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IN THE  
SUPREME COURT OF THE UNITED STATES

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CHARLES CLAYTON, LIEUTENANT COLONEL,  
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

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**On Petition for a Writ of Certiorari  
To the United States Court of Appeals for the  
Armed Forces**

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**PETITION FOR WRIT OF CERTIORARI**

The petitioner, Charles Clayton, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

**OPINIONS BELOW**

The opinion of the United States Army Court of Criminal Appeals is unpublished (Appendix A). The decision of the United States Court of Appeals for the Armed Forces is reported at 68 M.J. 419 (C.A.A.F. 2010) (Appendix B).

## **JURISDICTION**

The judgment for the Court of Appeals for the Armed Forces (CAAF) was entered on March 17, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1259(3), the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Article 67(a)(3), Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 867(a)(3).

## **CONSTITUTIONAL PROVISION INVOLVED**

This case involves the Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

## **STATUTE INVOLVED**

This case also involves Articles 92 and 134, UCMJ; 10 U.S.C. §§ 892 and 934. These sections are provided below:

10 U.S.C. § 892 (2005)

Any person subject to this chapter who-

- (1) violates or fails to obey any lawful general order or regulation;
- (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order;
- (3) is derelict in the performance of his duties, shall be punished as a court-martial may direct.

10 U.S.C. § 934 (2005)

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

**MANUAL FOR COURTS-MARTIAL  
PROVISION INVOLVED**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(f)(2) provides in relevant part:

- (2) *Probable cause determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be based upon any of the following:
- (A) Written statement communicated to the authorizing officer;
  - (B) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or
  - (C) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. The Secretary of Defense or the Secretary concerned may prescribe additional requirements.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 311(b)(3)(C) provides in relevant part:

(C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

## STATEMENT OF THE CASE

### *Procedural History*

On February 13, 2007, petitioner was tried by a military judge sitting as a general court-martial at Fort McPherson, Georgia. The military judge convicted petitioner, pursuant to his conditional pleas, of violating a lawful general order and wrongful possession of child pornography, in violation of Articles 92 and 134, UCMJ; 10 U.S.C. §§ 892 and 934. The military judge sentenced petitioner to confinement for forty months and a dismissal. Pursuant to the terms of the pretrial agreement, the convening authority approved only thirty-six months confinement, but otherwise approved the adjudged sentence. The convening authority also credited petitioner with seven days of confinement credit.

In a per curiam opinion dated May 9, 2008, the Army Court of Criminal Appeals (ACCA) amended the Specification of Charge I regarding the location of the offense, affirmed the amended specification and the balance of the findings, and affirmed the sentence. On June 16, 2008, petitioner filed a petition for grant of review with the CAAF and filed a supplement to the petition on July 31, 2008. On August 7, 2008, respondent filed an opposition to the petition without formal briefing.

On July 22, 2009, the CAAF granted review of the following issue:

WHETHER THE MILITARY JUDGE  
ERRED IN DENYING APPELLANT'S  
MOTION TO SUPPRESS THE  
EVIDENCE SEIZED FROM  
APPELLANT'S QUARTERS.

The CAAF rendered its opinion on March 17, 2010, affirming the decision of ACCA in a 3-2 decision. The CAAF held that the military judge did not err in denying petitioner's motion to suppress evidence seized from petitioner's quarters.

### ***Statement of Facts***

On November 15, 2005, Senior Special Agent (SSA) Glen Watson, of the Department of Homeland Security's Immigration and Customs Enforcement Division (ICE), discovered an Internet child

pornography website group on Google entitled “Pre-Teen Bestiality and Anything Taboo” (Group). He reviewed various postings to the Group, including one picture of child pornography and several requests for various types of child pornography and child exploitation.

SSA Watson informed Google that a group operating on a Google website had posted child pornography. SSA Watson also requested information associated with the Group’s moderator and “approved members.” Google immediately shut down the website on November 15, 2005. Pursuant to a subpoena, Google provided ICE with a list of names and Internet addresses of approximately 130 members of the Group on February 16, 2006. The membership list included the e-mail address of “charlesjclayton@yahoo.com.”

SSA Watson obtained information from Google and Yahoo identifying petitioner as the owner of the e-mail account bearing his name. SSA Watson discovered that petitioner’s Yahoo account had been accessed via Internet Protocol (IP) and traced to a computer owned and operated by the U.S. Army in Kuwait. He learned that petitioner was a lieutenant colonel in the U.S. Army Reserve serving in Kuwait and that he had a residential address in Alpharetta, Georgia.

On March 8, 2006, SSA Watson prepared a detailed report of his investigation (ICE Report) and forwarded it to the Criminal Investigation Command

(CID) Headquarters in Baghdad, Iraq, and then to Kuwait for further investigation.

SSA Watson found no criminal conduct by petitioner, as per his ICE Report. His investigation showed only that, at some unknown time, petitioner registered for membership with the Group.

On April 18, 2006, CID Special Agent (SA) Yolanda McClain received SSA Watson's detailed ICE Report. She spoke with SSA Watson four or five times regarding the facts and status of the investigation. She verified that petitioner was assigned to Kuwait as a Safety Officer, the location of petitioner's quarters, and that he had recently departed for Hawaii for two weeks' leave.

SA McClain drafted an affidavit and request for search authorization to search petitioner's work computer and his room for a personal computer and any media storage devices. Most of the information in the two-page request for search authorization was taken verbatim from SSA Watson's ICE report. In an e-mail exchange with SA McClain, SSA Watson told her that it was possible that petitioner had received child pornography through the Group, but that it was impossible to determine how many times he accessed the Group's website.

SA McClain's affidavit stated that; "[t]he Camp Arifjan CID Office is currently conducting the discovery of apparent child pornography located within one of the Coalition Forces Land Component

Command (CFLCC) CAKU computers and the suspected login user is [Lieutenant Colonel (LTC) Charles J. Clayton . . . .” The affidavit also stated that “[m]embership logs . . . indicated that LTC Clayton requested a ‘Digest’ for the Group, in which he would receive daily e-mails that would contain 25 of the postings to the Group sent as a single e-mail to his account . . . .”

SA McClain’s affidavit also stated that ICE had recently executed two search warrants, resulting in the arrests of the Group’s moderator and media manager.

After coordinating with the CFLCC Safety Office, CID conducted a search of petitioner’s work area. His government-issued laptop was seized, as well as various DVDs and CDs. Sometime later, these items were sent to Germany for further investigation by CID computer analysts, who uncovered no incriminating evidence. The results of CID’s analysis of the evidence seized from petitioner’s workspace were not known for several weeks.

On April 20, 2006, SA McClain met with Major (MAJ) Lyons, the local military magistrate. She showed the magistrate her affidavit, the search authorization request, and SSA Watson’s ICE Report. Both SA McClain and the military magistrate knew that petitioner resided in Building 507, which had wireless Internet access, but this fact was not presented in the affidavit. The material provided by SA McClain to the military magistrate

did not indicate how often petitioner had accessed the Group, if ever, nor did it indicate that he accessed the website from his quarters, or that he owned a personal computer.

The military magistrate reviewed the evidence, principally the ICE Report and SA McClain's affidavit. Later that afternoon, the military magistrate approved the search authorization.

SA McClain searched petitioner's quarters in Building 507. SA McClain discovered and seized three computers, 536 CDs and DVDs, three external hard drives, and other pieces of computer media. A search of the digital media revealed suspected child pornography images and videos, among other things.

On October 19, 2006, petitioner filed a timely motion to suppress the evidence seized in his quarters. Petitioner argued that there was no probable cause for the search authorization. Respondent filed a response on November 1, 2006. On January 9, 2007, the military judge conducted a pre-trial hearing on the motion to suppress. SSA Watson, SA McClain, and MAJ Lyons testified.

SA McClain testified that she wrote the following in her affidavit: "The Camp Arifjan CID Office is currently conducting the discovery of apparent child pornography located within one of the Coalition Forces Land Component Command (CFLCC) CAKU computers and the suspected login user is LTC Charles J. Clayton." She testified that she meant to

say in her affidavit that a military computer in Kuwait had accessed a Yahoo account through a U.S. Army server in Kuwait and that petitioner was a suspect because of his membership in the Group and his use of this Yahoo account.

SA McClain also testified that, based on her CID and law enforcement training, discussions with other CID agents, and prior experience with four or five Kuwait-based investigations regarding child pornography, she was aware that suspects who collect child pornography usually store the images on various media devices. She testified that SSA Watson told her about the arrests of the Group moderator and media manager.

The military judge denied petitioner's motion to suppress and issued written findings of fact and conclusions of law. The military judge concluded that the military magistrate had a substantial basis for concluding that probable cause existed to conduct the search, citing *Illinois v. Gates*, 462 U.S. 213 (1983). The military judge gave substantial deference to the magistrate's finding that probable cause existed to authorize the search. The military judge found that SSA Watson's ICE Report and SA McClain's affidavit established a fair probability that child pornography would be found in petitioner's quarters and media sources. The military judge also concluded, in the alternative, that the evidence was admissible under the good faith exception to the exclusionary rule.

Petitioner entered into a pretrial agreement with the convening authority, agreeing to plead guilty, with exceptions, to the charged offenses. The pretrial agreement preserved petitioner's motion to suppress for appeal. Petitioner was convicted and sentenced on February 13, 2007.

### **REASONS FOR GRANTING THE WRIT**

Petitioner's constitutional right to be secure in his quarters against an unreasonable search without probable cause was violated. There was no probable cause to search petitioner's quarters and media sources because there was no actual nexus between the evidence sought and the place to be searched.

### **SUMMARY OF ARGUMENT**

The Fourth Amendment requires a nexus between the evidence sought and the location to be searched. The trial judge and the appellate court erred when they upheld the military magistrate's ruling despite the complete absence of the presentation to the military magistrate of any information demonstrating the required nexus. Petitioner's subscription to an Internet group that advertises child pornography, without more, is insufficient to support probable cause to search a suspect's residence. Should this Court affirm the decision of the lower appellate court, servicemembers may be subjected to search and seizure based solely on associations or memberships without any evidence that a crime has been committed. The CAAF found

probable cause despite there being no evidence that petitioner ever accessed the Group following his initial subscription, or, that if he did, he accessed the Group from his quarters, that he downloaded any child pornography to his personal computer, or that he stored any images in his quarters. In doing so, the CAAF established a dangerous precedent—if an individual subscribes to an Internet group and that group is alleged to have an illegal purpose, the government has probable cause to obtain a warrant to search the subscriber’s home even when there is no particularized evidence that the subscriber visited the Internet group subsequent to subscription or participated in the group’s functions in any manner. Because the CAAF failed to make an individualized assessment of petitioner’s participation, or lack thereof, the CAAF’s holding violates the Fourth Amendment’s protection against unreasonable searches and seizures.

## ARGUMENT

All Americans, including petitioner, have a fundamental right to be free from “rash and unreasonable interferences with privacy and from unfounded charges of crime.” *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *see also Wilson v. Layne*, 526 U.S. 603, 610 (1999) (“The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home.”); *Brown v. Texas*, 443 U.S. 47, 51 (1979) (“A central concern [is] . . . to assure that an individual’s reasonable expectation of privacy is not subject to arbitrary

invasions solely at the unfettered discretion of officers in the field.”).

“The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought.” *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (abrogated by statute on other grounds). “[T]he necessity of a nexus between the suspected criminal activity and the particular place to be searched is so well established that in the absence of such a connection, ‘the affidavit and resulting warrant are so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” *Poolaw v. Marcantal*, 565 F.3d 721, 734 (10th Cir. 2009) (quoting *United States v. Gonzalez*, 399 F.3d 1225, 1231 (10th Cir. 2005)).

In *Illinois v. Gates*, this Court explained that “probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” 462 U.S. 213, 232 (1983). “The task of the issuing magistrate or judge is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime *will be found in a particular place.*” *Id.* at 238 (emphasis added). In other words, there must be a nexus between the contraband or evidence sought and the place to be searched. *See Id.* Military Rule of Evidence

(M.R.E.), 315(f)(2) recognizes this nexus requirement, defining probable cause as “a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched.”

The military magistrate relied principally on SSA Watson’s ICE Report and SA McClain’s affidavit to determine that probable cause existed to search petitioner’s quarters and media storage devices. Examination of these documents reveals that there was no nexus between the evidence sought and petitioner’s quarters.

SSA Watson’s ICE Report explained how SSA Watson identified petitioner as a suspect but provided no evidence that petitioner had committed any offense. SSA Watson had perused several months of postings to the Group, many of which were photocopied and included in the ICE Report. Not one of these postings mentioned petitioner, was addressed to him, nor sent by him. The ICE Report stated that SSA Watson contacted Google the day he discovered the Group and that Google promptly shut down the Group. SSA Watson documented that, two months after contacting Google, he summoned Google to provide a membership list, which included petitioner’s Yahoo e-mail address. SSA Watson requested that Yahoo inform him who had registered petitioner’s Yahoo e-mail address, when the address had been most recently accessed, and from which IP address. SSA Watson determined that petitioner was the apparent registered owner of the e-mail

address; that he used the Yahoo account most recently via an IP address owned by the U.S. Army in Kuwait; that he opened the e-mail account from an IP address in Alpharetta, Georgia; and that petitioner was likely a servicemember.

SSA Watson's ICE Report failed to state that appellant had possessed or downloaded any child pornography. The ICE Report also failed to state that though it was possible that petitioner had received child pornography through the Group, it was impossible to determine how many times, if any other than requesting a digest, petitioner had accessed the Group. The ICE Report also failed to state that SSA Watson had advised SA McClain to subpoena Yahoo to determine how many times petitioner had accessed the Group. Notably, SSA Watson's ICE Report did not contain a profile of child pornography collectors.

SA McClain's one-and-a-half-page affidavit summarized her experience with "several computer crimes," including child pornography. She explained how SSA discovered the "Pre-teen Bestiality and Anything Taboo" Group and how she identified petitioner as a member. She concluded by stating that the moderator and media manager of the Group had been arrested and confessed to possessing a quantity of child pornography.

SA McClain's affidavit failed to inform the military magistrate that SSA Watson had advised her to subpoena Yahoo to determine how many times

petitioner had accessed the Group. The affidavit also failed to provide any information that petitioner had downloaded any child pornography from the Group or that he participated in any discussions, chats, or other activities as a Group member, save for his request to receive a digest. SA McClain failed to inform the magistrate that there had been no activity on the Group website for months as it had been shut down by Yahoo six months earlier. She had no evidence that petitioner received any digests or that, if he did, the digests contained child pornography. There was no evidence that petitioner used the wireless Internet access available in Building 507.

Not only did SA McClain's affidavit fail to establish a nexus between the possession of child pornography and petitioner's quarters, the affidavit contained a false statement. Though SA McClain wrote that petitioner apparently possessed child pornography on his government issued computer, this statement was false. No child pornography had been located on a CFLCC computer issued or used by petitioner.

In holding that probable cause to search petitioner's quarters exists, the CAAF added a fact not presented to or considered by the military magistrate. The CAAF wrote:

In view of the ease with which laptop computers are transported from work to

home and the ease with which computer media may be replicated on portable devices, the information provided to the magistrate was sufficient to support a practical, commonsense decision by the magistrate that there was a fair probability that contraband would be located in Appellant's quarters.

*United States v. Clayton*, 68 M.J. 419, 424-25 (C.A.A.F. 2010).

The CAAF held that the magistrate was not required to resolve matters such as whether petitioner posted messages to the Group, uploaded or downloaded child pornography, how long petitioner had belonged to the Group, how often petitioner had accessed the website, or whether he received the digests he requested for purposes of a probable cause determination. *Id.* at 425. Such actions “could have been taken to enhance law enforcement investigations as well as questions appropriately addressed to the factfinder at a court-martial in regard to whether the prosecution, at trial, could meet the high standard of proof beyond a reasonable doubt.” *Id.*

The CAAF severed SA McClain's erroneous and misleading statement from the affidavit after concluding that the military magistrate did not consider it significant for the probable cause equation. *Id.* at 426. The CAAF held that the remaining information was “more than adequate to

demonstrate that the magistrate had a substantial basis for finding probable cause to search Appellant's quarters." *Id.* After severing the misleading statement, the CAAF chose not to consider the military judge's alternative holding under the good faith exception to the exclusionary rule. *Id.* See M.R.E. 311(b)(3)(C); *United States v. Leon*, 468 U.S. 897 (1984).

The CAAF relied upon cases from other courts in which "a person's voluntary participation in a website group that had as its purpose the sharing of child pornography supported a probable cause determination that child pornography would be found on the person's computer." *Clayton*, 68 M.J. at 424 (citing *United States v. Gourde*, 440 F.3d 1065, 1072-73 (9th Cir. 2006) (en banc); *United States v. Martin*, 426 F.3d 68, 74-75 (2d Cir. 2005); *United States v. Froman*, 355 F.3d 882, 890-91 (5th Cir. 2004); *United States v. Hutto*, 84 Fed. App'x 6, 8 (10th Cir. 2003)). According to the CAAF, "[t]hese cases reflect a practical, commonsense understanding of the relationship between the active steps that a person might take in obtaining child pornography from a website and retaining it for an extended period of time on that person's computer." *Clayton*, 68 M.J. at 424.

The cases cited by the CAAF majority are inapposite to the instant case. In *Gourde*, that defendant paid \$19.95 per month for over two months to access a website containing child pornography images. 440 F.3d at 1067-68. He likely

paid by credit card and completed a multi-step process to enter his personal and financial information on the website. It is reasonable to assume that an individual who pays for a service is more likely to use that service in order to maximize the return on the investment than an individual who merely clicks on a “subscribe” button. *See id.* at 1070. Gourde did not become a member by accident or by a click of the computer mouse button. *Id.*

The affidavits in *Gourde*, *Martin*, and *Froman*,<sup>1</sup> all listed a behavioral profile of child pornography collectors and detailed the use of computers and other media storage devices by such collectors. 440 F.3d at 1068; 426 F.3d at 72; 355 F.3d at 889. Neither SSA Watson’s ICE Report nor SA McClain’s affidavit contained a behavioral profile of child pornography collectors or details regarding the use of computers and other media storage devices by such collectors. In *Gourde*, *Martin*, and *Froman*, the investigator sought to link those defendants’ suspected possession of child pornography to characteristics common to such perpetrators. In petitioner’s case, there was no such attempt to characterize him as a collector of child pornography or to explain how such collectors store and maintain depictions of child pornography.

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<sup>1</sup> The *Hutto* court issued a very brief decision that did not discuss the contents of the affidavit in question. *United States v. Hutto*, 84 Fed. App’x 6 (10th Cir. 2003). The affidavit in *Hutto* was the same as the affidavits in *Martin* and *Froman*, as all three cases resulted from an investigation by FBI Special Agent Binney.

In the petitioner's case, two of the CAAF judges dissented from the majority's holding. *Clayton*, 68 M.J. at 426 (Ryan, J. and Erdmann, J., dissenting.) The dissenting judges recognized that other circuit courts had reached similar conclusions as the majority, "[b]ut that others have joined our adventures does not make the course any less a folly. The better route is to continue to require, consistent with both M.R.E. 315(f)(2) and *Gates*, 462 U.S. at 238, some nexus between the items sought and the place the government wants to search." *Id.* at 428. (citations omitted.)

The dissenters rejected the majority's reasoning because the military magistrate was not presented with any evidence that petitioner had signed up for wireless Internet service in his barracks or that the wireless Internet connection was routed through the Army server from which petitioner's Yahoo e-mail address had been accessed. *Id.* at 427. Judge Ryan, who authored the dissent, reasoned that petitioner could have checked his personal e-mail at work or at other locations where deployed servicemembers access the Internet. *Id.* She disagreed with the majority's reasoning that, because petitioner's government issue computer was a laptop, it was more likely that he stored child pornography in his quarters, as opposed to another location. *Id.* She wrote, "[t]he portability of both laptops and the digital movies and images the Government sought here makes any 'commonsense' link to Appellant's room exceedingly tenuous." *Id.*

Judge Ryan believed that the CAAF's decision had diluted the "requirement that there be an actual, as opposed to an intuitive or a hypothetical, nexus between the evidence sought and the location to be searched." *Id.* at 426. She wrote:

The [CAAF] today appears to champion the idea that there is something *de minimis* about the Fourth Amendment's requirements when the thing sought by a search authorization or warrant is child pornography. It is now effectively the case that signing up for a website related to that topic-expressing an interest in it, from any location at all-provides sufficient cause to search one's home or living quarters. . . . This reasoning requires three logical inferences: First, if the suspect is a member of an Internet group related to child pornography, he has access to a computer. Second, if he has access to a computer, it is in his home or living quarters. Third, membership in the group equates to downloading and possessing child pornography. The first inference makes sense, but the other two do not—at least on the evidence presented to this magistrate. Once we have held that an expressed interest in child pornography probably means you are viewing and secreting it *somewhere*, it seems equally sustainable to hold

that the government is free to search for that pornography *anywhere*. This comes dangerously close to revising the writs of assistance that were the impetus for enacting the Fourth Amendment in the first place.

*Id.* at 428. (citation omitted).

Judge Ryan's analysis does not stand alone, but is supported by decisions from both the Second and the Ninth Circuits. In two recent cases, the Second Circuit held that the defendants' memberships in online child pornography e-groups were sufficient to establish probable cause for obtaining search warrants of their computers and homes. See *United States v. Coreas*, 419 F.3d 151 (2d Cir. 2005); *United States v. Martin*, 426 F.3d 68 (2d Cir. 2005). The cases were factually similar, but *Coreas* was decided by a different panel than in *Martin*. The *Coreas* panel unanimously agreed with Judge Pooler's dissent in *Martin* that the evidence was insufficient to establish probable cause where the government failed to demonstrate that Martin had downloaded child pornography and that the corrected affidavit supported only the inference that he had used legal, text-based functions of the website outside the purview of prohibited activity. *Coreas*, 419 F.3d. at 159. The *Coreas* panel upheld that defendant's conviction only because of the precedent established by *Martin*. *Id.*

In *United States v. Weber*, the court held that the trial court should have suppressed the evidence of child pornography seized pursuant to a search warrant. 923 F.2d 1338 (9th Cir. 1990). Regarding the logical leaps the trial court took to determine that probable cause existed, the Court reasoned:

But with each succeeding inference, the last reached is less and less likely to be true. Virtual certainty becomes probability, which merges into possibility, which fades into chance. The Fourth Amendment requires a “fair probability” that the items searched for will be found.”

*Id.* at 1344-45 (citation omitted).

The CAAF’s holding appears to reflect society’s disgust with child pornographers and sexual predators. Such disgust with those who prey upon the most innocent members of our society is understandable, but this disgust should not permit an end run around the Fourth Amendment. Though the Group may have provided a forum for a repugnant viewpoint, this does not alone support an inference of criminal conduct. *Coreas*, 419 F.3d at 156. The *Coreas* court stated that a “person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search . . . .” *Id.* (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). See *United States v. Brown*, 951 F.2d 999, 1003 (9th Cir. 1991) (ruling

that individual police officer's membership in a corrupt police unit was not sufficient for probable cause without further proof that the officer actually participated in illegal activities); *United States v. Rubio*, 727 F.2d 786, 793-94 (9th Cir. 1984) (holding that membership in Hell's Angels, without more, was not sufficient for probable cause without particularized allegation that the individual participated in the organization's criminal activity). The majority suggests that because the Group's moderator and media manager confessed to possessing child pornography, then petitioner must have possessed child pornography.

The CAAF majority erroneously attempts to create the required nexus between petitioner and illegal activity by appealing to "commonsense." *Clayton*, 68 M.J. at 424. The majority is correct that a military magistrate presented with a warrant may "make a practical, common sense decision," but that decision must be based on the "circumstances set forth in the affidavit." *Gates*, 462 U.S. at 238. Here, the affidavit fails to establish a sufficient nexus between petitioner and possessing child pornography. Respondent only offered evidence that petitioner clicked on a button to subscribe to the Group. As the *Coreas* court concluded, "[t]he notion that, by this act of clicking a button, [the defendant] provided probable cause for the police to enter his private dwelling and rummage through [his] various . . . personal effects seems utterly repellent to core purposes of the Fourth Amendment." 419 F.3d. at 156.

A subscription to an Internet group that advertises child pornography, without more, is insufficient to support probable cause to search a suspect's residence. Without the need for a nexus between the illegal activity and the place to be searched, one can imagine that the CAAF would find probable cause where an individual might mistakenly click a "subscribe" button in a pop-up ad on a website, or where a concerned parent subscribed to an Internet group to better understand the potential threats to his or her children, or where an individual subscribes to such a website for legitimate research purposes. Should the CAAF holding stand, servicemembers may be subjected to searches and seizures based solely on association or membership without any evidence that these servicemembers have committed a crime.

**CONCLUSION**

WHEREFORE, petitioner respectfully requests that this Court grant his petition.

Respectfully submitted,

MARK TELLITOCCHI  
Colonel, United States Army  
Chief,  
Defense Appellate Division

JONATHAN POTTER  
Lieutenant Colonel,  
United States Army  
Senior Appellate Counsel,  
Defense Appellate Division

TIMOTHY THOMAS  
Major, United States Army  
Appellate Counsel  
Defense Appellate Division

WILLIAM E. CASSARA  
Appellate Counsel  
*Counsel of Record*  
PO Box 2688  
Evans, GA 30809  
707-860-5769  
wcassara1@comcast  
.net

JESS B. ROBERTS  
Captain,  
United States Army  
Appellate Counsel  
Defense Appellate  
Division

*Counsel for Petitioner*