

LOOSE CANONS: THE CAAF'S FLAWED APPROACH TO CONSTRUING CONVENING AUTHORITY ACTIONS

JOHN F. O'CONNOR¹

*If the purpose of construction is the ascertainment of meaning,
nothing that is logically relevant should be excluded.*

-Felix Frankfurter²

I. Introduction

When a court-martial results in a conviction and sentence, the record of trial is presented to the military officer who convened the court – the “convening authority” – so that the convening authority can take action on the sentence. Subject to the terms of any existing plea agreement, the convening authority has the unfettered power to approve the adjudged sentence in full or, as a matter of clemency, to reduce the adjudged sentence by disapproving, suspending, or commuting a sentence in whole or in part.³ So unrestricted and profound is the convening authority’s power to grant clemency that the United States Court of Appeals for the Armed Forces (CAAF) repeatedly has observed that “the convening authority is an accused’s best hope for sentence relief.”⁴ While this observation by the CAAF was meant to convey that an accused’s best chance for sentence reduction is to convince the convening authority to grant clemency as part of his convening authority’s action, it has of late taken on a completely different, ironic meaning. Because of the CAAF’s developing jurisprudence for construing convening authority actions, it can be said with at least some justification that an accused’s best hope for sentence relief is not that the convening authority will *decide* to grant clemency, but rather that drafting errors at the command level will cause the convening authority’s action to reflect approval of less of the sentence than the convening authority intended, with the CAAF only too happy to give effect to such a drafting error no matter how obvious. The effect of this jurisprudence is to thwart the convening authority’s unfettered command prerogative to take action on a court-martial sentence.

¹ Partner, Steptoe & Johnson LLP. B.A., University of Rochester; M.S.Sc., Syracuse University; J.D., University of Maryland School of Law. The author served as an officer in the United States Marine Corps from 1988 to 1998, including service as a judge advocate from 1995 to 1998. The views expressed herein are those of the author only, and do not reflect the views of Steptoe & Johnson LLP or its attorneys or clients.

² Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 541 (1947).

³ See UCMJ art. 60(c)(2) (2007).

⁴ *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003); *see also* *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999); *United States v. Howard*, 48 C.M.R. 939, 944 (C.M.A. 1974).

The goal of this Article is to trigger a reexamination of the CAAF's developing jurisprudence for construing disputed convening authority actions. Based on cases decided in each of the CAAF's last two Terms, it appears that at least four of the five judges on the CAAF have adopted the canon of construction that a facially unambiguous convening authority's action will be applied as written, with no consideration of extrinsic evidence for any purpose.⁵ With all respect to the CAAF, it is this author's view that such a jurisprudence is flawed and deviates significantly from what must be the sole purpose in construing a convening authority's action, giving effect to what the convening authority *actually intended*. The "four corners rule" that the CAAF appears to have adopted disserves this fundamental principle by excluding highly relevant evidence of actual intent when the court concludes that the face of the action is unambiguous. The premise of this Article is that military appellate courts should *never* be bound by a "four corners rule" when logically relevant extrinsic evidence of actual intent exists.

Part II of this Article traces recent developments in the CAAF's treatment of disputed convening authority actions. As CAAF decisions from its past two Terms demonstrate, the CAAF has moved toward a "four corners" or "plain meaning" method of interpretation, one that ends all inquiry if the face of the convening authority's action is unambiguous, even where the result is absurd and even where the surrounding circumstances indicate a subjective intent at odds with the written convening authority's action as construed by the CAAF.

Part III of this Article explains why the CAAF's developing jurisprudence in this area is analytically unsound. While there is a surface appeal to borrowing well-accepted interpretive canons from contract law, a closer analysis reveals this method to be deeply flawed for at least two reasons. First, applying interpretive canons from contract law ignores that contracts are multilateral documents, while a convening authority's action is the quintessential unilateral action, and this fundamental difference affects the respectability and fairness of considering extrinsic evidence of intent. Second, the CAAF's adoption of the "four corners rule" from contract law ignores important contract principles that are designed to prevent absurd results. In essence, the CAAF has borrowed only half of contract law – the "four corners rule" – while simultaneously eschewing related contract principles designed to mitigate the harshness of a "four corners" jurisprudence. A more appropriate interpretive model for convening authority actions is one that, above all else, seeks to give effect to the convening authority's actual intent, and considers all evidence probative of such intent. Indeed, the jurisprudence used for construing donative transfer documents such as wills and trusts – documents that, like convening authority actions, are an expression of unilateral intent rather than a multi-party agreement – provides a useful framework for construing convening authority actions, an approach that gives effect to actual intent rather than thwarting it.

⁵ See *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007); *United States v. Politte*, 63 M.J. 24, 28 (C.A.A.F. 2006) (Erdmann, J., dissenting).

II. The Development of the CAAF's "Four Corners" Jurisprudence

The CAAF's emerging "four corners rule" for construing convening authority actions essentially is an outgrowth from two recent decisions, *United States v. Politte*⁶ and *United States v. Wilson*.⁷ A detailed examination of the facts of these cases, along with the various opinions issued with respect to these cases, will help identify the analytical underpinnings of the CAAF's jurisprudence and, in this author's view, expose the flaws in that analytical construct.

A. *United States v. Politte: The Dissent That Became a Majority Rule*

Under the Uniform Code of Military Justice (UCMJ), the convening authority, when taking action on a court-martial sentence, is required to approve or disapprove all aspects of the sentence.⁸ At the same time, the convening authority is vested with the power to order all approved aspects of a court-martial sentence *executed*, except that the convening authority lacks the power to order the execution of a sentence to death, the dismissal of an officer, or the punitive discharge of an enlisted servicemember. Those aspects of a court-martial sentence can be ordered executed only upon completion of all levels of direct appeal.⁹ In the ordinary case of a non-capital court-martial of an enlisted servicemember, the convening authority therefore has the power to approve the entire court-martial sentence but can order executed everything except any bad-conduct or dishonorable discharge that may have been adjudged at the court-martial.

While the convening authority's differing approval and execution powers are clear and unambiguous, these differing powers have, for whatever reason, confounded convening authorities and their staff judge advocates when they attempt to draft a convening authority's action that approves the entire sentence but, consistent with the convening authority's more limited execution powers, orders everything except the punitive discharge executed. The stubborn insistence of convening authorities and their staff judge advocates to state the convening authority's approval action and execution action in the same sentence – buoyed no doubt by the treatment of both concepts in a single sentence in the sample convening authority's action in the *Manual for Courts-Martial*¹⁰ – has led to a number of poorly drafted convening authority actions and a

⁶ 63 M.J. 24 (C.A.A.F. 2006).

⁷ 65 M.J. 140 (C.A.A.F. 2007).

⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(1) (2005) ("The approval or disapproval shall be explicitly stated.").

⁹ UCMJ art. 71 (2007). A death sentence may be ordered executed only once all direct appeals are exhausted and the death sentence has been approved by the President. *Id.* art. 71(a). The portion of a court-martial sentence dismissing an officer from the service may be ordered executed only once all direct appeals are exhausted and the dismissal is approved by the Secretary of Defense or his designee. *Id.* art. 71(b). The punitive discharge of an enlisted servicemember may be ordered executed only once all direct appeals are exhausted. *Id.* art. 71(c).

¹⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. 16 at A16-2 (2005).

cottage industry of litigation over their meaning. Recent decisions by the CAAF construing disputed convening authority actions are variations on this theme.

In *United States v. Politte*,¹¹ the accused, a petty officer in the United States Navy, pleaded guilty at a special court-martial and was convicted of making a false official statement, wrongful use of cocaine and introduction of cocaine on a military installation, and soliciting another to use cocaine.¹² The accused's pleas were pursuant to a pretrial agreement under which he agreed to plead guilty to five of the twenty specifications with which he was charged.¹³ The military judge presiding over the accused's case sentenced him to reduction to E-1 (the lowest enlisted grade) and a bad-conduct discharge.¹⁴ After the court-martial, Politte's defense counsel submitted a clemency package to the convening authority asking the convening authority to suspend the bad-conduct discharge for one year, meaning that the punitive discharge would be remitted if the accused behaved for the succeeding year.¹⁵

The staff judge advocate to the convening authority recommended that the accused's clemency request be denied, and proposed that the convening authority execute an action that included the following: "[T]hat the sentence as adjudged be approved and executed, except for that portion extending to a Bad Conduct Discharge, which cannot be executed until the completion of appellate review."¹⁶ The convening authority's action, as signed, provided that "the sentence is approved except that part of the sentence extending to a bad conduct discharge."¹⁷

On appeal, the accused did not raise any issue with the convening authority's action in his submission to the United States Navy-Marine Corps Court of Criminal Appeals or the CAAF.¹⁸ Nevertheless, the CAAF used its power to specify issues not raised by the parties¹⁹ in order to consider whether the military appellate courts even had jurisdiction over the accused's appeal "in light of the convening authority's action that does not appear to have approved a bad-conduct discharge."²⁰ The convening authority's action raised a jurisdictional issue because an accused has a right to automatic appeal to the service courts of criminal appeals only when the sentence, as approved, includes a sentence to death, a punitive discharge, or confinement for one

¹¹ 63 M.J. 24 (C.A.A.F. 2006).

¹² *Id.* at 24-25.

¹³ *Id.* at 25.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ For general discussions of the CAAF's power to specify appellate issues not raised by the parties, see generally Robinson O. Everett, *Specified Issues in the United States Court of Military Appeals: A Rationale*, 123 MIL. L. REV. 1 (1989); Eugene R. Fidell & Linda Greenhouse, *A Roving Commission: Specified Issues & the Function of the United States Court of Military Appeals*, 122 MIL. L. REV. 117 (1988).

²⁰ *Politte*, 63 M.J. at 25.

year or more.²¹ If there were no approved punitive discharge, the accused's sentence would not have triggered automatic appellate review.

In resolving the issue, the CAAF splintered into three separate opinions. Writing for himself and Judge Effron, Chief Judge Gierke determined that the convening authority's action was ambiguous and should be returned to the convening authority for clarification of his intent with respect to the bad-conduct discharge.²² In reaching this conclusion, Chief Judge Gierke noted that the CAAF had always required a clear and unambiguous convening authority's action "[b]ecause of the importance of the convening authority's action in the court-martial process."²³ Because of this need for clarity, Chief Judge Gierke's opinion observed that the court previously had remanded a case for clarification whether the convening authority intended to approve a punitive discharge,²⁴ and in another case had held that military appellate courts could resort to surrounding documentation "to interpret an otherwise unclear convening authority action."²⁵ Based on that view of the law, Chief Judge Gierke's opinion turned to the convening authority's action in *Politte* and found it ambiguous. Specifically, the opinion found that the face of the action – approving the sentence "except for that part of the sentence extending to a bad conduct discharge" – suggested an intent to *disapprove* the punitive discharge, while all of the surrounding documentation evinced an intent to *approve* the punitive discharge.²⁶

Of particular import to Chief Judge Gierke and Judge Effron's analysis: (1) the pretrial agreement permitted the convening authority to approve a bad-conduct discharge; (2) the staff judge advocate's recommendation expressly recommended approving the bad-conduct discharge; (3) the accused's clemency request did not seek disapproval of the bad-conduct discharge, but only suspension of the discharge; and (4) in the paragraph immediately following the language dealing with approval of the sentence, the convening authority's action stated that that case would be forwarded for appellate review under Article 66 of the UCMJ, something that the convening authority could not do unless the bad-conduct discharge were approved.²⁷ Because all of these surrounding circumstances led them to the conclusion that the convening authority's action was ambiguous, Chief Judge Gierke and Judge Effron concluded that the case should be remanded for clarification of the convening authority's intent.²⁸ Judge Crawford provided the crucial third vote for this course of action by concurring in the result.²⁹ Judge Crawford would have resolved the ambiguity without remand, concluding that a mere scrivener's error left the words "will be executed" off of the end

²¹ UCMJ art. 66(b) (2007).

²² *Politte*, 63 M.J. at 27.

²³ *Id.* at 26.

²⁴ *Id.* (citing *United States v. Scott*, 49 M.J. 160, 160 (C.A.A.F. 1998) (summary disposition)).

²⁵ *Id.* (citing *United States v. Loft*, 10 M.J. 266, 268 (C.M.A. 1981)).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 27.

²⁹ *Id.* at 27 (Crawford, J., concurring in the result).

of the convening authority's action.³⁰ Judge Crawford came to this conclusion because, in her view, the accused's failure to raise the issue himself on appeal and the seriousness of the charges led to the "common sense conclusion" that the convening authority intended to approve the punitive discharge.³¹ Because she lacked the votes to resolve the issue against the accused absent remand, however, Judge Crawford joined with Chief Judge Gierke and Judge Effron in voting to remand the case for clarification.³²

Judges Erdmann and Baker dissented.³³ In their view, the inquiry began, and ended, with consideration of the express terms of the convening authority's action. To the dissent, the only part of the convening authority's order that constituted the "convening authority's action" is the paragraph (or paragraphs) that state the approval or disapproval of the findings and sentence of the court-martial.³⁴ Therefore, to the dissent, the administrative instructions two paragraphs later – which directed that the case be forwarded for Article 66 review – was not part of the "convening authority's action" and therefore could not be considered in construing the paragraph discussing approval of the court-martial sentence.³⁵ To the dissent, if the paragraph (or paragraphs) stating the approval or disapproval of the findings and sentence are on their face unambiguous – that is, not susceptible to two differing meanings – the inquiry was over and administrative instructions for transferring the record of trial and other extrinsic evidence could not change the plain meaning of the convening authority's action.³⁶ Because they determined that the convening authority's action approving the sentence adjudged "except for that part of the sentence extending to a bad conduct discharge" was facially unambiguous, the dissent concluded that the proper result would have been to treat the case as one with no punitive discharge, meaning not only that the accused would have no punitive discharge but that the appellate courts lacked jurisdiction to review the case.³⁷

A few months after the CAAF decided *Politte*, the court decided *United States v. Gosser*.³⁸ In *Gosser*, the convening authority's action stated that "except for the bad-conduct discharge, the sentence is approved and ordered executed."³⁹ The very next sentence, however, stated that the record of trial was to be forwarded for appellate review by the U.S. Navy-Marine Corps Court of Criminal Appeals pursuant to service regulations, a review that the convening authority could direct only where Gosser's bad-conduct discharge had been approved.⁴⁰ Shortly after the record of trial reached

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 27-28 (Crawford, J., concurring in the result).

³³ *Id.* at 28 (Erdmann, J., dissenting).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ 64 M.J. 93 (C.A.A.F. 2006).

³⁹ *Id.* at 95.

⁴⁰ *Id.* at 95 & n.6.

the court of criminal appeals, the accused's appellate defense counsel filed a motion arguing that the court had no jurisdiction to conduct appellate review because the convening authority had not approved the accused's punitive discharge.⁴¹

Apparently viewing the convening authority's action as ambiguous, the court of criminal appeals remanded the record to the command level for clarification of the convening authority's action.⁴² On remand, the convening authority issued a new convening authority's action that expressly stated that Gosser's bad-conduct discharge was approved.⁴³ Before the CAAF, Gosser challenged the court of criminal appeals decision to remand for a clarification of the convening authority's action, arguing that the original action was unambiguous and was therefore required to be applied as written.⁴⁴ In a *per curiam* opinion joined by Chief Judge Gierke and Judges Effron⁴⁵ and Baker, the court held that the original convening authority's action was ambiguous, and that it was therefore appropriate for the court of criminal appeals to remand the record for clarification.⁴⁶ Indeed, the majority held that its "recent holding in *Politte* controls this issue," and that a remand is appropriate where there is "surrounding documentation conflicting with the language of the convening authority's action."⁴⁷ Judge Crawford concurred in the result, finding that this was a case of obvious administrative oversight that could have been corrected on the appellate level without a remand.⁴⁸ Judge Erdmann dissented, as he had in *Politte*, based on his view that the convening authority's action was facially unambiguous and, therefore, was required to be applied as written.⁴⁹

In the final analysis, *Gosser* did not change the state of the law. *Gosser* merely stood for the same proposition developed in *Politte*, that a remand is permissible when the convening authority's action and surrounding documentation create an ambiguity as to the convening authority's action on the adjudged sentence.⁵⁰ This is a concept with which the entire court agreed, as the dissent in *Politte* opposed remand only because of its view that the convening authority's action was unambiguous on its face.⁵¹ At the time the court decided *Gosser*, Judge Baker's shift from the dissent in *Politte* to the majority in *Gosser* may have seemed mildly puzzling, as the *Politte* dissent rejected the notion that the convening authority's instructions for appellate review could create an

⁴¹ *Id.* at 95. Because Gosser's approved sentence to confinement was only ninety days, the only basis for automatic appellate review by the court of criminal appeals was the existence of an approved punitive discharge. See UCMJ art. 66(b) (2007).

⁴² *Gosser*, 64 M.J. at 95.

⁴³ *Id.*

⁴⁴ *Id.* at 96.

⁴⁵ Chief Judge Effron did not join the entirety of the *per curiam* lead opinion, but he did join that portion of the opinion addressing the disputed convening authority's action. *Id.* at 99 (Effron, J., concurring in part and in the result).

⁴⁶ *Id.* at 96.

⁴⁷ *Id.*

⁴⁸ *Id.* at 99 (Crawford, J., concurring in the result).

⁴⁹ *Id.* at 99 (Erdmann, J., dissenting).

⁵⁰ *Id.* at 96.

⁵¹ *United States v. Politte*, 63 M.J. 24, 28 (C.A.A.F. 2006) (Erdmann, J., dissenting).

ambiguity in an otherwise unambiguous convening authority's action.⁵² Subsequently, however, in *United States v. Wilson*,⁵³ Judge Baker explained his view that a convening authority's action, such as that in *Gosser*, that neither expressly approves nor expressly disapproves of a punitive discharge is facially ambiguous and not subject to a "four corners" analysis.⁵⁴ Regardless, the *Gosser* court expressly reaffirmed the correctness of the lead opinion's analysis in *Politte*,⁵⁵ and it is clear that a majority of the CAAF – Chief Judge Gierke and Judges Crawford and Efron – rejected the notion that a "four corners rule" could apply when surrounding documentation created doubt as to the convening authority's actual intent.

B. United States v. Wilson: A Literal and Jurisprudential Changing of the Guard

By the time the CAAF considered *United States v. Wilson*⁵⁶ in the Term after it decided *Politte*, the fifteen-year terms in office for Chief Judge Gierke and Judge Crawford – two of the three judges voting to remand in *Politte* – had expired, and they had been replaced on the CAAF by Judges Stucky and Ryan. In *Wilson*, a court-martial convicted the accused – contrary to his pleas – of rape, assault, adultery, and unlawful entry into a dwelling.⁵⁷ The court-martial panel sentenced the accused to a dishonorable discharge, confinement for eight years, forfeiture of all pay and allowances, and reduction to pay grade E-1.⁵⁸ The convening authority's action provided as follows: "[T]hat part of the sentence extending to confinement in excess of 3 years and 3 months is disapproved. The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed."⁵⁹

As in *Politte*, the accused did not raise the argument before the court of criminal appeals that his dishonorable discharge had been disapproved by the convening authority, nor did he allege before the CAAF that the court of criminal appeals had erred in affirming a sentence including a dishonorable discharge.⁶⁰ Instead, the CAAF raised the issue *sua sponte*, specifying as an issue for review "whether the United States Navy-Marine Corps Court of Criminal Appeals erred in affirming a sentence that included a dishonorable discharge when the convening authority's action did not approve one."⁶¹

In deciding this issue, Judge Erdmann, one of the two dissenters in *Politte*, was now in the majority, this time joined by the two newest members of the court, Judges

⁵² *Id.*

⁵³ 65 M.J. 140 (C.A.A.F. 2007)

⁵⁴ *Id.* at 144 (Baker, J., dissenting).

⁵⁵ *Gosser*, 64 M.J. at 96 ("Our recent holding in *Politte* controls this issue.").

⁵⁶ 65 M.J. 140 (C.A.A.F. 2007).

⁵⁷ *Id.* at 140.

⁵⁸ *Id.*

⁵⁹ *Id.* at 140-41.

⁶⁰ *Id.*

⁶¹ *Id.* at 141 n.1.

Stucky and Ryan. The *Wilson* majority applied the following rule for construing disputed convening authority actions:

In light of the convening authority's broad discretion to provide relief from the adjudged sentence and the importance of this role in the court-martial process, when the plain language of the convening authority's action is facially complete and unambiguous, its meaning must be given effect.⁶²

Examining the four corners of the convening authority's action, the majority concluded that the action unambiguously approved three years and three months of confinement and all other aspects of the sentence "*with the exception of the Dishonorable Discharge,*" meaning that the dishonorable discharge was disapproved.⁶³ As a result, the CAAF reversed the court of criminal appeals to the extent that it affirmed a sentence including a dishonorable discharge, and affirmed the lower court in all other respects.⁶⁴

Judge Baker, who had dissented with Judge Erdmann in *Politte*, dissented from the majority's decision in *Wilson*. Importantly, however, Judge Baker expressly agreed with the majority that "when the plain meaning of the convening authority's action is facially complete and unambiguous, its meaning must be given effect."⁶⁵ Indeed, Judge Baker referenced the *Politte* plurality's consideration of extrinsic evidence to identify an ambiguity and stated that the *Wilson* majority "sets the law straight" that extrinsic materials are irrelevant where the four corners of the convening authority's action are clear.⁶⁶ Judge Baker departed from the majority, however, in his conclusion that the convening authority's action in this case was in fact ambiguous. As Judge Baker saw it, the first sentence of the convening authority's action stated what was disapproved (confinement in excess of three years and three months), and the second sentence stated what *was* approved (everything else except the dishonorable discharge), but that the dishonorable discharge "arguably falls into a limbo between that which the convening authority expressly disapproved and that which he expressly approved."⁶⁷ To Judge Baker, this created an ambiguity that should be clarified through a remand.⁶⁸

Chief Judge Efron also dissented, finding that Rule for Courts-Martial 1107(d)(1) required that the convening authority's action expressly identify all aspects of a sentence that were approved, and also expressly identify all aspects of a sentence that were disapproved.⁶⁹ Because the convening authority's action, under Chief Judge

⁶² *Id.* at 141.

⁶³ *Id.* at 141-42.

⁶⁴ *Id.* at 142.

⁶⁵ *Id.* at 144 (Baker, J., dissenting).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 142-43 (Efron, C.J., dissenting).

Effron's reading of it, neither approved nor disapproved the dishonorable discharge, the action was incomplete and should be remanded for corrective action.⁷⁰

When the three opinions in *Wilson* are scrutinized, it seems quite clear that four of the five judges on the CAAF (Judges Erdmann, Baker, Stucky, and Ryan) have adopted a "four corners rule" for construing convening authority actions. Under this framework, when there is a dispute over the construction of a convening authority's action, the court must first review the plain meaning of the convening authority's action itself, and if that language is unambiguous the inquiry ends without consideration of *any* extrinsic evidence.⁷¹ While Chief Judge Effron did not need to confront this issue in *Wilson* because he found the four corners of the convening authority's action facially incomplete, it appears from *Politte* that Chief Judge Effron considers it appropriate to consider surrounding evidence and documentation to determine whether an ambiguity exists in a convening authority's action.⁷² Where a consideration of the convening authority's action in conjunction with surrounding evidence and documentation suggests an ambiguity, it appears from his opinion in *Politte* that Chief Judge Effron finds it appropriate either to resolve the ambiguity on appeal or to remand the case for clarification by the convening authority.⁷³ For the reasons that follow, it seems to this author that Chief Judge Effron's approach is much more faithful to the purpose of construing a convening authority's action and is a more defensible approach than the formalistic "four corners rule" espoused by the remainder of the court.

III. A Critical Assessment of the CAAF's "Four Corners Rule"

A. The CAAF's Counterintuitive Rejection of Actual Intent Evidence

Perhaps the most noteworthy aspect of the *Wilson* case is that the majority made no effort to suggest a possibility that its decision setting aside the accused's dishonorable discharge was consistent with the convening authority's actual intent. While Chief Judge Effron's dissent correctly observed that it was within the convening authority's clemency powers to disapprove a punitive discharge if the convening authority were so inclined,⁷⁴ it borders on ludicrous to suggest that the convening authority *actually* intended to disapprove a punitive discharge for a convicted rapist who the convening authority concluded should spend more than three years behind bars for his offense.⁷⁵ Even the accused was not audacious enough to include in his clemency submission a request that the convening authority approve no punitive discharge, instead asking as a matter of clemency that his dishonorable discharge be

⁷⁰ *Id.* at 143 (Effron, C.J., dissenting).

⁷¹ *Id.* at 141 (majority opinion); *id.* at 144 (Baker, J., dissenting).

⁷² *United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006).

⁷³ *Id.*

⁷⁴ *Wilson*, 65 M.J. at 143 (Effron, C.J., dissenting).

⁷⁵ *Id.* at 140.

commuted to a bad-conduct discharge, and the accused's own description on appeal of his approved sentence stated that his dishonorable discharge had been approved.⁷⁶

By far, the most likely scenario is that the convening authority intended to approve the dishonorable discharge, while recognizing that he lacked the power to order that aspect of the sentence executed because all levels of direct appeal had not been exhausted.⁷⁷ If that premise is correct, the language in the convening authority's action is a function of a clerical error whereby the language excepting out the dishonorable discharge was inserted at the wrong place in the sentence. Thus, while the actual convening authority's action stated that "[t]he remainder of the sentence, *with the exception of the Dishonorable Discharge*, is approved and will be executed,"⁷⁸ the convening authority likely intended a result that would have been plain from the action itself if the language excepting the dishonorable discharge had been moved three words to the right: "[t]he remainder of the sentence is approved and, *with the exception of the Dishonorable Discharge*, will be executed." Even if one were to quibble with this conclusion as to the convening authority's likely intent, the reality is that the *Wilson* court's analytical model does not care what the convening authority's actual intent was if the written product reads in an unambiguous manner. For that reason, the analytical construct adopted by the *Wilson* majority does not even offer a nod toward trying to resolve the case consistent with the convening authority's actual intent.

The *Wilson* court employed the following analytical path in concluding that a "four corners rule" ought to apply to convening authority actions: (1) "A convening authority is vested with substantial discretion when he or she takes action on the sentence of a court-martial";⁷⁹ (2) "In light of the convening authority's broad discretion to provide relief from the adjudged sentence and the importance of this role in the court-martial process, when the plain language of the convening authority's action is facially complete and unambiguous, its meaning must be given effect";⁸⁰ and (3) "Accordingly, the convening authority must exercise care in drafting the action."⁸¹

This analytical construct raises at least two questions. The first is in its second premise: without question, the convening authority has broad discretion in taking action on a court-martial sentence, and this role is an essential element of the court-martial process. But why do these concepts lead to the conclusion that an appellate court will apply an erroneous (but facially unambiguous) convening authority's action as written no matter how strong the evidence that the convening authority intended a different result? Shouldn't the second premise of the *Wilson* court's analysis be more along the following lines: "In light of the convening authority's broad discretion to provide relief from the adjudged sentence and the importance of this role in the court-

⁷⁶ *Id.* at 142 (Effron, C.J., dissenting).

⁷⁷ See UCMJ art. 71 (2007) (providing that a convening authority can order executed all aspects of a court-martial sentence other than a punitive discharge and a sentence to death).

⁷⁸ *Wilson*, 65 M.J. at 140-41 (emphasis added).

⁷⁹ *Id.* at 141 (quoting *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003)).

⁸⁰ *Id.*

⁸¹ *Id.*

martial process, a court must endeavor at all times to construe a convening authority's action to give effect to the convening authority's actual intent." Indeed, given that the power to grant clemency "is a matter of command prerogative involving the sole discretion of the convening authority,"⁸² a rule such as the "four corners rule" – that would bind the government to the "plain meaning" of a poorly drafted convening authority's action no matter how overwhelming the evidence that the commander had a different intent – seems to be a diminution of the commander's prerogative rather than, as the *Wilson* majority would have it, a reflection of the commander's prerogative.

The second question raised by the *Wilson* majority's analytical construct is one of motivation. The *Wilson* majority explained that because an unambiguous convening authority's action is going to be applied as written, "the convening authority must exercise care in drafting the action."⁸³ The court followed this statement with a citation to *Politte* to note that the court had "suggest[ed] ways to avoid ambiguity in a convening authority's action."⁸⁴ That line of reasoning seems to be saying, "you're supposed to be taking convening authority actions seriously, and if you don't, then you're going to be stuck with results that you never intended."

If the CAAF is simply exasperated by a perceived lack of attention to the post-trial processing of courts-martial, that would be perfectly understandable. A convening authority's action ought to be a relatively simple document to draft, but the military appellate courts repeatedly receive convening authority actions with errors that should be caught on a simple proofread at the command level.⁸⁵ Indeed, the court's decision in *Gosser* possibly reveals some of this (understandable) exasperation with command inattention, as the court noted that it was faced with "yet another ambiguous convening authority action."⁸⁶ Moreover, the CAAF has in the past few years been faced with cases involving post-trial and appellate delays of such embarrassing and unjustifiable lengths that the court has, on occasion, found the delays to have deprived the accused

⁸² UCMJ art. 60(c)(1) (2007).

⁸³ *Wilson*, 65 M.J. at 141.

⁸⁴ *Id.*

⁸⁵ A cursory Westlaw search for military appellate decisions between January 1, 2006 and August 31, 2007, revealed myriad cases in which the military appellate courts have remanded for correction, or otherwise corrected, obvious errors in drafting convening authority actions. *See, e.g.*, *United States v. Gosser*, 64 M.J. 93, 96-97 (C.A.A.F. 2006); *United States v. Hunter*, No. ACM S31205, 2007 WL 2500225, at *1 (A.F. Ct. Crim. App. Aug. 31, 2007); *United States v. Barr*, No. NMCCA 200602492, 2007 WL 2059799, at *1 (N-M. Ct. Crim. App. July 17, 2007); *United States v. Lawhorn*, No. NMCCA 200600128, 2007 WL 1774489, at *1 (N-M. Ct. Crim. App. June 20, 2007); *United States v. Rivera*, No. ACM 36123, 2006 WL 3085702, at *3 (A.F. Ct. Crim. App. Oct. 30, 2006); *United States v. Mejirodo*, No. ACM S31114, 2006 WL 2829995, at *1 (A.F. Ct. Crim. App. Sept. 5, 2006); *United States v. Thompson*, No. ACM S30924, 2006 WL 254982, at *1 (A.F. Ct. Crim. App. Aug. 25, 2006); *United States v. Taylor*, No. ACM 35685, 2006 WL 521595, at *2 (A.F. Ct. Crim. App. Feb. 22, 2006). These cases, of course, do not include any decisions correcting or remanding erroneous convening authority actions in unpublished opinions that were not selected for publication in Westlaw.

⁸⁶ *United States v. Gosser*, 64 M.J. 93, 94 (C.A.A.F. 2006).

of his due process right to a timely appeal.⁸⁷ Given these repeated examples of seeming inattention to post-trial matters, it would hardly be shocking if the CAAF determined that it should “send a message” by adopting a canon of construction that would punish commands for repeating the same drafting errors that the military appellate courts have faced for years. Motivation aside, however, the CAAF has adopted a canon of construction that rejects evidence of a convening authority’s actual intent, no matter how competent and compelling, if the convening authority’s action actually signed is unambiguous in its written terms.

B. Contracts, Donative Transfers, and a Subjective Intent Theory of Construction

The starting point for examining the advisability of CAAF’s “four corners rule” is to consider its origins. Essentially, the “four corners rule” is a well-established method for construing contracts, with courts first considering whether the words of the parties’ contract are themselves ambiguous. If the words of the contract are unambiguous, the inquiry ends and the court applies the contract as written. Under this analytical framework, a court considers extrinsic evidence of intent only if the words of the contract are themselves ambiguous.⁸⁸ At first blush, it seems only natural that a court construing a convening authority’s action might seek analytical guidance from contract law, the most developed area of the law concerned with properly construing written documents. But that first blush would be an incorrect one, as the nature of contracts is so different from convening authority actions that interpretive norms from contract law simply should not govern construction of convening authority actions.

Because contracts are by their nature multi-party documents, contract law does not seek to give meaning to one person’s subjective intent. As Judge Learned Hand famously explained, “[a] contract has, strictly speaking, nothing to do with the personal, or individual intent of the parties.”⁸⁹ Rather, the goal of contract law is to give meaning to an *agreement* between two or more contracting parties by construing the contract in accordance with the contracting parties’ *mutual intent*. Because of the multilateral nature of contracts, courts generally apply the objective theory of contract, which gives meaning to the intent manifested by the parties as set forth in the contract to which they agreed. As the *Restatement (Second) of Contracts* explains, “The phrase ‘manifestation of intent’ adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention.”⁹⁰

⁸⁷ See, e.g., *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Haney*, 64 M.J. 101, 102 (C.A.A.F. 2006); *United States v. Gosser*, 64 M.J. 93, 99 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006); *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006); *United States v. Dearing*, 63 M.J. 478, 488 (C.A.A.F. 2006).

⁸⁸ See, e.g., *HRE, Inc. v. United States*, 142 F.3d 1274, 1276 (Fed. Cir. 1998); *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1546 (D.C. Cir. 1985); *South Rd. Assocs., LLC v. Int’l Bus. Mach. Corp.*, 826 N.E.2d 806, 809 (N.Y. 2005); *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992).

⁸⁹ *Hotchkiss v. Nat’l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).

⁹⁰ RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1981).

Therefore, because the essence of contract law is an *agreement* between the parties, it would be intolerable except in the rarest of cases for a party to impose its undisclosed subjective intent on the other parties to the contract when the contract itself cannot be squared with that intent.⁹¹ For that reason, it is a black-letter principle of contract law that a party's subjective intent is irrelevant to contract construction unless the other party had reason at the time of contracting to know of this subjective intent.⁹² As one court eloquently explained:

[S]ubjective intent is *not* the proper test in a contract case. Contractual intent is concerned with objective manifestations of intent, not with the subjective, hypothetical, unexpressed, or nonexistent intentions of the parties. "The relevant intention of a party is that manifested by him rather than any different undisclosed intention."⁹³

Moreover, so focused on objective intent is contract law that a party generally is bound to the terms of a contract even if he or she misunderstood its terms or had a subjective intent different from the contract's express terms.⁹⁴ Simply put, one contracting party's

⁹¹ *Id.* § 212 cmt. a ("Interpretation of contracts deals with the meaning given to language and other conduct by the parties rather than with meanings established by law. But the relevant intention of a party is that manifested by him rather than any different undisclosed intention.").

⁹² *Id.*; see also *Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13, 19-20 (1st Cir. 2002) ("And when intent is plainly revealed by the express terms of a written contract, an inquiring court should not search for 'some undisclosed intent . . . but [rather, look to that intent] . . . expressed by the language contained in the contract'" (omissions and alterations in original) (quoting *Woonsocket Teachers' Guild, Local 951 v. School Comm. Of City of Woonsocket*, 367 A.2d 203, 205 (R.I. 1976))); *Am. Cas. Co. of Reading, PA v. Baker*, 22 F.3d 880, 890 (9th Cir. 1994) ("In California, '[i]t is immaterial that one of the parties to a contract had an undisclosed intention or belief as to what it meant.'" (alteration in original) (quoting *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, 215 n.39 (Cal. Ct. App. 1993))); *Central States, S.E. & S.W. Areas Pension Fund v. Indep. Fruit & Produce Co.*, 919 F.2d 1343, 1353 (8th Cir. 1990) ("Given the purpose of written contracts and section 515 of ERISA, the parties to a collective bargaining agreement are bound by the terms of their agreement, regardless of their undisclosed intent."); *Bretz v. Portland Gen. Elec. Co.*, 882 F.2d 411, 413 (9th Cir. 1989) ("In Montana, as in most other jurisdictions, '[t]he mutual assent essential to the formation of a contract . . . must be gathered from the outward objective manifestations of the parties and not by the subjective undisclosed intent of one of the parties.'" (omission in original) (quoting *Miller v. Walter*, 527 P.2d 240, 243 (Mont. 1974))).

⁹³ *Central States, S.E. & S.W. Areas Pension Fund v. Melody Farms, Inc.*, 969 F. Supp. 1034, 1041 (E.D. Mich. 1997) (citation omitted) (emphasis in the original).

⁹⁴ See, e.g., *Applied Elastomerics v. Z-Man Fishing Prods., Inc.*, No. 06-2469, 2007 WL 703606, at *6 (N.D. Cal. Mar. 5, 2007) ("[A] party is bound even if he misunderstood the terms of the contract and actually had a different, undisclosed intention." (quoting *Kucharczyk v. Regents of Univ. of Calif.*, 946 F. Supp. 1419, 1433 (N.D. Cal. 1996))); *Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd.*, 243 Cal. Rptr. 300, 305 (Cal. Ct. App. 1988) ("These statements by counsel of unexpressed intent cannot be used to interpret a contract. 'A party is bound, even if he misunderstood the terms of a contract and actually had a different, undisclosed intention.'" (quoting *Blumenfeld v. R.H. Macy & Co.*, 154 Cal. Rptr. 652 (Cal. Ct. App. 1979))).

undisclosed understanding or intention is not helpful in determining the *mutual* intent manifested by the parties in reaching a contractual agreement.⁹⁵

By contrast, however, a convening authority's action is not a contract, does not involve an agreement, a compromise, or consideration, and is not the manifestation of the intent of more than one person. A convening authority's action is a raw exercise of command prerogative.⁹⁶ So long as the convening authority complies with any pretrial agreement into which he or she has entered, and does not increase the severity of the sentence, the convening authority can take *any action he or she wants* with respect to a court-martial sentence as a matter of clemency.⁹⁷ For that reason, it is peculiar (to say the least) that the test for giving effect to the convening authority's exercise of subjective judgment would place zero weight on evidence of actual, subjective intent where the court determines that the face of the action is unambiguous. Rather, the paradigm that should inform the test for construing convening authority actions should be one grounded in ascertaining subjective intent, and not the contract-law paradigm that is concerned solely with objective intent.

The United States Court of Appeals for the Tenth Circuit has made this precise point in explaining the analytical flaw in exporting contract interpretation principles to areas of the law not grounded in agreement and objective intent:

Rules of construction tell us how to "construe" legal documents. The appropriate rule of construction depends on the nature of the document. For example, construction of contracts is generally guided by the "objective theory" of contracts - what is important is what the language of the document conveys to reasonable people in the circumstances, not what the party to the agreement privately intended.

In contrast, in the law of donative transfers the modern approach is to give effect to what the donor intended, regardless of how precisely that intent was expressed in the operative document. . . . Thus, in the law of donative

⁹⁵ *Lynott v. Nat'l Union Fire Ins. Co.*, 871 P.2d 146, 149 (Wash. 1994) ("[W]e have long adhered to the objective manifestation theory of contracts. This theory means that we impute to a person an intention corresponding to the reasonable meaning of his words and acts. Petitioner's unexpressed impressions are meaningless when attempting to ascertain the mutual intention [of the parties]." (quoting *Dwelly v. Chesterfield*, 560 P.2d 353 (Wash. 1977))).

⁹⁶ See UCMJ art. 60(c)(1) (2007) (noting that a convening authority's power to modify the sentence of a court-martial "is a matter of command prerogative involving the sole discretion of the convening authority").

⁹⁷ See *United States v. Alexander*, 63 M.J. 269, 274 (C.A.A.F. 2006) (noting convening authority's unfettered discretion with respect to clemency matters); *United States v. Rosenthal*, 62 M.J. 261, 263 (C.A.A.F. 2005) (same); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (same); *United States v. Finster*, 51 M.J. 185, 186 (C.A.A.F. 1999) (same).

transfers, “rules of construction . . . aid in determining and giving effect to the donor’s intention or probable intention . . .”⁹⁸

The leading treatise on the law of wills makes this same point, explaining that the differences between contracts and wills require a different paradigm of construction:

In the process of construction, a distinction is generally made between donative and non-donative conveyances and instruments, and between wills and deeds. In two-party commercial transactions, considerations of reliance prevent primary emphasis being given the conveyor’s subjective intent. . . . “With respect to any instrument involving such a contractual aspect an additional element affects the process of construing the instrument, namely, that a conveyor is bound by the meaning which he reasonably should have anticipated that the conveyee would derive from the language employed.” Such a meaning is sometimes called the “objective meaning” as distinguished from the actual meaning or “subjective meaning” intended by the conveyor . . . In the case of wills and donative deeds the courts are confronted with unilateral transactions, to which, in the case of wills, the testator was not bound during his lifetime; and the contending, sometimes quarreling beneficiaries have no grounds upon which to claim reliance. Greater liberality in construing wills than is permitted in construing contracts seems completely justified.⁹⁹

Indeed, the principles used to construe donative transfer documents – wills, testamentary and *inter vivos* trusts, and the like – seem an appropriate starting point for considering the paradigm that ought to govern construction of a convening authority’s action. Donative transfers – like convening authority actions – are quintessentially unilateral documents that are designed to implement one person’s subjective intent. Because this area of the law is focused on subjective intent, and not the *mutual* and *objective* intent that necessarily controls contract construction, it is hardly surprising that the law of donative transfers places much more value in extrinsic evidence of actual intent than is the case with respect to contract law.

⁹⁸ *Stillman v. Teachers Ins. & Annuity Ass’n College Ret. Equities Fund*, 343 F.3d 1311, 1316-17 (10th Cir. 2003) (citations omitted).

⁹⁹ 4 WILLIAM J. BOWE & DOUGLAS H. PARKER, *PAGE ON WILLS* § 30.1, at 2-3 (rev. ed. 1961) (quoting RESTATEMENT (THIRD) OF PROP. § 241).

As the *Restatement (Third) of Property (Wills and Other Donative Transfers)* explains, “the controlling consideration in determining the meaning of a donative document is the donor’s intention,” and “[t]he donor’s intention is given effect to the maximum extent allowed by law.”¹⁰⁰ To effect this goal, the modern *Restatement* approach eschews canons of construction that artificially exclude consideration of evidence bearing on the donor’s actual intent: “In seeking to determine the donor’s intention, all relevant evidence, whether direct or circumstantial, may be considered, including the text of the donative document and relevant extrinsic evidence.”¹⁰¹

An appellate court applying New York law summed up this modern view of construction, one that considers any and all evidence that enhances the court’s ability to divine the donor’s actual intent:

The cardinal rule of construction of a will is to carry out the intent of the testator. All rules of interpretation are subordinated to the requirement that the actual purpose of the testator is sought and effectuated as far as is consonant with principles of law and public policy. “Intent is not to be gleaned by focusing upon any one particular word, sentence or provision; rather, it must be ascertained from a perusal of the entire will by a reader mindful of the particular facts and circumstances under which the provisions of the instrument were framed.”¹⁰²

¹⁰⁰ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (2003).

¹⁰¹ *Id.* § 10.2. Comment (f) to this section of the *Restatement* explains the types of evidence that may be relevant to ascertaining the donor’s actual intent:

Direct as well as circumstantial evidence relevant to the donor’s intention may be considered. Direct evidence relevant to the donor’s intention includes documents and testimony evidencing the donor’s intention; the donor’s own declarations of intention, written or oral; contents of the drafting agent’s files; and written or oral statements made to the donor by the drafting agent or another concerning the contents or effect of the document, to the extent that the donor acquiesced, silently or expressly, in the other person’s statements. A donor’s declarations of intention are found in such utterances as the donor’s oral statements or conversations, letters, memoranda, and written or oral statements instructing the drafting agent regarding the preparation of the donative document.

Id. cmt. f.

¹⁰² *In re Ramdin*, 783 N.Y.S.2d 643, 644 (N.Y. App. Div. 2004) (citations omitted); *see also In re Fabbri’s Will*, 140 N.E.2d 269, 271 (N.Y. 1957) (applying similar analytical framework); *see also* 4 BOWE & PARKER, *supra* note 98, § 30.2 at 8 (“Wills, as well as donative deeds, are unilateral transactions upon which the conveyee has no grounds upon which to claim reliance. It is the subjective intent of the testator that should therefore be allowed to control.”). The *Restatement* similarly rejects the “four corners rule” as archaic and inappropriate for construction of donative transfer documents:

This is an interpretive approach that furthers what ought to be the singular goal in construing a convening authority's action: giving effect to what the convening authority actually intended to accomplish. Unlike contract law, there are no concepts of agreement or reliance with respect to convening authority actions that should permit a construction that differs from the convening authority's actual intent. That is, the approach that is best calculated to giving effect to the convening authority's actual intent is one that considers any and all evidence of the convening authority's actual intent.

Moreover, even courts in states that have not adopted the *Restatement* approach to construing donative transfer documents typically will consider extrinsic evidence of actual intent in one of two ways. First, many courts purporting to apply a "plain meaning" rule nonetheless will consider extrinsic evidence of intent in order to make the threshold determination whether an ambiguity exists in the donative transfer document as drafted.¹⁰³ This was the approach of the CAAF's lead opinion in *Politte*,¹⁰⁴ an approach rejected by the majority in *Wilson* in favor of a "four corners rule" that ignores extrinsic evidence – no matter how compelling – when the convening authority's action is facially unambiguous.¹⁰⁵ Given these courts' willingness to consider any logically relevant evidence of actual intent in determining whether an ambiguity exists, it seems that there is little if any difference between the methodology used by the lead opinion in *Politte* and the *Restatement* approach for construing donative transfer documents. More to the point, there is no good reason why a unilateral document such as a convening authority's action should be construed using principles different from the well-developed body of law for construing other types of unilateral statements of intent.

In addition, even when courts are reluctant to consider extrinsic evidence in order to determine whether a donative transfer document is ambiguous, they generally will reform an otherwise unambiguous document when extrinsic evidence shows by clear and convincing evidence that a mistake of law or fact caused the document to

The necessity for reading the donative document as a whole does not, however, justify the so-called plain-meaning rule, which relies solely on the document's text and excludes extrinsic evidence. The plain-meaning rule is archaic because it unduly stresses a supposed ordinary meaning of the words employed. This rule has long been discredited, and is disapproved here, because the text of a document is so colored by the circumstances surrounding its formulation that evidence regarding the donor's intention is always relevant.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.2 cmt. b (2003).

¹⁰³ See, e.g., *Estate of Torregano*, 352 P.2d 505, 512 (Cal. 1960); *Weir v. Leafgreen*, 186 N.E.2d 293, 296 (Ill. 1962); *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 532-33 (Ind. 2006); *In re Estate of Warren*, No. 262937, 2006 WL 3333091, at *2 (Mich. Ct. App. Nov. 16, 2006); *Harding v. Pederson*, No. A06-837, 2007 WL 1673975, at *3 (Minn. Ct. App. June 5, 2007); *In re Wilton*, 921 A.2d 509, 513 (Pa. Super. Ct. 2007); *Dean v. Estate of Stanley*, No. E2006-02570-COA-R3, 2007 WL 2126359, at *3 (Tenn. Ct. App. July 25, 2007); *Matter of Cohorn's Estate*, 622 S.W.2d 486, 487-88 (Tex. Ct. App. 1981).

¹⁰⁴ *United States v. Politte*, 63 M.J. 24, 25-26 (C.A.A.F. 2006).

¹⁰⁵ *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007).

deviate from the donor's actual intent. The *Restatement* expressly supports reformation of donative transfer documents to correct drafting errors,¹⁰⁶ and notes that courts regularly reform donative transfer documents other than wills to correct such errors.¹⁰⁷ Even with respect to wills, however, the *Restatement* notes that a minority of courts permit reformation of an otherwise unambiguous will, and the trend appears to favor allowing reformation even of wills.¹⁰⁸

Wills, of course, are unique in their own right in that the person whose intent matters to construction is always dead, which necessarily complicates determination of actual intent and arguably supports greater reticence to disturb an unambiguous written document. Moreover, there are often state statutes that prohibit oral wills. Some early commentators have explained courts' refusal to reform wills based on that prohibition,¹⁰⁹ a policy judgment that has some force when the testator is by definition unavailable to rebut oral evidence. Convening authority actions differ in that the relevant convening authority is often – indeed, usually – available to provide direct evidence of his or her subjective intent in taking action on a court-martial sentence.

Even if a rule of construction peculiar to wills, and not to other types of donative instruments, might otherwise have some persuasive value in construing convening authority actions, Rule for Courts-Martial 1107(g)¹¹⁰ eliminates such an argument. R.C.M. 1107(g) provides that “[w]hen the action of the convening . . . authority is incomplete, ambiguous, or contains clerical error, the authority who took the

¹⁰⁶ As the *Restatement* explains:

A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (2003).

¹⁰⁷ See, e.g., *Stover v. Hill*, 94 So. 826, 830 (Ala. 1922); *Reinberg v. Heiby*, 88 N.E.2d 848, 852-53 (Ill. 1949); *Bosse v. Bosse*, 57 S.W.2d 995, 997 (Ky. 1933); *Putnam v. Putnam*, 682 N.E.2d 1351, 1353 (Mass. 1997); *Berman v. Sandler*, 399 N.E.2d 17, 19 (Mass. 1980); *Magnuson v. Diekmann*, 689 N.W.2d 272, 275 (Minn. Ct. App. 2004); *Irish v. Irish*, 65 A.2d 345, 346 (Pa. 1949); *Brinker v. Wobaco Trust, Ltd.*, 610 S.W.2d 160, 162 (Tex. Civ. App. 1980).

¹⁰⁸ See *Stillman v. Teachers Ins. & Annuity Ass'n College Ret. Equities Fund*, 343 F.3d 1311, 1316-17 (10th Cir. 2003) (noting trend of courts to employ rules of construction that best reflect the donor's actual intent); see also *In re Estate of Tolin*, 622 So. 2d 988, 990-91 (Fla. 1993) (reforming will); *Wilson v. First Fla. Bank*, 498 So. 2d 1289, 1291 (Fla. Dist. Ct. App. 1986) (same); *In re Estate of Ikuta*, 639 P.2d 400, 406 (Haw. 1981) (same); *In re Snide*, 418 N.E.2d 656, 656 (N.Y. 1981) (same); *McCauley v. Alexander*, 543 S.W.2d 699, 700 (Tex. Civ. App. 1976) (same); *Estate of Lohr*, 497 N.W.2d 730, 736-37 (Wis. Ct. App. 1993) (same).

¹⁰⁹ BOWE & PARKER, *supra* note 98, § 13.8 at 775-76. Nevertheless, the same authors note that, even as of 1960, a majority of courts were willing to reform a will in order to deny probate to a provision mistakenly included in the will. *Id.* § 13.7 at 770-71.

¹¹⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(g) (2005) [hereinafter R.C.M. 1107(g)]

incomplete, ambiguous, or erroneous action may be instructed by [a military appellate court] to withdraw the original action and substitute a corrected action.”¹¹¹ By its terms, this Rule appears to reflect the policy judgment that, above all else, the goal in applying convening authority actions should be to give effect to the convening authority’s actual intent, rather than treating a signed convening authority’s action as an unalterable *fait accompli*. Given these apparent policy judgments, the CAAF’s treatment of R.C.M. 1107(g) in *Politte* and *Wilson* is difficult to justify. In *Politte*, Judges Erdmann and Baker, whose methodology was adopted by the majority in *Wilson*, waved off R.C.M. 1107(g) as having no application whatsoever when the face of the convening authority’s action is unambiguous:

Without going beyond the terms of the action itself, the words used by the convening authority are susceptible of but one meaning: the punitive discharge was not approved.

*For this reason, the action is not subject to the provisions of R.C.M. 1107(g) which permit correction of an action that is “incomplete, ambiguous, or contains clerical error.” The action here is clear and unambiguous.*¹¹²

In *Wilson* the majority eschewed any discussion whatsoever of R.C.M. 1107(g), apparently concluding (consistent with the *Politte* dissent) that R.C.M. 1107(g) did not apply because, in the *Wilson* majority’s view, the convening authority’s action was facially unambiguous.

Thus, to the *Politte* dissent, and apparently to a majority of the CAAF, a facially unambiguous convening authority’s action never triggers R.C.M. 1107(g). It is far from clear, however, why this would be the case. R.C.M. 1107(g) allows for correction of convening authority actions not only where they are incomplete or ambiguous, but also where they are infected by a “clerical error.” By asserting that a facially unambiguous convening authority’s action does not implicate R.C.M. 1107(g), the *Politte* dissent is necessarily positing that clerical errors never result in a document that is facially unambiguous. Common experience, however, demonstrates that this is not the case. Suppose, for example, a clerk in the convening authority’s office erroneously omits the word “not” from a convening authority’s action. While the resulting product might make grammatical sense, it would remain an error nonetheless as it completely changes the meaning of the executed convening authority’s action. By the same token, where a clerk is directed to draft a convening authority’s action that approves an accused’s dishonorable discharge and orders all punishment other than the discharge executed, if the clerk places the “except for the dishonorable discharge” clause in the wrong part of

¹¹¹ *Id.*

¹¹² United States v. Politte, 63 M.J. 24, 28 (C.A.A.F. 2006) (Erdmann, J., dissenting) (citation omitted) (emphasis added).

the sentence, a “clerical error” has occurred even if the resulting sentence is a grammatically plausible sentence.

Indeed, R.C.M. 1107(g) itself refutes the *Politte* dissent’s reading of it, as it permits correction of both ambiguities *and* clerical errors. If “clerical errors” only exist in ambiguous convening authority actions, then there would be no need for R.C.M. 1107(g) to permit correction of both ambiguities *and* clerical errors, as there would be no clerical errors that are not covered by the provision relating to ambiguities. Therefore, the only reasonable conclusion is that the insertion of the phrase “clerical errors” in R.C.M. 1107(g) is a recognition that there will be instances where a facially unambiguous convening authority’s action is nonetheless infected by a clerical error that changes the meaning of the document. As a general matter, statutes and regulations should be construed to give meaning to each of their words,¹¹³ a command that is particularly appropriate where, as here, the natural meaning of the term “clerical error” does not require that the error result in a facially ambiguous document. Thus, R.C.M. 1107(g) is but one more reason why the CAAF should jettison its contract-based “four corners rule” in favor of an interpretive model that is focused on giving effect to a convening authority’s actual intent, no matter how inartfully expressed.

C. The Dangers of a Partial Adoption of Contract Principles

The willingness of courts construing unilateral documents such as donative transfers to consider extrinsic evidence of intent highlights another flaw in the CAAF’s convening authority’s action jurisprudence. While one would expect the rules of construction for convening authority actions – documents grounded in unilateral intent and command prerogative – to be more receptive to considering evidence of actual intent than the law of contracts, the CAAF’s approach in *Wilson* is actually more hostile to such extrinsic evidence than contract law. Therefore, the analytical model announced in *Wilson* would be of questionable merit *even if* the law of contracts supplied the appropriate rules of construction.

First, the respectability of a pure “four corners rule” of the type applied in *Wilson* is under siege even as a matter of contract law. The *Restatement (Second) of Contracts* rejected a pure “four corners rule” in favor of the *Politte* approach, a jurisprudence that allows consideration of extrinsic evidence in order to make the threshold determination whether an ambiguity exists in a contract.¹¹⁴ The *Restatement* approach has been adopted by a number of courts in the context of contract interpretation.¹¹⁵ Therefore, a

¹¹³ See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” (citing *Duncan v. Walker*, 533 U.S. 167 (2001))).

¹¹⁴ *RESTATEMENT (SECOND) OF CONTRACTS* § 212 cmt. b (1981).

¹¹⁵ See, e.g., *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1046 (7th Cir. 2007); *Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 811-12 (6th Cir. 2007); *Connect Commc’ns Corp. v. Sw Bell Tel., L.P.*, 467 F.3d 703, 709-10 (8th Cir. 2006); *Cruz-Martinez v. Dep’t of Homeland Sec.*, 410 F.3d 1366, 1371 (Fed. Cir. 2005); *DP Aviation v. Smiths Indus. Aero. & Def. Sys.*, 268 F.3d 829, 837-38 (9th Cir. 2001); *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 94 (3d Cir. 2001); *Rossetto v. Pabst*

strict “four corners rule” is of questionable value as a contract concept, to say nothing of unilateral agreements where an objective theory of construction has much less analytical force.

Second, it is a universally accepted concept of contract law that even a facially unambiguous contract may be reformed if clear and convincing evidence demonstrates that, as a result of the contracting parties’ mutual mistake, the contract fails to accurately reflect the parties’ agreement.¹¹⁶ In *Wilson*, however, the CAAF ignored this important contract law concept in holding that facially unambiguous convening authority actions cannot be corrected no matter how compelling the evidence of drafting error.¹¹⁷ Thus, the CAAF’s interpretive approach in *Wilson* not only employs a contract theory of construction better suited to identifying objective intent, but does so only halfway, and ignores important doctrines of contract law that will, regardless of the plain language of a contract, give effect to actual intent when such intent is clear from the surrounding circumstances and extrinsic evidence. Therefore, even if a contract-based theory of construction were defensible – which it really is not in the context of unilateral documents – the fact remains that CAAF’s interpretive model does not even faithfully apply principles of contract construction.

IV. Conclusion

The thesis of this Article is that the CAAF should return to basics in construing convening authority actions. Convening authority actions are supposed to be an unfettered expression of command prerogative, cabined only by the terms of a pretrial agreement and the prohibition on increasing the sentence adjudged at the court-martial.¹¹⁸ Because, as the CAAF has observed,¹¹⁹ a convening authority can do most anything he or she wants with respect to a court-martial sentence, an interpretive methodology in cases of disputed convening authority actions should focus on giving

Brewing Co., 217 F.3d 539, 542-43 (7th Cir. 2000); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998); *AM Int’l v. Graphic Mgmt. Assocs.*, 44 F.3d 572, 575 (7th Cir. 1995); *Foley v. Huntington*, 682 A.2d 1026, 1040 (Conn. Ct. App. 1996); *Drees Co. v. Thompson*, 868 N.E.2d 32, 39 (Ind. Ct. App. 2007); *Hollis v. Garwall, Inc.* 974 P.2d 836, 837 (Wash. 1999).

¹¹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 155 (“Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.”); *see also, e.g., NLRB v. Cook County Sch. Bus, Inc.*, 283 F.3d 888, 893 (7th Cir. 2002); *Berezin v. Regency Sav. Bank*, 234 F.3d 68, 72 (1st Cir. 2000); *Bucholz v. Rural Cmty. Ins. Co.*, 402 F. Supp. 2d 988, 996 (W.D. Wis. 2005); *Cerberus Int’l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1152-54 (Del. 2002); *Lunceford v. Houghtlin*, 170 S.W.3d 453, 464 (Mo. Ct. App. 2005); *Pioneer Res., LLC v. D.R. Johnson Lumber Co.*, 68 P.3d 233, 248-50 (Or. Ct. App. 2003); *Vandenberg v. Cont’l Ins. Co.*, 628 N.W.2d 876, 889-91 (Wis. 2001).

¹¹⁷ *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007).

¹¹⁸ *See supra* notes 95-96 and accompanying text.

¹¹⁹ *See supra* note 96.

effect to the commander's actual intent, rather than applying canons of construction that exclude some of the most probative evidence of actual intent.

Of course, the starting point for this new paradigm should be not with the military appellate courts, but with the commands themselves. Commands should treat a convening authority's action as the solemn yet potent expression of command prerogative that it is. This means exercising due care in drafting a convening authority's action that reflects the commander's actual intent, and recognizing and avoiding the recurring errors that have plagued convening authority actions and led to the "four corners rule" that the CAAF currently employs.

That said, in those cases where a dispute arises over the substance of a convening authority's action, even when the dispute appears to be a function of command sloppiness or incompetence, the CAAF should resist the understandable urge to conclude that the command "has no one to blame but itself" when it is saddled with a convening authority's action that is at odds with the commander's actual intent. A unilateral instrument such as a convening authority's action never should be subject to the law of unintended consequences; the effort must be made at all times to conform a convening authority's action to reflect actual intent. This treatment is consistent with the treatment given to donative transfer documents, where the sole question is the donor's actual intent, and there is no good reason to adopt a contract theory of construction with its basis in giving effect to the *objective* intent for a *bilateral* agreement.

Of course, in the context of the convening authority's action, and unlike with wills and certain other types of donative transfer documents, a court resolving a dispute often will have available to it the best possible evidence of subjective intent, as the convening authority often will be available to clarify his or her intent. Indeed, the CAAF appropriately remanded in *Politte* so that the convening authority could clarify his intent with respect to the adjudged punitive discharge.¹²⁰ As a general matter, the convening authority's clarification of intent is likely to be conclusive, which is appropriate given that the convening authority's action is an act of pure command prerogative in the first place. But, as Judge Crawford correctly observed in *Politte*, it is equally true that a court need not remand for clarification (or seek evidence from the convening authority without a remand) in every case of a disputed convening authority's action, as there clearly could be instances where the surrounding evidence is so clear on the issue of actual intent that an appellate court could resolve the dispute without the need for additional clarification from the convening authority.¹²¹ In such cases, there is nothing wrong with taking the efficient course and construing a convening authority's action in light of the convening authority's obvious intent if the surrounding evidence is clear.

Similarly, in cases where the convening authority is unavailable, or unable to recall his or her actual intent, an appellate court giving effect to the unilateral nature of a convening authority's action can construe the action just as one would construe a will

¹²⁰ United States v. Politte, 63 M.J. 24, 25-26 (C.A.A.F. 2006).

¹²¹ See *id.* at 27 (Crawford, J., concurring in the result).

or other donative transfer document, by considering the written terms of the action and *all* of the surrounding evidence that is probative of actual intent in order to reach a construction that most fairly reflects the convening authority's apparent intent. There is no reason, however, why a court should employ canons of construction, such as the CAAF's "four corners rule" that impose artificial impediments to the quest for actual intent by excluding the evidence most probative of such intent.