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The Reporter

The Judge Advocate General's Corps

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The Reporter is published quarterly by The Judge Advocate General's School for the Office of The Judge Advocate General, United States Air Force. Contributions from all readers are invited. Items are welcome on any area of the law, legal practice, or procedure that would be of interest to members of the Judge Advocate General's Corps. Items or inquiries should be directed to The Judge Advocate General's School, AFLOA/AFJAGS (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802).

LIEUTENANT GENERAL
RICHARD C. HARDING
The Judge Advocate General of the Air Force

MAJOR GENERAL
STEVEN J. LEPPER
Deputy Judge Advocate General of the Air Force

COLONEL HOLLY M. STONE
Commandant
The Judge Advocate General's School

MAJOR RYAN D. OAKLEY
MAJOR KENNETH A. ARTZ
Editors

THOMASA T. PAUL
Illustrator

Message from the Commandant

Colonel Holly M. Stone

NOW IS THE PERFECT TIME FOR ALL OF US TO REFRESH OUR FOCUS ON MILITARY JUSTICE. With the completion of summer rotations, we are better able to turn our attention to a "revival" in this critical mission and skill set.

The school is officially kicking off its military justice push with this edition of *The Reporter*. It has a distinct military justice theme, starting with TJAG's strategic vision.

Subject matter experts from AFLOA/JAJM then weigh in on several provocative, yet very practical, articles. First, Colonel Ken Theurer and Maj Conrad Huygen discuss a new approach to streamline Resignations in Lieu of Court-Martial (RILO) applications. Colonel Theurer next joins up with Capt Shane McCammon to write on another recent initiative—holding RCM 802 conferences within seven days of docketing a case. This is yet one more method to expedite court-martial processing whenever possible.

Our paralegals are also stepping up to ensure military justice processes are as smooth as possible. TSgt Tanya Lopez, a paralegal assigned to JAJ, provides her thoughts and advice on the management of court reporters.

Folks in the field also provide you with fantastic insight on best practices, to include Colonel Melinda Davis-Perritano, the director of JAS. She uses Carl von Clausewitz—the author of On War, the classic on military theory and strategy—to illustrate how trial counsel can think more strategically in the courtroom. Lt Col Eric Mejia, the SJA at Altus AFB, shares his wisdom on the usefulness of military justice metrics. His fellow SJA from Whiteman AFB, Lt Col Mark Stoup, provides some excellent points on how to re-invigorate base-level military justice training programs.

And last but not least, military justice faculty member Maj Lynn Schmidt covers the latest on the AFOSI's policy on recording subject interviews. This is definitely a challenging area of practice and the article provides great insights on the issues.

On an operational note, you will want to read an article on the CIA's use of unmanned aerial vehicles in Pakistan by Maj Matt Burris, Chief of Space Law at USSTRATCOM. Also, don't miss Maj Rob Chatham's exploration of the lawful use of tactical nuclear weapons. Maj Chatham is the Chief of International Agreements with US FORCES KOREA and captures many lessons from his area of specialty.

This edition of *The Reporter* is a great kickstart to the Air Force's Military Justice revival! We greatly appreciate everyone's contributions. You can bet we will continue to bring you the latest changes and process improvements in military justice. Be sure to share your success stories with us for the widest distribution across the JAG Corps. We look forward to hearing from you!

Contributors

Colonel Kenneth M. Theurer (B.S., Colorado State University; J.D. University of Cincinnati College of Law; LL.M, George Washington University) serves as, Chief, Military Justice Division, Air Force Legal Operations Agency.

Colonel Melinda L. Davis-Perritano (B.A., McMurry Methodist University; J.D., St. Mary's University School of Law; M.S. Air War College) is currently assigned as the Director, Legal Information Services, Air Force Legal Operations Agency.

James W. Russell III (B.S., Texas A&M University; J.D., University of Houston; M.A., University of Northern Colorado) is the Assistant Chief of the Military Justice Division, Air Force Legal Operations Agency. Mr. Russell retired as a colonel from the United States Air Force after completing 30 years active duty.

Lieutenant Colonel Eric F. Mejia (B.S., Arkansas State University; J.D.,University of Arkansas) is the Staff Judge Advocate for the 97th Air Mobility Wing, Altus AFB, OK. He previously served as the Chief, Military Justice and Court Activities Branch, AFLOA/JAJM, and as an area defense counsel.

Lieutenant Colonel Le T. Zimmerman (B.S., University of Florida; J.D., Florida State University) is currently serving as a trial judge in the Atlantic Region, Air Force Trial Judiciary, Bolling Air Force Base, Washington, D.C.

Lieutenant Colonel Mark D. Stoup (B.A., J.D., University of Wyoming) is the Staff Judge Advocate, Office of the Staff Judge Advocate, 509th Bomb Wing, Whiteman Air Force Base, Missouri. He has previously served as an assistant professor at the United States Air Force Academy, Colorado.

Major Conrad L. Huygen (B.A., Humboldt State University; J.A., University of California, Davis) serves as the Assistant Executive Officer, Office of the Assistant Vice Chief of Staff.

Major Robert P. Chatham (LL.M., The Judge Advocate General's School; J.D., Boston University; B.A., California Lutheran University) is presently assigned as Chief, International Agreements, for United States Forces Korea.

Major Lynn Schmidt (B.S., Park College; J.D., University of Arkansas at Little Rock) is an instructor in the Military Justice Division, The Judge Advocate General's School, Maxwell Air Force Base, Alabama.

Major Matthew D. Burris (B.A., University of Tulsa; J.D., University of Tulsa) is the Chief of Space Law, USSTRATCOM, Offutt Air Force Base, Nebraska.

Captain Thomas C. Franzinger (B.A., John Carroll University; J.D. Georgetown University Law Center) is assigned to the Appellate Defense Division, Air Force Legal Operations Agency, Bolling AFB, DC, and previously served as an area defense counsel.

Captain Shane A. McCammon (B.A., University of Utah; J.D., University of Akron) is the Assistant Chief, Justice and Court Activities Branch, Military Justice Division, Air Force Legal Operations Agency.

Technical Sergeant Tanya Lopez is the Court Reporter Administrator assigned to the United States Air Force Judiciary, Air Force Legal Operations Agency, Bolling Air Force Base, Washington, D.C.

Sharon R. Vriesenga (B.S., University of Kentucky; J.D., University of Louisville) is an attorney in the Restoration Branch of the Air Force Legal Operations Agency's Environmental Law Field Support Center in San Antonio, Texas.

A Revival in Military Justice

An Introduction by The Judge Advocate General

by Lieutenant General Richard C. Harding, The Judge Advocate General, United States Air Force

I WRITE THIS INTRODUCTION to *The Reporter* as Chief John Vassallo, Col Doug Cordova and I fly to Afghanistan to visit our JAG Corps' officers and enlisted Airmen, who are deployed in support of Operation Enduring Freedom. All are in harm's way, but they are comforted knowing that they are members of a richly-resourced, highly-trained, and well-disciplined American military force, the best on the face of the earth. A source of their units' strength has long been a respected system of military justice, which enhances combat effectiveness while safeguarding the physical safety of friendly forces. Against that backdrop, I would like to share my thoughts about the importance of military justice, demonstrate how military justice increases combat effectiveness, and emphasize our Corps' vital role in fostering and protecting good order and discipline.

Is military justice job #1? Many have said so. For me, I believe that judge advocates and military paralegals cannot attain full and complete professional development and, at the same time, somehow skip mastery of military justice. Similarly, SJAs cannot claim success, if they failed in their military justice responsibilities. Indeed, an SJA, who can claim the grade of "A" in all other fields of practice but who fails in his leadership role in military justice, fails as an SJA. Why? Simply put, it is military justice that safeguards and fosters military discipline and, in turn, enables the Air Force to *fly, fight* and *win* in air, space and cyberspace. In short, as proud members of the JAG Corps, it is our solemn responsibility to preserve, protect and facilitate the administration of military justice.

Proper administration of military justice enhances combat effectiveness. America can proudly claim to have won most of the wars it has fought because in each armed conflict, the Nation has employed four interdependent military strengths.

First, America brings the very best people into its military services. America's armed forces, especially the United States Air Force, attract and recruit the very best. Each of you is living proof of that truth. Regardless of your source of commissioning and how you were assessed into the JAG Corps, you were highly recruited and were among the very few who were selected to enter our elite Corps. The same degree of selectivity applies to other career fields in the Air Force.

Second, we provide the best training to those lucky few selected to join our ranks. The Air Force trains its people to execute our mission with high fidelity, and the JAG Corps is an outstanding example of that standard of training.

Third, we develop, procure, maintain and employ the best equipment. The Air Force's long-standing claim of air superiority over all peer competitors clearly demonstrates this point.

But there is a fourth element which, in combination with the other three, explains our success in armed conflict. It has been observed that a four-legged table, when missing one its legs, wobbles and falls. So too, when this fourth element of combat effectiveness is missing, we fail. The fourth element is ***discipline***, often referred to as "military discipline" or, more expansively as "good order and discipline." The best people, training and equipment will fail without discipline to mold these elements into an effective fighting force. Without discipline, a fighting force is little more than a dangerous mob.

History is replete with examples of where discipline was used as a combat multiplier or where its absence spelled disaster and defeat. Perhaps one of the best examples of the latter is Saddam Hussein's defeat in the First Gulf War. Saddam confused harsh punishment with discipline. In his mind, the more punishment heaped upon an offense, the more his forces would be disciplined and subjugated to his will. In Saddam's world, even small offenses could equate to large penalties, such as imprisonment and death. Saddam was sadly confused. The result of his approach was not discipline; it was fear…fear of Saddam. While his Republican Guard in the rear of his line of battle was a force to be reckoned with, his front line troops failed to hold their ground, surrendering in large numbers. Fear of Saddam did not sustain them. They lacked discipline.

We are the guardians and stewards of military justice.

Our nation's history is a testament to the importance of discipline in projecting effective combat power. In the earliest years of our nation, General Washington understood the importance of discipline in achieving military success. Over the course of eight years of war, General Washington employed his concept of military discipline to defeat the world's greatest army of its day. We owe our independence and our Nation's birth to General Washington's leadership in military discipline. In 1757, after a series of defeats from which he learned the value of training and sustaining a disciplined force, the General in an instruction to his officers said, "Discipline is the soul of the Army. It makes small numbers formidable, procures success to the weak and esteem to all." Today, we would paraphrase his words by saying, "Discipline is a force multiplier." With this instruction to his officers, General Washington built a legendary militia for the Colony of Virginia in the French and Indian War. In 1776, the General began building our first national army by employing the same disciplinary philosophy.

In later years, other American military leaders taught us additional lessons in military discipline. While many examples exist, some of the best lessons come from General George Patton. Patton is said to have noted that "the field of battle is littered with the corpses of undisciplined men"—translated: discipline saves lives. General Patton also reminded us that "one cannot be undisciplined in small things, but disciplined in big things."

Our Founding Fathers' fear of standing armies and their reliance on militias composed of volunteer citizens gave rise to an American doctrine of military discipline, a doctrine developed and perfected over the last two hundred and thirty-four years. The tenants of this doctrine are critical to judge advocates and paralegals, who wish to master the art of military justice. The tenants of our doctrine are:

Due process enhances discipline. America's mothers and fathers send their sons and daughters to us to join our all-volunteer force because they believe their children will be fairly treated. They believe and expect we will adhere to due process in judging their children, should they violate our code; otherwise, they would not have sent them to us. As a result, when we adhere to due process, we send a message to those parents, parents of other prospective Airmen, and all Airmen everywhere that they can trust the Air Force to treat its Airmen fairly and to protect and promote justice within our service. By protecting our recruiting and retention pipelines, due process safeguards our combat effectiveness. Conversely, when we permit due process to suffer, we discourage enlistment of America's best and brightest; we demoralize and discourage the retention of currently-serving Airmen, who

worry they will likewise be treated unfairly, and as a consequence, we degrade military discipline and combat effectiveness.

You cannot be disciplined in a deployed environment but undisciplined in garrison. Discipline is a learned behavior. It cannot be turned off and on like a light switch. Once attained, it must be carefully maintained through exercise in garrison for use when deployed.

"Sweat the small stuff, and the big stuff will never happen." These are the words of a highly effective high school principal I was privileged to know years ago. She understood the value of discipline. She should have been an Air Force commander. She, like Patton, understood that by ignoring small transgressions, commanders and supervisors necessarily encourage bigger transgressions. When small transgressions are ignored and commanders fail to respond, Airmen take note. It is understandable how they come believe that the rules, which were violated, are neither important to the commander nor to the Air Force. The commander's inaction signals tolerance. What is then considered a minor offense, in the eyes of the community, is elevated on the scale of egregiousness to a new threshold for actionable misbehavior. Conversely, the commander, who appropriately holds subordinates accountable for minor infractions, or demands that supervisors do so, enhances his unit's discipline and deters Airmen from testing the tolerance of misbehavior and committing more serious offenses.

More punishment does not always guarantee more discipline. Often the opposite can be true. Remember the lesson of Saddam Hussein; there is a difference between fear and discipline. The goal of disciplining Airmen, who misbehave, is to hold them accountable and to deter others from doing likewise. Accountability enhances discipline. While punishment in the form of deprivation of liberty, pay, rank, and privileges are visible ways to hold Airmen accountable, these must be tempered to match the gravity of the offense. Too much punishment sends a message which harms the maintenance of discipline by demonstrating that commanders are incapable or unwilling to tailor punishment to the gravity of the offense. Too little punishment likewise harms the maintenance of discipline by demonstrating that commanders lack the will to hold subordinates accountable. Any Chief of Military Justice or the SJA, who believes their role is to always convince commanders to impose the maximum possible punishment under Article 15, does a grave disservice to military discipline. "Hang 'em high" judge advocates can do great damage to military discipline, not to mention the credibility of the JAG Corps. JAGs should advise commanders to consider the full range of options to address misconduct and to impose punishment appropriate to the offense, no less and no more.

Responsive disciplinary processes enhance the unit's state of discipline. Untimely disciplinary processes degrade discipline. Commanders, who fail to initiate disciplinary processes in response to Airmen's misbehavior in a timely fashion, send a signal by their inaction that the misbehavior may be tolerated. They also deprive Airmen of the opportunity to put the punishment for the offense behind them as soon as possible and to demonstrate they have recovered and can now be trusted as part of the combat team. Finally, these commanders fail to assure their unit's state of discipline is repaired as soon as possible. JAGs, who fail to process disciplinary actions on a timely basis, likewise degrade discipline.

If you are privileged to serve as a defense counsel or defense paralegal, you have the primary obligation to protect the rights of your client. Otherwise, it is the sacred responsibility of Air Force judge advocates and paralegals to safeguard unit discipline by helping commanders process disciplinary actions in a timely fashion. Regardless of your role and whether you work in a defense counsel's office or in a base legal office, we are the guardians and stewards of military justice. In this we must not fail.

This edition of *The Reporter* is devoted to the practice of military justice and dedicated to our commitment to a revival in the administration of military justice. Please consider carefully the practice pointers and best practices discussed herein, and join us as we turn the page to the next chapter in our proud history of our Corps.

Why Military Justice Matters

by Colonel Kenneth M. Theurer, USAF, and Mr. James W. Russell, III

It is no accident that the preamble to the Manual for Courts-Martial stresses the importance of military justice

A few weeks ago, we had the opportunity to respond to questions from the Government Accounting Office regarding our military justice system. One question was "why don't you just refer your cases to civilian jurisdictions?" It is a valid question, but unfortunately it shows that for many people, the importance of the Uniform Code of Military Justice (UCMJ) as a tool for commanders to maintain good order and discipline is not readily apparent.

The importance of good order and discipline certainly was not lost on General George Washington. In 1775, General Washington took command of an army composed of "a mixed multitude of people…under very little discipline, order or government."[1] As General Washington understood, an undisciplined military unit is undistinguishable from an armed mob. From the start, General Washington set about inculcating a discipline and used courts-martial to achieve this result. He famously remarked, "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak and esteem to all."[2]

While circumstance, the nature of combat, and the country have changed since General Washington's time, discipline is still critical to mission accomplishment, and the Air Force is not exempt. While the Articles of War are now historic, the law provides commanders with a modern tool—the UCMJ—to enforce discipline. The UCMJ is a valuable aid for commanders if used properly. To be an effective disciplinary tool, punishment administered under the UCMJ needs to be fair and timely. The inability to administer punishment that is both swift and just deprives commanders of a means vital to maintaining an effective, well-disciplined force.

Discipline

The need for discipline in the armed forces has no parallel in the civilian world.

> The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise… An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.'[3]

The military takes thousands of young men and women from throughout society, trains and then arms them with the most lethal weapons man

[1] *The American Soldier Series*, CMH Pub. 70-1-3, *available at* http://www.army.mil/-news/2009/08/23/26105-the-two-sides-of-general-washington/.

[2] George Washington, Letter of Instructions to the Captains of the Virginia Regiments (29 July 1759), *available at* http://www.docstoc.com/docs/3036008/Famous-Quotes-by-George-Washington.

[3] Parker v. Levy, 417 U.S. 733, 743-44 (1974)(quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) and *In re Grimley*, 137 U.S. 147, 153 (1890)).

has developed. These same young Soldiers, Sailors, Airmen, and Marines are then asked to apply lethal force in a prescribed manner—but, at the same time, they are directed to refrain from using force in other circumstances. At all times, they must use the utmost care to prevent collateral damage and maintain public trust. Mission accomplishment and retaining public confidence requires well-disciplined units and self-disciplined individuals.

It is no accident that the preamble to the Manual for Courts-Martial stresses the importance of military justice:

> The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.[4]

Combat forces are required to overcome both any natural reluctance to use lethal force and to place themselves in harm's way. Discipline is the impetus that ensures our forces engage the enemy. For commanders of ground forces in the Army and Marine Corps, the need for well-disciplined forces is evident. Without a considerable amount of discipline, a soldier or marine unit is unlikely to willingly place themselves at risk and to engage the enemy.

History is replete with examples of undisciplined forces fleeing contact with the enemy. Studies have also shown the reluctance of soldiers to actually engage the enemy once in contact.[5] A recent visit to Gettysburg National Military Park brought home the challenges both Union and Confederate officers faced in leading units in battle directly in the face of withering cannon and small arms fire. The Union Army alone suffered more than 23,000 casualties—including 3,155 killed in the three-day battle.[6] Likewise, the D-day invasion at Normandy during World War II required well-disciplined units to overcome their collective fear and storm the beaches.

If not for disciplined members, our Air Force would never have developed into the modern, effective fighting force it is today. Aviation, even in peacetime, is inherently dangerous. Throughout World War II, the Army Air Corps aircrews assigned to the European and Mediterranean Theater of Operations suffered almost 30,000 killed.[7] These pilots and aircrews overcame incredible self-risk in order to engage the enemy. Aerial combat remained perilous during the Vietnam Conflict, and continued to involve a considerable amount of self-risk in order to inflict damage on the enemy.

The necessity of discipline as a means of overcoming self-risk may be less of a factor today than it was even 30 or 40 years ago. Beginning with the first Persian Gulf War in 1990, our Air Force has gained such a tremendous advantage in training and equipment that our aircrews have been able to engage the enemy with relatively low self-risk (if not with impunity). While combat aviation always involves risk, stand-off weapons and air superiority have greatly increased the odds that an American aviator will survive an encounter with the enemy. Today, with the advent of UAVs, our aircrews can now reach out, destroy the enemy, and still be home for dinner. In many ways, for the UAV operator, war might resemble a video game—one in which the UAV operator suffers no personal risk and the enemy is a faceless target.[8]

While the necessity to overcome self-risk once formed the basis for military discipline, the dwindling self-risk experienced by most Airmen today actually makes it *more* important to have a well-disciplined force. As important as discipline is to compel armed forces to engage and destroy the enemy, it is equally important in order to control the use of lethal force. Once again, history provides many examples of war crimes and

[4] Manual for Courts-Martial, United States, pt. I, ¶ 3 (2008).

[5] Dave Grossman, On Killing: The Psychological Cost of Learning to Kill in War and Society, 4 (1995).

[6] Military History Online, *Battle of Gettysburg: Casualties*, http://www.militaryhistoryonline.com/gettysburg/getty4.aspx.

[7] Combined Arms Research Library, *Army Battle Casualties and Nonbattle Deaths in World War II*, http://cgsc.cdmhost.com/cdm4/document.php?CISOROOT=/p4013coll8&CISOPTR=130&REC=1.

[8] Grossman, *supra*, note 5, at 137.

atrocities perpetrated by armed forces against defenseless civilians. The Nanking Massacre, wherein soldiers of the Imperial Japanese Army tortured, raped, and killed thousands of innocent civilians, illustrates the devastation caused by the lack of discipline on a large scale.[9] Mistreatment of prisoners by US forces at Abu Ghraib reminds us that consequences of a breakdown in discipline on even a small scale can have serious consequences.[10]

Discipline also requires conscientious adherence to checklists, rules of engagement, and regulations. For the Air Force, the lethality of our weapons and the potential for collateral damage demand well-disciplined units and individuals. Failure to maintain discipline can have potentially devastating consequences. In 2002, a F-16 pilot disregarded rules of engagement by dropping a GBU-12, 500 lb laser guided bomb on a target and accidently killing four Canadian soldiers and injuring eight others.[11] In 2007, aircrew and weapons transport crews at Minot AFB, North Dakota failed to conduct proper inspections resulting in a B-52 taking off and flying to Barksdale AFB loaded with AGM-129 nuclear cruise missiles.[12] While this particular incident did not result in death or injury, the lack of discipline exhibited by these individuals seriously compromised the public trust in the Air Force.

Commanders are charged with maintaining good order and discipline. While leadership and training are key to creating a disciplined force, breaches of discipline require consequences. The law vests commanders with the UCMJ as their primary tool for administering legal consequences for breaches of discipline.

Accountability and Timeliness

While discipline and punishment are not synonymous, punishment is a necessary component to ensure accountability. The ability to demand accountability and to administer consequences is key to creating good order and discipline within Air Force units. In the simplest sense, punishment is necessary to correct or modify the "undesirable behavior" of a person.[13] From an organizational perspective, however, punishment is important because it conveys "important information about standards of behavior, outcomes of misconduct, and workplace justice."[14] In this context, punishment serves a number of important purposes, including "reinforcing behavioral standards, making an example of the violator, and maintaining the perception that the organization is a just place where people get what they deserve."[15] Given the potential consequences of "undesirable behavior" within a military unit, commanders need the ability to effectively administer punishment.

To be an effective tool for maintaining good order and discipline, punishment needs to be fair and timely.

To be an effective tool for maintaining good order and discipline, punishment needs to be fair and timely. Common sense tells us that punishment needs to be fair to be effective. Why? If people react purely in their own self-interest, punishment—no matter how severe—would seem to be effective. However, studies have shown that when people perceive a punishment to be unfair, the imposition of that punishment often backfires.[16] When people believe that sanctions are unfair, there is a measured decrease in their willingness to cooperate.[17] Timeliness is likewise important both because it is a component of fairness,[18] and because the effects of punishment become discounted over time.[19] One is less

[9] *Scarred by history: The Rape of Nanjing*, BBC News, Apr. 11, 2005, http://news.bbc.co.uk/2/hi/223038.stm; Hata Ikuhiko, *The Nanking Atrocities: Fact and Fable*, 25 Japan Echo 4, (Aug. 1998), *available at* http://www.wellesley.edu/Polisci/wj/China/Nanjing/nanjing2.html.

[10] Seymour M. Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib 22 (2004).

[11] Linda D. Kozaryn, *U.S. Pilots Blamed for Friendly Fire Incident* (June 28, 2002), http://www.defense.gov/news/newsarticle.aspx?id=43703.

[12] Thomas E. Ricks & Joby Warrick, *Tough Punishment Expected for Warhead Errors*, Wash. Post, Oct. 18, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/10/17/AR2007101702300.html.

[13] Kenneth Butterfield, et al. *Organizational Punishment from the Manager's Perspective: An Exploratory Study*, Journal of Managerial Issues, Sept. 22, 2005.

[14] *Id.*

[15] *Id.*

[16] Ernst Fehr & Bettina Rockenbach, *Detrimental Effects of Sanctions on Human Altruism*, 422 Nature 137 (2003).

[17] *Id.*

[18] *Id.*

[19] Yair Listokin, *Crime And (With A Lag) Punishment: The Implications Of Discounting For Equitable Sentencing*, 44 American Crim. L. Rev. 115 (Winter 2007).

deterred by the possibility of being punished at some time in the distant future than the probability of being called immediately to account. Likewise, delayed justice is unfair to the victims and the innocent.

The UCMJ provides a framework that allows for the imposition of punishment that is both fair and timely. Numerous scholars have favorably described the UCMJ in terms of fairness and due process as compared to the civilian criminal justice system.[20] The late Senator Ted Kennedy called the UCMJ the gold standard of military justice. The UCMJ contains numerous provisions, including nonjudicial punishment and summary courts-martial, that envision imposition of punishment very shortly after the offense. The rules themselves suggest that even more serious proceedings under special and general courts-martial should be relatively expeditious. The rules require only three days between referral of charges to a special court-martial and commencement of trial; five days in the case of a general court-martial.

In today's Air Force, the average general court-martial takes more than 70 days from referral to trial and this is only after a lengthy investigation and pre-referral process. It is not unusual for far more than a year to elapse from the date Air Force officials discover an offense to resolution of the criminal allegation in a trial by courts-martial. Even minor offenses handled through nonjudicial punishment suffer inordinate delays. Today, on average, nonjudicial punishment is offered more than 40 days after the date an offense is discovered. The Air Force is failing to leverage the tools available under the UCMJ to impose punishment that is both fair and timely. This failure reduces the effectiveness of the UCMJ as a means to ensure good order and discipline.

A recent news article described the frustration of commanders in one of our sister services with the military justice system.[21] As an alternative to a system they described as slow and resource-intensive, these commanders advocate using administrative procedures to "fire" military offenders and then rely on the civilian criminal justice system to administer whatever criminal consequences the civilians thought appropriate.[22]

While understandable, this is unacceptable. A commander's threat to "fire" a military member needing discipline—the reluctant deployer, the guard who abuses detainees, the pilot whose recklessness results in civilian casualties—rings hollow. It fact, it arguably destroys good order and discipline; does a no-cost, relatively pain-free ticket out of the Air Force have any deterrent value or serve to encourage the 'right stuff'? The UCMJ provides the mechanism to assure just consequences and a disciplined force—and as judge advocates, our mission is to ensure the UCMJ works for our commanders.

As judge advocates, we are responsible for providing advice on disciplinary issues and administering justice under the UCMJ. Military justice is our core competency. When we fail to provide a process that is fair, timely, and accurate, we fail in a central mission. Our system must be responsive to commanders, fair to the accused, transparent to the public, and administered by competent, confident military justice professionals JAG Corps-wide. That is why military justice is not an additional duty—it is "a brick and mortar skill-set" and for base legal offices it needs to be "Job One."

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[20] *See, e.g.*, Fred Karasov, *Military Justice: An Oxymoron?*, 66 Bench and Bar of Minnesota 26 (Dec. 2009).

[21] Andrew Tilghman, *JAG High-op Tempo May Cut Courts-Martial*, Navy Times, June 12, 2010.

[22] Civilian juries asked to render verdicts against members of the military for criminal acts occurring during military operations have expressed reluctance to do so. In a recent civilian criminal case of a former marine for alleged combat crimes resulted in an acquittal.

> Although they said they found him not guilty mainly because the prosecution had not presented forensic evidence, the names of the dead or any eyewitnesses to the shootings, several jurors acknowledged that they also did not feel qualified to judge a Marine's actions in the midst of a battle.
>
> "You don't know what combat is until you're in combat," said jury forewoman Ingrid Wicken, a physical education teacher at Riverside City College. "It's an extraordinary situation, and there just wasn't enough evidence."

Tom Perry, *Marine is Acquitted of Killings of 4 Iraqis*, L.A. Times, Aug. 29, 2008; a*vailable at* http://articles.latimes.com/2008/aug/29/local/me-marine29.

On Trial

An Application of Clausewitzian Military Strategic Thought to Litigation

by Colonel Melinda L. Davis-Perritano, USAF

Major General Carl von Clausewitz's contributions to the world were not displayed through brilliant military maneuvers on the battlefield, but rather through his lifelong study of history and war, tracing "the interaction of intention and planning with the realities of combat and psychology of the soldier," while exploring "the relationship of war to policy, politics, and society."[1] Like "war is a continuation of political activity by other means," litigation is a continuation of human conflict by other means.[2] Just as *On War* helps the Airman, Soldier, Sailor, Marine, and Guardsman think about war, it can also help the trial counsel[3] think strategically about the practice of litigation—both inside and outside of the courtroom.[4]

On the Nature of Trial and War

According to Clausewitz, if an opposing party is to be coerced, you must put them in a situation that is even more unpleasant than the sacrifice you call on him to make.[5] War and litigation both seek to resolve conflict of some sort that can no longer be resolved through the respective sides.[6] While the ways and means are different, both seek to achieve resolution by imposition of the opponent's will. In fact, the adversarial legal system "developed from the medieval antecedents of trial by ordeal, trial by fire, and trial by combat…[and thus] resonates as a strong, militaristic metaphor for the modern civil trial."[7]

Historically, trial by combat, also known as "wager of battle," was a method of conflict resolution utilized by European countries from approximately the 9th century until the 16th century.[8] Individuals, sometimes litigants in mass, would fight to resolve their legal differences with the victor winning the conflict.[9] As these battles evolved, litigants facing trial by combat were assigned an individual, commonly known as a squire, to assist in the ceremonial rules of combat with the opposing squire.[10] "Over time, squires would meet and resolve the disputes during negotiations over combat."[11] The practice of trial by combat for conflict

[1] Carl von Clausewitz, On War, (Michael Howard & Peter Paret eds., Princeton University Press, 1976) (1832).

[2] *Id*. at 87.

[3] The term "trial counsel" as used in this paper refers to a designated judge advocate in the Uniformed Services serving in either a prosecutorial or defense counsel role in a military court-martial. Occasional use of "defense counsel" is used when necessary to distinguish roles.

[4] This paper selected Clausewitz's thoughts and concepts to illustrate the value of military strategic thought in planning and executing litigation strategy. This is not intended to exclude or minimize the value of other military strategists in comparison to Clausewitz.

[5] *Id.* at 77.

[6] *Id*. at 149.

[7] Antonin I. Pribetic, *The Trial Warrior: Applying Sun Tzu's The Art of War to Trial Advocacy*, 45 Alberta L. Rev. 1 (2008).

[8] Joseph J. Ellis, *Founding Brothers* 20-47 (Alfred A. Knopf 2001); http://en.wikipedia.org/wiki/Trial_by_combat.

[9] *Id.*

[10] *Id.*

[11] *Id.*

resolution gradually disappeared by the early 18th century as governing bodies realized "too many innocent men were convicted by the practice just for being physically weak."[12]

A similar system known as "judicial dueling" or "dueling among nobles," also used force for conflict resolution[13] It survived well into the 20th century in the United States,[14] most famously demonstrated in the 1804 duel between Vice President Aaron Burr and Alexander Hamilton. In accordance with the *code duello*, the Founding Fathers exchanged pistol shots at ten paces in an effort to seek resolution over alleged slanderous statements made by Hamilton against Burr.[15] Burr won the duel by killing Hamilton, but was subsequently indicted (though was never tried) in two states for murder. Judicial dueling was subsequently outlawed in the mid-1800s in favor of resolving legal disputes through the modern adversarial system.[16]

Resolving today's legal conflicts relies heavily on the skill of an attorney representing his or her client's interests before an impartial fact-finder. Just as war is subordinate to the political objective, litigation is subordinate to the client's objective in the adversarial system as the trial counsel is bound by ethical rules of professional responsibility to zealously advocate on behalf of their respective client's interests.[17] But, all too often, the novice or unenlightened trial counsel lacks the fundamentals and principles necessary to think in strategic terms. This lack of knowledge may result in trial counsel focusing on case theory at the tactical level while overwhelmed with checklist management, thereby creating a huge void in strategic litigation planning and execution.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Air Force Rules of Prof'l Conduct R. 1.3, (2005).

It is important for trial counsel to truly appreciate that case theory and strategy are two separate, but related functions.

It is important for trial counsel to truly appreciate that case theory and strategy are two separate, but related functions. The case theory is simply an explanation of what happened.[18] The litigation strategy is the way the counsel intends to employ its resources to present the case theory to the fact-finder to achieve the client's objectives. Throughout pretrial, trial, and post-trial, key decisions in each stage must be linked together through strategy. Resources in litigation include attorneys, paralegals, expert and lay witnesses' testimony, and evidence. The decision of how to employ those resources to achieve the client's objectives, along with the employment of discovery, motions, objections, arguments, and jury instructions, as well as the anticipation of opposing counsel's reactions thereto, are all part of a litigation strategy.

According to intellectual property attorney Frederick L. Whitmer in his book *Litigation Is War*, "[t]he development of successful strategy requires perceptive insight as to what the context is in which one's side may best be presented, meaning the context in which it is likeliest to be accepted by a dispassionate fact-finder. The foundation of successful strategy therefore depends upon insight into the workings on interpersonal relations and the psychology of what attracts people to concepts."[19] Because of the diverse and changing nature of litigation, as in war, trial counsel should plan and execute a flexible strategy designed to the specific nature of the litigation.

The Remarkable Trinity

With a clearer understanding of the nature of war and litigation, and strategy and case theory, trial counsel should next think about the "dominant tendencies" of war in an effort to define these

[18] Colonel Timothy J. Cothrel, a designated judge advocate possessing a Masters of Law in Trial Advocacy and recognized expert in litigation, offers the following example of a basic case theory: "a crime has been committed, exceptional investigative work has identified the offender; offender is the accused; jury will use their collective judgment to sit, hear, and see the facts; prosecutor will convince jury by proof beyond a reasonable doubt that the defendant is guilty; court will instruct jury to use common sense and knowledge in the ways of the world; and the defendant will merit serious punishment given the gravity of the crimes committed."

[19] Frederick L. Whitmer, Litigation is War 39 (West Legalworks, 2007).

in regard to litigation.[20] Clausewitz used the remarkable trinity as the foundation for his theory that the "three magnets" of the remarkable trinity—blind emotional force, chance, and reason—had to maintain a balance for successful wager of warfare.[21] Thus, the remarkable trinity is a "framework for understanding war's changeable and diverse nature" which can be illustrated in a shift in the balance among the dominant tendencies.[22]

Litigation is changeable and diverse by its very nature of conflict resolution and the forces unique to each trial. Accordingly, an analogous concept of the remarkable trinity is applicable to litigation in understanding the dynamics which occur within the stages of litigation, and specifically within the battle space of the courtroom. The classic vision of the blindfolded lady justice balancing evidentiary scales does little to illustrate the forces and their respective characteristics interacting within the courtroom. A more useful vision is a three dimensional, interlocking set of triangles with three aspects at the tip of each triangle. The first aspect of the remarkable trinity of litigation is the judge representing objective reason as an impartial arbiter.

The second aspect is trial counsel in representation of their respective clients and analogous to the "scope which the play of courage and talent will enjoy in the realm of probability and chance depend[ing] on the particular" advocacy and skill of the trial counsel.[23] The third aspect[24] is the jury representing the "blind emotional force" and "consciousness of the community" they represent.[25]

[20] Von Clausewitz, *supra* note 1, at 89.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] The jury aspect will merge with the judge aspect of the trinity in cases where an accused elects to be tried by a military judge sitting alone.

[25] National Institute for Trial Advocacy, Master Advocate's Handbook 8 (D. Lake Rumsey, ed., 1986).

Thus, trial counsel should plan and execute a strategy that considers and maintains an appropriate balance among these three forces. Each trial will be unique as the three forces are all unique in their background, age, education, race, gender, religion, affinity, values, beliefs, opinions and attitudes, and life experiences. These three dominant tendencies will mold and shape the trial while influencing every aspect of the courtroom environment. A trial counsel with the ability to recognize the dynamics and interaction of the aspects of the remarkable trinity of litigation can affect its balance by how they wage litigation. The goal is therefore to plan and execute a strategy that best harmonizes the trinity in favor of the client's interests.

Litigation is changeable and diverse by its very nature of conflict resolution.

For example, for many years it was very difficult for a plaintiff to successfully sue a doctor for malpractice because the public's image of the doctor made it difficult for a jury to assess liability. Over time, as that respect began to wane in certain urban jurisdictions, it became possible to obtain large awards. But widespread news reports about these large awards led to a public outcry for "medical malpractice reform," and the pendulum swung back again.[26] In such cases, the trial counsel needs to recognize the jury aspect of the remarkable trinity is unbalanced because of the social underpinnings of the issue. The astute counsel will then counterbalance the jury by developing a strategy that presents the case in a socially acceptable manner within community standards. Another example is illustrated by the cliché that even the most winnable case can be lost if tried before the wrong jury. Thus, in *voir dire*, the trial counsel must learn the individual and collective characteristics of a potential jury panel to select, or rather peremptorily or challenge for cause, jurors likely to unbalance the trinity outside the advantage of the client's objectives; (e.g., defense counsel would seek to challenge persons with similar affinity of the victim, rather than the accused).

Secondly, a trial counsel who is arrogant, overly aggressive, or uncivil may cause the jury

[26] *Id.* at 29.

and judge, to dislike him or her and therefore prejudice the client's case. This hostility can fill the jurors' minds with "extraneous information to which they attach unwarranted inferences" ultimately affecting their verdict, either consciously or unconsciously.[27] Jurors, as groups in general, will interact with individuals who treat others equitably and withdraw from individuals who treat others inequitably.[28] As a result, if a jury is forced to observe and participate in such a relationship, they may be more inclined to restore balance to the relationship through their verdict.

Third, a judge who is impatient, intemperate, or displays prejudice for or against one of the counsel (or the nature of the case), also affects the trinity's balance. At the one extreme of complete imbalance, a judge has judicial discretion to dismiss a case *sua sponte* or upon request of counsel for a directed verdict.[29] Further, the judge's interaction may cause a trial counsel to lose their boldness to make bona fide objections or approach the bench, or even invoke reactions in jurors such as believing the case is without merit or sympathizing with the berated trial counsel. The properly trained counsel should therefore immediately recognize a potential imbalance and take action such as being extra polite, courteous and respectful to the judge, in an attempt to find a healthy equilibrium among these forces in the client's best interests. The ultimate task is to therefore develop a strategy and employ trial tactics that maintain a balanced trinity.

Psychological Forces

Trial counsel must approach every trial mindful of the psychological elements inherent in litigation. This element of human nature "infuses war [trial] with its intangible moral forces."[30] Clausewitz's strong regard for the human element innate within war caused him to have little use for theories that prescribed mathematical calculations with certainty. Litigation, like warfare, will be shaped by the human nature and peculiarities of the individual litigants, jurors, judge, and witnesses, along with the collective human emotions of each party. Every trial takes on its own personality because of the peculiar interaction of the remarkable trinity's dominant tendencies and their respective personality, character, and judicial temperament. These actors' interaction is more likely to define the nature of any given litigation than the controversy itself.[31]

Trial counsel must appreciate that the human element is the most powerful force in litigation.

Trial counsel must appreciate that the human element is the most powerful force in litigation. "Different interests and a wide variety of passions, good and bad, will arise on all sides. Envy and generosity, pride and humility, wrath and compassion—all may appear as effective forces in this great [courtroom] drama."[32] Often times, the human element of emotion is a stronger force than even reason and logic, thus requiring the trial counsel to acquire discerning and intuitive skills and judgment to devise and employ trial tactics with this in mind.

Examples illustrative of psychological force range from the simple to complex. While one trial tactic may force one accused and defense counsel to negotiate a plea, the same trial tactic in another trial may do the exact opposite and only serve to solidify their resolve to fully litigate all charges. Likewise, a direct approach used successfully by defense counsel to attack the victim's credibility during cross examination in one trial may evoke sympathy for the victim and bolster his or her credibility in another trial.

A basic appreciation and understanding of psychology and the human elements, along with how and why a particular trial tactic works, is critically important for trial counsel to fashion an effective strategy that strategically and deliberately employs tactics, rather than haphazardly. This includes understanding the decision-making

[27] Loretta A. Malandro and Lawrence J. Smith, Courtroom Communication Strategies 540 (Kluwer Law Book Publishers, Inc. 1985).

[28] *Id.*

[29] While judges should not abuse this discretion, case law is replete with examples of abuse of authority.

[30] U.S. Marine Corps, Field Manual 1, Warfighting 10, (Mar. 6 1989).

[31] Whitmer, *supra* note 19 at 36.

[32] Von Clausewitz, *supra* note 1, at 188.

It is at this moment when fog and friction is at its greatest that the trial counsel must be able to operate in a flexible manner or risk losing control and command of the courtroom.

process whereby people make decisions by emotion, through their unconscious mind, and validate them with logic through their conscious mind. If a trial counsel has studied this decision-making process, they can plan and employ an effective strategy and trial tactics by structuring communications to "engage the [juror's] conscious mind while communicating to the[ir] unconscious mind."[33]

Fog and Friction

"Everything in war is simple, but the simplest thing is difficult," Clausewitz wrote. "Countless minor incidents—the kind you can never really foresee—combine to lower the general level of performance, so that one always falls far short of the intended goal."[34] Fog and friction of litigation can turn the simplest trial into a complex and difficult one.

A trial counsel generally litigates at all times within some level of fog as they can never truly predict how evidence may be presented or received, or what a witness may or may not testify to on the witness stand, or how the witnesses' testimony on cross examination might affect their case theory's credibility. Additionally, one can never predict with certainty what rulings a judge may issue thereby affecting the course of their respective strategy. It is this uncertainty of fog that can invade a trial as litigation rarely unfolds in the neat manner the trial brief has been arranged. It is at this moment when fog and friction is at its greatest that the trial counsel must be able to operate in a flexible manner or risk losing control and command of the courtroom. Friction may be aggravated by the litigants themselves, opposing counsel, a hostile witness, or even self-induced. Self-induced friction may be caused by lack of preparation, an incoherent strategy, errors in judgment, or lack of confidence, training and experience. Self induced friction is perhaps the most debilitating because of its difficulty, if not impossibility, to overcome in the heat of litigation.

The trial counsel strategist "must…maintain control throughout" to direct the proceedings to the client's objective.[35] According to Clausewitz, "A sensitive and discriminating judgment is called for; a skilled intelligence to scent out the truth" to penetrate the "fog of uncertainty."[36] It is imperative for the trial counsel to develop a similar discriminating judgment and skilled intelligence that becomes intuitive to make the right split-second decisions in keeping with their predefined strategic course. Predefined does not mean strategy is static. To the contrary, strategy must be flexible and fluid enough to anticipate changes in intelligence when the fog has lifted to allow for a change of course when necessary.

It is a daunting task to develop a litigation strategy that provides strategic course throughout the inevitable chaos of litigation yet is flexible enough to allow a change of course in light of an intelligence, or rather evidentiary, failure. Trial advocacy training, experience, preparation, and effective use of discovery are instrumental in helping to develop the skills necessary to create such a strategy. With an even greater honing of skills, the trial counsel "genius" is able to employ the associated uncertainty of fog to the client's advantage by such actions as manipulating opposing counsel into doubting their chances of success by "encouraging a perception that success is likelier to favor his or her own side" and thus, in turn, convincing the jury of their client's

[33] Malandro Et. Al., *supra* note 27 at 349.

[34] *Id.* at 649.

[35] *Id.* at 177.

[36] *Id.* at 101.

position through opposing counsel's loss of bearing and lack of confidence.[37]

Attack and Defense

Clausewitz found that "defense is the inherently stronger form of combat." The terms attack and defense "are not mutually exclusive as the defensive strategy may not be one of passive resistance, but may assume an offensive character, striking at the enemy at the moment of his greatest vulnerability…creating a sudden powerful transition to the offensive—the flashing sword of vengeance—is the greatest moment for the defense"[38] Likewise, the "requirement to concentrate forces at the focus of effort for the offense often necessitates assuming the defensive elsewhere." Thus, the attack, also referred to as the offense, and defense are integral components of one another.[39]

Both the prosecution-plaintiff and accused-defendant will switch in and out of the attack and defense throughout the course of a trial. Strategic and tactical decisions must therefore be made in light of the anticipated reactions and counteractions of opposing counsel, recognizing that "while we are trying to impose our will on our enemy, he is trying to do the same to us."[40]

To do so, however, trial counsel must recognize the elements and characteristics of the offense and defense and specifically know when it is operating in either realm while keeping in mind "the same concepts employed during the offense can be employed during the defense."[41] The effective execution of a prosecution through offensive actions requires the prosecutor to protect and defend any gains already made while simultaneously employing offensive actions in proving the next element. Conversely, a defense counsel of an accused with no burden of proof may elect a strategy of passive resistance to merely defeat the prosecution or may choose an offensive strategy designed to exploit evidentiary weaknesses in the government's case, a faulty strategy, or imbalanced trinity.[42] A lesson for defense counsel is to think creatively and look for unique opportunities to counterattack the prosecution, perhaps when it least suspects it, such as during the government's case-in-chief.

Any strategy built solely upon offensive or defensive principles is likely to fail if it does not anticipate opposing counsel actions and reactions. A defensive counterattack in litigation, as in warfare, disrupts the offensive momentum and can result in the prosecution falling into a defensive mode to react to the defense offensive. The ability of trial counsel to recognize they operate in both modes will gain an advantage in planning and executing a successful strategy.

Decisive Points

"The best strategy is always to be very strong; first in general, and then at the decisive point."[43] Clausewitz's reference to decisive points in war was geographical in nature with specific reference made to waging the attack or defense in the terrain of mountains, rivers and streams, swamps, forests, and flooded areas. Today's decisive points in warfare, especially in asymmetric warfare and within the cyberspace domain, are broader and include non-geographical decisive points.

The decisive points in litigation are unique to each case decided by its respective facts and circumstances, composition of the remarkable trinity, and client's objective, all of which are ultimately linked through the litigation strategy. Decisive points can serve to form a coherent path requiring one point to be met before venturing on to the next point. In rare cases, decisive points may intentionally not be as well-defined to allow for deviant courses of action during litigation. Regardless, trial counsel must at a minimum identify decisive points in relation to its strength against that of the opposition.

Thus, if the defense has notified the judge that it intends to enter into a stipulation of fact with the trial counsel and thereby conceding an element of the crime, the prosecutor should not

[37] Whitmer, *supra* note 19 at 36.

[38] *Id.* at 370.

[39] U.S. Marine Corps, Field Manual 1, *supra* note 30 at 26.

[40] *Id.*

[41] Whitmer, *supra* note 19 at 206.

[42] *Id.* at 225.

[43] Von Clausewitz, *supra* note 1 at 195, 204.

waste effort presenting evidence of that element, but rather should focus its effort on contested (decisive) points. Likewise, defense counsel who recognize they cannot defend, either through passive resistance or offensive counterattack, against the prosecution's maximum force at a specific decisive point, should devise a strategy that concentrates their forces, or rather effort, at another decisive point in the government's case.

For example, in a court-martial in which an accused was charged with committing indecent acts by exposing his penis to his eight year-old daughter, the prosecution had to prove, among other things, the accused committed the act with the intent to gratify his lust or sexual desires. Armed with overwhelming evidence that the accused confessed to exposing his penis to both an investigator and his wife, in addition to the child's eyewitness testimony, the prosecutor thought he had a slam dunk case. However, the accused was acquitted after the jury found he did not display his penis with the intent to satisfy his lust or sexual desires, but rather did so with the intent of providing sex education to his child, which was elicited to the surprise of the prosecutor during defense cross examination of both the wife and child.[44] For defense counsel, the lesson is that if the defense is not strong anywhere else, bring all strength to bear at one decisive point.

Likewise, trial counsel should be especially alert to situations where decisive points of the opposing counsel may not be properly identified or anticipated. For example, during the government's case-in-chief in a prosecution of an accused for assault with a loaded 9mm pistol, the alleged victim, who is also the accused's estranged spouse, testified the accused pointed the gun at her head and then cocked the gun. The police officer who responded to the scene disclosed to defense counsel during a pretrial interview the weapon was found engaged with a fully loaded clip, but no bullet was chambered in the gun. This testimony, elicited during defense counsel's cross-examination of the police officer, was the first time trial counsel had heard this fact as he never questioned the police officer about the condition of the gun. Because it is impossible to cock a fully loaded weapon without chambering a round, the defense counsel built their entire defense and counterattack around the case theory that the wife was lying. Meanwhile, the trial counsel's actions remained paralyzed and inflexible as he wasted his force against collateral matters. The discrepancy in the victim's credibility, coupled with the accused's good military character, became the decisive point adopted by the jury in acquitting the accused.

Decisive points must be actively identified at the earliest stages, even before preferral of charges.

Decisive points must be actively identified at the earliest stages, even before preferral of charges. Trial counsel should consider the first, second, and third order consequences of charging offenses in relation to creating potentially risky decisive points. A narrowly focused charge sheet on the gravamen of the offense(s) will minimize opportunities for opposing counsel to create diversions or "flank attacks drawing attention and strength from the main force" of the prosecution.[45] Predefining, identifying, and avoiding unnecessary decisive points, when applicable, will assist trial counsel in developing and employing a litigation strategy that correctly positions their respective case for the fact finder.[46]

Culminating Point of Victory

Clausewitz proposed that "victory has a culminating point," of which the offender should not pass because the offensive superiority decreases beyond this point with the offender's decrease of strength equaling the defense's gain of strength.[47] According to Brodie's interpretation of Clausewitz, "to push beyond this point without a good chance of an imminent favorable decision is dangerous."[48] Clausewitz questioned "if all this is true, why does the winner persist in pursuing his victorious course, in advancing his offensive?

[44] Albeit the accused used poor judgment in his use of demonstrative aids.

[45] Whitmer, *supra* note 19 at 291.

[46] Positioning is a strategic way of thinking with regard to how to present a case in the minds of the jurors.

[47] Von Clausewitz, *supra* note 1 at 195, 204.

[48] *Id.* at 698.

Can one really still call this a 'utilization of victory?' Would he not do better to stop before he begins to lose the upper hand?"[49] Clausewitz emphasizes the overarching relationship between the culminating point of victory and the strategy for achieving the political objective by stating "Thus the superiority one has or gains in war is only the means and not the end: it must be risked for the sake of the end. But one must know the point to which it can be carried in order not to overshoot the target; otherwise instead of gaining new advantages, one will disgrace oneself."[50]

Ultimately, the culminating point of victory is the point at "which we can no longer sustain the attack and must revert to the defense. It is precisely at this point that the defensive element of the offense is most vulnerable to the offensive element of the defense,—the counterattack."[51] Clausewitz's experience at the Battle of Waterloo and Waivre no doubt attributed to this concept as he watched Napoleon lose all he had gained.[52]

Both trial and defense counsel should develop a concept of culminating point of victory in developing a litigation strategy and tactics in pursuit of the client's objectives, including the evidentiary terms necessary to reach it. Careful evaluation of the facts in the perspective of each side is critical in defining this point. A mis-calculation could result in falling too long or short of the culminating point. Going too far in trial, as in war, can likewise lead to offensive defeat as trial counsel takes an unnecessary risk opening up peripheral areas to attack. The challenge is in developing the judgment necessary to identify the culminating point that to go further would actually weaken the client's position.

Trial counsel must resist asking the one additional question to a witness that ends up being the "one to many" that opens the door to allow introduction of previously suppressed evidence. Or perhaps calling that one cumulative witness that has conflicting testimony on a collateral matter thereby challenging their credibility on a primary issue; or overcharging the case thereby affecting the government's credibility to prove any of the charges; or floundering around in the courtroom with endless and pointless cross-examinations. It is at this point where either counsel may unnecessarily make its case vulnerable through attacks on peripheral matters or risks infusion of collateral information and jury confusion. Counsel who have studied military strategic thought will more accurately identify the culminating point of victory, know when it has reached this point, and have the judgment to stand fast or risk losing gains already achieved.[53]

Every move a counsel makes, whether it is in discovery, charging, or in motion practice, should have a strategic link to its client's objectives.

Conclusion

The true significance for any judge advocate in studying Clausewitz and other great military strategists is to think on a strategic level with an appreciation for the nature of litigation, strategy, theory, and tactics and their respective relationship to one another. Every move a counsel makes, whether it is in discovery, charging, or in motion practice, should have a strategic link to their client's objectives. Decision making at the strategic level requires certain knowledge and skills and intellectual development that empowers them to recognize and analyze the full spectrum of a case in creating and executing an effective strategy. As Clausewitz might say, litigation is no place for irresponsible enthusiasts. " It is a serious means to a serious end, and all its colorful resemblance to a game of chance, all the vicissitudes of passion, courage, imagination, and enthusiasm it includes are merely its special characteristics."[54]

A version of this article was written as a research report submitted to the Air War College Faculty in partial fulfillment of graduation requirements. Major General Steven J. Lepper, currently serving as Depouty Staff Judge Advocate of the Air Force, sponsored the research topic.

[49] *Id.* at 570.

[50] *Id.*

[51] U.S. Marine Corps, Field Manual 1, *supra* note 30 at 35.

[52] Roger Parkinson, Clausewitz A Biography 288 (First Scarborough Books, 1979).

[53] Whitmer, *supra* note 19 at 317.

[54] Von Clausewitz, *supra* note 1 at 86.

AFOSI Begins Recording Subject Interviews

by Major Lynn Schmidt, USAF

Air Force Office of Special Investigations now has orders to record (audio and/or video) suspect interviews during investigations. Although this policy could create problems if not handled carefully, it is a positive step in the judicial process.

While this policy and practice is new for the Air Force, the Navy recently implemented a similar requirement. Other federal law enforcement agencies, and many state, city and county law enforcement agencies have also implemented recording policies. This policy will go a long way not only in protecting the rights of the suspect and the agents engaged in their investigation, but also in ensuring enhanced fairness.

Some who are reluctant to embrace the policy focus primarily on how the actions of AFOSI agents will be perceived by external audiences. However, many in the JA and AFOSI communities believe a recorded interview will serve as a factual record of the interview with the exact words spoken by the suspect and the agents as well as capture the demeanor of the suspect and the agents involved. . . all of which should enhance the perceptions of external audiences. A secondary concern is the potential chilling effect recording will have on a suspect's willingness to continue with the interview. However, studies have shown there is not a substantial chilling effect and in fact, recorded statements are usually more revealing in most cases.

Unresolved logistical issues raised by the policy include whether or not all suspects should be recorded or only those accused of more serious crimes (i.e., murder, rape, sexual assault); whether or not consent should be requested of the suspect before recording; whether or not interviews of alleged victims and witnesses should be recorded; whether or not recordings are of the suspect only, or inclusive of suspect and agent(s). Another issue is the particulars of maintaining and disposing of the recording.

Why did the AF finally adopt this new policy? Some of the factors include: The Naval Criminal Investigative Service led the precedent when it implemented its policy of recording suspect interviews in 2008; state and local law enforcement policies were increasingly moving to recording suspect interviews; local and state police investigators started commenting about their experiences with recording, many (who were formerly skeptical) saying it was the right move to make; and, with all of the television shows about crime investigations, there arguably isn't any real "tradecraft" left to protect. With all of this, AFOSI anticipated that it was a matter of time before the military courts would require them to start recording suspect interviews. AFOSI conducted working groups that included members from the Air Force, Army and Navy Judge Advocate General Corps and law enforcement personnel to develop the October 1, 2009 policy.

The importance of this policy was recently validated when a Japanese delegation contacted the Navy inquiring why they had adopted such a policy of recording suspect interviews, when it was not required by statute or case law. Navy legal representatives provided much of the same rationale for implementing their policy as the US Air Force. Recording suspect interviews will protect an accused's right to counsel, right against self-incrimination, and right to a fair trial. At the same time, recording suspect interviews protects AFOSI agents from false claims of coercion and improper conduct.

HIGH IMPACT

How to Reinvigorate Your Military Justice Training Program

Tell me and I'll forget. Show me and I may remember. Involve me and I will understand.
Chinese proverb

by Lieutenant Colonel Mark D. Stoup, USAF

If you are like me, you've noticed there are fewer opportunities in the Air Force to practice military justice. Court-martial numbers are down across the board, resulting in a smaller cadre of seasoned practitioners. Today's investigators, commanders and judge advocates have more demands, yet fewer cases. This issue isn't raised to insult anyone's advocacy or case management skills, but instead to recognize the simple reality that our most active days of trial practice are likely behind us. As our 10th TJAG Major General David C. Morehouse foresaw back in the 1990's, a decreased caseload all the more underscores the importance of having robust, brick-and-mortar skills training programs in place at our installations.

At the wing level, we often see work products in need of "additional attention," such as reports of investigation, command directed investigation reports, legal reviews, proof analyses, charge sheets, and more. Some of these are clearly substandard, while others just need a subtle change in focus. When you see a trend develop in a particular product in your office, the first response may be to talk to the drafter and provide immediate face-to-face feedback. But what if the problem is systemic? Suppose you need to rebuild your entire military justice program from the ground up. What can you do? What are the most effective and efficient ways to train your team?

Today's Challenges

Group training too often comes in the form of reactive, mass briefings on narrow topics at a Commander's Call or Wing Standup. PowerPoint is all too often the standard delivery tool. Unfortunately, the long term impact of this type of training for complex issues or technical processes is not very beneficial. As U.S. Marine Corps General James N. Mattis,[1] recently said, "PowerPoint makes us stupid."[2]

While it is easy to blame PowerPoint when training fails, the true culprit may be our attention spans.[3] A landmark 1993 study showed that college students were not attentive to what is being said in a lecture 40% of the time and students retain 70% of the information in the first ten minutes of a lecture but only 20% in the last ten minutes. If this was true for undergraduate students in 1993, how much less attentive are we today?

Today a majority of our target audience wields one or more BlackBerry, I-Phone, or similar devices. They receive and send frequent text messages or "tweets." Twitter, for example, (which limits text messages to a mere 140 characters) now has over 100[4] million registered users. Put bluntly, we now have to considerer our informational competition when we train and educate. In order for training and educational efforts to be successful; the instructor absolutely has to capture the attention of the student. The best way to do this is through active learning and there is no better place to practice this than in the area of military justice.

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[1] General Mattis is the Commander, U.S. Joint Forces Command.

[2] Elisabeth Bumiller, *We Have Met the Enemy and He is PowerPoint*, Wall St. J., Apr. 26, 2010, http://www.nytimes.com/2010/04/27/world/27powerpoint.html. This article also included the now infamous PowerPoint slide presented to Gen Stanley McChrystal in Kabul depicting the complexity of American military strategy.

[3] Chet Meyers & Thomas B. Jones, Promoting Active Learning: Strategies For The College Classroom (1993).

[4] *Twitter Snags over 100 Million Users, Eyes Money Making*, The Economic Times, Apr. 15 2010, http://economictimes.indiatimes.com/infotech/internet/Twitter-snags-over-100-million-users-eyes-money-making/articleshow/5808927.cms.

Teaching Methodologies

We have all experienced countless lectures and engaged in Socratic Method. Many of us have even experienced modeling and simulation and field training exercises, such as PACJOLE or JAGFLAG. Each one of these approaches to education has its place. The key for us, as part-time educators, is to know what educational method to use and when to use it. My experiences in this area over the past 16 years have taught me a significant amount about teaching and the actual science of learning

"Learning is not a spectator sport," according to educational leadership professors Arthur Chickering and Zelda Gamson. "People do not learn much just by sitting in class listening to lectures or by reviewing prepackaged information. They must talk about what they are learning, write about it, relate it to past experiences, and apply it to their daily lives. They must make what they learn part of themselves."[5]

People do not learn much just by sitting in class listening to lectures or by reviewing prepackaged information

As legal professionals, a significant part of our job is education. It isn't always formal. On a daily basis, we educate others such as legal assistance clients, commanders and first sergeants. These forms of "education" provide the perfect opportunity to simply lecture or provide highly directive written advice. And we tend to employ the same method when we train groups of people. Falling back on our most common educational experiences, we *lecture*. To spice things up, we might add creative Power Point slides or a funny video, but the main method remains the same. All too often we fail to ask ourselves if this is the most beneficial teaching tool or are we simply using this teaching method because it is most convenient for us.

Active Learning

However, analysis of the research literature suggests that students must do more than just listen: they must read, write, discuss, or be engaged in solving problems. Most important, to be *actively* involved, students must engage in such higher-order thinking tasks as analysis, synthesis, and evaluation.[6]

It is through active learning that we can have the greatest impact on our clients. "Active learning is simply that–having students engage in some activity that forces them to think about and comment on the information presented."We need to realize that mere "[l]ecturing induces passivity of thought, even in the best of students."[7]

Active learning is, in short, anything that students do in a learning environment other than merely passively listening to an instructor's lecture. There are a number of types of active learning and everyone has been exposed to at least a small number of them. Since we have some experience with the concept of active learning, why isn't it employed more? Perhaps the single greatest barrier of all involves risk. Risks include the potential that students will not participate or use higher-order thinking, or that the instructor will lose control. The other most common barrier is time. Clearly, it will take significantly more time and effort to plan, organize and execute an active training session than to simply prepare and deliver a lecture. So what can you do to get started?

Collaboration

In order to help reinvigorate military justice in your office; I have included several examples of active learning models used in the field. Each example also fits within the arena of collaborative learning, which is a subset of active learning.

In loose terms, collaborative learning is a group approach to learning that puts the facilitator and the student on an equal level to find a common solution to a problem. Collaborative learning includes a variety of educational approaches involving joint intellectual effort by students, or students and teachers together. It centers on the

[5] Arthur W. Chickering and Zelda F. Gamson, *Seven Principles for Good Practice*, AAHE Bulletin 39: 3-7, Mar. 1987, *available at* http://www.aahea.org/bulletins/articles/sevenprinciples1987.htm.

[6] *Id.*

[7] *Speaking Of Teaching*, Stanford Newsletter on Teaching, Fall 1993, Vol. 5, No. 1.

students' exploration or application of the course material, not simply the teacher's presentation or explanation of the material.[8] Each example below produced stunning results, both in the form of feedback and improved work product.

There are several added benefits to the collaborative approach. First, involvement of outside offices or agencies fostered much greater team work. For example, after participating in joint training, Security Forces gained appreciation of how the legal office fit into their system. Afterwards, Security Forces personnel were more likely to call JA and ask questions. Simply put, the on-call JAG was more than a matrix notification, we became advisors, subject matter experts and top cover. Second, practice makes perfect. Interagency/interoffice coordination in training led to even greater coordination during real-world situations. All parties better understood their respective roles and the practice of protecting turf was minimized. Finally, the legal office learned significantly more about the wing mission and how the office fit into that mission. The four active learning models I used were a panel discussion, a case study and two role playing events.

Perhaps the easiest active learning model to carry out is a panel discussion.

Panel Discussions

Perhaps the easiest active learning model to carry out is a panel discussion. For example, after noticing a number of problems in the administration of adverse action across the wing, I teamed with the wing command chief and the area defense counsel (ADC). We conducted several panel discussions with enlisted supervisors, all E-6s and above in the wing. After briefly introducing ourselves and the problems we noticed across the wing, we explained our respective roles in the disciplinary process. Our agenda was only to address wing trends and discuss a range of appropriate responses by mid level supervisors. Issues ranged from Article 31 rights advisement to documenting discipline. Our audiences expected a *Jerry Springer Show*, but were surprised to see how much we all actually agreed on issues. They realized that in most cases, the legal office, ADC and command chief had very similar goals. They understood when to seek advice from the legal office and how the ADC can actually be used to help redirect a troubled Airman. Additionally, they got a glimpse into the thought processes at the Wing level as it related to certain types of issues, such as underage drinking and fitness failures.

In short, this type of training is easy to set up. Any command chief, ADC and SJA/DSJA can help facilitate several hours of productive discussion. Build it and people will engage—the command chief will make sure of that.

Role Playing

The first type of role playing used was through an EET exercise. EET is an often overlooked tool, with significant potential for incredible collaboration in military justice training. For example, just about any force protection scenario can work, such as the current active shooter scenario being used Air Force wide in response to the Fort Hood shooting.[9] Our office created a number of military justice injects through EET that allowed security forces to exercise their force protection, while involving other agencies to exercise related functions. The active shooter scenario allows for investigative and law enforcement efforts and can easily raise Fourth and Fifth Amendment issues. Any legal office can send an exercise e-mail through the NIPRnet[10] containing evidence of a potential crime.[11] We also placed a hard copy of the e-mail in a vehicle in plain view. This will create a significant training opportunity for law enforcement, OSI, on-call JAG and the Military Magistrate. At the same time, it won't take away

[8] Barbara L. Smith & Jean T. MacGregor, *What is Collaborative Learning*, Nat'l Center on Postsecondary Teaching, Learning, and Assessment at Pennsylvania State University, (1992).

[9] Major Nidal Hasan, a U.S. Army Psychiatrist, is accused of shooting 43 people on 5 November 2009 at Ft Hood, TX. 30 of those people were wounded because of the shooting and 13 were killed.

[10] Non-classified Internet Protocol Router Network

[11] I created an e-mail chain between an Airman and a civilian with known terrorist ties. The terrorist ties can be provided as an exercise inject through A-2 or OSI a day or two before the exercise starts. Also exercise BOLO (Be On the Look Out) can be issued and facts inserted showing that the civilian was processed onto the base by the subject airman. Finally, the exercise e-mail can suggest additional evidence can be found in the Airman's dorm room.

The Whiteman AFB legal office completed the most unique and all encompassing active learning event in May 2010… Our goal was cradle to grave realism.

from the force protection response to the active shooter. This scenario can continue through capture of a second potential shooter. It will create tough legal issues such as Article 31 rights advisements for a suspected terrorist supporter. Finally, take the exercise through a pre-trial confinement hearing. Your trial counsel will work through issues that young judge advocates don't often have the opportunity to experience.

Be creative in your use of EET. We have also taken a bio-environmental exercise and found ways to involve law enforcement by simply making the hazard a potential meth lab. EET scenarios can carry more risk and preparation time than a panel discussion, but the rewards will be significantly greater. Once you use EET in this fashion, you will be surprised how straightforward it is to actually execute.

Case Studies

The third type of active learning situation we employed was a case study at a Commander/First Sergeant Workshop. JAGs tend to think of this method as largely confined to law schools and ivory-tower academia, but the case study method is easily adaptable in a number of other environments, including an operational Air Force base.

Don't think of case studies only as law and precedent. Instead envision it as a body of facts and experiences handled within a legal framework.

For our Commander/First Sergeant Workshop, we created a case about a hypothetical Airman who progressively got into more trouble. Similar models are used at the JAG School for JASOC and at the US Air Force Academy in the form of a command discretion exercise. I provided participants with the same type of evidence they would get in an actual case, witness statements, Security Forces blotters, urinalysis results, and related materials. The purpose of the training was to discuss the issues based on the hypothetical case file. Each time the facts presented enough ambiguity to allow commanders and first sergeants to discuss a number of potential disciplinary actions. The group collaboratively drafted an LOR, interviewed the subject Airman, offered an Article 15, determined the appropriate punishment, and eventually built a discharge package.

These escalating scenarios were interlaced throughout substantive training on topics such as quality force management and Article 31 rights advisements. Participants were also provided a number of resources to include a CD with sample documents and important web citations. This training was much higher risk and took significantly more resources to plan and execute than the previously mentioned exercises. But the course material was right at our fingertips. Every legal office has faced challenging issues that can form the basis of a case study. Simply find the legal problems that are most often repeated or that carry the most potential for disaster and create a pseudo case file using those situations. The rest will come together quickly.

Crime Scene to Courtroom Training

The Whiteman AFB legal office completed the most unique and all encompassing active learning event in May 2010. We referred to it as "crime scene to court room training." The training took place over an entire week. The target audience was Security Forces patrolmen (the first responders) and our new trial counsel. AFOSI is another potential player, but could not participate due to the timing.

Our goal was cradle to grave realism. We wanted to create a crime scene that was as real-world as possible to allow a complete investiga-

tion followed by a court-martial. To start, we focused the two most common and troubling issues at Whiteman: domestic assault and DUI. Role players were provided as the victim, accused, and witnesses. The role players acted out the crime. This allowed all role players to provide statements about what they actually experienced. Their memory and perception were subjected to scrutiny since they were not limited to a short factual scenario. The crime was scripted and discussed in advance, but role players had the ability to take some liberty with their roles. Witnesses were placed in specific locations to serve as potential witnesses and physical evidence was used to create additional realism. Other agencies such as the medical group and alert photography participated in the exercise.

We all have a number of unique and interesting cases in our portfolio that can be used to teach others… Dust them off and let others benefit from the experience you had.

Day 1 – The Crime

The role players, a husband and wife living in base housing, got into an argument that escalated into a potential aggravated assault. Both parties pushed one another. The husband punched his wife three times then attempted to strangle her, creating enough noise for neighbors to hear. The husband then fled the house in his car. The wife called Security Forces, which prompted a response to both the residence for a domestic assault and to a moving vehicle for a DUI. The husband smelled of alcohol upon exiting the vehicle, failed a field sobriety test and was detained by Security Forces.

Day 2 – Writing the ROI

Security Forces then conducted follow up investigation and wrote their reports. Participants treated each investigative step as they would in a real-world incident. The only artificial constraint was time.

Day 3 – Trial Preparation

Security Forces delivered their ROI to the legal office. Three trial counsel were assigned to the case and had one day to read the report, interview all witnesses and draft charges. They were given absolute charging discretion. The deputy SJA served as the ADC, and had access to all witnesses. He also met with his client prior to the offenses and had a "confidential" discussion with him regarding his role playing. The ADC instructed his client to be cooperative up to a point, but to refuse the breath test and then invoke his Article 31 rights.

As part of our initial planning, we ensured that the facts would allow the ADC to argue a suppression motion.

Day 4 – Trial

A fully litigated court-martial with members was convened. The SJA served as the military judge. All participating Security Forces and witnesses served as members. They were able to watch the entire proceedings to include all Article 39(a) sessions. Several steps in the court as well as a number of instructions were either pared down or skipped entirely. But each step was explained to the members so they understood the entire process. For example, counsel did not conduct voir dire and the court ended at announcement of findings, regardless of the verdict.

As part of our initial planning, we ensured that the facts would allow the ADC to argue a suppression motion. The ADC argued that evidence seized from search of the accused's vehicle should be suppressed in light of Arizona v. Gant.[12] The Security Forces searched the husband's vehicle after the husband was cuffed and removed from the immediate vicinity of his vehicle. Additionally, we told the victim to testify at trial about everything except for the actual assault. She could no longer remember her husband actually hitting her or placing his hands on her throat. This allowed counsel to deal with hearsay issues and refreshing the witness's recollection (which did not work).

Both evidentiary issues showed law enforcement the importance of each piece of evidence and also taught them that they must thoroughly investigate every aspect of a case. Security Forces can now better appreciate the fact that they cannot simply ask a victim to complete an AF Form 1168 (Statement of Suspect/Witness/Complainant) at the crime scene or rely on evidence found at the scene (such as alcohol containers in a vehicle or a blood alcohol test).

[12] Arizona v. Gant, 126 S. Ct. 1710 (2009). The case involved Rodney Gant, who was arrested by Tucson, Arizona police for driving on a suspended driver's license. Gant was secured in the back of a police patrol car. Police officers then searched Gant's vehicle and found cocaine in the pocket of a jacket in the backseat of Gant's car. The Arizona Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement did not justify the search in this case. The U.S. Supreme Court agreed.

Day 5 – Classroom Training and Hotwash

Finally, we conducted substantive legal training on issues such as search and seizure, Article 31 rights, witness interview/interrogation tips, and witness testimony tips. The hotwash included feedback from the actual case as well as broad policy discussions on military justice and discipline.

Conclusion

We all have a number of unique and interesting cases in our portfolio that can be used to teach others. Typically these are cases without a clearly correct or easy answer. Dust them off and let others benefit from the experience you had. Realize that our unique experiences as JAGC members provide us with a powerful teaching device. The ambiguity inherent in many cases sparks discussion that forces students to weigh the credibility and validity of arguments and reasoning. This type of active learning can be applied to a number of areas beyond those mentioned above. Collaborate with other base agencies and your teaching efforts will have an exponentially greater payday. In other words, don't just sit back and tell "war stories." Use them as teaching tools for others.

Justice No Longer Delayed:
Improving Referral-to-Verdict Processing Times

by Colonel Kenneth M. Theurer and Captain Shane A. McCammon, USAF

In a speech to the American Bar Association in August 1970, Chief Justice Warren Burger proclaimed that "a sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people. . ." He then identified three things that "could destroy that confidence and do incalculable damage to society. . ." The first? "That people come to believe that inefficiency and delay will drain even a just judgment of its value."[1]

Justice Burger's warning should sound familiar. Ever since the drafting of the Magna Carta, " a guiding principle in English, and later American, jurisprudence has been justice delayed is justice denied."[2] Despite our familiarity with the concept, Justice Burger's warning is no less dire today than it was 40 years ago. In fact, with each court-martial, we run the risk of draining the value of a just value—and destroying the fabric of good order and discipline—through inefficiency and delay.

Forthcoming new ideas in processing courts-martial—specifically TJAG's new requirement that military judges hold mandatory Rules for Courts-Martial (RCM) 802 conferences, preferrably via video teleconference (VTC), within seven days of referral—will speed up the process. Arraignment during the initial RCM 802 conference may be mandated as well following an initial test run in USAFE.

BACKGROUND

Air Force Instruction 51-201 sets standards for expeditious processing of courts-martial. The primary intent of these standards is to minimize disruptions in the Air Force mission and in the lives of the victims, witnesses, and the accused. The AFI standard for general courts-martial is to complete 80% of all courts from preferral to action within 160 days. Since January 2007, the Air Force has achieved this goal in only 49% of general courts-martial and has averaged 201 days from preferral to action. The standard for special courts-martial is to complete 80% of all courts from preferral to action within 75 days. During this period, the Air Force has achieved this goal in 70% of cases and has averaged 75 days from preferral to action.

AFI 51-201 also sets a standard governing the timely convening of courts following referral of charges. Paragraph 13.11.3.1 states "convene 80% of all courts-martial within 45 days after the accused is served (RCM 602)." Since January 2007, the Air Force achieves this goal in only 36% of general courts-martial. The Air Force is far more successful in moving special courts-martial to trial, with 81% of special courts-martial convened within 45 days.

HISTORICAL COURT-MARTIAL PROCESSING TIMES

Unfortunately, falling short of the standards set by AFI 51-201 is not a recent phenomenon—as **Figures 1 and 2** illustrate, the length of time from date of discovery of an offense to final action in all types of courts-martial has steadily increased over the past 20 years.

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[1] *What's Wrong With the Courts: The Chief Justice Speaks Out*, U.S. NEWS & WORLD REPORT, Aug. 24, 1970, at 68, 71.

[2] *United States v. Wilson*, 10 C.M.A. 398, 403 (1959)(Ferguson, J., dissenting).

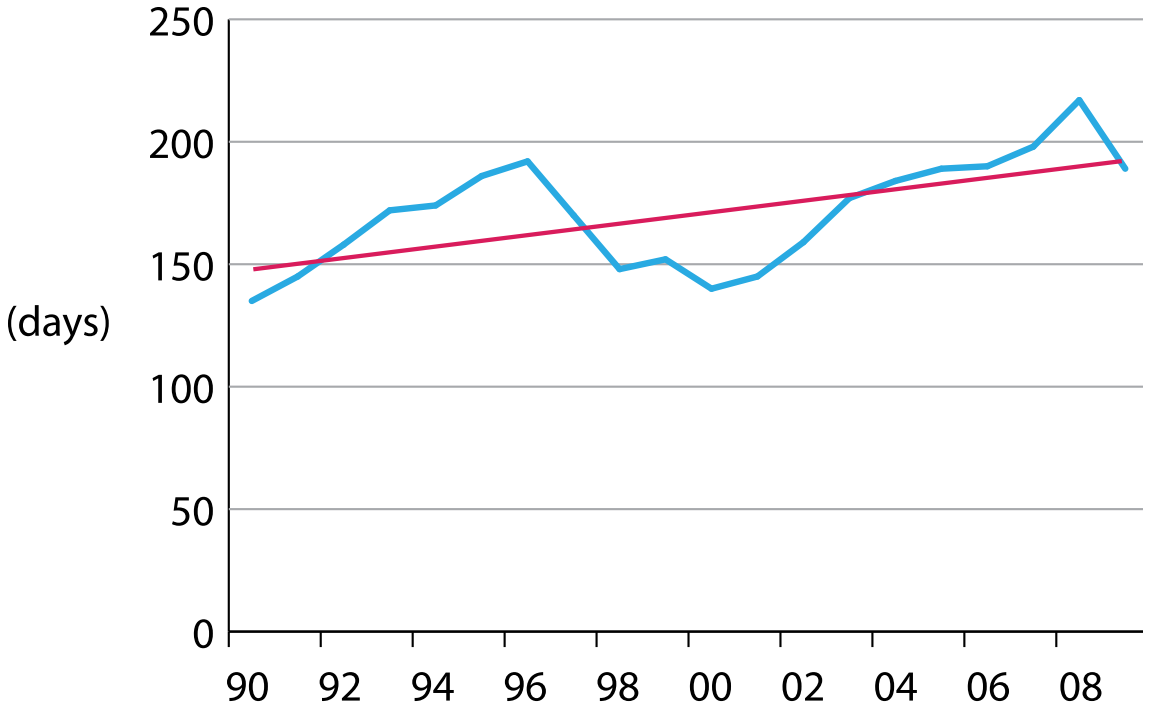


Figure 1: GCM Preferral to Action from 1990 – 2009 (days)

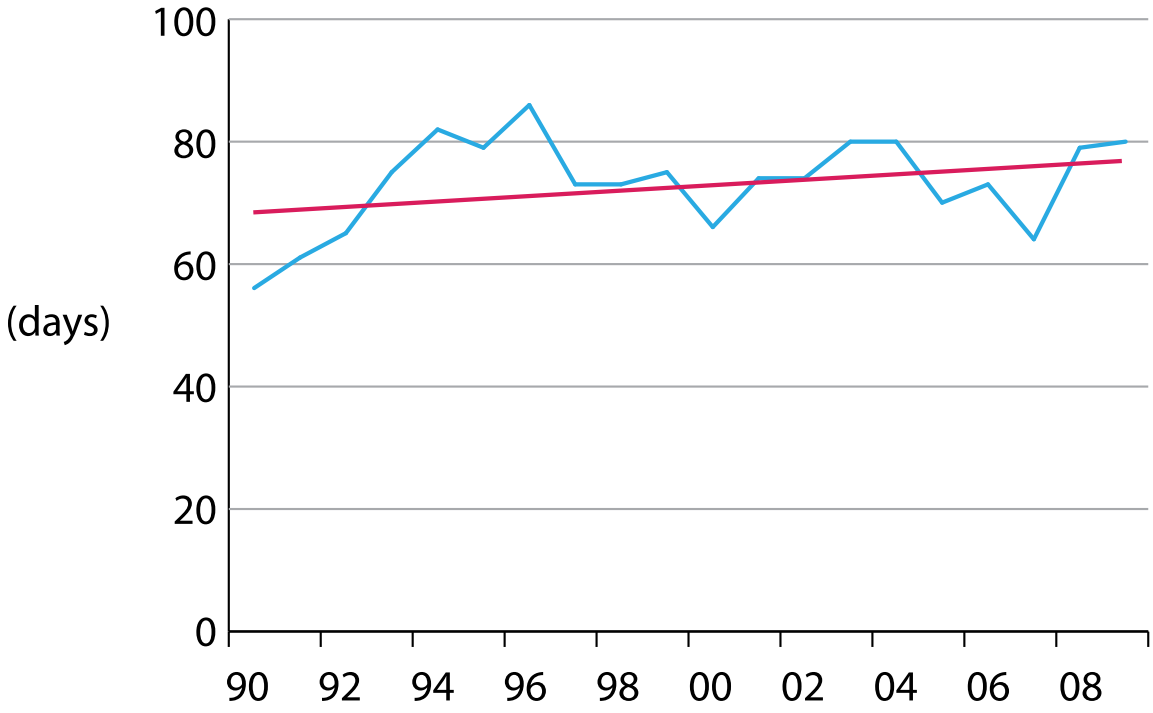


Figure 2: SPCM Preferral to Action from 1990 – 2009 (days)

Consistent with the overall trend, the average time from referral to sentence/acquittal has steadily increased since 1990. **Figure 3** shows the trend in referral to sentence/acquittal for general courts-martial. **Figure 4** reflects the same data for special courts-martial.

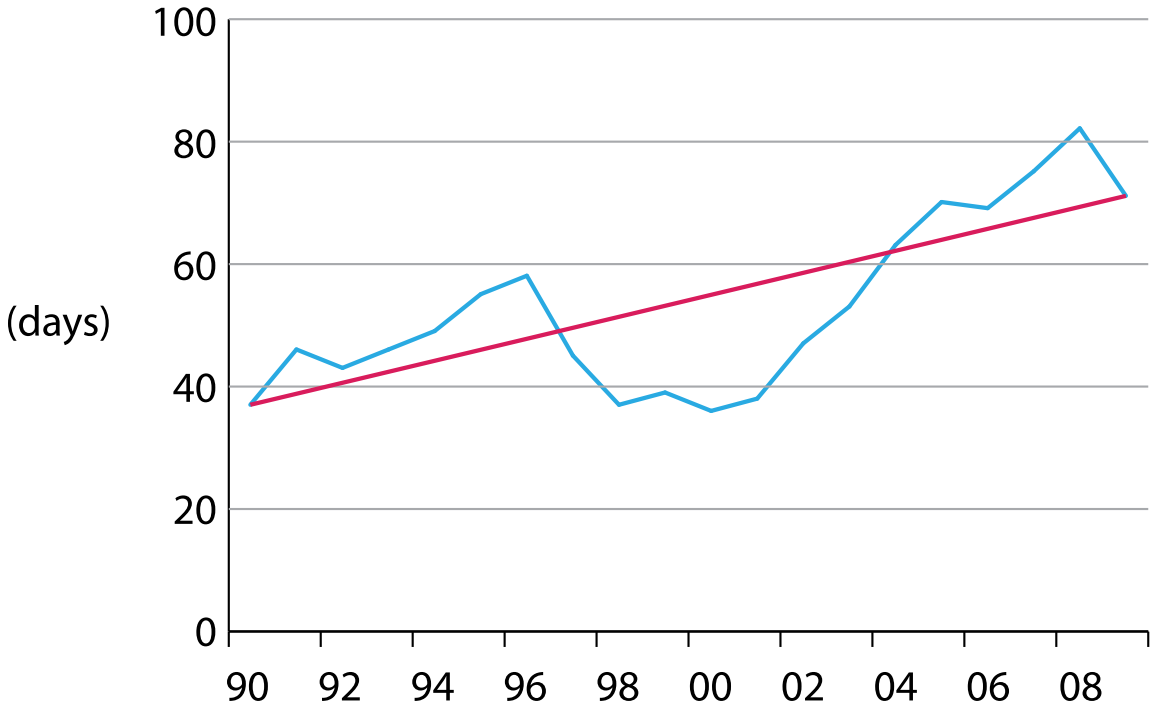


Figure 3: GCM Referral to Sent/Acquittal from 1990 – 2009 (days)

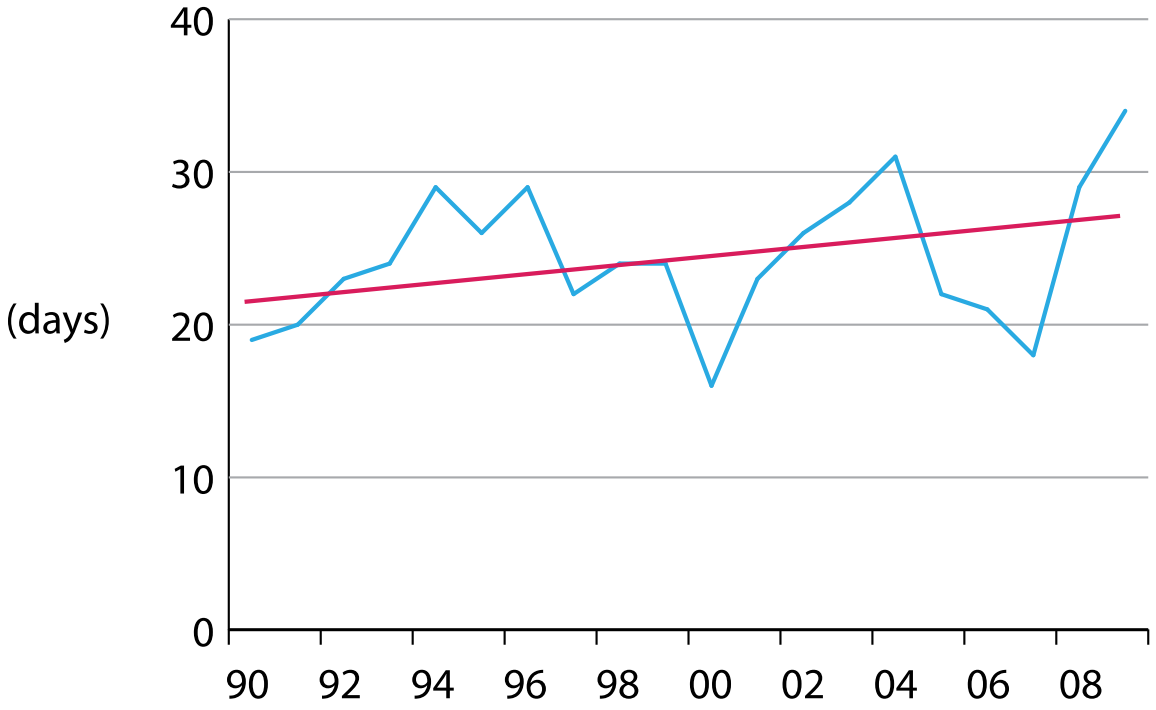


Figure 4: SPCM Referral to Sent/Acquittal from 1990 – 2009 (days)

While all phases of the courts-martial process need improvement, the length between referral and the date of sentence/acquittal is the most pressing issue because it has steadily increased as a percentage of the overall processing time. **(Figure 5.)** For example, in 1990, the period between referral and the date of sentence/acquittal accounted for 27% of the overall preferral-to-action time. In 2009, referral to action accounted for 37% of a much longer time. In short, this portion of the overall problem has been getting worse the fastest—and therefore warrants increased attention. The problem with special courts-martial is less pronounced, although the time from referral to sentence/acquittal remains a significant portion of the overall processing time for these courts. **(Figure 6.)**

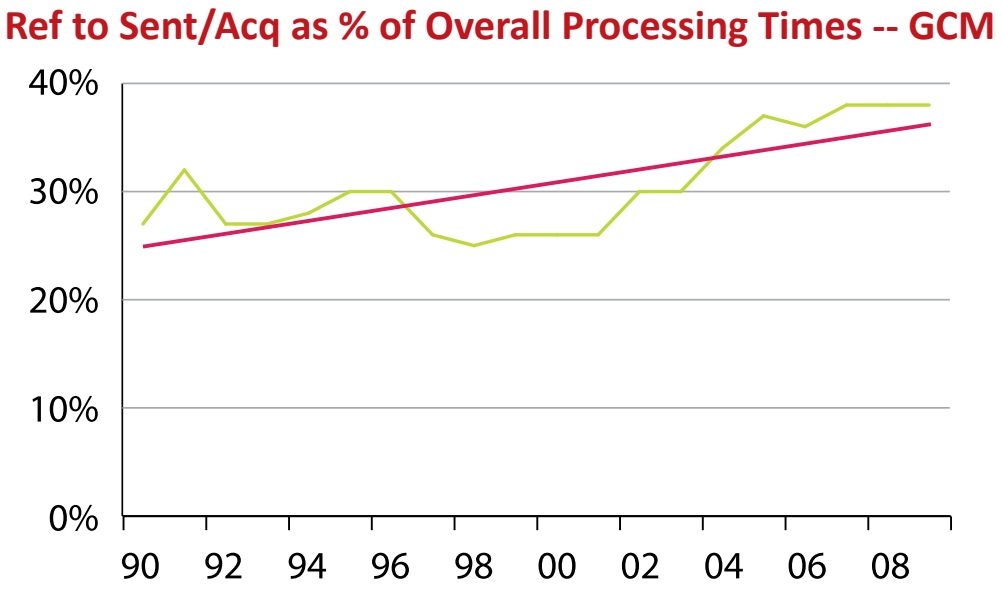


Figure 5: Referral to Sentence/Acquittal as a Percentage of Overall Processing Times – GCMs

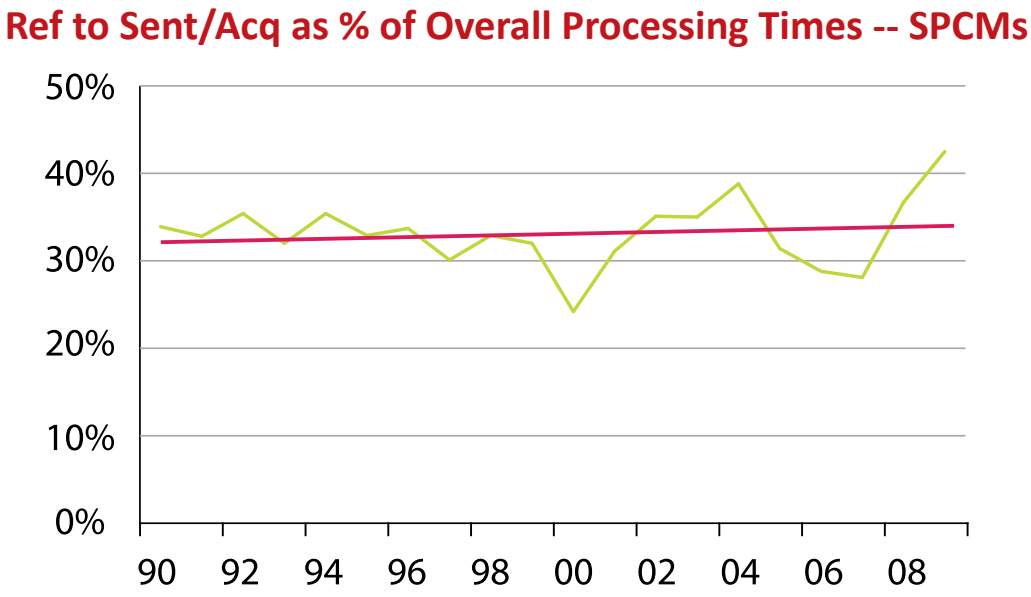


Figure 6: Referral to Sentence/Acquittal as a Percentage of Overall Processing Times – SPCMs

ELIMINATING DELAYS

While there are numerous limiting factors that affect the initial trial date—including availability of counsel, military judges, and expert witnesses—a surprising number of general courts-martial are delayed beyond the initial trial date. (Table 1.) The CDO sets the initial trial date based on the availability of witnesses, counsel, and the military judge. However, in 38% of all general courts-martial, cases are delayed beyond the initial trial date. Reasons for the delay involve discovery issues, disputes over expert witnesses, and RILO processing in officer cases. When cases are delayed, the delay is significant—an average of 62 days. This accounts for approximately 31% of the cumulative referral-to-sentence/acquittal processing times Air Force-wide since 2007. Eliminating all delays would reduce the overall processing times for general courts-martial by 24 days.

Court Type	Number	Number Delayed	Percent Delayed	Avg Delay (Days)
GCM	**673**	**258**	**38%**	**62**
2007	**202**	**87**	**43%**	**64**
2008	**211**	**91**	**43%**	**60**
2009	**210**	**59**	**28%**	**64**
2010	**50**	**21**	**42%**	**58**
SPCM	**1161**	**167**	**14%**	**30**
2007	**345**	**49**	**14%**	**25**
2008	**345**	**47**	**14%**	**34**
2009	**375**	**57**	**15%**	**28**
2010	**96**	**14**	**15%**	**42**
Total	**1834**	**425**	**23%**	**49**

Table 1: Courts Delayed Beyond Initial Trial Date, and Average Delay

While eliminating all delays is impossible, eliminating delays associated with discovery, appointment of experts, and resolution of legal issues in advance of the scheduled trial date would reduce the necessity of delaying scheduled courts. This alone warrants instituting mandatory RCM 802 conferences immediately following referral. The Uniform Rules of Practice Before Air Force Courts-Martial (Uniform Rules) are in the process of being amended to effectuate this change. At the RCM 802 conference, the military judge will be able to require early discovery and motion practice.

Under the current Uniform Rules, the defense is required to file notice of "probable pleas and choice of forum" within 24 hours of service of referred charges. With limited discovery and no resolution of any legal issues, the cautious defense counsel will anticipate "not guilty, members." Both the defense and government then negotiate their initial trial date with the Central Docketing Office based on the assumption that all courts will be litigated with members.

Once the initial trial date is set, all other dates mandated under the Uniform Rules work backwards from the initial trial date. For example, the parties must submit any motions in writing no later than seven calendar days before trial. Witness lists are required five days before trial. The parties must make any notifications required by statute, case law, the Manual for Courts-Martial or regulation (such as alibi, MREs 304(d), 404(b), 412, 413, and innocent ingestion of controlled substances), but not less than 14 duty days prior to trial. While the rules encourage early resolu-

In addition to minimizing delays, conducting RCM 802 conferences early in the court-martial process adds formality and likely will impress upon the accused the seriousness of the military justice proceedings.

tion, the rules do not mandate required actions to be completed any sooner than two weeks before the scheduled trial date. Any unresolved issues are likely to lead to requests for delay—especially when they deal with discovery and witness requests.

However, even more problematic is that the current process works backwards from a trial date based on the "not guilty, members" plea/forum selection decision the defense counsel made in a vacuum. This is the worst-case scenario for courts-martial processing—particularly as there are no litigated specifications in as many as 70% of Air Force courts-martial.[3] To the extent the military judge resolves all disputed legal issues early in the process, the defense counsel can make an informed decision when advising his/her client about the appropriate plea and forum.

Currently, Air Force judges do not routinely become involved in the case during the period between the docketing conference and just before the initial trial date. Unless either the trial counsel or defense counsel files a motion with the court, the military judge may assume the case is proceeding towards trial on the initial trial date. Further, because the Uniform Rules do not require motions to be filed earlier than seven days before the scheduled trial date, pretrial disputes may not be brought to the judge's attention until a week prior to the parties walking into the courtroom.

The bottom line is the current system ensures courts will not be concluded any earlier than the initial trial date, with very few exceptions. Hence, the Uniform Rules are being revised to bring the military judge into the case earlier.

During the period from referral to the scheduled trial date, a military judge is in the best position to move the case towards resolution and to resolve the parties' differences. The CDO will continue to docket cases immediately after referral. Under the new rules, the military judge will conduct a mandatory RCM 802 conference (preferably via VTC) within seven days of referral, permitting the military judge to set specific deadlines for the parties to complete all pretrial discovery, produce witnesses, and submit motions in advance of an initial trial date predicated upon the "not guilty/members" plea and forum selection. Once these common pretrial issues are resolved, the defense counsel will be asked for the accused's plea and forum selection and, if possible, the trial date can be advanced to accommodate a plea.[4]

In addition to minimizing delays, conducting RCM 802 conferences early in the court-martial process adds formality and likely will impress upon the accused the seriousness of the military justice proceedings. In many cases, arraignment, which may eventually be conducted during the initial RCM 802 conference, is the first time the court-martial becomes "real" for an accused. By

[3] JAJM analyzed the results of 2568 courts-martial tried between Jan. 2007 and June 2010. Of these, 797 cases were litigated (31.03%). The overwhelming majority of the cases—1771, or 68.96%—were apparent guilty pleas. Of the cases featuring guilty pleas, 229 involved mixed pleas. There is no simple way to determine whether the government litigated the not guilty specification in these mixed plea cases. Even assuming the government litigated every single not guilty specification in a mixed-plea case—which is unlikely—a staggering 1542 cases (60.05) did not feature any litigated specifications.

[4] Under the RCM and applicable AFIs, VTC is permitted for all portions of the trial up to findings. With VTCs available in all Air Force courtrooms, these RCM 802 conferences should utilize this technology. In addition, Article 39a sessions can be accomplished via VTC. This new process anticipates maximum use of these resources in order to minimize expense and delay associated with RCM 802 conferences and Article 39a sessions.

driving home the reality of the impending trial, an accused may be in a better position to aid in his or her defense. At the very least, by formally involving the accused at this early stage, the accused will be in a better position to make decisions regarding the resolution of his or her case.

As part of this new process, JAT and JAJM will test the feasibility of conducting arraignments early in the post-referral process. The test will be conducted in the European Region. Under this test program, the accused will be arraigned via VTC during the mandatory RCM 802 conference (to be held the first available date following the required three- or five-day waiting period following the accused's receipt of referred charges but within seven days of docketing). After evaluating the test program and making any necessary revisions, the program likely will be implemented Air Force-wide.

CONCLUSION

A military justice system that forces commanders, victims, witnesses, and the accused to wait inordinate periods of time for resolution is fundamentally flawed. Within the Air Force, the time from referral to sentence/acquittal, especially in general courts-martial, continues to expand both in time and as a percentage of the overall processing time. While there are resource issues—such as the availability of military judges, counsel, experts, and other witnesses—there are also process issues that lead to inefficiencies. Trial dates set based on the questionable "not guilty, members" probable plea/forum selection and too many delays from the initial trial date are compounding an already slow process. Conducting RCM 802 conferences immediately following referral will minimize the number and length of delays. The process will allow an earlier conclusion of trials that will ultimately result in guilty pleas. In the end, we must avoid the danger of destroying confidence in the military justice system and draining the value of even a just judgment.

Speedy Justice - Officer Style

How to Make RILOs a Nonfactor in Processing Officer Courts

by Colonel Kenneth M. Theurer and Major Conrad L. Huygen, USAF

COMMISSIONED OFFICERS FACING TRIAL are eligible to submit a request for resignation in lieu of court-martial for the good of the service.[1] These requests, commonly termed "RILOs," provide an alternate means of disposition in the right cases. However, one reason that overall processing times for general courts-martial (GCMs) involving officers take much longer than GCMs of enlisted Airmen who face comparable charges is the inefficient manner in which the Air Force has handled RILO submissions. AFLOA/JAJM has taken a hard look at our current processing times for RILOs, examined each step in the procedure, and has created a new approach to RILOs that streamlines the entire process by leveraging the JAG Corps' existing technological capabilities.

Background

An officer may submit a RILO with the understanding that the Secretary of the Air Force (SAF) may direct a discharge characterized as under other than honorable conditions when the officer's conduct makes him or her subject to trial by court-martial.[2] All RILOs submitted after referral of charges must be "expeditiously" forwarded through command channels to AFLOA/JAJM.[3] First, the wing commander or equivalent authority indorses the resignation to the general court-martial convening authority (GCMCA). Next, the GCMCA refers the resignation to the officer's MAJCOM of assignment. The MAJCOM then endorses the resignation and sends it to AFLOA/JAJM. Finally, AFLOA/JAJM forwards the resignation to SAF through the appropriate Headquarters Air Force offices. When viewed in its most basic form, RILO processing should not be a time-consuming endeavor. Historical data, however, reveals a far different picture.

Historical RILO Processing Times

From 2006-2009, AFLOA/JAJM processed 63 RILOs with an average total processing time of 110 days from the RILO submission date to SAF decision. Of this average time period, the wing-level legal office took 17 days from the date the RILO was tendered by the accused to complete its legal review and forward the package (15% of total processing time), while the GCMCA legal office took nine days to complete its review (8%). The MAJCOM legal office took an additional 21 days to complete its legal review and another nine days to forward the RILO package to AFLOA/JAJM (27%). Upon receipt, AFLOA/JAJM's legal review and staffing through AFLOA/JAJ took an average of 13 days (12%) and then AF/JA spent an average of 10 days reviewing the RILO package (9%). SAF/GC took an average of 18 days to complete its review (16%). Finally, SAF acted on the RILO package after an average of 15 days from the date of SAF/GC's review (13%). ***See Figure 1***.

With RILO processing taking an average of 110 days from start to finish, it is not surprising that the total average time from referral of charges to initial trial date in officer general courts-martial was 116 days during the 2006-2009 study period. For non-RILO GCMs during that same time span, however, the average time from referral to the initial court date was approximately 70 days. The clear challenge that emerged from this disparity

[1] AFI 36-3207, chapter 2, section 2C.

[2] *Id.*

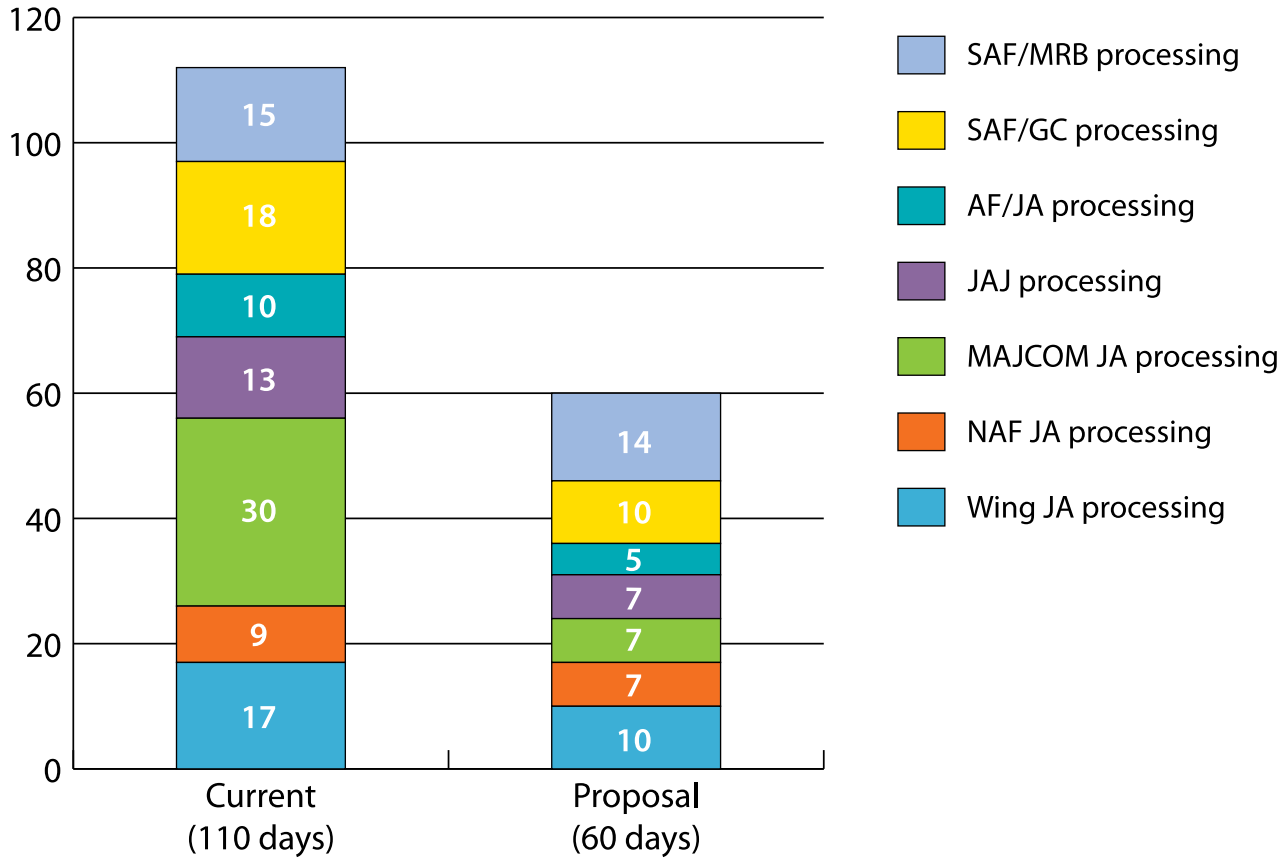
[3] AFI 51-201, para. 8.17.1.

Bases currently average 17 days from receipt of a RILO for processing through the wing commander or equivalent.

Figure 1

RILO Processing Times

Average Days Per Processing Step
2004-2009



was to determine the best way to eliminate RILO processing as a factor for getting officer trials underway.

The Path To Faster Processing

At TJAG's direction, JAJM hosted video teleconference sessions with representatives from each of the MAJCOM legal offices. All participants provided valuable feedback on the current process and each of the offices presented comments and ideas that were carefully evaluated. One common theme that emerged revolved around the importance of having the MAJCOMs continue to play a vital role in RILO decision-making. All parties recognized that because post-referral RILOs require a SAF-level decision, it would be counterproductive to circumvent command input from the MAJCOMs. By using WebDocs as a secure means to quickly transmit packages and accompanying documents via the Internet, the participants felt confident that RILOs would no longer be subject to lengthy periods of inactivity. A detailed evaluation of the entire process by JAJM combined with the MAJCOM inputs revealed opportunities for increased efficiency at every stage. The end result approved by TJAG is a new 60-day processing concept of operations which breaks down as follows: 10 days at the wing level; 7 days at the NAF; 7 days at the MAJCOM; 7 days at JAJM and JAJ combined; 5 days at AF/JA; 10 days at SAF/GC; and 14 days at SAF/MRB. *See Figure 1.*

The New Process

Bases currently average 17 days from receipt of a RILO for processing through the wing commander or equivalent. Packages sent to JAJM often are missing required attachments, to include copies of charges referred to trial and input statements from victims. Under the new process, base legal offices will complete RILO processing in 10 days. The base will post the officer's request and other readily available documents (e.g., Charge Sheet, Article 32 Report, Personal Data Sheet) to a restricted-access WebDocs RILO folder in their "office only" file, with email notice of the upload to the GCMCA/JA, MAJCOM/JA, and JAJM, within one workday of receipt of the defense submission.[4] The base will then staff and upload all remaining documents (e.g., legal review, CC's indorsement) listed on the Comprehensive RILO Checklist to the WebDocs folder within 10 days of receipt of the RILO, with email notice to the GCMCA/JA, MAJCOM/JA, and JAJM. The original RILO package will be mailed using overnight mail to JAJM and one additional copy will be sent via overnight mail to the GCMCA/JA.[5] GCMCA legal offices currently average nine days to process RILOs through GCMCA concurrence. In many cases, a NAF legal review will substantially repeat the information contained in the base legal review without adding new matters.[6] The GCMCA legal office will now have seven days to process the RILO package to include obtaining GCMCA/CC concurrence (or non-concurrence with rationale). A NAF legal review will not be accomplished unless the GCM staff judge advocate non-concurs with the recommendation of the wing; otherwise, the only required JA document will be a memo reflecting concurrence. The GCMCA legal office will notify the base legal office, MAJCOM/JA, and JAJM that GCMCA processing is complete and that additional documents have been posted to the base WebDocs folder. A paper copy of the RILO package will be provided to the MAJCOM if required by that MAJCOM.

MAJCOM legal offices currently take approximately 30 days from receipt of a RILO application until delivery to JAJM. Again, the MAJCOM legal review often repeated preceding legal

[4] AFI 51-201 will be modified to require defense applications to be submitted electronically as well as in paper to speed up the process.

[5] Or as the GCMCA directs.

[6] AFI 51-201, para. 8.17.1.3. states that "[w]ritten legal reviews are not required at intermediate levels of command between the originating legal office and AFLOA/JAJM, unless an intermediate level legal office disagrees with a lower level legal review or needs to add and discuss omitted matters. Otherwise, written coordination indicating concurrence is all that is required."

The RILO checklist has been updated in great detail to capture the new process and is available on FLITE.

reviews without adding new information and it has been exceedingly rare for a MAJCOM commander to non-concur with the recommendation of the GCMCA. MAJCOM legal offices will now have seven days to process RILOs through MAJCOM CC or CV concurrence or non-concurrence. MAJCOM legal offices will then post copies of the concurrence/non-concurrence along with any legal review, if necessary, to WebDocs and will notify the base legal office, GCMCA/JA, and JAJM of the same via email.

JAJM and JAJ together currently take 13 days from receipt of the RILO package from the MAJCOM to delivery to AF/JA. The vast majority of this time has been spent assembling material in the RILO package that was inadvertently left out by the base and overlooked at higher levels of review. JAJM will provide a renewed emphasis through courses and on-line training materials to increase familiarity with RILO processing. The RILO checklist has been updated in great detail to capture the new process and is available on FLITE.[7] Sample templates of well-reasoned legal reviews will also be provided on the JAJM website. Receipt of complete packages will enable JAJM to complete processing in seven days or less.

TJAG's office currently turns RILO packages on average in 10 days, SAF/GC takes 18 days, and SAF/MRB takes 15 days. With a renewed emphasis on RILO processing times, these offices will review RILO packages in five days, 10 days, and 14 days, respectively. The last and perhaps most important piece of the puzzle is that under the current construct, the Central Docketing Office (CDO) sets a "place-holder" date for an officer court approximately 90 days from the submission of a RILO. Under the new paradigm, CDO will docket the earliest possible actual trial date based on availability of witnesses and counsel, but no earlier than 75 days from submission of the RILO. Unlike past practices, this date will be established not as a "place-holder" but as the actual date trial will commence—keeping this date will depend on every office in the decision chain acting on requests and forwarding them as quickly as possible. After an assessment period of 12 months, JAJM will provide TJAG with an analysis of whether the new processing times are realistic and effective. JAJM will also propose metrics to TJAG as necessary for inclusion in AFI 51-201.

Conclusion

Shortly after TJAG approved the new processing construct and the field received word through the Online News Service in May 2010, a base legal office processed and uploaded the first "next generation" RILO package to WebDocs. JAS was able to quickly allow access to this restricted folder so that every office that had a "need to know" could download the package. The base legal review and wing commander's recommendation made its way up the chain of command, JAJM had immediate visibility, and both the NAF and MAJCOM were extremely efficient with their command indorsements and SJA written concurrences. As of the writing of this article, the package had been forwarded to AF/JA within the new time standards, shattering the complacency of the past.

By taking the existing RILO regulatory framework, analyzing AMJAMS data to fully detail each step in the process, and collaborating with the MAJCOM legal offices, JAJM was able to team with JAS to establish a streamlined procedure that will transform RILO processing and return it to its most basic form. Although JAJM will continue to monitor the new framework and make course corrections as they become necessary, the days of RILOs being the long pole in the tent for docketing and litigating officer cases are officially over.

[7] The checklist is posted on FLITE under JAJM's Fields of Practice/Checklists folder.

Back To The Future:

Improving Pre-Offer Nonjudicial Punishment Processing

by Colonel Kenneth M. Theurer and Captain Thomas C. Franzinger, USAF

THE PURPOSE OF NONJUDICIAL PUNISHMENT IS to provide commanders with a prompt and efficient tool for maintaining good order and discipline. That efficiency is only as good as the JAGC's ability to process NJP actions and provide commanders with the service they need to ensure swift justice. Once the commander offers NJP, the process is usually completed within the 20-day metric. However, over the last three years, the amount of time consumed by pre-offer processing has drifted upwards. The JAGC needs to reinforce the importance of timeliness on the front end of the NJP process. The current metric of case ready date to offer provides some measure of the administrative efficiency of a base legal office, but fails to assess the overall health of the military justice process at an installation. What follows outlines the basis for a new metric, in which 80% of all NJP actions must be offered within 10 days from the date of discovery.

BACKGROUND

Under AFI 51-202, pre-offer processing times are tracked using the metric that 90% of NJP actions should be offered within 10 days of the "case ready date," as defined by the criteria listed in Attachment 3 of the AFI. In practice, these criteria have been applied subjectively and inconsistently to the point where the metric has lost its usefulness as a measure of efficiency. In 2007, JAJM stopped providing this metric to TJAG and DJAG as part of Article 6 inspections. Since achieving that metric was de-emphasized, no MAJCOM has met the original goal. At TJAG's direction, JAJM sought a means to reign in inflating pre-offer processing through a new, objective, and consistent metric based on the date of discovery of the misconduct.

METHODOLOGY

JAJM and JAS extracted nonjudicial punishment data for all Article 15s offered in calendar years 2007 through June 2010. Data extracted included date of last offense, date discovered, case ready date, and date offered. Date of discovery was not tracked for NJP actions prior to 2008. In about 5% of the cases, the entries included missing or obviously incorrect data. For the purposes of this analysis, that data was excluded.

ANALYSIS

From a commander's perspective, the efficiency of the NJP process would be best gauged as the time elapsed between when he or she learns of an offense to the time when he or she is able to take disciplinary action. That requires a view of the military justice system as a whole, from the initial discovery by investigators or leadership through final legal review of an NJP action. Of concern to the JAGC, the average time from case ready date to offer in the last three years has steadily increased from 7 days to 9 days. While overall pre-offer processing times have remained constant since 2008 at around 40 days when measured from date of discovery to offer, there is room for improvement.

In order to assess and improve the overall NJP process, base legal offices will continue recording "date of discovery to offer" in all AMJAMs cases. Effective now, the goal is to offer 80% of NJP actions within 10 days. Date of discovery to date offered will be included as an AMJAMS field, and processing times reports will show the percentage of NJP actions offered within 10 days of the date of discovery. AFI 51-202 will be modified to reflect these changes. JAJM will continue to monitor this processing time goal to determine whether it needs adjustment.

Current metrics may gauge efficiencies within JA functional control, but that does not measure the overall health of the military justice system.

This new metric of "date of discovery to offer" is intended to provide a more comprehensive view of military justice at an installation. Current metrics may gauge efficiencies within JA functional control, but that does not measure the overall health of the military justice system. No legal office has absolute control over processing times for nonjudicial punishment. This is especially true in the pre-offer portion of the process where a commander or investigative agency has primary responsibility. Nonetheless, good order and discipline is a team sport requiring cooperation among multi-functional players. Application of this new metric should encourage the collaboration between the legal office, commanders, and investigative agencies. While failure to achieve the metric in any single case could be attributed to other agencies, success or failure over time reflects the integration of the legal office across functional lines. Just as we have formalized the integration of judge advocates and paralegals into the OSI investigative process, this new metric will encourage early collaboration with SFOI and commanders.

Date of discovery to offer should provide meaningful data for tracking by MAJCOM, NAF, and base-level staff judge advocates. For purposes of this metric, date of discovery will be defined as "the date when any investigative agency (e.g. OSI, SFOI, IG), legal office, or commander, supervisor, or first sergeant becomes aware of an allegation and has identified a subject."[1] JAJM will also be working with JAS to ensure MAJCOM, NAF, and base-level staff judge advocates can easily access reports detailing NJP processing times that include date of discovery to offer. Staff judge advocates should provide this information to commanders as part of their quarterly status of discipline meetings. During MAJCOM and NAF staff assistance visits and TJAG/DJAG Article 6 inspections, senior-level judge advocates will reinforce the message of the base level staff judge advocate that NJP is primarily a commander's program and timeliness is critical.

The existing "case ready date to offer" metric will remain unchanged because, if applied conscientiously, it provides a good measure of the efficiency of the military justice system within the legal office. When the case ready date is applied consistently with the guidelines in AFI 51-202, the delta between date of discovery and case ready date is largely attributable to agencies outside the base legal office. Case ready date to offer allows the staff judge advocate to determine how efficiently his or her subordinates are providing legal services to commanders.

No single metric is perfect. This new metric of date of discovery to offer should be viewed within the proper context to avoid unintended consequences, such as applying pressure to resolve a case using NJP that is not fully investigated and should more appropriately be handled by a court-martial. Date of discovery to offer is meant to supplement existing metrics, not replace any. Base-level staff judge advocates must use these metrics in harmony consistent with their design: case ready date to offer to assess their internal operations and date of discovery to offer to help assess the military justice system at an installation as a whole.

[1] Date of discovery is currently defined in AMJAMS as "the date when an investigative agency (e.g.: OSI, SFOI, Civilian authorities) is notified of an allegation that an offense has been committed and a subject has been identified or, in a case involving a Command Directed Investigation, a commander is notified of an allegation that an offense has been committed and a subject has been identified. If an allegation is investigated by CDI and subsequently turned over to an investigative agency for further investigation, use the date the commander first became aware of the allegation and initiated the CDI."

It's Not (Really) About the Metrics

by Lieutenant Colonel Eric F. Mejia, USAF

As Captains, we were told to "touch every case every day." By moving cases faster we could meet the processing metric. But while the importance of meeting the metrics was clearly understood, the reasons for them were not. Occasionally, an SJA might explain that metrics were for the benefit of the accused. However, it was often the defense requesting a trial delay, with counsel on both sides of the bench accepting the adage "time benefits the accused." Was the accused unaware of the benefits of rapid processing or was the underlying rationale suspect? Perhaps from time to time you've heard the same question: *Why do we have these metrics?*

But while the importance of meeting the metrics was clearly understood, the reasons for them were not.

Today, as a staff judge advocate, I find myself staring at predominantly red stoplight charts, exhorting my staff to move cases faster and touch every case every day. But, they deserve a better rationale than the requirement to meet processing metrics. AFI 51-201 states that expeditious processing minimizes disruption to the mission and the lives of trial participants, saves money and sustains good order and discipline.[1] As it turns out, the instruction has it right: rapid processing benefits the accused, the victim, and society generally.

What supports these conclusions? The idea that rapid processing of criminal trials benefits the accused is certainly not a new concept. One of the earliest documented speedy trial rights is found in the 1215 Magna Carta, which in turn influenced our Constitutional right to a speedy trial.[2] The Sixth Amendment to the Constitution focuses on the trial rights of the accused, including the right to a speedy trial: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…."[3]

The accused reaps benefits from a speedy trial in at least three tangible ways. First, by limiting the period a member spends behind bars before trial. Pretrial confinement in the military is the exception, and is not intended to be punitive. However, when imposed, it results in a significant deprivation of liberty. A speedy trial ensures that an accused is not incarcerated without a finding of guilt any longer than necessary. This same rationale holds true for less severe forms of restriction. Secondly, a speedy trial minimizes the anxiety, fear and hostility related to public accusation. This same unease is often shared by the accused's family as well. Finally, minimizing unnecessary trial delay ensures that the accused's ability to defend against pending charges is not hindered by the failing memories and availability of both fact and sentencing witnesses.[4]

[1] U.S. Dep't of Air Force, Instr. 51-201, Administration of Military Justice para. 12.15.2 (Dec. 21 2007).

[2] *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (quoting the Magna Carta: "We will sell to no man, we will not deny or defer to any man either justice or right.")

[3] U.S. Const. amend. VI.

[4] *See* U.S. v. Ewell, 383 U.S. 116 (1966); H.R. Rep. No. 93-1508 (1974).

Although the Sixth Amendment focuses on the rights of the accused, it is now recognized that bringing a case to a swift conclusion is a fundamental right of the victim as well. According to the Department of Justice, Office for Victims of Crime, one of the greatest hardships victims endure in the criminal justice process is lengthy pretrial delay. Such delays cause the victim to relive the trauma of their victimization as they prepare for trial. When the trial is delayed, the trauma of pretrial preparation is often repeated.[5] In some cases, the victim may no longer want to testify. In recognition of this fact, the federal Crime Victims Rights Act states that crime victims should be accorded "the right to proceedings free from unreasonable delay."[6]

The victim's right to a speedy trial has also been recognized by a majority of states, either constitutionally, or statutorily. For example, in Tennessee the court is required to consider the victim's views on a continuance and "the victim's right to a speedy trial."[7] In Utah, the crime victim's right to a speedy trial is on par with the right of the accused: "In determining the date for any criminal trial or other important criminal or juvenile justice hearing, the court shall consider the interest of the victim of a crime to a speedy trial resolution of the charges under the same standard that govern a defendant's…right to a speedy trial."[8] Further, if a continuance is granted, the court must document the procedures that have been taken to avoid additional delays.[9]

There are also compelling societal interests to consider. As a result of ever increasing delays in processing criminal trials, in 1974 Congress enacted the Speedy Trial Act.[10] The act provides, among other things, for dismissal of charges if the defendant is not brought to trial within specified time limits. Prior to enactment, the House report from the Judiciary Committee noted several societal benefits of a speedy trial. These benefits included reducing the administrative and financial burdens that result from trial delays and lengthy processing times, as well as decreasing the likelihood that the accused would re-offend while awaiting trial.[11] The report also concluded that faster and more efficient processing increased deterrence, made rehabilitation easier, and reduced crime.[12]

At some point, every discussion about military justice turns to metrics. Invariably, someone will argue that these time periods are arbitrary.

Finally, while it appears that time does work in favor of the accused, speed works in favor of justice. A 1980 study of 444 homicide cases found that cases which were processed quickly were more likely to result in a conviction. The authors hypothesized that this may partially be a result of prosecutors being able to use witnesses whose "memories are unclouded by time."[13] However, it should also be noted that the availability of reliable evidence is equally important to exonerating an innocent accused.

At some point, every discussion about military justice turns to metrics. Invariably, someone will argue that these time periods are arbitrary. Is a court that concludes in 160 days inherently better than a court that concludes in 161? Probably not. However, metrics do serve to remind us of the need to process cases faster and more efficiently, to oppose unreasonable delays, and to do everything within our power to bring every case to a swift and fair conclusion. Not because a metric requires it, but simply because a case processed without unreasonable delay is better for the accused, the victim and for society.

[5] Videotape: New Directions From the Field: Victims' Rights and Services for the 21st Century (USDOJ, Office for Victims of Crime 1998).

[6] Crime Victims Rights Act, 18 U.S.C. § 3771 (2004).

[7] Tenn. Code Ann. § 40-38-116 (2000).

[8] Utah Code Ann. §77-38-7 (1995).

[9] *Id*.

[10] 18 U.S.C. § 3161-3174 (1974).

[11] H.R. Rep. No. 93-1508 (1974) (The report cites a 1968 study that found an increased propensity for an accused to be re-arrested when released for more than 280 days).

[12] *Id.*

[13] Victoria L. Swigert & Ronald A. Farrell, Speedy Trial and the Legal Process, 4 L. & Hum. Behav. 135 (1980).

TACTICAL NUCLEAR WEAPONS

LAWFUL USE IN THE AFTERMATH OF THE ICJ OPINION

by Major Robert P. Chatham, USAF

NUCLEAR WEAPONS POSE A HUGE THREAT in magnitude of damage that can be inflicted. A common misperception comes in thinking that nuclear weapons only exist in huge sizes that will annihilate entire cities. Much of this perception comes from the atom bombs dropped on Hiroshima and Nagasaki in World War II—the only nuclear weapons used in warfare to date. The majority of nuclear weapons, however, are tactical and smaller, causing much less damage. While it would be difficult to conceive that using a large, strategic nuclear weapon could withstand the scrutiny of the modern law of war, tactical nuclear weapons may be used lawfully in certain circumstances. The International Court of Justice (ICJ) issued an advisory decision on the legality of nuclear weapons in 1996, refusing to rule that nuclear weapons are per se illegal.[1] In the aftermath of that opinion, the use of tactical nuclear weapons meets the requirements of the UN Charter and the law of armed conflict as lawful in certain circumstances.

[1] Timothy J. Heverin, *Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense*, 72 Notre Dame L. Rev. 1277, 1286 (1997).

DEFINITIONS

No exact formulation or definition exists for tactical nuclear weapons, but such a weapon is usually identified by size.[2] Conventional weapons are measured in pounds of TNT and commonly range from 500 to 2,000 pounds.[3] Because of the explosive power of nuclear weapons, they are measured in tons of TNT (2,200 pounds of TNT).[4] Standard measurements of nuclear weapons appear in kilotons (1,000 x 1 ton) and megatons.[5] A one kiloton nuclear weapon has 2.2 million pounds of explosive (TNT) power equaling 1,100 conventional 2,000 pound bombs.[6] The Hiroshima bomb was 12 kilotons or the equivalent of 13,200 conventional bombs.[7]

A nuclear weapon small in size may actually deliver extreme amounts of radioactive damage.

Tactical nuclear weapons generally range from .1 kilotons (equivalent to 110 conventional bombs) to 10 kilotons.[8] But the heat, radiation, and light the weapon emits must be considered when determining whether the weapon is strategic or tactical.[9] A 10 kiloton nuclear weapon explosion would destroy everything within a 275-yard radius, causing intense heat and fires, but allow for some survivors within a .5 mile radius, and have a radioactive plume up to 18 miles long and 2 miles wide affecting as many as 150,000 people in a large city.[10] A nuclear weapon small in size and explosive power may actually deliver extreme amounts of radioactive damage. The actual size of tactical nuclear weapons is generally smaller allowing for different delivery systems applied to more discreet targets. To be defined as a tactical nuclear weapon, the weapon should be low-yield with limited range for use against military targets on the battlefield.[11]

BACKGROUND

Much debate and criticism of the use of nuclear weapons culminated in the 1996 ICJ advisory opinion *Legality of the Threat or Use of Nuclear Weapons*.[12] The opinion affirmed the common belief that the law of war rules, particularly discrimination, proportionality, necessity, humanity, and neutrality, apply to the use of nuclear weapons.[13] The ICJ opinion had six substantive holdings: 1) that no specific authorization of the threat or use of nuclear weapons exists in customary or conventional international law; 2) that no prohibition of the threat or use of nuclear weapons exists in customary or conventional international law; 3) that any threat or use of nuclear weapons must be consistent with the UN Charter; 4) that any threat or use of nuclear weapons must be consistent with the law of war; 5) that the threat or use of nuclear weapons is generally contrary to the law of war, but no definitive decision could be reached under the facts presented whether the threat or use of nuclear weapons would be lawful in an extreme circumstance of self-defense where the survival of a state is at risk; and, 6) that an obligation exists to negotiate a nuclear disarmament agreement.[14]

The opinion was ambiguous at best leaving room for both opponents and proponents of nuclear weapons to argue victory. It left the question of the legality of nuclear weapons unanswered and even more questions as to the definition and meaning of "generally" and "extreme circumstances" in the fifth substantive holding. Tactical nuclear weapons were specifically discussed in the opinion alluding to the proposition that strategic nuclear weapons would

[2] Brian Alexander & Alistair Millar, Tactical Nuclear Weapons: Emergent Threats in an Evolving Security Environment vii (2003).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at viii.

[8] *Id.* at 5.

[9] *Id.* at viii.

[10] *Id.* at 5.

[11] *Id.*

[12] Burns H. Weston, *Nuclear Weapons and the World Court: Ambiguity's Consensus*, 7 Transnat'l L. & Contemp. Probs. 371, 372 (1997).

[13] Charles J. Moxley, Jr., *The Legality of Nuclear Weapons and Missile Defense: The Unlawfulness of the Use or Threat of Use of Nuclear Weapons*, 8 ILSA J. Int'l & Comp. L. 447, 448 (2002).

[14] Weston, *supra* note 12, at 376–92.

likely violate the law of war, but tactical nuclear weapons might be able to meet the law of war requirements.[15] This may be the impetus behind the opinion's use of the term "generally" in the fifth substantive holding.[16] Clearly, the term was meant to preclude an absolute prohibition on the use of nuclear weapons.[17]

Ultimately, the advisory opinion did not differentiate between strategic and tactical nuclear weapons.[18] It did, however, recognize the possibility of a lawful use of nuclear weapons, particularly tactical, if the use met the requirements of the UN Charter and the law of war.[19]

JUS AD BELLUM

Per the ICJ opinion and the requirements of conventional international law, any use of a tactical nuclear weapon must meet the *jus ad bellum* requirements of the UN Charter. Under the classical customary international law principles of sovereignty and consent, a state is permitted to do anything it has not consented to be limited by.[20] No presumption of a limitation of sovereignty should be made, giving a state a right to use nuclear weapons under this principle unless restricted by limits of its own consent (or other principles of international law).[21] As virtually every state has consented to a limit on its sovereignty through membership in the United Nations, states must comply with the UN Charter for any use of a nuclear weapon to be lawful.

The ICJ concluded that nuclear weapons could be lawful under the UN Charter because the Charter is not weapon-specific and does not expressly prohibit the use of any weapon.[22] But in order to be lawful, a threat or use of a tactical nuclear weapon must comply with Articles 2(4) and 51 of the Charter.[23] Article 2(4) is the key provision of the Charter for controlling and preventing conflict and aggression.[24] It requires members to "refrain in their international relations from the threat or use of force" to resolve disputes.[25] Article 51 codifies when states can resort to the use of force in self-defense.[26] In authorizing self-defense, Article 51 legitimizes certain acts of force which would otherwise be illegal.[27] The UN intended Articles 2(4) and 51 to work together even though Article 51 is the only exception allowing a state to use force (prior to UN approval) without being labeled an aggressor.[28] Definitively, any use of a tactical nuclear weapon would only be permissible in self-defense and could never lawfully be used in aggression.

Any use of a tactical nuclear weapon must be proportionate and necessary in self-defense of an armed attack

Any use of a tactical nuclear weapon must be proportionate and necessary in self-defense of an armed attack.[29] The *jus ad bellum* principle of proportionality requires that the use of force cannot be unreasonable or excessive and permitted only as necessary to counter the threat.[30] Thus, an action in self-defense that greatly exceeds the imminent threat will be viewed as illegally disproportionate.[31] The jus ad bellum necessity principle allows a state to only use force in response to an armed attack if

[15] Heverin, *supra* note 1, at 1303.

[16] *Id.*

[17] Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 A.J.I.L. 417, 429 (1997).

[18] Stefaan Smis & Kim Van der Borght, *The Advisory Opinion on the Threat or Use of Nuclear Weapons*, 27 GA. J. Int'l & Comp. L. 345, 358 (1999).

[19] Heverin, *supra* note 1, at 1286.

[20] Smis & Borght, *supra* note 18, at 356.

[21] *Id.* at 356–57.

[22] *Id.* at 370.

[23] Matheson, *supra* note 17, at 418. States must also comply with the law of war and treaty obligations. *Id.*

[24] Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 Chi. J. Int'l L. 1, 3 (2003).

[25] U.N. Charter art. 2, para. 4.

[26] Robert A. Zayac, Jr., *United States' Authority to Legally Implement the Self-Defense and Anticipatory Self-Defense Doctrines to Eradicate the Threat Posed by Countries Harboring Terrorists and Producing Weapons of Mass Destruction*, 29 S. Ill. U.L.J. 433, 440 (2005).

[27] Ingrid Detter De Lupis, The Law of War 173 (1987).

[28] Zayac, *supra* note 26, at 445.

[29] Smis & Borght, *supra* note 18, at 370.

[30] Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 Harv. J.L. & Pub. Pol'y 539, 545 (2002).

[31] Oscar Schachter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1637 (1984).

no other means of addressing the threat exist.[32] Certain targets, such as underground al-Qaeda facilities, may only be terminated via tactical nuclear weapons.[33]

Tactical nuclear weapons may be preferred over conventional weapons where a target is heavily defended or needs to be kept out of use for a significant period of time.[34] Tactical nuclear weapons may be a lawful means of self-defense where their effects are reasonable and necessary to counter a threat—especially if no other means exists to counter the threat.

Use of a tactical nuclear weapon may be legal in an extreme circumstance of self defense where a state's survival is at risk.

JUS IN BELLO

The principle of self-defense under the UN Charter only justifies using force such as deploying a tactical nuclear weapon.[35] Once such a weapon is used, its use must be consistent with the law of armed conflict.[36] The use of all weapons, including nuclear weapons, is governed by three basic law of war principles: necessity, proportionality, and humanity.[37] Additionally, as mentioned in the ICJ opinion, the rules of discrimination and neutrality apply.

Opponents of the use of nuclear weapons argue that such use would violate the principle of distinction because any type of nuclear weapon would injure both civilians and combatants.[38] The principle of distinction prohibits directing attacks against nonmilitary targets and using weapons that cannot be directed against military targets.[39] This precludes the use of weapons that are uncontrollable such as biological weapons.[40] Nuclear weapons, particularly battlefield tactical devices, can be directed at specifically military targets.[41] Conventional weapons are just as likely to cause damage to both civilians and combatants depending on the proximity of the civilians to the target. A conventional bomb dropped on a military command and control facility could easily damage surrounding homes and businesses. The risk and degree of collateral damage, and hence the principle of proportionality, is a far more important tool for evaluating the legality of using a tactical nuclear weapon. As long as a tactical nuclear weapon is directed at a military target with precision, its use would not violate the principle of distinction.

The *jus in bello* principle of proportionality prohibits the use of force expected to cause damage to civilian persons or property excessive when compared to the military advantage that will be gained.[42] Any proportionality analysis must consider the unique characteristics of nuclear weapons such as destructiveness, heat and energy output, radiation, risk of escalation, and environmental harm.[43] While a proportionality analysis may not weigh in favor of their use, tactical nuclear weapons' characteristics generally are of a substantially lower impact than their strategic counterparts. By passing a proportionality test, use of tactical nuclear weapons must withstand the *jus in bello* principle of necessity requiring a state to use only that force necessary to achieve a military objective.[44] Tactical nuclear weapons will be useable in a similar way as smart bombs and cruise missiles with pinpoint accuracy.[45] In some circumstances, tactical nuclear weapons can be used with little collateral damage such as attacking warships on the high seas or troops in

[32] Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 Brook. J. Int'l L. 493, 498 (1990).

[33] William Conrad, *The Future of Tactical Nuclear Weapons*, Air & Space Power J.-Chronicles Online J., June 26, 2001, http://www.airpower.maxwell.af.mil/airchronicles/cc/conrad01.html.

[34] Weston, *supra* note 12, at 455.

[35] Smis & Borght, *supra* note 18, at 370.

[36] *Id.*

[37] Mary Eileen E. McGrath, *Nuclear Weapons: The Crisis of Conscience*, 107 Mil. L. Rev. 191, 202–03 (1985).

[38] Matheson, *supra* note 17, at 428.

[39] Moxley, *supra* note 13, at 448.

[40] *Id.* at 449.

[41] Matheson, *supra* note 17, at 428.

[42] Moxley, *supra* note 13, at 448.

[43] Heverin, *supra* note 1, at 1286.

[44] McGrath, *supra* note 37, at 202.

[45] Conrad, *supra* note 33.

Photo courtesy of National Nuclear Security Administration

sparsely populated locales.[46] Limited experience showed nuclear weapons causing horrendous damage, but use of small yield tactical nuclear weapons in appropriate situations would result in minimal civilian damage and casualties.[47]

The principle of neutrality requires a state involved in armed conflict to avoid harming neutral states. Opponents of nuclear weapons cite this principle arguing that any use of a nuclear weapon would damage a neutral state.[48] If this theory were true, a state involved in armed conflict could never launch a conventional munition, shoot down enemy aircraft, or commit any other armed action anywhere near the border of a neutral state for fear of damaging the neutral state. The principle prohibits intentional damage to a neutral state, but does not guarantee that a neutral state will never suffer collateral damage.[49] Many tactical nuclear explosions would never cause harm to a neutral state if not near a border. Even when causing harm, it may be a permissible amount of collateral damage.

The principle of humanity requires the weighing of the military advantage gained by using a specific weapon against the suffering the weapon will cause.[50] Opponents argue that any nuclear weapon would cause a degree of suffering so great that it would violate this principle.[51] The principle precludes suffering that exceeds that necessary to accomplish a military objective.[52] An armed attack by any means will cause some degree of suffering to an enemy. Without doubt, if a weapon exists that will accomplish the same military objective as a tactical nuclear weapon and cause less suffering, the alternative weapon must be used. In instances where a tactical nuclear weapon best accomplishes a mission (such as taking out underground bunkers), or is the only means, use complies with the principle.

EXTREME SELF-DEFENSE

The ICJ opinion left open the possibility that the use of tactical nuclear weapons may be lawful by stating they would "generally" be contrary to the law of armed conflict.[53] The ICJ finished by recognizing that the use of a tactical nuclear weapon may be legal in an extreme circumstance of self-defense where a state's survival is at risk.[54] Without further definition, many historical conflicts can be viewed as extreme circumstances where the survival of a state is at stake. Israel's conflict with Hezbollah and Hamas, the North Korean nuclear threat faced by South Korea and other states, the Iraqi invasion of Kuwait, and the Cold War are all conflicts entailing extreme circumstances where the survival of a state is in peril. No requirement exists as to how "extreme" the circumstance must be or what level of peril a state must face as long as it faces a threat to its

[46] Weston, *supra* note 12, at 467.

[47] Michael N. Schmitt, *Nuclear Weapons and the World Court*, 9 USAFA J. Leg. Stud. 179, 180–81 (1998) (reviewing Ved P. Nanda & David Krieger, Nuclear Weapons and the World Court (1998)).

[48] Matheson, *supra* note 17, at 427.

[49] *Id.*

[50] *Id.* at 429.

[51] *Id.* at 428–29.

[52] *Id.* at 429.

[53] *Id.* at 430

[54] *Id.*

survival. The ICJ could not have meant that use of a nuclear weapon violates international law because a state losing a conflict does not have a right to disregard the law of war.[55] The principle of proportionality requiring the weighing of damage caused against the military advantage gained fills the void of a lack of definition given by the ICJ.[56] While using a tactical nuclear weapon may cause extensive damage, if it is the only or best means necessary for a state to accomplish a military objective in self-defense, or even to survive, then clearly its use would be consistent with the ICJ's edict.

THE QUESTION OF LEGALITY

The ICJ opinion states that "state practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition."[57] In order for tactical nuclear weapons to be *per se* illegal, they would have to be illegal in all circumstances—something the ICJ failed to conclude.[58] The ICJ held that states are obligated to negotiate a nuclear disarmament agreement and evaluated treaty law to determine if any restrictions existed on nuclear weapons.

Other than regional agreements, the Non-Proliferation Treaty (NPT) is the primary instrument designed to limit nuclear weapons.[59] Unlike nuclear weapons, international law explicitly bans possession and use of biological and chemical weapons through the Biological Weapons Convention and Chemical Weapons Convention.[60] The law of armed conflict does not pose a ban on any particular weapon, only the results of a weapon's use. In the *Shimoda Case*, the only other case where nuclear weapons were reviewed, the use of the atom bomb in World War II was judged under the law of war principles.[61]

CONCLUSION

The legality of tactical nuclear weapons should be judged on their effects. The jus in bello proportionality test should determine the lawfulness of using a tactical nuclear weapon, not a per se rule. Determining the legality of use should depend entirely on the situation, the enemy threat, the importance of the objective, and the collateral damage.[62] Dynamite was once thought to be an inhumane weapon that would destroy civilization due to its destructiveness.[63] Tactical nuclear weapons are being developed with yields as low as tens of tons and 1,000 times cleaner than current nuclear weapons by achieving fusion without a fission primary—resulting in no radioactive fissile material and a very small footprint.[64] Ultimately, any use of a tactical nuclear weapon must meet the requirements of the UN Charter and the law of war. The use of tactical nuclear weapons in some situations will comply with both. Use that is an appropriate and necessary response in self-defense is lawful if precisely targeting a military objective and limiting collateral damage and suffering.

[55] *Id.*

[56] *Id.*

[57] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 247 (July 8).

[58] Moxley, *supra* note 13, at 462.

[59] Wolfgang K. H. Panofsky, *Dismantling the Concept of "Weapons of Mass Destruction,"* Arms Control Assoc., Apr. 1998, http://www.armscontrol.org/print/336.

[60] *Id.* Some commentators link a prohibition on radiation to the Hague regulations forbidding poisonous weapons or the Geneva Protocol with a similar restriction. De Lupis, *supra* note 27, at 203. But the ICJ specifically determined that there was no prohibition of nuclear weapons under conventional international law.

[61] De Lupis, *supra* note 27, at 202.

[62] Weston, *supra* note 12, at 470.

[63] Conrad, *supra* note 33.

[64] *Id.*

ACTIONS to Match Our Rhetoric or Rhetoric to Match OUR ACTIONS

The CIA UAV Program in Pakistan

by Major Matthew D. Burris, USAF

To begin with, I believe that all nations—strong and weak alike—must adhere to standards that govern the use of force…America cannot insist that others follow the rules of the road if we refuse to follow them ourselves. For when we don't, our action can appear arbitrary, and undercut the legitimacy of future intervention—no matter how justified…Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe that the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength…We lose ourselves when we compromise the very ideals that we fight to defend. And we honor those ideals by upholding them not just when it is easy, but when it is hard.

President Barack H. Obama

Our current armed conflict, with its widening array of transnational terrorist adversaries is unquestionably hard. In Pakistan, domestic political considerations preclude the U.S. armed forces from conducting offensive operations within the country.[1] At the same time, the Pakistani armed forces have been unable—whether by operational limitation, inadequate motivation—to dispatch, disrupt, or detain the majority of terrorists[2] operating within its borders.[3] This is particularly evident in the uncontrolled tribal areas of northwestern Pakistan where Taliban leaders conduct the insurgency against coalition forces in Afghanistan and Al Qaeda is granted sanctuary.[4]

Faced with this stark reality, what is the President to do? Disregard the wishes of the government of Pakistan and direct the U.S. armed forces to conduct offensive operations against terrorists in the tribal areas? To do so, would violate Pakistan's sovereignty and may, in fact, constitute an act of war. Continue (with Congress' support) to infuse the Pakistani government with cash, materiel, and military training with the aim of developing and fostering an organic means of addressing the terrorist threat?[5] While diplomatic

[1] James Kitfield, *Wanted: Dead*, National Journal, Jan. 9, 2010, at 21; Jane Perlez, *Soldier Deaths Draw Focus to U.S. in Pakistan*, N.Y Times, Feb 4, 2010, http://www.nytimes.com/2010/02/04/world/asia/04pstan.html?scp=1&sq=solider%20deaths%20draw&st=cse; Mark Mazzetti, *C.I.A. Takes on Bigger and Riskier Role on Front Lines*, N.Y. Times, Jan. 1, 2010, http://www.nytimes.com/2010/01/01/world/asia/01khost.html?scp=1&sq=CIA%20takes%20on%20bigger%20role&st=cse; Eric Schmitt, *U.S. Speeds Aid to Pakistan to Fight Taliban*, N.Y Times, Oct. 29 2009, http://www.nytimes.com/2009/10/29/world/asia/29weapons.html?_r=1&scp=1&sq=U.S.%20speeds%20aid%20to%20Pakistan&st=cse.

[2] "…[T]he Pakistani Taliban operates in collusion with both the Taliban in Afghanistan and Al Qaeda…it is impossible to separate these groups." Robert Gates, *Our commitment to Pakistan*, News Int'l, Jan. 21 2010, *available at* http://www.thenews.com.pk/daily_detail.asp?id=219826.

[3] Elisabeth Bumiller, *U.S. Offers Pakistan Drone to Urge Cooperation*, N.Y. Times, Jan. 22, 2010, http://www.nytimes.com/2010/01/22/world/asia/22gates.html?scp=1&sq=U.S.%20offers%20Pakistan%20drone&st=cse; *The Last Frontier*, Economist, Dec. 30, 2009, http://www.economist.com/world/middleeast/displaystory.cfm?story_id=15173037.

[4] Perlez, *supra* note 1.

[5] *Id.*; Lolita C. Baldor (AP), *Pentagon Seeks Billions to Battle Terror Abroad*,

USAF Photo

aid may have benefits in the long run, to date it has failed to produce desired results.[6] Choose to do nothing? Withdraw? Given the continuing threat, and the fact that the 9/11 attacks on New York and the Pentagon were hatched from terrorist-training camps in Afghanistan, an approach affording the terrorists a similar safe haven in Pakistan, a nuclear state, is both politically and morally indefensible. The remaining alternative: a targeted killing program to disrupt terror groups in Pakistan by utilizing armed unmanned aerial vehicles (UAVs) operated by the Central Intelligence Agency (CIA). Like his predecessor, because of the perceived nature of the threat and the paucity of means to respond, the President has clearly chosen this aggressive option—one that only became available in the immediate aftermath of 9/11.

The CIA's UAV targeted killing program (hereinafter "CIA program") arguably represents a compromise—a Faustian choice made by the U.S. and Pakistan. Ideally, the CIA program affords both parties the benefits of plausible denial.[7] The government of Pakistan can privately consent to the targeted killing strikes, while publically condemning them.[8] More importantly, both parties can deny a U.S. armed forces role in lethal operations conducted against terrorists within Pakistan's borders.[9] However, plausible denial is only effective so long as the CIA program is kept secret. But as the number of UAV strikes have increased—some 53 in 2009 (as opposed to 39 in 2008)[10]—so too has the media attention. In March 2010, CIA Director Leon Panetta called it, "the most aggressive operation the CIA has been involved in our history."[11] In turn, *The Washington Post* called Director Panetta's comments, "near acknowledgment of what is officially a secret war."[12]

To be sure, CIA operatives are unlawful combatants and are not authorized under the law of war to carry out targeted killings.

If the widespread reporting on the CIA program is accurate—if CIA operatives are conducting lethal UAV strikes on terrorists within Pakistan—then there is an apparent disconnect between our rhetoric and our actions.[13] To be sure, CIA operatives are unlawful combatants and are not authorized under the law of war to carry out targeted killings.[14] Dr. Gary Solis, retired head of the law of war program at West Point, put it thusly: "Every day, CIA agents and CIA contractors arm and pilot armed unmanned drones over combat zones in Afghanistan and Pakistan, including Pakistani tribal areas, to search out and kill Taliban and al-Qaeda fighters," said Dr. Solis, adding:

> In terms of international armed conflict, those CIA agents are, unlike their military counterparts but like the fighters they target, unlawful combatants. No less than their insurgent targets, they are fighters without uniforms or insignia, directly participating in hostilities, employing armed force contrary to the laws and customs of war. Even if they are sitting in Langley, the CIA pilots are civilians violating the requirement of distinction, a core concept of armed conflict, as they directly participate in hostilities.[15]

Feb. 4, 2010, http://www.google.com/hostednews/ap/article/ALeqM5hnKTIl_TuaG-13zFFXTiVvD2oY8gD9DLHPD80; Schmitt, *supra* note 2; Bumiller, *supra* note 4.

[6] Bumiller, *supra* note 2.

[7] Kitfield, *supra* note 1.

[8] Mark Mazzetti & Eric Schmitt, *C.I.A. Missile Strike May Have Killed Pakistan's Taliban Leader, Officials Say*, N.Y. Times, Aug. 7, 2009, http://www.nytimes.com/2009/08/07/world/asia/07pstan.html?scp=1&sq=C.I.A.%20Missile%20Strike%20MAy%20have%20killed&st=cse; Scott Shane & Eric Schmitt, *C.I.A. Deaths Prompt Surge in U.S. Drone Strikes*, N.Y. Times, Jan. 23, 2010, http://www.nytimes.com/2010/01/23/world/asia/23drone.html?scp=1&sq=deaths%20prompt%20surge%20in%20U.S.%20drone&st=cse.

[9] Perlez, *supra* note 1; Tom Coghlan, *et al.*, *Secrecy and Denial as Pakistan lets CIA use airbase to strike militants*, Times (London), Feb. 17, 2010, http://www.timesonline.co.uk/tol/news/world/asia/article5755490.ece.

[10] New America Foundation Counterterrorism Strategy Initiative, http://counterterrorism.newamerica.net/drones/2009 (last visited Apr. 1 2010).

[11] Joby Warrick & Peter Finn, *CIA director says secret attacks in Pakistan have hobbled al-Qaeda*, Wash. Post, Mar. 18, 2010, at A.01

[12] *Id.*

[13] Jane Mayer, *The Predator War*, New Yorker, Oct. 26, 2009, at 36; David Ignatius, *The View From Pakistan's Spies*, Wash. Post, Sept. 29, 2009, at A.19; Bobby Ghosh & Mark Thompson, *The CIA's Silent War in Pakistan*, Time, June 1, 2009, http://www.time.com/time/magazine/article/0,9171,1900248,00.html.

[14] Peter M. Cullen, *The Role of Targeted Killing in the Campaign against Terror*, Joint Forces Q. 48, 1st Q. 2008, at 22, 27, https://digitalndulibrary.ndu.edu/u?/ndupress,20160.

[15] Gary Solis, *CIA drone attacks produce America's own unlawful combatants*, Wash. Post, Mar. 12, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/

U.S. Air Force photo by Senior Airman Julianne Showalter

Dr. Solis' words reflect an enduring American orthodoxy—war is to be waged by armed forces, not private citizens. In furtherance of this orthodoxy, we are prosecuting a number of detainees held at Guantanamo Bay. For instance, Omar Khadr's prosecutors have indicated that unlawful combatants like Khadr, "violate the laws of war when they commit war-like acts, such as murder."[16] Touting our strict adherence to the law of war while prosecuting unlawful combatants like Khadr—all while authorizing the CIA to conduct targeted killing operations which depart from the law of war—appears arbitrary, no matter how justified the operations (to use the language of the President). And thus the question is: should we change our actions to match our rhetoric or change our rhetoric to match our actions? Based on the intractability of our current armed conflict, we may, by force of necessity, be required to choose the latter. Doing so may entail leveling with the public about what this fight necessitates.

This argument does not break any new ground. In fact, it is rather tame in comparison with its historical antecedent, to wit:

> It is now clear that we are facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply. If the United States is to survive, long-standing American concepts of "fair play" must be reconsidered. We must develop effective espionage and counterespionage services and must learn to subvert, sabotage, and destroy our enemies by more clever, more sophisticated and more effective methods that those used against us. *It may become necessary that the American people be made acquainted with, understand and support this fundamentally repugnant philosophy.*[17] [emphasis added]

These words were written by USAF General Jimmy Doolittle regarding the CIA's role during the early years of the Cold War.[18] General Doolittle's report on the Agency, issued to President Eisenhower in 1954, remained classified until 2001.[19] As borne out by history, Eisenhower and his Cold War-era successors chose not to acquaint the American people with, nor garner their support for, this "fundamentally repugnant philosophy." Indeed, with few exceptions throughout its history[20], the CIA has managed to successfully conceal its ongoing operations—paramilitary and otherwise—from the gaze of the American public.[21] One of those exceptions, however, is the present CIA program.

Why is this program exceptional? When Hellfire missiles rain down from a UAV in the sky above Pakistan, immolating a terrorist and those around him, it does not take the deductive powers of Sherlock Holmes to determine the responsible party. There are arguably only two organizations with both the capacity and motivation to carry out such a strike: the U.S. armed forces and the CIA. When U.S. and Pakistani officials repeatedly deny that the U.S. armed forces conduct operations within Pakistan—covert or

AR2010031103653.html.

[16] Government Response to the Defense's Motion to Dismiss Charge I & II at 6, Dec. 14, 2007, United States Department of Defense, Military Commissions, http://www.defenselink.mil/news/commissions.html (last visited Apr. 1 2010).

[17] Tim Weiner, Legacy of Ashes–The History of the CIA 125 (Anchor Books 2008).

[18] *Id*. at 125.

[19] *Id*. at 124.

[20] The Agency was born of the National Security Act of 1947 and thus shares its birthday with the USAF. *See* National Security Act of 1947, 50 U.S.C. § 403-1.

[21] *See generally* Weiner, *supra* note 18 (The Agency's operations are generally only disclosed to the public following a scandal and subsequent congressional inquiry. Examples include the Church Commission Reports of the 1970s and the Iran-Contra Hearings of the 1980s).

otherwise—then the responsible party is, by default, the CIA.[22] Presumably, the CIA program was intended to be covert, but in contravention to the Agency's charter, it "was not conducted in ways so subtle that the American hand was unseen."[23] The technology utilized and the statements of U.S. and Pakistani officials made this a forgone conclusion.

Tragically, the exposure of the CIA program has proved deadly. On 30 December 2009, Humam Khalil Abu Malal al-Balawi, a Jordanian suicide bomber, killed eight people at a remote CIA outpost in the mountains of Afghanistan.[24] Among the dead were seven CIA operatives.[25] In a posthumously released video, the suicide bomber indicated he was exacting revenge for the killing of Pakistani Taliban leader, Baitullah Mehsud. Mehsud was reportedly killed by a CIA UAV strike on 5 August 2009.[26] Additionally, on 3 February 2010, three Special Operations team soldiers were killed in a suicide attack in Pakistan, reportedly as "payback for the mounting frequency of drone attacks."[27]

Tragically, the exposure of the CIA program has proved deadly.

Despite this, U.S. officials will not explicitly acknowledge or otherwise talk about the CIA program on the record.[28] While this tack is understandable from a generic national security perspective and in line with past practice, an operation is not covert just because it is unacknowledged. To refuse to acknowledge the existence of a pink elephant in the room does little more than strain credulity. It also foments doubt as to the "legality and legitimacy" of the targeted killings.[29] And thus, there have been numerous calls for the Administration to divulge its legal justification for the CIA program—from the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions[30] and the American Civil Liberties Union[31], to name a few.

In March 2010, Harold Koh, Legal Advisor to the U.S. Department of State, indicated that "it is the considered view of this Administration… that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."[32] This statement is the most pointed made by an Administration official to date and is also consistent with previous, though more opaque, statements on the matter.[33] However, Mr. Koh does not acknowledge the CIA's role in the "lethal operations," nor does he provide further insight into how civilian CIA operatives, unlike the unlawful combatant civilians they target, are lawful combatants under the law of war. At most his statement reinforces the notion that the law of war applies to these targeted killings. In so doing, it implicitly calls into question the continued applicability of the above-mentioned American orthodoxy—that war is to be waged by armed forces, not private citizens.

All of this again begs the question, what is the President to do? The CIA program in Pakistan

[22] Perlez, *supra* note 1; Coghlan, *supra* note 9.

[23] Weiner, *supra* note 18, at 109.

[24] Stephen Farrell, *Video Links Taliban in Pakistan to C.I.A. Attack*, N.Y. Times, Jan. 10, 2010, http://www.nytimes.com/2010/01/10/world/middleeast/10balawi.html?scp=1&sq=Video%20Links%20Taliban%20in%20Pakistan%20to%20C.I.A.%20attack&st=cse; Shane & Schmitt, *supra* note 8.

[25] Mazzetti, *supra* note 1.

[26] Mayer, *supra* note 13, at 36.

[27] Perlez, *supra* note 1.

[28] "The White House routinely dodges questions on the subject, and neither the CIA nor the State Department would talk about the [CIA's drone program in Pakistan] on the record."

[29] Nils Melzer, Targeted Killing in International Law 43 (Oxford U. Press 2008).

[30] *Id*. at 188.

[31] Shane & Schmitt, *supra* note 8.

[32] Harold Koh, Legal Adviser, U.S. Dep't of State, Address at Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25 2010), (transcript *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.)

[33] *See e.g.* "In responding to questions asked by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions with regard to the killing of al-Harithi in Yemen, the US Government merely pointed out that the confrontation between the United States and al-Qaida constituted an armed conflict governed by [the laws of war] and that, therefore, 'allegations stemming from any military operations conducted during the course' of such an armed conflict 'do not fall within the mandate of the Special Rapporteur', or of the Human Rights Commission." Melzer, *supra* note 30 at 188; Secretary of State Hilary Clinton, in response to angry protestations from Pakistani citizens concerning the UAV target killing operations, stated, "there is a war going on." *Pakistanis Confront Clinton Over Drone Attacks*, ABC News, Oct. 30, 2009, http://abcnews.go.com/International/wireStory?id=8954109.

has proven effective.[34] It is essentially "the only game in town."[35] At the same time, CIA operatives are unlawful combatants—and therefore are not authorized under the law of war to carry out targeted killings. By allowing the program to continue, are we compromising the ideals we fight to defend? Are we dishonoring those ideals by failing to uphold them when it is hard? These are extraordinarily difficult questions. Neither are they new. In a letter dated 20 September 1810, Thomas Jefferson wrote:

> A strict observance of the written laws is doubtless *one* of the highest duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of a higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[36] [emphasis original]

Thus far, President Obama has prohibited torture, vowed to close the detention facilities at Guantanamo, and reaffirmed our commitment to the Geneva Conventions. Clearly, his calculus – the balancing of necessity, preservation of self and country, and of strict observance to the law – differs from that of his predecessor. The administration has decided not to sacrifice the end to the means, by shutting down the CIA targeted killing program, when: (1) there is currently no viable alternative to replace it; and, (2) doing so would afford terrorists a safe haven in Pakistan from which to plan and train for the next attack on the U.S.

This pragmatic decision, made in response to an intractable set of circumstances, is not without its trade-offs, however. Justifying departures from the law works both ways. If necessity forces us to depart from the law, then we should tread lightly when it comes to holding our adversaries strictly accountable to the law from which we depart. To do otherwise—to demand "victor's justice"[37]—truly is anathema to the ideals we fight to defend. Moreover, an argument could be made that the apparent hypocrisy of "victor's justice" is as strategically damaging as policies of sanctioned torture or detention without trial.

The other trade-off relates to our rhetoric. It is undoubtedly important to tout our achievements. But it is also important to temper our rhetoric with the hard realities of this conflict. In so doing, it may become necessary to acknowledge the pink elephant in the room. Failing to acknowledge the obvious is to perpetrate a fiction—a fiction that may act to undermine our true achievements.

Furthermore, acknowledging the CIA program appears far less threatening than the disclosures portended by General Doolittle. Rather than acquainting the American people with a "fundamentally repugnant philosophy" under which any means to achieve the desired ends is acceptable, acknowledging the CIA program would be to acquaint the American people with a narrowly tailored and reasonable means to the desired ends. While opinions may differ on whether the program is, in fact, narrowly tailored and reasonable, it is certainly not the "no-holds-barred" approach portended by General Doolittle. This game is not without rules.

[34] CIA Director Leon Panetta has said of the program, "[i]t's pretty clear from all the intelligence we are getting that they are having a very difficult time putting together any kind of command and control, that they are scrambling. And that we really do have them on the run." Warrick & Finn, *supra* note 11; Kitfield, *supra* note 1. *But see* Mayer, *supra* note 13, at 45 (where a commentator likened the drone strikes to "going after a beehive one bee at a time"—the problem being, "the hive will always produce more bees.")

[35] CIA Director Leon Panetta reportedly made this comment with regard to UAVs in Pakistan. Brian Mockenhaupt, *We've Seen the Future, and It's Unmanned*, Esquire, Oct. 2009, *available at* http://www.esquire.com/features/unmanned-aircraft-1109?click=main_sr.

[36] Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), (*available at* http://etext.virginia.edu/etcbin/toccer-new2?id=JefLett.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=204&division=div1) (last visited Feb. 28, 2010) (Interestingly, Jefferson closed the letter with the following admonition, "I have indulged freer views on this question, on your assurances that they are for your own eye only, and that they will not get into the hands of newswriters.").

[37] "Victor's justice," in which only the vanquished are held to account for misdeeds committed during the course of an armed conflict. Gillian Triggs, *National Prosecutions of War Crimes and the Rule of Law, in* The Changing Face of Conflict and the Efficacy of International Humanitarian Law 189 (Helen Durham & Timothy L.H. McCormack eds., 1999).

The Role of Land Use Controls in Environmental Cleanups

by Ms. Sharon R. Vriesenga, AFLOA/JACE

Land use controls (LUCs) play an important role in cleanups conducted under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Judge Advocates need to know what LUCs are, how they fit in the environmental restoration picture, and the key issues to look for when reviewing a restoration decision document. Most importantly, this includes a basic understanding of how LUCs apply to cleanups on active installations.

The Process

Before choosing a remedy, the base civil engineer (CE) squadron must investigate and determine what contamination and risks exist at a specific site, evaluate remedial alternatives to address the risk, and then show the public its proposed plan for cleaning up the site. LUCs are part of the remedy and should be summarized in the proposed plan. The nitty-gritty details can be left for records of decision (RODs) or other CERCLA cleanup decision documents.

Types of Controls

LUCs are defined as engineering or institutional controls that either limit the use of resources or restrict exposure to those resources to protect human health and the environment. LUCs are part of the remedy, just like such active cleanup measures as pumping and treating contaminated groundwater or digging out and hauling away contaminated soil. However, LUCs rarely can be the *sole* remedy for a site, although they might be the sole *final* remedy if active remediation was carried out as an interim remedy.[1]

[1] See the National Contingency Plan at 40 CFR 300.430(a)(1)(iii)(D).

The first type of LUCs are engineering controls such as physical signs, structures, or devices placed on site. These may include fences around landfills, "keep out" signs posted to warn off recreational users, as well as landfill caps and slurry walls.

Next, there are institutional controls (ICs) which are legal, proprietary or administrative in nature. Legal ICs include legal restrictions, such as a court order or a RCRA permit imposed by an outside party. Proprietary ICs, such as easements or deed restrictions, involve an owner giving up a portion of its ownership interest to someone. (Remember the "bundle of sticks" analogy from law school?) In some cases, the Air Force might seek a deed restriction on a neighboring piece of property if contamination is flowing from the restoration site onto private land. However, the Air Force has no authority to impose a deed restriction or easement on its active installations. The General Services Administration (GSA) is the only federal agency that can restrict DOD active installations in this way.

The last type of institutional controls are administrative ICs, or such measures as deed notices, the base's dig permit process, and the base master plan (also called a general plan). Some states allow an entity to put a deed notice on another person's land; this alerts the owner (and future owners) to a condition, but does not legally restrict land use. For example, the Air Force has on occasion put deed notices on private property adjoining a restoration site advising the owners (and future owners) that private wells should not be used for potable water.

A Practical Example

Suppose the civil engineer squadron (CE) has sent you a landfill ROD to review. The remedy is a combination of long-term monitoring (LTM) and LUCs. LTM is straightforward: CE watches to see if the contamination migrates. But what sort of LUCs are appropriate for a landfill on an active installation? Engineering controls could include fencing in the site and topping it with a clay cap, covered in grass. Institutional controls might include restricting the site to industrial use, and *should* include ensuring that the site's restricted use is recorded in the base master plan; LUCs should appear on the base master plan's map of the installation. Another important institutional control should be the base's dig permit process. Anybody who needs to dig on site should have to go to CE for approval.

Where to Get Help

The Air Force Legal Operations Agency's Environmental Law Field Support Center (AFLOA/JACE-FSC) and the environmental liaison officer at your MAJCOM legal office can advise you on environmental cleanup issues, including LUCs.

Start by reviewing the Air Force Land Use Controls (LUCs) Guidance/Checklist.[2] Make sure all relevant provisions of that checklist are covered in the ROD. For example, does the ROD delineate the geographical extent of the LUC? The base cannot accurately plot the LUC in the base master plan or enforce the LUC if the base doesn't know how far the LUC extends. Language such as "the LUC covers the entire remediation site" is insufficient, unless the boundaries of the site are clearly delineated by a fence. You'll need the metes and bounds, geographic information system coordinates, or something like the following: "The groundwater use restriction LUC is bounded on the south by Patton Street, on the west by Building 40, on the north by the base fence, and on the east by the river."

[2] The most current Air Force Land Use Controls (LUCs) Guidance/Checklist, published in Dec. 2009, is *available on* the Restoration tab of AFLOA/JACE's website: https://aflsa.jag.af.mil/AF/ENVLAW/restoration.html.

Sources for More Information

-- AFI 32-7020: This instruction presently has a very short paragraph (1.9) on LUCs that is somewhat outdated. There is a new version on the horizon that will have more information on LUCs.

-- AFI 32-1021: Para. 2.3.12 requires installations to ensure planned MILCON construction will not violate LUCs.

-- AFI 32-1001: Para. 6.4 requires work requests to be coordinated through the environmental flight.

-- AFI 32-7062: Para. 3.1.3 requires the base site planning process to consider environmental constraints.

-- AFPAM 32-1010: Section 7C requires land use planning to be incorporated into the base master plan.

-- The Management Guidance for the Defense Environmental Restoration Program (ODUSD, Sept 2001) is being overhauled and will be issued as a DOD manual. The current guidance's Section 21 covers LUCs. The new manual will contain updated changes in the LUCs section.

Base attorneys dealing with environmental cleanups at their locations need to know the critical part that LUCs play in the process. The Environmental Law Field Support Center and your MAJCOM liaisons are standing by to help you.

If you need additional assistance, contact the author at DSN 969-8975, Commercial (210) 395-8975, or e-mail at sharon.vriesenga@us.af.mil.

BOOKS IN BRIEF

Life Without Lawyers:

RESTORING RESPONSIBILITY IN AMERICA

by Philip K. Howard (W.W. Norton Paperback 2010)

Reviewed by Lieutenant Colonel Le T. Zimmerman, USAF (A LAWYER)

WHY DID PHILIP K. HOWARD TURN ON HIS PROFESSION? Before the writing bug bit, he was a practicing attorney. Now, he's a legal reform advocate making waves with his best-sellers *The Death of Common Sense, How Law is Suffocating America.*, and now *Life Without Lawyers*. *The Washington Post* called it "2009's most needed book on public affairs." I wholeheartedly disagree.

Admittedly, the catchy book title piqued my interest as I browsed the bookstore. It contained glowing reviews from the likes of *Forbes*, *the Economist*, Newt Gingrich and Michael Bloomberg. So why at the end of 200 pages was I not moved? *Life Without Lawyers* certainly lays out grand goals for America, but it never divulges a realistic, ground-level plan for the reform. Imagine a campaign speech carried on for eight chapters.

The book starts with the premise that everything in America is broken from our governments to our schools to our families to our own misplaced priorities. This was the first turn-off: the unrelenting, uber-negative, Doomsday attitude. Parroting his belief that Americans can't get anything done right, the author attempts to set forth an agenda of "change", radically reform our American society and legal system from the bottom up. He envisions a new authority structure in America where citizens freely make daily choices; judges aspire to keep lawsuits reasonable; schools are run by values, not bureaucracy; public policy is driven by the common good, not to appease an individual right, including a systematic overhaul of Washington D.C. to restore transparency and accountability. Clearly, these are noble goals. Who wouldn't want responsible officials to have the tools and ability to run our country more effectively? But Mr. Howard stirs the pot without delivering a practical plan to achieve these lofty ideals. Instead, he scatters each chapter with random anecdotes about people who have used the law for atrocious gain or suffered great losses as a result of ridiculous regulations or bad court decisions.

The author agrees that law is vital to freedom, but counters that it can also destroy liberty when we forget that people, not legal rules, make things happen. He laments we have created a society of fearful, cautious people. To attain a clean environment, safe workplace, good schools, or competent doctors we need "less rules and rights designed to avoid decisions by people with responsibility."

To achieve this end state, the author advocates a new freedom to take risks. He explains how we have become accustomed to not doing something because there is a risk associated and a fear of being sued. He criticizes the "compulsion to move heaven and earth to eliminate a risk even if in the clear light of day, everyone agrees that the effect is a grotesque misallocation of resources." For example, certain pesticides were banned because there was a miniscule cancer risk, even though they result in greater safety and increased crop productivity. Instead of focusing on the odds of not getting cancer,

he believes American leaders are focused on the effect of one situation on one person, which then results in misallocation of resources and other bad decisions.

Arguing that safety is only "half an idea," the author states we should be asking instead about what we are sacrificing to achieve safety. He counters that limiting time on playgrounds or making jungle gyms less dangerous promotes safety, but it makes playtime less fun for kids, which ultimately leads to childhood obesity. Although I'm no expert on child obesity, I doubt the causal relationship is that direct.

"In America today we try to make public policy by looking at the effect of one situation on one person." Mr. Howard also states, "Uncle Sam has become a kind of mad scientist, peering all day through the microscope to identify risk to individuals instead of looking at the effect on everyone." To reverse what he calls legal fear, he suggests two changes. First, law must reclaim its authority to draw enforceable boundaries of reasonable judges, legislatures and regulators to take back the responsibility of drawing these boundaries. Further, "risk commissions" should be created to offer guidance on where to draw the lines. These nonpartisan risk commissions would offer guidance to courts and regulators. Coincidentally, Mr. Howard is founder of one such group, called Common Good.

Surely some laws restrict our ability to make sound judgments. But is America really ready to be given "free exercise of judgment at every level of responsibility"? What sort of havoc will that create? Unfortunately, Mr. Howard doesn't address this potentiality in his book. Instead, he writes about a kindergartener who threw a full-blown temper tantrum at school, destroying her classroom from wall to wall, while the assistant principal helplessly circled the little girl, but made no attempt to physically stop her. Ultimately, the little girl was handcuffed and taken away by police because the teachers believed that holding the child's arm was verboten. No touching, but it's OK to have policemen handcuff her. Using this incredible incident as an example of teachers being overly regulated in what they can do in the schoolhouse, Mr. Howard proposes American law be restructured to protect freedom in daily choices.

Although not discussed, Mr. Howard's ideas also caused me to consider the effects of military bureaucracy and individual judgment versus collective decision-making. As the chapters dragged on, I pondered: Can this philosophy be applied to military service and specifically to the practice of military law? More to the point, is there an area in which our laws and regulations are negatively impacting our mission? Are we so bogged down with legal restrictions such that our good judgment is being overborne? If so, what would military members do to implement changes suggested by the author? *Life Without Lawyers* may provide you with similar food for thought on the state of our modern legal system. However, the book as a whole is not nearly as interesting as its title. And in case you were wondering, there was no talk of completely eliminating lawyers. Thank goodness.

Maximizing Court Reporter Utilization

by Technical Sergeant Tanya Lopez, USAF

Two years ago, the centralized management of court reporters went into effect, replacing an informal "phone-a-friend" system subject to unpredictable workloads and processing delays. Today, base legal offices can directly contact AFLOA/JAJ (JAJ) for support, rather than randomly cold-calling bases. New technologies have enabled court reporters at any location to upload recordings to a single depository where colleagues on the other side of the world can download and transcribe audio files, streamlining the completion of records of trial. Gone is the infamous "Darth Vader" mask, replaced by new recording and voice recognition/re-dictation software, which have streamlined the transcription process. Enlisted court reporters have made a resurging comeback and have exciting career opportunities ahead.

These rapid changes have allowed for the transcription workload to be evenly apportioned among all court reporters, as well as guaranteeing that record transcripts take priority over other assigned court reporter duties. Thanks to transformative technologies, Air Force legal offices not only have the ability to share files for transcription with geographically separated court reporters, but also can complete their transcripts with an increased proficiency of 200%. Already, 2010 has been a busy year for court reporters Air Force-wide, including 127 successfully supported TDYs to date with the combined transcription of 587 hours of audio for courts-martial and boards.

Responsibilities

While some things have changed, others stay the same. The supervision of court reporters remains at the local level, in accordance with the Court Reporter Utilization Memorandum, dated 30 June 2008. JAJ is now responsible for centralized management of the court reporter program and is the single point of contact for all requests for court reporter support. Court reporters are made available for recording and transcription assistance when available and not occupied with home station requirements.

Transformation

Several years ago enlisted court reporters were, practically speaking, an endangered species. Today, JAJ oversees seven enlisted court reporters (ECRs) in the ranks of technical and master sergeant. ECRs have been in high demand this year, traveling in support of courts-martial, Accident Investigation Boards (AIBs) and various boards all over the globe, including several cases in the AOR. Missions range from short notice and extended TDYs that last anywhere from a few days to a record-breaking two-month-long AIB! In addition to traveling, ECRs provide technical support and training to the field and input on discussion forums. Of the seven ECRs, four will be retiring or PCSing between now and the end of December of this year. Advertisements for these assignments will be out soon.

Detailing

Court reporters are detailed to transcribe all requests for transcription assistance based on their schedules in the Judicial Docket System (JDS). To ensure that all requests are received, legal offices should e-mail them directly to the AFLOA

Court Reporting inbox at afloa.court@pentagon.af.mil. In most cases, legal offices should expect to receive the name of the court reporter who volunteered for travel approximately two weeks prior to the date of the court or board, depending on the response date from the court reporter, or when the request was received. Additionally, bases should receive confirmation for requests for transcription assistance, no later than the next day after audio has been uploaded, so long as all requested info is received.

Everyday our enlisted and civilian court reporters are doing great wonderful things in providing reliable support to bases around the world.

Improvements

To ensure the cross-flow of accurate and current information, it is critical that bases regularly update their court reporters' schedules in JDS. This is the sole source JAJ has to determine which court reporters are available, and who may be detailed to provide support. Consequently, if your base's local calendar is not correct, it can delay the completion of a transcript until JAJ can find an available replacement, which in turn adversely affects timely court processing and metrics. All legal office superintendents (LOS) and MAJCOM Chiefs have access to their respective court reporters' schedules in JDS. If you need access, please e-mail the AFLOA Court Reporting inbox.

Some users have also experienced technical difficulties while using JAJ's central depository, Air Force Knowledge Now (AFKN), or WebDocs, which is the secondary location for file sharing. Some have asked about the potential use of an Army system called AMRDEC Safe Access File Exchange (SAFE), as an alternative system. However, this program does not allow the court reporter administrator to make necessary changes when detailing a court reporter to transcribe, or in some cases, detail more than one court reporter to transcribe from the same file. Therefore, JAJ does not utilize AMRDEC SAFE for everyday use.

In response to similar feedback, several changes have recently been made to the process. In the past, suspenses were set only for transcription requests; JAJ is now setting suspenses for completion of the transcript for court reporters that volunteer to travel as well ensuring that one transcript does not get put on a backburner for completion of another. Additionally, court reporters will now include the MAJCOM SJA, Chief, and LOS in the e-mail traffic when acknowledging receipt of an assigned suspense, as well as when informing JAJ of completion of the transcript.

Conclusion

Everyday our enlisted and civilian court reporters are doing great things in providing reliable support to bases around the world. JAJ is currently working on a feedback system that will allow the requesting base legal office to provide feedback to the office of the court reporter providing requested service. Further information on developments will be forthcoming. Until that time, please continue send all feedback, questions, and comments to AFLOA Court Reporting inbox. We welcome your ideas as the JAG Corps continues to transform the opportunities for court reporter utilization in the Air Force.

Legal Assistance Notes

Legal Assistance Website Updates

In May the legal assistance website moved from a commercial server to the JAS server. The redirect from the old website lasted much longer than we originally publicized that it would, but it is no longer working. Please disseminate and publicize the current urls as widely as possible—Client side: https://aflegalassistance.law.af.mil/. Admin side: https://aflegalassistance.law.af.mil/lass/admin.

As of 10 August the website had 60,209 hits, 21,485 tickets issued, 11,325 tickets processed, and 1,643 customer surveys submitted. The number of offices that made the Honor Roll in July significantly surpassed previous months. If you are looking for new ways to encourage utilization of the website for wills, powers of attorney and obtaining customer feedback, please see the website learning center on CAPSIL.

Finally, be on the lookout for good news stories about the website. If you recall a client that was particularly satisfied with the website, please contact them and ask if they would be willing to share their story.

New Information on Legal Assistance Topics

Information on the Continued Health Care Benefit Program (CHCBP), health insurance for former military spouses, has been added to the legal assistance website under the "Divorce and Separation" tab. As you may recall, the CHCBP provides transitional health insurance for former military spouses who are not entitled to standard Tricare. Also, a recent article warning beneficiaries of SGLI payouts was posted under the "Wills & Other Means of Passing Property" tab. Basically, payment does not come in a lump sum, but with a "checkbook" and lots of fine print that encourages the beneficiary to leave the money sitting in a non-FDIC insured account making a tiny amount of interest.

WebLIONS—Flexibility You May Not Be Aware of

Did you know that your office can add or delete units in WebLIONS, anytime a unit name changes or a new unit comes to base? On the WebLIONS actions menu select "add local unit." At the bottom of the unit list, you can enter a new unit. On the same table you can edit and delete units. Did you also know that you can create office specific special interest identifiers in WebLIONS? On the actions menu select "assign identifier," enter the name of the special identifier and a description, and then select submit. The identifier will show up for your office's inputs only.

Military Pro Bono Roundtable

The ABA and the Boston Bar hosted a first of its kind roundtable focused on pro bono legal assistance for servicemembers on 15 July. The roundtable highlighted the opportunities for cross-feed and mutual support between the military legal assistance and civilian legal aid communities. In some cases your clients may be eligible for legal aid. If the legal aid clinic cannot directly assist your client, they may still be able to provide valuable information on state law or local agency procedure. If you have not done so, strongly consider contacting the legal aid clinic closest to you. As part of the relationship building we will be making a concerted effort to publicize legal assistance webcasts, particular on military specific legal issues like the SCRA, to the legal aid community.

ABA's Military Pro Bono Project

In a letter to a member of Congress in the fall of 2009, Secretary of Defense Robert Gates touted the ABA Military Pro Bono Project (MPBP) as a valuable tool for ensuring that servicemembers "receive the best possible representation." If you are not familiar with the MPBP, then please visit the CAPSIL learning center today to learn about it. Jason Vail, the ABA project director, and LTC George McHugh, the DoD liaison to the MPBP, presented a 24 June webcast on the MPBP. If you missed it, you can reach the recorded version of the webcast through CAPSIL.

There are a few important things to remember about referrals in the ABA MPBP:

1. Make sure you give as much relevant information as you can about the case.
2. Upload the client consent form and any other relevant documents before you submit the referral. If papers have been filed in court make sure you attach them.
3. Please put your phone and e-mail contact information (the attorney's) into the referral.
4. Review the submission guidelines on client and subject eligibility, which are located on the MPBP website and on CAPSIL, before you make a referral.

Here is just one example of an Airman who benefited from the program. A young A1C, after several incidents of domestic violence, filed for divorce pro se in her state of domicile, although she was stationed in another state and her husband had left the jurisdiction as well. She obtained a divorce decree by default judgment after her husband did not show. Subsequently, the husband hired a lawyer in the wife's state of domicile and challenged the divorce decree on grounds that the servicemember wife was stationed outside of the state and not residing there. The judge set aside the divorce decree and found them to still be married. Through the MPBP the client was able to bring to the court's attention to the fact that a person that moves because of military orders does not lose her residency or domicile, and was able to reinstate the divorce.

CAPSIL
Capturing Wisdom

New as Chief of Legal Assistance?

The Judge Advocate General's School has developed division chief courses, including a Chief of Legal Assistance Course. This three-hour course provides guidance for leading the base legal assistance program and offers key substantive law pointers on will drafting, consumer law, and Veteran's Administration benefits. By TJAG direction, completion of the course is mandatory before a judge advocate may assume division chief responsibilities within the legal office.

If you have feedback on how we can improve the course or information you would like to see added, please contact us and let us know.

Legal Assistance Chief
Major Scott Hodges

After a lot of valuable contributions to the legal assistance mission, Maj Jeff Green and SSgt Mark Simonds have moved on. TSgt Garza has now officially taken over as the NCOIC for legal assistance. Capt Dan Mamber recently joined the legal assistance team. He is a Civil Law instructor, and the Labor Law liaison, at AFJAGS. He will be my back-up on legal assistance as well as the primary POC for the VITA program.

If you have any legal assistance issues or policy questions, please contact me at DSN 493-3436, commercial 334-953-3436, or scott.hodges@maxwell.af.mil. You can also send an e-mail to AFJAGS.LegalAsst@maxwell.af.mil.

Heritage to Horizons

On 24 June 2010, the Officer Training School, Maxwell Air Force Base dedicated the new Commissioned Officer Training Dormitory in honor of the late Major General David C. Morehouse, the 10th Judge Advocate General. Lieutenant General Richard C. Harding, The Judge Advocate General of the United States Air Force, attended the dedication ceremony and made the following remarks before an audience which included Air University leadership, AFJAGS faculty, as well as students of the Staff Judge Advocate and Law Office Management courses.

The Dedication of Morehouse Hall

Every building has a story. Part of its story is about the people who planned the building. They will tell you why it was needed, and how the funding was secured. Part of the story is about the people who designed and erected the building. They will tell you about its foundation, and the materials used in its construction. But soon, those people and their stories are forgotten. And a building—especially a dormitory—starts to tell a different story. It is the story of the people, who stayed in the building—a story about their experiences. Their stories become the building's story.

In the case of this dormitory, it's the story about a young lieutenant attending COT, who stayed up much too late studying for his final exam. It's the story about a captain, who while attending a trial practice course, practiced her closing argument for hours and hours. It's the story of a major, who returned late at night, too excited to sleep, and woke up his entire floor to share the great news that his long-time girlfriend had agreed to be his wife. And it's the story about a lieutenant colonel, who proudly prepared her uniform, ready to attend her daughter's graduation from OTS. And from this day forward, all who are privileged to stay in this dormitory will proudly say, "I was there. I was in Morehouse Hall."

It is all together fitting that the memory of a man, who was such an important part of the history of our Air Force, now becomes a living part of the continuing Air Force story for so many men and women in uniform today and for those who will serve in the future. Major General David C. Morehouse had a remarkable 33-year career. Commissioned in 1960, he was a direct appointee just like many of the JAGs in this audience. In an era when JAGs mainly served in garrison, General Morehouse deployed for one year as the Staff Judge Advocate, Third Tactical Fighter Wing at Bien Hoa Air Base, Republic of South Vietnam. He turned in long hours under persistent enemy fire at our busiest air base in the Vietnam War. It was there that he earned his reputation as being a "commander's JAG." He went on to serve as a staff judge advocate four more times before becoming, in 1991, the 10th Judge Advocate General of the United States Air Force.

We should remember at times such as this, that members of our Corps are guided in their service, not only by the Air Force core values of integrity, service, and excellence, but also by our Corps' guiding principles: wisdom, valor and justice. General Morehouse embodied wisdom, valor, and justice. He showed wisdom when, drawing on his own experiences in Vietnam, he recognized the growing need for formal training in the area of operations law.

Understanding and practicing the law of war is second nature to today's JAGs. Yet, for JAGs in Vietnam, and later in Grenada, Panama, and the first Gulf War, it was an emerging area of our practice. Today, while many cast a wary eye on the emerging area of cyberlaw, in the 1970s and earlier, many legal professionals gave that same skeptical look to the area of operations law. General Morehouse saw operations law as an important part of our growing legal practice, and in 1991, signed a letter formally establishing a new legal discipline, called "Operations Law." And it is no surprise that this very wise man is known as "the Father of Air Force Operations Law."

Our second guiding principle is valor. While I have already talked about his courage under fire, the examples of General Morehouse's valor do not end there. In 1991, Clark Air Base in the Philippines was destroyed by the eruption of Mount Pinatubo. Among the last groups to depart the installation were the men and women of the Clark Air Base legal office. Under dangerous

conditions, that legal team worked to gather all documentation needed to adjudicate pending courts-martial and unsettled claims … all while continuing to provide legal assistance for those evacuating the base. As the base population was fleeing, one man decided that it was the right time to visit the Clark Legal Office to assist in their cause. Imagine the surprise when, in the midst of continuing volcanic eruptions, General Morehouse, the new TJAG, arrived to assist with last minute preparations.

Our third guiding principle is justice. After Vietnam, General Morehouse returned to duty stateside, as the Chief of Military Justice at 22d Air Force, Travis Air Force Base, California. This was a turbulent time for our country, our Air Force, and for Travis Air Force Base. Stateside bases were often the site of marches, demonstrations and even riots, as people protested the war outside the gate and protested inside the gate the perceived unjust treatment of minority members under our administration of military justice.

In fact, Travis Air Force Base was the site of one of our worst on-base disturbances during these years. After three days of unrest, it was only through the assistance of civilian law enforcement personnel that order was restored. General Morehouse, then a major, saw Travis Air Force Base for the powder keg that it was. As unrest was slowly quelled, he saw that there was potential for more disturbances and, perhaps, even violence.

The base hosted the confinement facility where many Airmen court-martialed for offenses in Vietnam served out their punishment. These convicted, punished, and soon-to-be discharged military members were not allowed to leave the installation upon completing their jail term. Instead, they remained on base. Often, they were forced to do menial tasks, while waiting for their cases to be reviewed by the appellate courts. Consequently, hundreds of impatient and unhappy men gathered all over the base, waiting impatiently to start their lives anew, in the civilian community.

This practice was not intended as punishment, but it sure felt like it. General Morehouse

saw this practice as unfair to the member and unproductive for the Air Force. He recommended ending this practice inspiring the creation of involuntary excess leave what we call today, "appellate leave." The conditions at Travis, and General Morehouse's efforts to diffuse the situation, helped draw attention to the larger issue of disparate treatment of minority members in the military. This issue soon found its way to Congress and to the desk of the President ushering in revisions to ensure that military justice was not only fair, but color-blind.

My predecessor, Lieutenant General Jack Rives, said of General Morehouse, "He was "one of the Corps' most influential and inspirational leaders." I have to agree. General Morehouse's career inspires Air Force members today and will continue to inspire others in the future. However, he was also one of the JAGs, who made an indelible mark on my career…a tremendous attorney, leader, teacher and a patriot.

Finally, there is one last story which exemplifies General Morehouse's service to the Corps. I was the staff judge advocate at Randolph Air Force Base in San Antonio, Texas, in the early 1990s when General Morehouse retired. Because I had worked closely with him in an earlier assignment in Washington, I knew that when General Morehouse returned to his home in San Antonio that I would likely see him again. I was right.

Almost like clockwork, every two weeks, General Morehouse drove to the Randolph Officers' Club for a haircut. Sometimes, after his haircut, he would drop by the legal office just to say hello to everyone. He never called. Often, the first warning I had that a former TJAG was in the office was his distinctive, deep voice resonating through the halls.

I remember one afternoon's visit in particular. I was walking down the hall when I heard his voice. I knew instantly that General Morehouse was in the building. I went to investigate and found him in the claims office talking to our youngest and most inexperienced paralegal about his final household goods claim. Senior Airman Alicia Baxter was not only new to our office, but she was also new to our areer field. In fact, she had not yet attended the Paralegal Apprentice Course, had not earned her 3-level yet, and technically was not even a "paralegal" yet. So, you can imagine my concern when I walked in to find General Morehouse, the recently retired TJAG, huddled over his claim with a novice paralegal.

I did what any SJA would do in that situation; I tried to intervene. I offered to handle the claim myself, but he waved me away. I left Airman Baxter and General Morehouse in the claims office. He had located a copy of AFM 112-1, our old three-inch thick, claims manual, and he was explaining how to use the manual, page-by-page, showing Airman Baxter how to locate rates of depreciation and depreciating items on his own claim. Almost two hours later, the lesson was still going on.

Later, as he was leaving the office, I asked him why he spent all that time training SrA Baxter, when in a few days, she would go to school. He looked me in the eye and replied, "I enjoy it. I have plenty of time, and it was exactly what I wanted to be doing." It is my honor to be here today for the dedication of Morehouse Hall. This is exactly what I want to be doing.

In 1993, General Morehouse, the first direct appointee to become TJAG, presided over the dedication of the William L. Dickinson Law Center, our Air Force Judge Advocate General's School, right here on Maxwell Air Force Base. Over 17 years later, as the second direct appointee to become the TJAG, I am honored to help dedicate Morehouse Hall in his honor.

It is said that it takes many voices to tell a single story that stands the test of time. I am proud to add my voice to those of others, telling the story of General Morehouse, and I am proud that his name, as applied now to this dormitory, will continue to be a living part of the story of Maxwell Air Force Base and of its students. May all those, who reside in Morehouse Hall, enjoy the same fullness of service and display the same character of wisdom, valor and justice, so richly demonstrated by General Morehouse's lifetime of service. Thank you.

AFJAGS Update
Webcast Schedule

Date	Topic	Presenter	AFJAGS Division OPR
7 Oct 10	Uniformed Services Former Spouses Protection Act (USFSPA)	Col (ret.) Mark Sullivan, Family Law Practitioner & LTC Charlie Raphus (USAR)	LA
19 Oct 10 @ 1100	AMC/JAO Ops Law Training – The CR Mission in Action Operation Unified Response (Haiti)	AMC/JAO	POD
4 Nov 10 @ 1000	Keystone: A message for the Corps	Lt Gen Richard C. Harding The Judge Advocate General	POD
16 Nov 10 @ 1000	AMC/JAO Ops Law Training— Virtual Tour of the 618 TACC	AMC/JAO	POD
18 Nov 10	Budgeting Basics for Legal Offices	Speaker to be Announced	POD
2 Dec 10	Air Show Legal Issues	Services Field Support Center	CL
9 Dec 10	Working with Child Victims	Lt Col Christine Bosau, 18th AF/JA	MJ
16 Dec 10	Survivor Benefit Plan	Col (ret.) Mark Sullivan, Family Law Practitioner & LTC Charlie Raphun (USAR)	LA
6 Jan 11	Defense Support to Civil Authorities	Lt Col Vicki Doster NORAD and USNORTHCOM JA	OIL
20 Jan 11	Detainee Operations	Maj Tamona Bright AFLOA/AFJAGS	OIL
3 Feb 11	Housing Privatization Month, Overview and Background	AF/JAA	CL

All sessions begin at 1300 (central) unless otherwise noted.
WEBCAST LINK ON CAPSIL:
https://aflsa.jag.af.mil/apps/jade/collaborate/course/category.php?id=198

For information contact:
Mr. J.J. Whitaker, DSN 493-8458, james.whitaker1@maxwell.af.mil;
or Major Ken Artz, DSN 493-3424, kenneth.artz@maxwell.af.mil

Where in the World?

"The Surprising Side of Guantanamo Bay"
by Captain Rob Palmer, USAF

If you have a unique, funny, or poignant photograph of your travels in the JAG Corps for inclusion in "Where In The World?" please e-mail the editors at ryan.oakley@maxwell.af.mil or kenneth.artz@maxwell.af.mil.

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