Force Court of Criminal Appeals (AFCCA) has continued to apply Article 12 credit to situations where Airmen are confined in "immediate association" with foreign nationals. No other service court has ever agreed that Article 12 should apply to civilian confinement

facilities and AFCAA's stance is in direct conflict with the D.C. Circuit. Therefore, AFCCA appears to be steadfastly standing alone in providing unwarranted Article 12 credit to any situation involving foreign nationals.

AFCCA's continued application to Article 12 in "everyplace" has directly led to unintended consequences, like this case, because civilian confinement facilities are being forced to place service members into solitary confinement to ensure there is no violation of AFCCA's interpretation of Article 12. This dilemma has further led to absurd situations where members complain both that time spent in solitary is cruel and unusual punishment and time spent in general population is an Article 12 violation. In enacting Article 12, Congress never would have intended this absurdity to result from their desire to keep service members from having to be confined with enemy nationals at the close of World War II.

Therefore, Appellee should not be entitled to receive any administrative credit for his alleged confinement in this case and AFCCA's holding that Article 12 was applicable was error. This Court should hold that Article 12 does not apply under these circumstances and affirm Appellee's sentence without modification.

ARGUMENT

ARTICLE 12, UCMJ, DOES NOT APPLY TO MEMBERS OF THE ARMED FORCES CONFINED WITHIN STATE OR FEDERAL FACILITIES WITHIN THE UNITED STATES.

Standard of Review

This Court reviews de novo whether post-trial conditions of confinement violate Article 12, UCMJ. United States v. Wise, 64 M.J. 468, 473 (C.A.A.F. 2007.)

Law and Analysis

Article 12, UCMJ provides:

> No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.

However, Article 58, UCMJ provides, in part:

> . . . a sentence of confinement . . . may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States. Persons so confined under the control of one of the armed forces are **subject to the same discipline and treatment** as persons confined or committed by the courts of the United States or of the State, District of Columbia, or place in which the institution is situated.

(emphasis added.) These two articles both involve treatment of confinees but create a conflict between Article 12 (no confinement with foreign nationals), which is not specific to location, and Article 58 (must treat all confinees the same), which is specific as to location.

In resolving this conflict, this Court should look to the principles of statutory construction. Where Congress includes particular language in one section of a statute but omits it another section, it is generally presumed that Congress acts intentionally and purposely in the disparate exclusion. Bates v. United States, 522 U.S. 23 (1997); United States v. Wilson, 66 M.J. 39 (C.A.A.F. 2008). Statutes that cover the same subject matter (confinement) should be considered to harmonize them, if possible, and does not empower courts to undercut the clearly expressed intent of Congress in enacting particular statutes. United States v. Bartlett, 62 M.J. 426 (C.A.A.F. 2008). Further, in cases of direct conflict, a specific statute overrides a general one, regardless of their date of enactment. Id. In utilizing these principles, it becomes clear that Article 58's specificity as to same-treatment in a particular location trumps Article 12's more general protection.

This statutory analysis was best expressed in Webber v. Bureau of Prisons, 2002 WL 31045957 (D.C. Cir. 12 September 2002)(unpub. op.)(J.A. at 86.) In Webber, the D.C. Circuit found:

> Article 58 states categorically that military prisoners housed in Bureau of Prisons facilities shall be subject to the same treatment as their civilian counterparts. It does not create an exception concerning confinement with foreign nationals, nor does Article 12 of

> the Code provide that its prohibition against such confinement survives Article 58's same-treatment rule. Thus, by its terms, Article 58 trumps Article 12.

(Id.) Therefore, as articulated in Webber, and consistent with statutory construction principles, this Court should not apply Article 12 to situations involving civilian confinement.[3]

B. LEGISLATIVE HISTORY

The legislative histories of Articles 12 and 58 support the conclusion of the Webber decision. Through the establishment of these articles, Congress manifested its intent to control the confinement of military prisoners in military facilities while leaving the confinement of military prisoners in federal facilities to the discretion of those civilian facilities.[4]

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[3] Similar instances where same-treatment trumps military-specific treatment have occurred in other areas. *See* Bates v. Wilkinson, 267 F.2d 779 (5th Cir. 1959)(good time credit – "the petitioner was treated as any other military prisoner who is confined in a federal prison, being subject to the advantages and disadvantages of the civilian prison); Koyce v. United States Board of Parole, 306 F.2d 759 (D.C. Cir. 1962)(parole conditions); Stewart v. United States Board of Parole, 285 F.2d 421 (10th Cir. 1960)(parole determination).

[4] As articulated in Untied States v. Schell, 72 M.J. 339, 343-44 (C.A.A.F. 2013), the plain language of a statute will normally control unless "it leads to an absurd result." In addition to the recognizable conflict between Article 12 and 58, a reading of Article 12 that finds armed forces members cannot be confined in civilian facilities with foreign nationals leads to the absurd result of having the member placed in solitary confinement to avoid the "immediate association" provision. This, in turn, does not permit the member to participate in any rehabilitative programs as envisioned under Article 58 and leads to new claims of Article 13, UCMJ, violations for their segregation. *See* United States v. Wilson, 73 M.J. 529 (A.F. Ct. Crim. App. 2014). Therefore, appellants argue that members can never be confined in civilian facilities because it would involve a violation of Article 12 (general population) or Article 55 (segregation to avoid "immediate association). This absurd result was never the intention of Congress in enacting Articles 12 and 58.

Prior to World War II, the individual services maintained their own codes of criminal and criminal procedure through the Articles of War (Army), the Articles for the Government of Navy and the Disciplinary Laws of the Coast Guard. *See* Edmund M. Morgan, The Background of the Uniform Code of Military Justice, 28 Mil. L. Rev. 17, 17-22 (1965). Despite numerous amendments, none of the military codes contained any provision regarding the confinement of members of the armed forces with enemy prisoners or foreign nationals.[5]

At the close of World War II, there was a great concern related to perceived injustices perpetrated under the relative service codes.[6] Despite recognizing many prisoners were confined in "federal penitentiaries, the good management of which is well known," specific complaints about confinement centered around the "smaller and more temporary places of confinement, guardhouses and stockades serving local areas and units and under local commands." H.R. Res. 20, 79th Cong. at 45

[5] The absence of this type of provision is demonstrated in the 1920 amendment to the Articles of War which, including legislative history, are available online via the Library of Congress at http://www.loc.gov/rr/frd/Military_Law/pdf/RAW-vol2.pdf#page=39.

[6] These criticisms included concerns about lack of representation, command influence, excessively severe punishments, review on appeal, among many others. Report of War Department Advisory Committee of Military Justice (Vanderbilt Report) (13 December 1946) at 4. (J.A. at 22.) This report is available online through the Library of Congress at http://loc.gov/rr/frd/Military_Law/Vanderbilt-report.html as well as the Harvard Library's searchable "Edmund Morgan Papers on the drafting of the UCMJ" at http://pds.lib.harvard.edu/pds/view/13963097 in addition to other documents related to the formation of the UCMJ.

(1946)(J.A. at 23.) Here, prisoners faced low-quality guards with lax supervision succumbing to "deep-seated sadistic impulses" which resulted in "brutalities" and other "cruel treatment." (J.A. at 24). Regardless, there was no action on these brutality claims as they were seen to be "more administrative than any matter being considered by the committee at this time."[7] *Sundry Legislation Affecting the Naval and Military Establishment*: Hearings Before H. Comm. on Armed Services, 80th Cong., at 1947 (1947)(J.A. at 25); H.R. Res. 20, at 45 (1946)(J.A. at 23.)[8] There was also no mention of confinement of military prisoners in close association with foreign nationals.

In 1948, Congress amended the Articles of War to incorporate many changes to the code. This amendment included an addition to Article 16 which specified that

> No person subject to military law shall be confined with enemy prisoners or any other foreign nationals outside the continental

[7] It must be noted that Congress did raise concerns about the management of "county jails and small city prisons." H.R. Res. 20, at 45. (J.A. at 23.) However, this concern is alleviated by AFI 31-205, *The Air Force Corrections System*, 7 April 2004, *Certified current* 28 April 2011, ¶ 1.2.2.1 that requires special certification before these jails can be used. (J.A. at 85.) Regardless, despite this concern, Congress did not prohibit the use of these jails when they enacted Article 58.

[8] *See also Sundry Legislation Affecting the Military* at 2072, 2170 (discussions of prisoner treatment undercut by discussions on unequal punishments for enlisted versus officers for these abuses). (J.A. at 26-27.) The legislative history of these hearings is available online at http://www.loc.gov/rr/frd/Military_Law/hearings_1947.html. The issue of cruel and unusual punishment was more directly tied to Article 41, Articles of War.

> limits of the United States, nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him.

Selective Service Act of 1948, Pub. L. No. 80-759, § 212.[9] However, the life of this provision was short-lived as the Articles of War were scrapped with the enactment of the UCMJ.

In 1948, Secretary of Defense, James Forrestal, created a committee to draft a uniform code among the services.[10] The initial Article 12[11] replacing Article 16 of the Articles of War read:

> No member of the armed forces of the United States shall be placed in confinement outside the continental limits of the United States so that he is forced to associate with enemy prisoners or other foreign nationals not members of the armed forces of the United States.

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[9] This particular provision did not generate any comment prior to the enactment of this section. A comprehensive listing of Congressional Committee hearings, Reports, and other legislative history is available at http://www.loc.gov/rr/frd/Military_Law/Elston_act.html. The specific revision to the Articles of War are generally referred to as the "Elston Act." There was no provision within The Articles for the Government of the Navy that dealt with "regulating confinement of naval prisoners with foreign nationals." A comparison of these Articles is available online at http://www.loc.gov/rr/frd/Military_Law/Morgan_Vol-2.html.

[10] Morgan, The Background of the Uniform Code, at 22-23. This committee has been referred to as the "Forrestal Committee" and "Committee on a Uniform Code of Military Justice."

[11] The first contemplation of a combined code, the "Military Justice Code," had this Article 12 provision contained in Article 9. *See* Draft Military Justice Code, Draft #4, Table of Contents, by Committee on a Uniform Code of Military Justice at 2. (J.A. at 29.) Coincidentally, the Article that was to become Article 58 was initially intended to be placed at Article 8 and specifically listed "other Federal Institution" as a place of confinement. (Id.)

See Proposed Article 12, UCMJ, by Committee on a Uniform Code of Military Justice (9 December 1948)(J.A. at 30.)[12] The necessity for amending Article 16 of the Articles of War was presented through the commentary that feared that the original provision if applied to the Navy would "prohibit putting naval personnel in the brig of a ship if the brig contained prisoners from an enemy vessel." *See also* H.Rep. No. 81-491, at 13 (1949)(emphasis added)(J.A. at 75.)[13] Ultimately, this language was changed when the Article was presented to Congress:

> No member of the armed forces of the United States shall be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States.

The Commentary of this Article also provided the final rationale for the change:

> AW 16 could be interpreted to prohibit the confinement of members of the armed forces in a brig or building which contains prisoners of war. Such construction would prohibit putting naval personnel in the brig of a ship if the brig contained prisoners from an enemy vessel. This Article is intended to permit confinement in that same guardhouse or brig, but would require segregation.

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[12] This draft is available through the Library of Congress through http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-VII-drafts-paragraphs-code.pdf.

[13] This Report as well as other legislative history for UCMJ can be found online at http://www.loc.gov/rr/frd/Military_Law/Morgan-papers.html.

Draft Article 12, UCMJ, provided to Congress by Committee on a Uniform Code of Military Justice (1949)(J.A. at 31.)[14]

During the subcommittee hearings on this issue, there was little comment by the members about the text of the article itself. As presented, Article 12 was intended to "continue[] the provision enacted by the Eightieth Congress (Elston Act) in connection with confinement with members of armed forces with enemy prisoners and enemy nationals." *Uniform Code of Military Justice*: Hearings on H.R. 2498 Before H. Subcomm. on Armed Services, 81st Cong., at 601 (1949)(emphasis added)(J.A. at 38); *see also Uniform Code of Military Justice*: Hearings on S. 857 and H.R. 4080 Before S. Subcomm. on Armed Services, 81st, Cong., at 35 (1949)(J.A. at 79.) Robert W. Smart, Professional Staff Member of the Subcommittee, commented that the intent of the provision was to ensure that "American boys were not confined with prisoners of war or other enemy nationals." House Subcommittee Hearings at 914 (emphasis added)(J.A. at 52.) Congressman L. Mendel Rivers (South Carolina) echoed, "like happened during the war." (Id.)[15] This concern makes perfect

[14] This initial draft is located online at http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-V_mimeographed-UCMJ.pdf. Interestingly, the ultimate change to the initial draft can also be seen on the copy of the initial draft in the Library of Congress records by the pencil line-through of the language regarding "outside the continental limits of the Unites States. (J.A. at 30.)

[15] The practice of having armed forces control of enemy foreign nationals during the time of this legislation can be seen in Johnson v. Eisentrager, 339 U.S. 763 (1950), where German nationals were held by the Army. Another

logical sense considering the general animosity that would be present from battlefield enemies as well as the close association between the prisoner and the authority restricting an enemy national's freedom.

There was no significant additional comment on the Article other than concerns expressed by the some of the members relating to confinement in foreign jails ("jails in some of those foreign countries are pretty lousy") and segregation of male and female prisoners. (J.A. at 53-54.) Ultimately, the issue of outside confinement was better left to debate on Article 58 and confinement of service members in federal confinement facilities. (Id.)

The transformation of Article 12, as well as the discussion related to the Article, show Congress' intention to apply Article 12 to situations in which members were forced to be confined with the enemy rather than generic foreign nationals. This distinction is even more developed through Congress' debate of Article 58.

In examining Article 58, Congress was presented with a provision that allowed the services to send prisoners to "a correctional institution under the control of the United States

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example involved the internment programs during World War II. *See* Executive Order 9066, 19 February 1942. (J.A. at 83.) These real World War II era circumstances take into account situations far more serious than a service member being confined with someone awaiting ordinary deportation or serving a DUI sentence.

or which the United States may be allowed to use." (J.A. at 45.) The Subcommittee heard testimony from the Army[16] and Navy in which they discussed the regular practice of confining service members in federal prisons as well as a strong desire to continue the practice.[17]

In this context, the authority of the party imposing the confinement appears to be more important than the mere fact that foreigners may be present. When Congress established the UCMJ, they sought to consolidate the multiple "court-martial procedures" of the different services to "insure the maximum amount of justice with the framework of a military organization," and correct the perceived abuses of the military. (J.A. at 34-37.) The drafting of Article 58 was seen as a positive step to "make available more adequate facilities for rehabilitation of offenders." (J.A. at 39.) The UCMJ was not intended or designed to reform the practices of Federal or State penal systems and nowhere in the discussion of Article 58 are there any concerns about service members being confined with

[16] It must be noted that, under Article 42 of the Articles of War, the ability of Army to transfer its prisoners to other institutions was limited to specific classes of offenders (such as offense and length of confinement). (J.A. at 57-58.)

[17] The Navy, as of 31 December 1948, reported having 255 members combined in Federal institutions and revealed that they had been engaged in the practice of confining its members in non-military institutions since 1908. (J.A. at 60, 65, 74.) In fact, testimony revealed an Army desire to move 1,500 prisoners to the federal system and reduce the number of disciplinary barracks from five to two and possibly close the remaining "at some future time." (J.A. at 73.)

foreign nationals in these federal prisons (including Alcatraz). (J.A. at 55-74.)

It would be utterly impossible in a country built on and maintained through immigration that somehow all of these institutions were "foreign national" free at the time the UCMJ was debated in Congress. This legislative history establishes concerns with military abuses related to confining members with enemy prisoners and nationals and not with a general practice of segregating Americans from "foreigners" anywhere and everywhere. Therefore, consistent with Webber, Article 12 is meant solely to involve military confinement facility situations (similar to Wise), and Article 58 was meant to allow the professionals who undertake confinement operations "as their vocation and their life work" to continue their practices unabated. (J.A. at 68.)

C. DEVELOPMENT OF ARTICLE 12 CASE LAW

The first and only time this Court has analyzed Article 12 occurred in Wise.[18] In that case, a soldier was confined in the same facility with Iraqi enemy prisoners of war in Tikrit, Iraq, and Wise argued that his confinement violated Article 12 because

[18] Article 12 is mentioned in United States v. Palmiter, 20 M.J. 90, 98 (C.M.A. 1985), however, it is only done in the context of arguing in an Article 13 case that "a prisoner may have a legitimate interest in being confined apart from persons who are in a distinctively different class." (Everett, C.J., concurring). Interestingly, the main opinion still characterized Article 12 as "specifically prohibit[ing] the intermixture of prisoners of war with our prisoners." Id. at 86. The only other mention of Article 12 occurred in United States v. Heard, 3 M.J. 14, 17 (C.M.A. 1977)(this reference was made in a mere cataloging of articles related to "Apprehension and Restraint" and there was no analysis of the meaning of Article 12).

he was held in "immediate association" with enemy prisoners or other foreign nationals. Id. at 470-71. Although this Court conducted an extensive look at the legislative history, this Court primarily looked at the definition of "immediate association" rather than a comprehensive look at Article 12's applicability to State or Federal facilities that were not part of this case. Therefore, the Wise decision only established (1) a strand of concertina wire "represents a real boundary" and (2) the necessity of members to exhaust administrative remedies prior to claiming a violation on appeal. Id. at 471-77. Aside from this one case, this Court never addressed Article 12 again.

Similarly, the service courts were silent on this issue for over fifty years until the Navy Court addressed whether Article 12 applied to a sailor confined in Japan. United States v. Marquez, 2006 WL 1133539, NMCCA 200201852 (N.M. Ct. Crim. App. 27 Apr 2006)(unpub. op.)(J.A. at 87.)(Article 12 only applies to service members in the custody of the United States). Once, again, there was no examination of State or Federal confinement, and since Marquez none of our sister service courts nor the federal courts have analyzed Article 12 aside from the decision in Webber.[19]

[19] An allegation was also raised in another federal court case in Kuykendall v. Taylor, 285 F.2d 480 (10th Cir. 1960), but this claim was summarily denied without analysis. The Tenth Circuit merely held that Article 12 is not "necessarily violated by the general confinement of the designated classes of prisoners within the same institution" due to the "immediate association"

Despite this lack of precedent, in 2008, the Air Force began applying Article 12 to confinement within the United States. The first mention of Article 12 credit occurred in United States v. Amaro, ACM S31562 (A.F. Ct. Crim. App. 16 Jun 2009)(unpub. op.)(J.A. at 92.)(accused sentenced in 2008, confined in Oklahoma County and military judge granted Article 12 sentencing relief). Thereafter, in a series of cases, AFCCA determined that an appellant was entitled to administrative credit for his claims that he was confined with foreign nationals in civilian confinement facilities without any regard to the enemy distinction listed in the legislative history of Article 12 or the same-treatment rule prescribed in Article 58. *See* United States v. Alexander-Lee, ACM S31784 (A.F. Ct. Crim. App. 16 Mar 2012.)(unpub. op.)(J.A. at 96.)(confined in the same bay with foreign nationals at Hoke County Detention Center, North Carolina); United States v. Towhill, ACM 37695 (A.F. Ct. Crim. App. 16 Mar 2012)(unpub. op.)(J.A. at 103.)(combined in the same pod with foreign nationals at Grand Forks, North Dakota); United States v. Quinn, ACM S31747 (A.F. Ct. Crim. App. 1 Aug 2011)(unpub. op.)(J.A. at 108.)(confined in open bay with foreign nationals at Yuba County Jail, California). Even now, there are continued claims of Article 12 violations with most

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requirement. Id. at 481. The Court did not analyze the status of the alleged foreign nationals or the significance any status would have on the case due to the appellant's failure to show "immediate association."

being denied because of failure to exhaust administrative remedies rather than any consideration of the offending national being anything beyond merely being foreign or any analysis of whether Article 12 applies to such civilian confinement facilities. *See generally*, United States v. Burleigh, ACM 37652 (A.F. Ct. Crim. App. 29 May 2013)(unpub. op.)(J.A. at 112.); United States v. Grocki, ACM 37982 (A.F. Ct. Crim. App. 12 Feb 2013)(unpub. op.)(J.A. at 119.); United States v. Luckado, ACM 37962 (A.F. Ct. Crim. App. 1 Aug 2013)(unpub. op.)(J.A. at 122.); United States v. Norman, ACM 37945 (recon) (A.F. Ct. Crim. App. 16 Jul 2013)(unpub. op.)(J.A. at 129.)

After this case was remanded to AFCCA, AFCCA re-analyzed Article 12 in Wilson, 73 M.J. at 529. (J.A. at 5.) AFCCA looked at the relationship between Articles 12 and 58 and held in its published decision that Article 12 does not involve "a matter of 'discipline and treatment' falling within the parameters of Article 58(a), UCMJ." Id. at 533. Further, even if was relatable to Article 58, AFCAA held that Article 12 "should be construed as an exception to the general "same-treatment" rule." Id. Although acknowledging the decision in Webber, AFCCA completely rejected its holding and affirmatively held that Article 12 applies to civilian confinement facilities as a matter of law. Id. 533-34. Therefore, at this time, the Air Force Court appears to be steadfastly standing alone in

applying Article 12 credit to any situation involving foreign nationals.[20]

D. CONSEQUENCES RELATED TO AFCCA ARTICLE 12 CASE LAW ON ARTICLE 55

As established in this case, AFCCA's published rulings on the applicability of Article 12 "everyplace" has directly led to unintended consequences, like this case, because civilian confinement facilities are being forced to place service members into solitary confinement to ensure there is no violation of AFCCA's interpretation of Article 12.[21] The most extreme example of this absurdity is demonstrated in Luckado. Luckado was held in solitary confinement for one week and then returned to general population prior to his transfer to a military confinement facility. Id., slip op. at 3. This resulted in two complaints: (1) that his time in solitary confinement to prevent immediate association with foreign nationals was "cruel and unusual" and (2) his time in general population violated Article 12 because an unidentifiable "Mexican national" was in

[20] In light of the historical pattern of confining military members in State and Federal institutions detailed above, it would seem impossible to believe that the Army, Navy and Coast Guard has never confined anyone in a civilian facility similar to ones which the Air Force has utilized.

[21] *See also* United States v. Knight, ACM 38083 (rem) (A.F. Ct. Crim. App. 21 October 2013)(unpub. op.)(Article 55 claim that member was confined in solitary confinement for 31 days to prevent "commingling" with foreign nationals)(J.A. at 141.); United States v. Simmons, ACM 37967 (A.F. Ct. Crim. App. 27 June 2012)(unpub. op.)(allegation that trial defense counsel was ineffective for failing to preserve use of solitary confinement to prevent Article 12 violation issue for future Article 55 claim)(J.A. at 144.)

his pod and played cards with his friends.[22] Id. In a very real sense, this case represents the classic dilemma for civilian confinement facilities where any method of civilian confinement will result in some form of complaint from an appellant. In enacting Article 12, Congress never would have intended this absurdity to result from their desire to keep service members from having to be confined with enemy nationals at the close of World War II.

E. CONTINUED APPLICATION OF ARTICLE 12 TO STATE AND FEDERAL CONFINEMENT FACILITIES

The historical context of the creation of Article 12 shows Congress' fear of American service members being confined with the enemy and pronounced lack of fear regarding service members being confined in federal confinement. Since that time, case law research reveals no other armed service providing credit for confining their service members with "foreign nationals." In short, the abuse of placing our military personnel with prisoners of war and the enemy was effectively cured by this enactment. With this context in mind, the time has come for the Air Force Court to join the rest of service courts and find that this article has no application beyond the confinement facilities controlled by our services as contemplated by Articles 12 and 58.

[22] It appears that this card player is different from the "Mexican national" card player in McPherson.

CONCLUSION

Wherefore, this Court should hold that Article 12 does not apply under these circumstances and affirm Appellee's sentence without modification.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 31 March 2014.

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