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The Reporter

The Judge Advocate General's Corps

"***Celerity*** **is an important element of excellence in military justice. It is a bridge to judge quality…"**

~The Judge Advocate General

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ce·ler·i·ty [suh-**ler**-i-tee]– n. swiftness of action or motion

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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 welcomed 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) (334) 953-2802/DSN 493-2802).

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Message from
The Commandant

Once again, *The Reporter* focuses on Foundational Leadership. In addition to spotlighting TJAG's foundational pillars, several articles in this edition focus on "celerity"—emphasizing the importance of speed and swiftness in military justice. We hope this publication will educate and inspire readers to focus not just on the present, but to also think about long-term training requirements in the years to come. This edition includes a number of interesting and engaging articles.

TEAMING

This edition of *The Reporter* highlights several successful teaming efforts by JAG Corps members in the field. In the teaming feature article *Foundational Leadership, Putting It All Together: Military Justice, Training, and Teaming*, Lieutenant Colonel Mark Stoup details the importance of not only teaming between JAGs and paralegals, but other people and organizations on an installation to facilitate celerity in the military justice process.

TRAINING

Captain James Gutzman offers a unique view of training from a new JAG Corps member. Captain Gutzman's article, *The Four Pillars: A First Assignment JAG's Perspective*, details his experience as his base legal office leadership implemented the foundational leadership principles of training, military justice, teaming and legal assistance.

MILITARY JUSTICE

This edition offers three military justice articles. In an informative article, Major Scott Jansen and Ms. Hattie D. Simmons give valuable pointers to base offices on post trial processing pitfalls. The article focuses on the legal implications of not maintaining celerity in post trial processing and the repercussions of not producing an accurate and detailed record of trial. Additionally, Captain Marc Mallone and Technical Sergeant Andrew Wikoff focus on celerity in the NJP Process with their article: *NJP Processing: Building Relationships, Staying on Message, and Owning the Process: The Keys to a Quality NJP Program and Achieving the 30 day metric*.

LEGAL ASSISTANCE

Captain Joseph Ahlers provides a great description of new requirements for legal assistance attorneys. He provides valuable information on revisions to family care plan requirements in DODI 1342.19 and AFI 36-2908 that prompt military members to seek legal advice if they choose a third-party caregiver in a family care plan in the event of a deployment, rather than a biological parent.

FIELDS OF PRACTICE

Finally, we offer an interesting article on *Orders and Oaths*. Major Davis Younts provides great insight and historical information on an officer's duty to support and defend the Constitution.

FOUNDATIONAL LEADERSHIP

Putting It All Together: Military Justice, Training and Teaming

by Lieutenant Colonel Mark D. Stoup

One of the toughest parts of the military justice process for non-lawyers to understand is the importance of celerity, both how and when it should be applied in order to improve military justice.

I spent five great years serving as a wing staff judge advocate. In that time, I was fortunate enough to serve five different wing commanders. Each had unique leadership styles and qualities, and each one spent time mentoring me in different ways. There was a common theme all of them had; it was their view of my relationship with their squadron commanders and my role in mentoring them. Each wing commander expected me to teach and mentor his squadron commanders. Each wing commander wanted me to help him mold his squadron commanders into future senior leaders. The main area I was to mentor them was in military justice and discipline. Each one of these wing commanders understood the vital role discipline has in successfully achieving Air Force and Wing missions. They believed what General George Washington said about it—"Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all." They also all understood the importance of timely discipline and often cited the 19th Century British politician, William Gladstone, who said "justice delayed is justice denied." Finally, each wing commander understood that discipline, through the effective practice of military justice, needed to be executed both proactively and reactively. After all, getting ahead of issues would improve the unit's disciplinary climate much more than simply reacting to disciplinary problems.

This proactive approach is the area in which the wing commanders expected me to be the most involved with their squadron commanders, and was accomplished by training and mentoring the commanders before actual problems occurred. In addition, JAGs are charged with this training responsibility as seen in the AF Rules of Professional Conduct.[1] It is in the proactive area of military justice that we can impact discipline the most. This is where we recognize trends and recommend comprehensive courses of action. This is the area where we truly mentor leaders. It is at this point in the disciplinary system that we need to help our commanders and other key players understand critical components of the military justice process. One of the toughest parts of the military justice process for non-lawyers to understand is the importance of celerity, both how and when it should be applied in order to improve military justice. JAGs need to counsel and advise on more than just the law, but also in other areas, all of which relate to celerity.[2] By training and teaming with the appropriate people at the appropriate time we can achieve synergy through Foundational Leadership.

How can a JAG use synergy to improve military justice? Simply by combining a couple of areas of Foundational Leadership, military justice practitioners can easily make improvements. It is done by combining three of the principles of Foundational Leadership; military justice, teaming and training. I am smart enough to understand that not everyone likes the term "celerity" and not everyone agrees that it can have a positive impact on the effective administration of military justice. For those readers who are not convinced that celerity is really that important, simply switch the term "celerity" with the

[1] AF Standards for Criminal Justice, Standard 3-2.6, Training Programs states "Training programs should be established within legal offices and circuit offices for new personnel and for continuing education of the staff." This standard is listed under Chapter 1 "The Prosecution Function." A successful justice program should include other people involved in the military justice process such as investigators and commanders at a minimum.

[2] AF Rules for Professional Conduct, Rule 2.1, states "In representing a client, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." Good order and discipline included! In addition, AF Rules for Professional Conduct, Rule 1.3, Diligence, states "A lawyer shall act with reasonable diligence and promptness in representing a client." Further, Rule 3.2 Expediting Litigation, states "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

concept of keeping a smaller docket. The faster cases are closed, the fewer open cases an office must deal with. And who doesn't like fewer "open" cases? JAGs can make a significant mission impact for their client, the Air Force, by appropriately moving cases along.

I am reminded of a case in point. As an SJA, my office had a fairly straightforward case involving an Airman who had sex with a 12-year-old girl and possessed naked photographs of her. The offense was discovered several months after it occurred and was initially investigated and rejected by civilian authorities. The investigation revealed sufficient physical and digital evidence (texts, e-mails and photos) supporting the allegation. The Airman admitted to the offense. As the legal office pushed to move the case along, other "forces" continued to slow the case down. The legal office was prepared to take the case to trial within six months of getting jurisdiction of the case, which was about a year after the offense took place. The victim was then 13. Despite our most determined efforts, the case lingered for another year. The entire time the Airman talked about suicide and he became increasingly burdensome on the unit. Approximately 26 months after the offense, the Airman distributed and used LSD and Ecstasy. The only thing that helped us move the case quickly from this point forward was pretrial confinement. We did not enter into a pretrial agreement and, despite a delay because of a sanity board and the coordination between seven expert witnesses, we were able to take action on the General Court-Martial in just under 160 days after preferral.

TEAMING:

This case provided an excellent tool to teach all the stakeholders about the importance of celerity in military justice. We didn't need to worry about or discuss metrics, particularly since the legal office met all its standards. The experience really helped me to think about how to educate others on the importance of celerity in the entire military justice process. I identified all the stakeholders. They included investigators (OSI, lab experts, and forensic psychologists), commanders, supervisors and mental health professionals. We spoke about the mission impact and the drain on all types of resources. The Airman also occupied a crucial Top Secret billet in a very small shop and the unit was unable to fill the Airman's position for more than two years. When we talked about lessons learned, I realized that this was the ultimate exercise in teaming and I should have collected as many of the stakeholders as possible as early in the process as possible and collectively we might have been able to avoid such a lengthy process.

In hindsight, I realized some of the case delay was due to miscommunication between parties. Other causes of delay were due to misunderstandings of the process, the need for specific evidence, interpretation of evidence and even the quality or weight of the evidence that we had. In short, better teaming in advance of the trial could have made a difference in the timeliness of the case. Had we taken the case to court earlier, the Airman would not have committed the additional misconduct while assigned to the Wing. He would have had the stress of the case behind him and would have either been in jail or discharged.

Teaming simply is leveraging assets to improve efficiency.

IDENTIFY THE STAKEHOLDERS

Teaming simply is leveraging assets to improve efficiency. Attorneys and paralegals are central players in the context of teaming under JAG Corps Foundational Leadership. In the area of military justice, we absolutely need to expand the concept of teaming to include other people involved in the military justice process. Team players are stakeholders or people who have an interest in the outcome of a case. Stakeholders can cover a broad range of people or offices depending on the actual case and include, the legal office, the ADC, commanders (and the chain of command), investigators, mental health, Drug Demand Reduction, Equal Opportunity, and more.

After all the stakeholders are identified and before effective teaming can take place, it is crucial for the team players to be properly trained. Training is an area where JAGs and paralegals must step up. We all need to take more affirmative steps to educate all the players involved with military justice. In order to do that, some basic concepts of education must

be considered. Without conducting an official poll or study, I would guess that the vast majority of conversations JAG Corps members[3] have regarding celerity centers around the word "metrics." I would also guess that the majority of training we do in this area simply involves telling commanders and first sergeants that a metric exists and that it is important to meet that metric. Although this simple knowledge based approach to training works with a small percentage of commanders and first sergeants, it is unlikely to convince the majority of them to act any differently. Why? Because most of them simply don't care about JAG metrics.

We have to approach educating commanders and first sergeants in a different way. We simply cannot just provide commanders with information and expect all of them to act in a certain way. As a parallel, I recall dozens of wing staff meetings in which the Wing Commander or the Vice would present slides on OPR and EPR timeliness. I would watch the same squadron commanders week after week with the same or increasing number of late evaluations and they simply never made a change. If requiring a commander to explain evaluation timeliness to his or her boss in front of his or her fellow commanders doesn't improve timeliness, how can JAGs expect a different response regarding military justice celerity by simply showing a chart during a staff meeting or Status of Discipline (SOD) meeting? It reminds me of a humorous definition of insanity: repeating the same actions, but expecting a different response.

So why won't some commanders improve the timeliness of their evaluations? Everyone understands that some late evaluations were likely due to circumstances beyond the commander's control (such as a referral or a short notice PCS). But I watched week after week as OPR and EPR timeliness stagnated. I then noticed that these same commanders seemed to have other issues with their unit. I understood then that metrics are a window into the quality of a program. They don't tell the whole story. When it comes to celerity in military justice, in order to make an appreciable change, we have got to go beyond JAG metrics and teach stakeholders what celerity means to them.

[3] "JAG Corps members" is intended to include all members of the Corps: Active duty, ARC, and civilians, both attorneys and paralegals.

TRAINING

From an educational perspective, there are three main areas or domains in which people learn. These domains are also known as taxonomies of learning and they deal with the areas of knowledge, skills and attitudes, also known as "KSAs." In order to achieve a learning objective, a teacher or instructor is more effective when they teach in the appropriate learning domain and at the desired level of learning. For example, at the JAG School we teach trial advocacy courses. Our learning objectives focus on the knowledge domain of learning. As we teach trial practice, we expect our students to be able to recognize legal issues, to comprehend the applicable law and to apply it to a court-room situation. We then design lesson objectives to meet those desired educational outcomes. As you attempt to educate commanders and others on celerity, you must think about what your desired outcome or learning objective is, then approach your teaching accordingly. In other words, think about how you want the person to exhibit that they learned the lessons of celerity and teach them in the appropriate domain and at the appropriate level.

The first domain is the cognitive domain, which is best described by Bloom's Taxonomy of Learning. Simply put, cognitive learning is the development of intellectual skills.[4] This is the domain most of us default to when we think of training. For example, when it comes to celerity, we likely tell commanders about the need to achieve particular processing time metrics. This means we train at the knowledge level and then we hope commanders will comprehend and apply that information.

[4] Bloom's Taxonomy of Learning deals with cognitive learning and can also be described as the development of intellectual skills. Like in other learning domains, there are levels or categories of learning. Cognitive skills begin with recalling or remembering information and higher levels of cognitive skills are exhibited by an ability to analyze or evaluate information. These levels can be described with commonly used words. The most basic level is knowledge or recalling data or information. A person can demonstrate knowledge by recognizing and describing facts. The second level of learning is comprehension. This is often shown by interpreting or paraphrasing something or stating a problem in one's own words. The third level of cognitive learning is application in which people can use a concept in a new situation by modifying or problem solving. The fourth level of cognitive learning is analysis. Here people can separate material or concepts into component parts in order to understand organizational structure. The fifth level of learning is synthesis. In this level people can build a structure from diverse elements or even create a new meaning or structure. The final and highest learning level in the cognitive domain is evaluation, where people make judgments about the value of an idea or material through critiquing or defending a concept.

The second domain, the psychomotor domain, deals with doing things. There are seven levels of learning in this domain and they progress from perception and using sensory cues to guiding motor activity. The higher levels of learning deal with origination, or creation of a new psychomotor activity. This domain is not particularly relevant to this discussion and is often applied when it comes to training people to physically complete a task, such as using hand and eye coordination.

The third domain of learning is the affective domain. It is detailed best in Krathwohl's Taxonomy.[5] This domain deals with feelings and attitudes, and is probably the most important educational area to consider when educating or training commanders and all other stakeholders in areas such as celerity. In order for stakeholders to become true team players in military justice they have to at least be at the acceptance or commitment level of learning. We hope to get some stakeholders to higher levels of learning in this domain such as prioritizing and internalizing.

In summary, knowing that a metric exists will not get us very far in the quest to improve celerity, and teaching at the knowledge level will not likely end in application. These concepts do not connect. However, commanders who *commit to* or *prioritize* celerity will make serious positive impacts on celerity. In order to get stakeholders to the appropriate level of action, we need to teach to that level.

TRAINING THE TEAM:

Educational theory sounds great—in theory. But how do you really make it work? Another way to look at it is messaging. A good example is seen in award and evaluation bullets. In order to write an effective bullet, we need to consider the reader or the audience. Once the audience is determined, we need to communicate to that person. For example, a member on a wing quarterly award board will likely not be impressed by reading a line in an award that states "bested the AF claims processing metric by 70%." That's lawyer talk, and people outside the JAG community don't care. Instead we should talk their language. Saying that a speedy process puts money back into an installation's budget funds means something to a commander or a command chief. Treat your celerity message the same way; equate it on an "affective" level to something that matters to appropriate audience. What matters is discipline and justice.

What this means from an educational perspective is that most of us have been communicating the wrong message. We have been communicating in the cognitive domain of learning. Another way to put it is we are simply providing stakeholders information and hoping they will think about it and act on it. If we really want people to treat celerity as they should, we need to approach things from a different angle or from the effective domain of learning. In other words, there isn't much of a problem getting people to *know*, *apply* and even *analyze* the importance of celerity. In fact, I am certain people analyze the importance of celerity every day, but that is not enough! What we need stakeholders to do is to *receive* celerity's lessons. We need them to appropriately *respond* to the message and take *value* in its capability. JAGs, commanders and investigators with time and experience should eventually be able to *organize* (or de-conflict) competing interests when wrestling with celerity and finally, our hope should be that all those participating in the military justice system could *internalize* its importance. By internalize, I mean to live it, or adopt it as their approach to justice.

In short, this whole discussion is really about messaging. We cannot continue to tell people that military justice metrics are important and expect them to understand and go along. In order to effectuate a real change, we must get all the stakeholders to view celerity differently. They need to see what celerity can do for them and make it part of their approach to discipline and justice.

[5] Krathwohl's Taxonomy of Learning involves the affective domain, or emotions and attitudes. It is also known as the feeling domain. At the most basic level of learning one "receives". It is simply a willingness to hear or pay attention. It is exhibited by actions such as asking, selecting or replying. The second affective level of learning is responding. It deals with active participation. Actions demonstrating this level of learning include assisting, performing and discussing. The third level of learning is valuing. This means placing an internal worth on a behavior, which can range from simple acceptance to commitment. Valuing is displayed when a person studies, justifies or initiates. The fourth level of affective learning is organization and it deals in part with prioritizing different values. Actions include ordering, altering, modifying. The final level of learning is internalizing to the level that the new value begins to control ones behavior. The student begins to act consistently with the new value.

In order to effectuate a real change, we must get all the stakeholders to view celerity differently. They need to see what celerity can do for them and make it part of their approach to discipline and justice.

Training (or appropriate messaging) can come in a number of ways. I discussed one training opportunity above. Using a "hotwash" at the conclusion of a case can make a big difference. Another fertile training ground is SOD meetings; leverage them to their fullest extent. My favorite quote in this area is "SOD is not a spectator sport!" Use SOD meetings to discuss celerity in action. Cite good and bad examples, but make certain to inform commanders in advance that you will discuss a particular case. SJAs can easily find time during a SOD meeting to dig into the weeds of one or two cases. Historically, JAGs have used SOD meetings to simply talk crime and punishment. There isn't a SOD OI that says you can't talk about process. This is a great opportunity to highlight cases where speeding the process aided good order and discipline. When you do this ensure everyone understands that they cannot "cherry pick" celerity either by the type of case or the stage in the case.

Arguably, every stakeholder believes in celerity when it comes to someone else's process. For example, a JAG might believe a particular case should be investigated quicker and a commander should act more decisively, yet the same JAG doesn't move their part of the case as quickly as possible. Likewise, a commander who wants a quick investigation and a quick legal process must also believe in timely command action. The logic continues no matter what stage of a case is addressed. If a stakeholder believes celerity is important in parts of a case, they must also believe it is important regarding the portion of the process that they own. Second, if celerity is important in one type of case, then it is important in all others. All too often stakeholders give appropriate attention to select types of cases and allow other types to linger. Everyone will easily agree that some cases need additional attention. Pretrial confinement or those that involve public safety issues often convince all stakeholders that a case must be moved faster than normal. Logically, this means that they believe in celerity. Our job is to expand their commitment to the concept beyond their current understanding. While some types of cases or some parts of a particular case might demand "additional" celerity, all cases and all stages demand some level of celerity.

Finally, when you discuss cases in SOD meetings make certain to discuss things that have meaning for all the stakeholders; that is resources. It is advisable to invite more than just commanders and first sergeants. Consider inviting some of the other stakeholders mentioned above. SOD meetings also present great opportunities to leverage the resources from one command to help another.

There is power in numbers. If the Security Forces Squadron Commander needs a discharge case moved quicker than normal, leverage the Force Support Squadron Commander to get it done. There will undoubtedly be a time when the FSS Commander needs a particular investigative step done quickly to move a case. Likewise, working with the Medical Operations Squadron Commander to help move something on an OSI investigation that needs a higher priority will likely also pay off in the future. Using commanders to help convince one another to keep cases moving is perhaps the most productive approach available to improve celerity. Once commanders realize that they all benefit from prioritizing certain steps in the military justice process, they will learn how celerity actually impacts them. JAGs do not need to be the sole driving force behind moving cases. Once other stakeholders see the *value* in celerity or when they begin to place a *priority* on it (from Krathwohl's taxonomy) they actually become team players and help in the process.

Educate stakeholders on the myriad ways celerity can help them. Find and share examples with them so they can begin to put a priority on celerity. Convincing a stakeholder to reprioritize a step in a couple cases a year can make a huge difference in the overall processing of military justice at your installation.

Celerity can make a positive impact on the AF mission. Celerity moves unproductive Airmen out of the Air Force faster (in courts and discharges), which means the Air Force is not paying unproductive Airmen for more time than they deserve. Trimming a couple of days from each discharge case can easily add up to the Air Force saving tens or hundreds of thousands of dollars in undeserved pay. Additionally, if an Airman needs to be removed from a unit (by court or discharge), it allows the commander to remove the Airman from their Unit Manning Document and replace the person with someone who is productive. It gets Airmen back to being mission focused by getting discipline over with quickly. It saves investigators from taking unnecessary investigative steps (saving man-hours and money). It helps prevent Airman from committing further misconduct while in the Air Force (because they are in jail or discharged). It frees unit manpower that might otherwise be needed to keep close watch on a troubled Airman. These are some of the most obvious advantages of celerity. There are a host of other examples and each case has its own unique circumstances, many of which can span several different units or agencies. Once stakeholders see that celerity is not a JAG metric at all they will begin to internalize the concept and you will see a difference.

CONCLUSION

I will close with an example of celerity mentorship. The case dealt with a Security Forces Airman who fell asleep on post. This was the second time the Airman was caught sleeping on duty. The first time he received an Article 15. He was in a weapons storage area guarding a bunker that contained nuclear weapons. At the time his supervisor found him sleeping the nuclear weapons were exposed to the point that a person off the installation could actually see them. The wing was preparing for a Nuclear Surety Inspection (NSI), which is essentially the installation's "license" to operate. The entire squadron knew about the misconduct and everyone was watching to see how it would be handled. Due to a number of factors, my recommendation was to prosecute the Airman at a Summary Court-Martial. Based on the timing of things the natural time frame to conduct the court was a week prior to the NSI. This was a point in time when the legal office was ready, an officer was available to conduct the Court-Martial, and the case would have met the processing time goal (i.e., metric). The Commander pushed back, arguing that the unit could not afford the manpower to go through a court-martial. He understood the court would consume a number of people at a critical time for his squadron and the wing; including an expedited investigation, several witnesses for the court, a bailiff, two confinement NCOs, the first sergeant, and several members of the Airman's chain of command. I spoke with him about an open trial conducted on the eve of a very important inspection and the positive impact a speedy trial would have on discipline. I believed it would increase the Squadron's focus on standards and laid out several other advantages of prosecuting the case sooner instead of later. The commander reluctantly agreed with my recommendation, and we expedited the investigation and the court date.

In short, the Airman was convicted and sentenced to 25 days confinement in front of a courtroom packed with Security Forces Airmen. The Summary Court-Martial, an O-6 Group Commander, briefly talked about the importance of standards and discipline, particularly as it applied to the nuclear enterprise and the pending NSI. We also ran a brief article in the base paper just before the NSI kicked off. In the end, the squadron aced the NSI and the commander couldn't have been happier with his decision to keep the case moving. He cited our conversation about his unit ability to focus on the inspection and not have such a huge disciplinary cloud lingering over the unit. He stated that the investment of time and resources was a bill that eventually needed to be paid and that the bill would only increase with time. In the end, we never talked metrics and he became convinced celerity was not a JAG metric. Instead he learned that it had appreciable and positive impacts on his unit's discipline. He became part of the team.

The Rest of the Story

Enhancing Your Sentencing Case by Paralegal Teaming

by Captain Michael A. Pierson

You are facing an "easy" case of guilty pleas and a simple sentencing case. This easy feeling vanishes when, during the initial 802, defense counsel, for the first time, raises that they intend to present an Article 13 issue for trial. Initially you think, Article 13, "Yeah I remember that in the script, but what is that again?" Finally your brain synapses fire and you remember illegal pre-trial punishment. Then you think—because this is a DUI case—he must be challenging the base rule that the last squadron who has a member suspected of a DUI is charged with changing the sign at the gate. You remember some case law that speaks to this, you know the squadron commander of the accused will give good testimony on the stand, and you realize you are stuck in the court room unable to develop this information. The office is low manned and so you turn to your case paralegal as he or she will be the one to build your case on this issue.

This article explores the concept of paralegal–JAG teaming in the context of the sentencing phase of trial. The article addresses where case paralegals in a base legal office can team in the preparation and execution phase of the sentencing case. This article contends the JAG–paralegal trial team should be an integrated trial preparation and execution machine that takes special advantages of the strengths of each other's skill set.

WHY FOCUS ON THE SENTENCING

Colonel Don Eller noted recently in his article "View from the Bench: Sentencing Evidence" that over 90 percent of Air Force courts-martial result in a conviction for at least one charged offense. Yet, despite the frequency of a sentencing phase of trial, trial counsel are perpetually indicted with lack of focus or thought in sentencing. This lack of focus is understandable given the aura of the guilty verdict in popular society and our own practice. In popular society, millions tune in to high visibility cases to hear the verdict; however, unless the death penalty is considered, the sentencing phase is often less popular. In our own practice, we often give junior counsel the majority of the responsibility in sentencing.

The importance of sentencing to both sides cannot be discounted. The sentencing phase is the Paul Harvey phase of the trial. Sentencing is where we find out "the rest of the story." Moreover, as then Captain James G. Gentry stated in a *JAJG Perspective on Sentencing Basics*, "*Justice* is not found in a conviction alone, but also in the appropriate level of punishment for the wrong-doer. Justice is not achieved until the punishment that fits the crime is served."

Trial counsel do great damage to their client if they let only the defense counsel tell "the rest of the story." Worse, trial counsel may not even take the time to find out the rest of the story. This is not to say that trial counsel are unwilling to prepare this evidence. More often, they run out of time or devote inadequate thought to sentencing due to the pressures of getting a favorable findings verdict. Given these constraints and concerns, it is worth exploring how the paralegal–JAG team can contribute to making a more robust sentencing case.

THE FUNDAMENTALS OF SENTENCING

A benefit of the sentencing phase of trial is that the rules regarding evidence are plainly laid out in Rules for Court Martial ("R.C.M.") 1001(b). For trial

counsel, there are five gates through which evidence can be entered for sentencing, in addition to evidence introduced in the findings case. These five gates are: service data, military history including disciplinary history, prior convictions, matters in aggravation, and evidence of rehabilitative potential. Admittedly, the first three are straightforward. The two that are pivotal in how trial counsel present a sentencing case are the last two: matters in aggravation and evidence of rehabilitation potential.

R.C.M. 1001(b)(4) allows the trial counsel to admit evidence in aggravation directly related to or resulting from the charged offenses. Proper aggravation evidence may include uncharged misconduct, facts and circumstances of the offense, ongoing course of conduct evidence, the *Care* inquiry, victim impact, and the accused's attitude towards the offense. Additionally, R.C.M. 1001(b)(5) allows opinion testimony on rehabilitation potential provided the witness has sufficient foundation for his opinion. Researching the case law and building facts for these areas is time-consuming and may at first blush seem secondary to the goal of conviction, but the result is critical information to the decision-maker.

WAYS TO ENGAGE PARALEGALS IN SENTENCING

In preparing for the sentencing case for my trial, I engaged the case paralegal. The "rest of the story" is that the case paralegal researched case law; called, interviewed, and prepared the squadron commander to testify; and got clarity from the first sergeant as to how exactly the accused carried out his military duty. In this case, I was physically foreclosed from doing this myself, but, as discussed above, time-constraints or other priorities often distract or preclude trial counsel from devoting full attention to the sentencing phase of trial. Thus, the paralegals, with their skill sets of researching and interviewing, are a critical asset to trial counsel in preparing for trial.

Colonel Tim Cothrel in discussing sentencing arguments states that to construct an effective sentencing argument trial counsel must know and understand three aspects of their case: (1) law; (2) facts; and (3) the human mind. This really can be expanded to state that in developing evidence and a strategy for the sentencing case you must: (1) know the laws relating to sentencing; (2) develop facts about the accused; and (3) understand how those facts will influence the sentence. Each of these phases can be aided by the case paralegal.

Regarding the laws relating to sentencing, team with your paralegals on case research related to sentencing. Lay out where you want to go with a piece of evidence or witness in the case (i.e., the strategy). Once the strategy is laid out, then challenge the paralegal to assist you in finding the law to admit that testimony or evidence. Then if things go sideways on an issue or an issue comes up at trial, rely on the case paralegal to assist you in finding the case law and rules to overcome the objection. Numerous times I have had paralegals bring me better cases than I was able to develop myself on an issue.

Developing facts on the accused is truly where the case paralegal can be the greatest asset. Have the case paralegal scrutinize those EPRs and derogatory data. Any NCO will tell you that for any problem Airman, "not all of the problems are documented." Have paralegals reach out to these individuals. Often, enlisted supervisors are more comfortable talking to peers than they are talking with officer attorneys. Take advantage of that. These supervisors and fellow Airmen are where the "rest of the story" is waiting. Having said that, you should keep in mind that many of these interviews may result in no findings. Your paralegals can help you filter relevant from irrelevant witnesses.

Finally, in understanding the evidence, rely on your paralegal's experience versus your relative inexperience. Many of the paralegals at Whiteman AFB cross-trained to the career field from maintenance. Several times I have asked them to put their maintainer hat on and tell me how maintainers would view an offense. In sentencing, it is worthwhile to have your paralegals give their non-lawyer view of the evidence. This is especially true when you murder board your findings and sentencing case. The paralegals need to be there.

By teaming in the ways described above, the JAG–paralegal team becomes one collective whole, laying every possible evidentiary brick, and of course ensuring the sentencing decision-maker now knows…"the rest of the story."

Eglin's Magistrate Court Teaming

by Captain Sarah R. Tasker

With a civilian population of close to 100,000 and an installation the size of Rhode Island, Eglin AFB prosecutes an average of 130 Magistrate court cases a year. This docket correlates to a tremendous amount of behind the scenes work for me, Eglin's primary Special Assistant U.S. Attorney ("SAUSA") and paralegal teammate, Ms. Cynthia Rivera. With all the demands of a legal office, it would be almost impossible to stay on top of the docket if it were not for the excellent paralegal assistance of Ms. Rivera.

At the start of each month the local U.S. Attorney's office sends out the preliminary docket; arraignments are always on the third Wednesday of the month. For each case, Eglin's Magistrate team must prepare the information, or charging document, a summary of the case, and send them along with the investigative report, criminal history and driving record, if applicable. These documents are due at least two weeks prior to arraignment. Understandably, this requires a quick turnaround to create and compile the case file. In addition, each report must be redacted to prepare a discovery packet to serve at the hearing.

Eglin AFB prosecutes an average of 130 Magistrate court cases a year. This docket correlates to a tremendous amount of behind the scenes work for me, Eglin's primary Special Assistant U.S. Attorney ("SAUSA") and paralegal teammate, Ms. Cynthia Rivera.

When the Eglin Law Center receives the preliminary docket, Ms. Rivera immediately contacts Security Forces to request the pertinent reports and evidentiary documentation. Over the course of the last year she has worked with Eglin law enforcement partners to create a template request form containing the case information and listing the documentation needed. As she receives it, she begins to build the case file. Her attention to detail is extraordinary, and she often catches references to videos, photos or other evidence missing from the records received from Security Forces. Her efforts ensure the case is 100% trial-ready two weeks before we set foot in the courtroom.

Once the records are received and the court documents are generated, I review the files. The vast majority of the misdemeanors are straightforward incidents of shoplifting, simple assault, and drug or alcohol related offenses. But occasionally, there is a complicated situation that has to be resolved before I can draft the charging document. Together we murder board each case and amend or correct the documents as necessary before submitting the file.

Ms. Rivera's participation in the Magistrate Court program is by no means limited to document preparation and discovery management. Ms. Rivera also accompanies me to court to assist with the arraignment hearings. Every defendant receives a copy of the information, the discovery, and a financial disclosure affidavit to determine eligibility for a public defender. As the defendants check in with the bailiff she distributes and explains the documents and answers questions about the affidavit.

For cases not resolved at the initial appearance, Ms. Rivera is instrumental during trial preparation in coordinating witness availability, assisting with witness preparation and ensuring all court dates are kept current on the staff calendar. When available, she also attends change of plea, sentencing, probation violation and revocation hearings, particularly when there are multiple cases heard at the same time. In addition, she tracks the cases on WebMag (the Magistrate Court's Tracking System) and has plowed through a five-year backlog to catch up our records management. From this, she generates reports for office leadership and Security Forces on the status of cases for the current month as well as year-to-date.

One of her more brilliant ideas was to create a workflow inbox specifically for Magistrate Court correspondence, and all communications with law enforcement, court officials, defense counsel, etc. is conducted through and archived in that mailbox. This has been a highly effective means of ensuring continuity as the most current information on every case is stored in a single space which can be monitored by anyone with approved access. By utilizing this mechanism, no data is overlooked or unavailable regardless of leave, duty transitions, TDYs, quarantined computers or other personnel or communication issues. Additionally, case scheduling and court documents are stored electronically in shared drive folders organized by date, status, and defendant name. Ms. Rivera meticulously monitors and organizes both the Magistrate Court inbox and electronic record storage so that the case files are continuously up-to-date.

If it sounds like a lot of work, it absolutely is. Her contributions and efforts are what makes our Magistrate Court program so successful; if teaming is a JAG Corps best practice, she is one of our best practitioners.

The Paralegal Multiplier

by Mr. William H. Hill and Staff Sergeant Gwendolyn B. Chapman

THE PROBLEM

The Warner Robins Air Logistics Center (WRALC) legal office was confronted with increased environmental law workloads and reduced-strength environmental attorney staffing.

THE SOLUTION

An environmental attorney/paralegal team.

The new work arose, in part, from local community efforts to support base missions and counter encroachments, from Occupational Safety and Health Administration (OSHA) efforts to enhance safety protections, and from Robins AFB's pursuit of energy saving initiatives. Attorney staffing, meanwhile, was reduced 50 percent, to a single civilian attorney to handle the complex environmental issues characteristic of depot maintenance activities. Consequently, legal support for increased workloads needed resolution. The perfect resolution proved to be paralegal teaming.

To develop the team, one of our military paralegals volunteered for a full year rotation in the environmental section. For baseline training, she completed the Air Force JAG School Environmental Law Course. She augmented that training by completing CAPSIL's Environmental Law Chief's Course and completing the Air Force JAG School Environmental Law Update Course. On the job

The commitment by the legal office leadership to assigning a paralegal for an entire year was critical to the paralegal teaming success.

training by working with the environmental attorney also sharpened her skills for law office responses to critical environmental matters such as environmental spills, regulatory notices of violation, and the legal perspectives for reporting enforcement actions. Like any good NCO, she fostered peer-to-peer contacts. In this case, with the engineering offices to maintain communications on status, technical information, and projects. Moreover, she attended meetings with the environmental attorney, and in his stead, on Base projects involving environmental law issues, energy-related environmental issues, and National Environmental Protection Act (NEPA) compliance.

Working with the environmental attorney, our paralegal tracked down technical and factual information in support of environmental law advice provided by the office. She researched issues and drafted preliminary memoranda of law. She also provided administrative support for an extremely high visibility investigation responding to OSHA findings and violations. This last monumental project involved compiling approximately 39 interview records, and, within two weeks, a detailed report to the WRALC commander.

In other matters, our paralegal's preliminary review of Air Force Forms 813 under the requirements of the Air Force Environmental Impact Analysis Program (codified at 32 CFR 989) aided the Command engineers in complying with NEPA at the early stages of project planning. Her additional preliminary reviews of weekly Environmental Safety and Occupational Health Compliance Assessment and Management Program (ESOHCAMP) findings assisted the Base officials and the legal office analyses. Importantly, this work extended her paralegal technical skill sets to paralegal program management, enabling the legal office to prepare for unplanned events and to resolve environmental law issues before they became a problem for the Command.

In the midst of this prototypical effort, the legal office had an Article 6 Inspection. One of the highlights was favorable recognition of this attorney/paralegal team. In retrospect, the commitment by the legal office leadership to assign a paralegal for an entire year was critical to the paralegal teaming success.

Moreover, the servant leadership by the senior enlisted paralegal fostered opportunities for the environmental paralegal to also collaborate with other sections in carefully managing her time and expertise to aid the achievements of the rest of the legal office team as well. This paralegal teaming turned out to be an opportunity for the environmental paralegal to grow, benefit, and serve in important, mission-essential ways that otherwise might have been lost from the office and paralegal.

The paralegal procedures that were developed continue to benchmark for the environmental law section. These benchmarks enable the legal office to prepare for unplanned events and to resolve environmental law issues before they become a problem for the Command. Now these benchmarks are guides for attorney and paralegal teaming on a project basis—and it is working.

Because of paralegal teaming, expanded workloads and staffing limits proved not to be insurmountable obstacles. This paralegal teaming proved to benefit paralegals, attorneys, and mission alike.

The Team!
(Paralegal Teaming)

by Technical Sergeant Joshua C. Watkins and Ms. Behn M. Kelly

Paralegal utilization has a new name and it is called *Paralegal Teaming*. I consider myself a prime example of how teaming is utilizing military paralegals more effectively. Paralegal utilization was about getting paralegals to do more than administrative work. Teaming goes even further and pairs us with attorneys to more effectively use our attorneys and paralegals for the mission. I want to share with you how the last six months have changed for me because of paralegal teaming.

THE PARALEGAL PERSPECTIVE

I am assigned to AFLOA/JAQ and have been involved with numerous contract cases since I started here in July 2011. This was a brand new duty for military paralegals when I came over to JAQ, now we have four military paralegals assigned. JAQ is a prime example of teaming. Obviously with any new area there is a certain amount of administrative work, but here in JAQ, all assigned personnel, to include military and civilians, split additional duties. This is to ensure paralegals are able to do substantive paralegal work. Also, paralegals attend all attorney training sessions to be able to get a better understanding of the tasks handed down to us. I have attended everything from Alternative Dispute Resolution to Continuing Legal Education credit level courses.

In my first three days here, I was assigned to an Armed Services Board of Contract Appeals (ASBCA) case and assembled a "Rule 4" file for a different case. By the end of the week, I had been in an ASBCA hearing, presented evidence to witnesses on the stand, actually participating in trial (as I sat at the government counsel's table). I was hooked! The next week I was assigned to a big contract litigation case and was tasked with setting up a timeline for the evidence as well as a case brief. I read and logged over 200 separate documents ranging from e-mails to memos to contract changes. When the attorneys read my summations of each document, they were able to see the chain of events clearly. Having all those documents put into an easy user friendly format saved time for the attorneys and brought to light things that they might not have otherwise found. This had a huge impact on the case and the attorneys working the case. Because of my work on the timeline, I was asked to sit-in on arbitrations with a top level law firm and was able to ask questions based on what I had found during my research. Further, when it came time to make the decision to settle or litigate the case, I was asked to attend the team meeting and my opinion, along with the knowledge gained from the work that I had done, was a deciding factor in moving forward with litigation.

Just as I was settling into JAQ, it split into two divisions. The Contract Litigation Field Support Center (CLFSC) handles issues arising after a contract has been finalized, and the Contract Law Field Support Center (KLFSC) handles everything that transpires before contract litigation. The KLFSC primarily handles issues that involve Air Force Fraud, Source Selection, and Enterprise Sourcing. These are all new areas that prior to this, military paralegals had never been involved with. Since being assigned to the new section, every task has been a new experience. One of the first taskers I was given was the ever so intimidating legal research. Legal research was something that was often talked about, but I had no experience with it. To further complicate things, I was looking for case law on an acronym, the HEAT trainer (HMMWV Egress Assistance Trainer). My first search brought up over 10,000 cases and they involved everything from overheating to heat exhaustion. It took me a good day just to figure out how to sort through all the cases found in Westlaw. That is when I asked an attorney for some no-nonsense refresher training on Westlaw. Ultimately, because of my findings on the case, the attorney and I agreed that there was no reason to litigate the case, again saving the attorney countless hours and the government money in litigation expenses.

Because the teaming concept is being implemented, paralegals across the Air Force have obtained real world experience in multiple areas of "real" paralegal work. This experience is invaluable.

This experience made me eager to do more research. My next legal research assignment was to find cases that were on both sides of Competitive Range Determination in regards to Source Selection. My legal research on that topic is currently used in an Air Force-wide Source Selection training brief.

The next case I worked on was a U.S. Government Accountability Office (GAO) bid protest case. The protester in this case alleged that the solicitation established an improper competitive range that illegally favored the manufacturer of the F-16 extended range multi-purpose (ERM) pod upgrades. This case was worth over 2 billion dollars to the U.S. government and I was inserted right smack in the thick of it all. First, I was asked to personally handle all government witnesses and evidentiary matters throughout the hearing. I was also asked by the Air Force counsel to assess the impact of every witness on the GAO hearing officer—and to opine on whether I thought the GAO hearing officer was buying the Air Force's argument. The evidence in the case was both protected and unprotected, and the testimony of the witnesses involved almost completely protected information. By adding a military paralegal to the team, the attorneys knew they could better focus their efforts on directing and cross-examining the complicated technical testimony because they knew that I could and would handle everything else that came up. Which I did! As a result of paralegal teaming, our team ended up saving the taxpayers over 2 billion dollars, and there was even an article published in the Air Force Times about our win.

THE ATTORNEY'S PERSPECTIVE

We were defending a bid protest that looked like a close call for the Air Force. The Air Force was trying to procure "old" pods for the F-16 aircraft that could be modified—instead of "new" pods, which is what the protester was in the market to provide, and are far more expensive. The cost savings to the Air Force from procuring and modifying the old pods was over $2 billion. After reading our submitted Memorandum of Law and the full Agency Report, the GAO called a hearing. We rejoiced because a hearing gave the Air Force the opportunity to explain very complex technical and cost judgments verbally—which was preferable to solely relying on a written document. We also rejoiced because that same day, Technical Sergeant Joshua Watkins was added to our trial team.

We had a lot of witnesses, a lot of complex points to make, and we were not sure which technical or numerical argument was our best foot forward. TSgt Watkins organized our witnesses and took custody of their written statements—most of which were protected. At our request, he monitored the witness stand for the duration of the two-day hearing, and provided us with his assessment of how each witness' testimony positively or negatively impacted the GAO hearing examiner. His input was pivotal with regard to our most critical witness—the cost expert. After this witness had gone through a grueling direct and cross-examination, we took a break. We wondered whether we should execute some re-direct. Did our paralegal think the GAO Hearing Examiner understood the expert's points? The paralegal answered in the affirmative. The Air Force rested. And shortly thereafter, we won a precedent setting case. This would not have happened without TSgt Watkins!

These are just a few examples of the direct impact that a military paralegal has made in the JAG Corp and to the Air Force since the implementation of Paralegal Teaming. Because the teaming concept is being implemented, paralegals across the Air Force have obtained real world experience in multiple areas of *real* paralegal work. This experience is invaluable. Air Force paralegals are obtaining skills that clearly translate to the civilian world and make them sought after for a civilian paralegal position.

The Four Pillars:

A First Assignment JAG's Perspective

by Captain James H. Gutzman

As I settled into my first JAG assignment in October 2010, Lieutenant General Harding announced the four inter-related pillars of Training, Justice, Teaming, and Legal Assistance at Keystone. Since then, eighteen months have passed and my first assignment is winding down. I offer the following single-base retrospective on my most memorable encounter with each of the pillars:

TRAINING

Training infiltrates every aspect of what we do as legal professionals. While I was still at Judge Advocate Staff Officer's Course (JASOC), my Staff Judge Advocate (SJA) and deputy signed me up for two formal school courses. Then, within a week of my arrival at McConnell AFB, our Law Office Superintendent assigned me three CAPSIL courses and gave me a copy of the office weekly training schedule, with classes every Thursday and assigned trainers. Additionally, the current Operations (OPS) Law JAG, whose position I was taking, told me about the training I would need to complete to prepare for two upcoming Operational Readiness Exercises (ORE) and an Operational Readiness Inspection.

All of this scheduled training paled in comparison to the amount of informal training I would receive. In November 2010, I was still fresh from JASOC and eager to make a good impression when the SJA called me into his office. The deputy was also there and had a copy of a Commander Directed Investigation legal review, which I had spent hours drafting, editing, and polishing. I anticipated they would praise me for the three pages of succinct, top-notch analysis. Instead, the SJA stared at me and told me the legal review did not meet his standards. It needed to be substantially re-written. The deputy nodded vigorously in agreement.

I hunched, deflated. What the SJA did next, however, surprised me. He encouraged me to develop my writing and develop as a JAG. He did not give the legal review to me or to the deputy and say, "fix this." Instead, he sat there, with both the deputy and me, and went over each section, identifying the weaknesses and offering suggested corrections. (The only strength he pointed out was that I had gotten his signature block right.) In that forty-five minutes I spent in his office I learned more about practical legal writing than I had learned in three years in law school. The unstated lesson was that my professional development was worth not only his time, but my deputy's time too. Within a couple of weeks, I went from writing terrible legal reviews to writing, with his and my deputy's help, solid legal reviews that needed only minor tweaking.

JUSTICE

Like many of my JASOC classmates, the justice pillar attracted me to the JAG Corps. I wanted to have a large caseload, to be in court a couple of times a week, and to prosecute high-profile murder cases. When I left JASOC, I believed I was an adept litigator, ready for the courtroom.

Three months into my assignment, as I continued to learn and as my writing improved, the deputy gave me a high-profile case assignment. She told me to come up with a communications plan for a case involving a senior non-commissioned officer who had been arrested for exposing himself in front of young girls downtown.

The deputy gave me a sample communications plan of a high-profile HIV case she was prosecuting and a sample case chronology. She assigned me my first case and told me to run with it.

I began to work on the communications plan. I engaged with public affairs anticipating interview requests and questions from the media. I identified key audiences, suggested appropriate postures, themes and messages, and developed mock questions. The deputy approved my communications plan, and I waited for the press to come calling. Weeks passed, and they never did.

We received the completed police report. I interviewed victims and police officers and drafted, edited, and polished a proof analysis.

The SJA called me to his office and told me to bring my proof analysis, charge sheet, and trial plan. The deputy was there again.

We went through the report of investigation page by page, noting witnesses, inconsistent statements by both the accused and the victims, and tweaks to the charges. We spent an hour and a half reviewing the case and my work.

The case paralegal and I re-interviewed every witness. I asked the same questions as before and got the same answers. We visited the crime scenes. I reviewed all of the materials until I knew every detail of the case. I felt confident and ready to do battle.

The SJA felt I needed help and requested a senior trial counsel (STC).

I worked non-stop on the case for the next three months. In addition to the Area Defense Counsel, the accused hired two civilian defense counsel. The STC patiently answered my repeated phone calls. He assisted with witness preparation, handled expert requests, and edited my responses down to nine subpoena requests and five motions.

The STC flew in the week before the trial. We interviewed every witness a third time. We then litigated the case over four days. My heart pounded, and I held my breath before the announcement of findings and again before the announcement of sentence: guilty on all charges and specifications. He received a sentence of 3 years of confinement, a dishonorable discharge, reduction in rank to E-1, and had to register as a sex offender.

TEAMING

During the first six months of my assignment, teaming felt forced. At my level, the value of teaming was not immediately apparent to me. The paralegals and attorneys each did their separate parts of the will or claim. The tasks were performed sequentially, not in parallel. Even worse, sometimes a paralegal and an attorney attempted to perform the same job, which should have only required one body. For each ORE, we sent a paralegal and attorney "team" to the mobility line to ask passengers whether they needed any legal documents before they deployed. Even after we told the passengers that we lugged the printer all the way from the law office, no one ever needed a will or a power of attorney.

Then, in late March, I got a late Saturday night call that an Advance Echelon (ADVON) team and two chalks were deploying to Spain in support of Operation Odyssey Dawn. We were expected to participate on the mobility line. Early Sunday morning, the paralegal and I arrived, ready to work. The SJA briefed us that I would also need to give an OPS Law briefing to the departing troops on the mobility line. Because of the time crunch, all of the work which had been sequential became parallel. My paralegal researched the Status of Forces Agreement (SOFA) and Rules of Engagement (ROE) for Spain and I

researched this for Libya. We built an International Law briefing covering Law of Armed Conflict, Law of Air Mobility, SOFAs, and ROEs for the SJA to review within a short 45 minutes.

While I made the SJA's requested changes to our briefing, the paralegal set up our part of the mobility line with two laptops and a printer. By 0830, we were processing the ADVON team. As opposed to when we were in an exercise, many deployers now needed powers of attorney and wills. I drafted the wills while the paralegal wrote the powers of attorney. Along with the help of the Chaplain, we executed the wills together.

As the paralegal processed the first chalk through the mobility line, I gave the international law briefing to the ADVON team.

While the first chalk departed, we processed and briefed the second chalk together. We finished the day finally understanding the benefit of the teaming concept, of working in parallel. We shared our newly found understanding of teaming with the rest of the office when we trained them at the next staff meeting.

LEGAL ASSISTANCE

When I arrived at McConnell AFB, our base had two legal assistance "frequent flyers." One being a retired lady who made fabulous cookies, who came bi-weekly to walk-in legal assistance to discuss who she would like to disinherit. The other was a retired man who was being evicted from his rented land and could not come up with a plan for what to do with his 14 antique, non-running cars.

Each of these retirees were well known around the office, and each would only see his or her legal assistance attorney.

Before I was allowed to see a client, the SJA called me into his office. "Jimmy, most of the JAG Corps sees legal assistance as an additional duty, as something that keeps us from doing our real work. Not me. Read up on Kansas law, sit in on a few other attorneys' legal assistance appointments, and remember that our clients' lives are in turmoil. You present their best hope."

I saw my first client a week later. She was the spouse of a deployed Army National Guardsman, who was being evicted from her home. At her first appointment, she brought no documents with her. I explained the Servicemembers' Civil Relief Act to her, gave her an educational flyer, and asked her to come back with her documents. She came back the next week, and the week after.

Meanwhile, I called her loan company and the attorney representing the loan company. I sent them copies of her husband's orders, and I waited. She called me a couple times a month for status updates, and I re-doubled my calls to the loan company and its attorney.

My client, now a legal assistance frequent flyer, came back week after week. She would only talk to me. One day, she handed me a letter and asked me to interpret it. I read it and told her that the company was no longer foreclosing on her house and that the loan company wanted to re-negotiate the mortgage.

I only saw her one more time. She came back four months later. She didn't bring me cookies, but she did bring her husband, who thanked me.

Together, the pillars made me a stronger attorney.

CONCLUSION

The above ups and downs are only a small part of my first assignment. All told, I attended five formal courses, prosecuted six courts-martial, worked closely with eight paralegals, and advised over 200 legal assistance clients.

At first, these four pillars seemed like disconnected ideas. Each had value, but I saw no thread tying them together, no self-evident relationship. Now, as I look back, I see how much I needed each pillar, and how I can use each of them going forward. Together, the pillars made me a stronger attorney. I did not need my SJA to sit me down and explain the relationship of the four pillars. I needed extended amounts of time with each of them. I needed perspective.

Revival of Military Justice in Post-Trial Processing:

Preventing Post-Trial Processing Errors that Delay Appellate Review and Undermine Confidence in the Military Justice System

by Major Scott C. Jansen and Ms. Hattie D. Simmons

The military justice revival over the last two years has largely focused on military justice practices at the pretrial and trial level. Many positive changes have been made in the first two steps the military justice process: pretrial investigation and trial practice within Air Force courts-martial. Post-trial processing, the third step in the life of a court-martial, is often overlooked, but it too needs to be a part of this revival.

This article focuses on post-trial processing errors, which have become all too common. According to AFLOA/JAJM and AFLOA/JAJG statistics, approximately 31 percent of all cases sent for post-trial review and/or Article 66(c) review in 2011 had some post-trial error. These were predominantly either unnecessary delay or substantive errors, which are discussed in this article.[1] Unfortunately, the year 2011 was not an abnormally high year for post-trial processing errors.[2] With greater attention to detail and more focus on celerity in overall post-trial processing, post-trial processing errors can be substantially reduced.

[1] From 1 January 2011 to 30 September 2011, AFLOA/JAJM identified 140 out of 578 cases that had some type of post-trial error. (AFLOA/JAJM statistics.) AFLOA/JAJM did not break down the errors by individual case, and since some of the cases contained multiple errors, Major Jansen used a conservative number of 20 percent error when calculating pre-submission post-trial processing error. The 578 cases included summary courts-martial and non-BCD special courts-martial, which are not reviewed by AFCCA. A note of caution: the above numbers do not include reporting errors made in AMJAMS. In 2011, AFLOA/JAJM reported a total of 341 AMJAMS reporting errors in the 578 cases reviewed by AFLOA/JAJM. In early 2012, JAJG reviewed each decision by AFCCA and the Court of Appeals for the Armed Forces (CAAF) for post-trial processing errors. JAJG identified an additional 11 percent of cases decided by these courts in 2011 that contained post-trial processing errors. The 11 percent calculation does not generally include cases which only run afoul of the United States v. Moreno 18-month presumptive standard for completion of appellate review (discussed *infra*), as the delay at the appellate level is not always attributable to legal office error.

[2] Appellate counsel at AFLOA/JAJG in 2009 and 2010 also reviewed each Air Force case decided by AFCCA, and identified similar percentages of errors. *See also,* United States v. Thompson, 43 M.J. 703 (A.F. Ct. Crim. App. 1995) (noting that in 1994 the Court identified post-trial errors in 18 percent of cases processed, and that the post-trial error grew in 1995 to 44 percent of cases processed by AFCCA).

At the most basic level, a court-martial is about doing justice—for the accused, victim, commander and the Air Force as a whole. This concern extends until post-trial processing is completed.

FOUR REASONS TO CARE ABOUT IMPROVING POST-TRIAL PROCESSING PRACTICES

(1) Justice Demands Accurate and Timely Post-Trial Processing.

At the most basic level, a court-martial is about doing justice—for the accused, victim, commander and the Air Force as a whole. This concern extends until post-trial processing is completed. The Air Force Court of Criminal Appeals (AFCCA) commented nearly three years ago on the need to ensure that post-trial processing is conducted with justice in mind:

> [I]t behooves SJAs to pay attention to what they are sending to a convening authority and take the time to get it right the first time…. While any given court-martial may seem routine to a legal office, it will be the single most important event in that military member's life. Nor is it routine to the members of the accused's unit, or to the friends, family members, or victims watching carefully to see that justice is served. Slip-shod treatment of the court-martial process, whether at the pre-trial, trial or post-trial stage, cannot help but undermine faith in the system itself, making it less effective overall as a tool for maintaining military discipline. If a military member's offenses are deemed serious enough to warrant court-martial, they are serious enough to demand the time needed to carefully and correctly shepherd each aspect of the case to conclusion.[3]

(2) Military Courts and Congress Care about Post-Trial Processing.

In some cases (to be discussed below) military appellate courts have set-aside a punitive discharge and/or reduced a term of confinement because of post-trial delays and/or post-trial processing errors. Similarly, post-trial processing delay has gotten the attention of Congress. In July 2011, The Judge Advocate General (TJAG) from each military service testified before the Senate Armed Services Subcommittee on Personnel about steps taken to improve post-trial processing standards within their service.[4] Congress has not yet taken corrective legislative steps to improve post-trial processing standards, but they have put the Navy and Marine Corps under the microscope of a Department of Defense Inspector General review of its post-trial processing standards.[5] While the Air Force does not have the historic post-trial processing problems to the degree found in the Navy and Marine Corps, the statistics listed above make clear that improvements are needed in the Air Force.

(3) The Judge Advocate General (TJAG) Cares about Post-Trial Processing.

Accuracy and timeliness of the post-trial process is a specific concern of TJAG. As such, post-trial errors will be discussed during all upcoming Article 6 visits.[6]

(4) Post-Trial Processing Errors Cost the Taxpayers Money.

If an appellate case was submitted "on the merits," (meaning no errors were identified at trial or during

[3] United States v. Lavoie, ACM S31453 (recon), pg.'s 5-6 (AFCCA 21 January 2009) (unpub. op.). In Lavoie, the appellant was convicted of his second court-martial, for criminal acts while in confinement. (Pg. 2.) While relief was not granted to appellant because he could not establish prejudice for the post-trial error, AFCCA was particularly concerned that the same staff judge advocate made almost the same identical errors in post-trial processing that were previously identified in Appellant's first appeal. (pg. 4) The errors were related to proper annotation of combat service and other decorations on the PDS and SJAR. AFCCA further noted that the SJAR contained "obvious" erroneous statements of law on matters AFCCA identified as being "basic tenet[s] of military justice," resulting in AFCCA to conclude that the SJA demonstrated carelessness in proof-reading. (pg. 4.) *See also*, United States v. Bullman, ACM 34403, pg. 1 (AFCCA 20 April 2001) (unpub. op.) (noting, "we find it ironic to review a record of trial replete with errors obvious to any conscientious reading in which the trial counsel stridently argues for harsh punishment for the accused's dereliction.").

[4] Hearing to Receive Testimony on Providing Legal Services by Members of the Judge Advocate Generals' Corps, Armed Services Committee, Subcommittee on Personnel, 111th Cong. (20 July 2011).

[5] Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy, Inspector General Report, Department of Defense, Report No. IPO2010E003 (10 December 2010).

[6] Post-trial processing issues are listed in Items 73-76, 79, and 137-150 of the most recent AF/JA Core Compliance Inspection Checklist, dated 20 December 2011.

post-trial processing by appellate defense counsel), AFCCA can issue a decision within approximately 12 months from the end of trial.[7] However, if the case was not submitted "on the merits," (meaning AFCCA would issue a formal opinion responding to the alleged errors) the overall time for post-trial processing increased to approximately 20 months on average.[8] Usually, if error is alleged on appeal to AFCCA, the case is appealed to the Court of Appeals of the Armed Forces (CAAF). CAAF expedites review decisions but there is usually about a three month time period from the AFCCA decision to when CAAF decides whether to grant appellate review. If CAAF grants review, the case will likely not be completed for an additional six to nine months, with the potential for CAAF to grant relief to the accused. This additional post-trial processing period is important in light of the fact that while an accused is on appellate leave, he/she is entitled to a military identification card, which provides him/her access to free medical care for them and their dependents and access to the commissary and other MWR programs.[9] Accuseds on appellate leave are also eligible for VA benefits they may have already earned and would likely lose with a punitive discharge. For example, use of the GI Bill.[10] Whether benefits during appellate leave should be granted is a policy issue best left to the Department of Defense and Congress, but what is not debatable is that post-trial errors result in significant yet unnecessary costs to the government. Thus, even if the post-trial error resulted in no "relief" to an accused, the taxpayers are still responsible for paying unnecessary benefits caused solely because the government erred or delayed in post-trial processing.

[7] The average time for "merits" post-trial processing was calculated by JAJG based upon a review of AFCCA's 2011 merits decisions.

[8] The average time for published and unpublished decisions, from the date of trial to issuance of opinion, was calculated by JAJG based upon a review of AFCCA's 2011 published and unpublished decisions. A note of caution: the statistics were for all unpublished and published cases, regardless of whether there was a post-trial error raised or not raised. In addition, some of the non-merits cases had substantive legal issues and post-trial processing errors, while some of the cases only raised post-trial error. The point of the statistic is to show that if there is post-trial error alleged, a significant amount of additional time between trial and AFCCA decision occurs.

[9] Air Force Instruction (AFI), 36-3026_IP, Identification Card for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel, para. 9.4 (17 June 2009). *See also*, DD Form 2717 (dated Nov 1999).

[10] *See* http://www.marines.mil/unit/hqmc/NAMALA/Pages/FAQ.aspx. The citation is from a Marine Corps website, but JAJG has not identified any Air Force restriction to the contrary.

THE PRINCIPLE OF *JUSTICIA CONCTATOR EST JUSTICIA DENEGO* APPLIES EQUALLY TO POST-TRIAL PROCESSING.[11]

CAAF and AFCCA have both been concerned for many years about unnecessary delays in post-trial processing.[12] Following many years of unheeded attention to post-trial timeliness, CAAF established a precedent in *United States v. Jones*[13] that post-trial processing delay can be remedied with the set-aside of a punitive discharge. In *Jones*, CAAF held that 363 days of delay from the date of trial to docketing the case with the Navy-Marine Corps Court of Criminal Appeals was prejudicial as a matter of law, such that it would "tailor an appropriate remedy."[14] CAAF held that under the circumstances, an appropriate remedy in *Jones* was to set-aside the bad conduct discharge.[15] As a result, the appellant was entitled to back pay and the Staff Judge Advocate had to explain to the convening authority why the post-trial error was so egregious that CAAF would disapprove an otherwise lawful punitive discharge sentence.

One year after *Jones*, CAAF in *United States v. Moreno*[16] established presumptive standards for determining whether a post-trial delay was unreasonable.[17] CAAF presumes a delay to be unreasonable if: (1) the convening authority did not take action within 120 days of the completion of trial; (2) the case was not docketed with AFCCA within 30 days of action; and/or (3) a decision is not rendered by AFCCA within 18 months of docketing.[18] A note of

[11] Latin quote attributed to William E. Gladstone, 19th Century British Statesman and Prime minister, translated into English as "justice delayed is justice denied." *See also*, United States v. Wilson, 27 C.M.R. 472, 477 (C.M.A. 1959) ("From the historic day at Runnymede, in 1215, when the English barons exacted the Magna Carta from King John, a guiding principle in English, and later American, jurisprudence has been that justice delayed is justice denied.").

[12] *See generally*, Major Andrew D. Flor, Army, *Post-Trial Delay: The Mobius Strip Path*, The Army Lawyer (June 2011), DA PAM 27-50-457 (discussing post-trial processing delay problems in a historical context).

[13] United States v. Jones, 61 M.J. 80 (C.A.A.F. 2005).

[14] *Id*. at 86 (quoting United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)).

[15] *Id. See also*, United States v. Mack, 65 M.J. 108, 115 (C.A.A.F. 2007) (noting that the Navy-Marine Corps Court of Criminal Appeals downgraded the adjudged dishonorable discharge to a bad conduct discharge pursuant to United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002) (Article 66(c), based upon unreasonable and unexplained post-trial delay); United States v. Beaber, No. 24416 (C.G. Ct. Crim. App. 15 April 2010) (setting-aside a bad conduct discharge for unreasonable delays in Action and forwarding the record of trial).

[16] United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).

[17] Moreno, 63 M.J. at 142.

[18] *Id*.

caution: CAAF in *United States v. Arriaga*[19] recently made clear that government excuses for delay will not be persuasive.[20] Moreover, CAAF held that delays associated with the clerical task of forwarding the case to AFCCA are the "least defensible of all" post-trial delays.[21]

To ensure timely post-trial processing of cases, TJAG has established even more responsive requirements than *Moreno*. For all Air Force court-martials, 80 percent of cases must be forwarded within 14 days of action to AFLOA/JAJM.[22] Applying this guidance will ensure that *Moreno* problems do not arise in Air Force cases.

If the post-trial delay is ruled to be unreasonable, appellate courts must conduct a full *Barker v. Wingo*[23] four-part speedy trial test that is largely focused on determining whether the convicted Airman was prejudiced.[24] *Moreno* provides that if the post-trial delay was significant enough to require a remedy, remedies available to appellate courts include: (1) confinement credit; (2) reduction in forfeitures; (3) set-aside of sentences, including punitive discharges; (4) limitation on sentence to be approved by the convening authority following rehearing; and (5) dismissal of charges, with or without prejudice.[25]

A good example of the AFCCA providing confinement credit relief is *United States v. Roberts*.[26] In *Roberts*, the appellant was convicted of unpremeditated murder and sentenced to a dishonorable discharge and 37 years confinement.[27] The government took 635 days to conduct post-trial processing and forwarding of the case to AFCCA.[28] The government attempted to explain away the delay, arguing that the case was complicated, the Record of Trial (ROT) was 21 volumes in length, and the legal office had a heavy docket and other manning issues.[29] AFCCA ruled that even though the appellant had not suffered any prejudice by the delay, it would still reduce the appellant's confinement sentence by one year.[30] Similarly, in *United States v. Strout*,[31] AFCCA disapproved the total forfeitures, adjudged and approved previously by the convening authority, because of post-trial delay.[32] AFCCA based its decision not on *Moreno* authority, but on its broader review authority under its "do justice" authority granted in Article 66(c), UCMJ.[33]

Another recent example of unreasonable post-trial delay was *United States v. Van Vliet*,[34] a case involving an Air Force Academy cadet that had just about every type of post-trial error imaginable, resulting in AFCCA reviewing the case on appeal three times.[35] The case ultimately took six years to complete appellate review, and during this time, the appellant was on appellate leave at the expense of the taxpayers.[36]

[19] United States v. Arriaga, 70 M.J. 51 (C.A.A.F. 2011).

[20] *Id*. at 57 (rejecting government's explanation for the 243-day delay from trial to Action was caused by: "two deployed senior captains, a pregnant trial counsel who reviewed the transcript while on maternity leave, inexperienced remaining captains in the office, a very heavy case load, and this fully-litigated 8-volume record of trial."). *See also*, United States v. Ambriz, ACM 37675 (A.F. Ct. Crim. App. 5 December 2011) (unpub. op.) (rejecting the government's explanation that the 108-day delay from Action to docketing the case with AFCCA was explainable: following paralegal turnover and delays associated with the search for missing court documents by the new paralegal). *But see*, United States v. Canchola, 64 M.J. 245, 247 (C.A.A.F. 2007) (noting that "general reliance on budgetary and manpower restraints will not constitute reasonable grounds for delay nor cause this factor to weigh in favor of the Government," reviewing appellate courts can consider this information if the staff judge advocate and convening authorities properly document how operational requirements (especially related to combat conditions) explain the post-trial processing delays).

[21] Moreno, 63 M.J. at 137.

[22] Post-trial processing issues are listed in Items 73-76, 79, and 137-150 of the most recent AF/JA Core Compliance Inspection Checklist, Item 76.

[23] Barker v. Wingo, 407 U.S. 514 (1972).

[24] The four-part test in Barker v. Wingo is: (1) length of delay; (2) reasons for the delay; (3) whether appellant asserted speedy trial rights, and (4) prejudice suffered by the Appellant. Barker, 407 U.S. at 530.

[25] Moreno, 63 M.J. at 143.

[26] United States v. Roberts, ACM 37000 (A.F. Ct. Crim. App. 2009) (unpub. op).

[27] *Id*. at pg. 2.

[28] *Id*. at pg. 9.

[29] *Id*.

[30] *Id*. at pg.'s 10-12.

[31] United States v. Strout, ACM 37161 (AFCCA 10 December 2009) (unpub. op.).

[32] *Id*. at pg. 2. But see, United States v. Barnett, 70 M.J. 568 (A.F. Ct. Crim. App. 2011) (unpub. op.) (holding that the 243 day-delay between trial and Action and the overall delay of over 900 days for an appellate decision was unreasonable, a remedy was not granted because the error was harmless beyond a reasonable doubt (e.g., no prejudice)); United States v. Melton, ACM 37558 (A.F. Ct. Crim. App. 31 January 2011) (unpub. op.) (holding that the convening authority's reduction of the appellant's confinement by two months for the Action taking 205 days to occur was sufficient relief for Moreno post-trial processing delay and no additional relief was granted).

[33] *Id*. (citing United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002)). *See also*, United States v. Weaver, Army 20009-397 (Army Ct. Crim. App. 28 March 2012) (unpub. op.) (granting relief under Tardif by reducing the confinement sentence by 2 months for post-trial delay: Action occurred on day 294 (174 days beyond Moreno standard); United States v. Matako, CGCMS 24454 (C.G. Ct. Crim. App. 20 March 2012) (unpub. op.) (granting relief under Tardif by not approving rank reduction to E-3 from E-6 but rather rank reduction to E-4 for post-trial delay: 144 days for Action (24 days beyond Moreno standard) and 64 days for forwarding of record (34 days beyond Moreno standard)); United States v. Richardson, 61M.J. 113, (C.A.A.F. 2005) (noting that the Navy-Marine Corps Court of Criminal Appeals reduced the appellant's confinement sentence by four months because of unreasonable post-trial delay).

[34] United States v. Van Vliet, ACM 36005 (f rev) (AFCCA 23 August 2010) (unpub. op.).

[35] *Id*. at pg. 2.

[36] *Id*. at pg.'s 1-3.

Celerity in post-trial processing is important, but so is accuracy and attention to detail.

AFCCA held that while the post-trial delay was "egregious," the appellant suffered no prejudice, such that the delay was ruled harmless beyond a reasonable doubt.[37] Nevertheless, AFCCA forwarded the case to TJAG for his review and consideration.[38]

Celerity in post-trial processing is important, but so is accuracy and attention to detail. Failure by a legal office to correctly process a case post-trial always results in delay but may also result in negative corrective action, to include such things as set-aside of a punitive discharge.

Speed in processing without attention to detail is counterproductive and can have negative outcomes that undermine confidence in the military justice system.

POST-TRIAL PROCESSING ADMINISTRATIVE ERRORS OCCUR TOO FREQUENTLY BUT ARE THE EASIEST TO PREVENT

Before a case is docketed with AFCCA for Article 66(c) review, the legal office must send to AFLOA/JAJM the authenticated ROT and all post-trial documents, including the convening authority's action and promulgating order.[39] This is the first time post-trial errors are identified. Sometimes AFLOA/JAJM can work with the legal office to fix the problem, but sometimes the errors cannot be administratively fixed. Nevertheless, any time the case is sent back to the legal office for correction, the correction takes time, resulting in potential *Moreno* problems.

According to AFLOA/JAJM, the most frequent administrative errors observed at the initial stages of post-trial processing include: (1) the AF Form 1359 and Personal Data Sheet (PDS) are not attached to the Staff Judge Advocate Recommendation (SJAR); (2) clemency submissions are not identified as attachments or attached to SJAR Addendum; (3) the excess leave or confinement paperwork is missing; (4) there are missing pages of the ROT; and (5) no evidence exists that defense counsel examined the ROT prior to authentication.[40]

During this initial review period, AFLOA/JAJM also reviews the case file for administrative errors in the action language. Rule for Courts-Martial (R.C.M.) 1107(f)(2) provides that once an action has been published or the accused is notified, the action may not be changed unless the modification is more favorable to the accused.[41] Frequent administrative action errors seen by AFLOA/JAJM include: (1) the accused's SSN is missing in the action, (2) an incorrect rank of the accused is identified (rank at trial, vice reduced rank) in the action, (3) a specific confinement facility is identified in the action, (4) the action language omits illegal pretrial confinement credit, (5) the action does not identify deferment and/or waiver language, (6) action does not reference that appellate leave is ordered, and (7) the action approves a sentence greater than the Pretrial Agreement (PTA) terms.[42]

AFCCA REVIEWS EACH CASE FOR POST-TRIAL ERRORS AND ORDERS RELIEF AS NECESSARY

By far, the most frequently discovered errors by AFCCA involve errors in the promulgated Court-Martial Order (CMO). Errors in the CMO are the least defensible because the CMO is merely a case reporting document, listing such things as: the type of court-martial, charges and specifications, pleas and findings, sentence, and convening authority action.[43] Case law makes clear that an accused is entitled

[37] *Id*. at pg.'s 6-7.

[38] *Id*. at pg. 7, n. 4.

[39] *See* AFI 51-201, *Administration of Justice*, Chapter 9C (5 April 2012). Similar processes occur in cases that are not entitled to Article 66(c) review, such as summary courts-martial and special courts-martial not resulting in punitive discharges or 12 month confinement sentences.

[40] AFLOA/JAJM 2011 KEYSTONE presentation on post-trial processing. Slides from the briefing are maintained at AFLOA/JAJM.

[41] R.C.M. 1107(f)(2). In cases in which appellate review is not automatic, the MCM also permits a convening authority to correct an "illegal, erroneous, incomplete, or ambiguous" action prior to review by a judge advocate under R.C.M. 1112. *Id*.

[42] AFLOA/JAJM 2011 KEYSTONE presentation on post-trial processing.

[43] *See* Rule for Courts-Martial (R.C.M.) 1114(c).

If AFCCA discovers errors in the CMO, the case is remanded back to the legal office for correction, a process that automatically causes delay.

to accurate court-martial records.[44] Nevertheless, AFCCA frequently finds errors in the CMO, including: incorrect spelling of the judge and accused's name, incorrect listing of the trial date, and incorrect identification of the pleas and findings. If AFCCA discovers errors in the CMO, the case is remanded back to the legal office for correction, a process that automatically causes delay. Closer attention to detail by the legal office will prevent these types of errors from occurring.

ERRORS THAT REQUIRE STAFF JUDGE ADVOCATES TO EXPLAIN THEMSELVES TO COMMANDERS AND SUPERIOR OFFICERS

A few times each year, substantive post-trial processing errors occur that AFLOA/JAJM and the best appellate advocacy cannot fix.

Staff Judge Advocate Recommendation (SJAR) Errors

R.C.M. 1106 establishes the rules for the SJAR and SJAR Addendum, and identifies the mandatory information that must be contained therein. One of the main problems related to the SJAR Addendum has been the failure to document that the accused's clemency matters were provided to the convening authority, as a convening authority is required to consider the accused's clemency matters prior to taking action.[45] In *United States v. Foy*,[46] AFCCA held that it will presume that the convening authority considered the accused's clemency matters prior to taking action if the SJAR Addendum identifies the clemency matters provided, states that the convening authority must consider the information provided, and attaches the information to the SJAR Addendum.[47] AFI 51-201, Figure 9.6, provides a good example of an SJAR Addendum for legal offices to follow.

If there are errors in the SJAR or SJAR Addendum, AFCCA will usually remand the case back to the convening authority for a new action.[48] This remedy requires the SJA to go back to the convening authority to explain that corrective paperwork must be done, potentially undermining their credibility with the convening authority. The errors also cause delay, something that AFCCA particularly discussed in *United States v. Baker*.[49]

> Because we ultimately found no prejudice, some may ask, 'So, what's the big deal?' The big deal is that the SJA's failure to properly process the case forced appellate defense counsel to research and write a brief raising the issue to this Court; the appellate government counsel had to research the issue, seek affidavits from the SJA and the convening authority, and prepare a brief [and motion to submit documents]; and we had to expend judicial resources considering the issue[s]. More importantly, this appellant has been left wondering whether the convening authority ever reviewed his submissions before taking action. All of this because the SJA failed to follow well-established and well-publicized procedures. As Chief Judge Cox noted, convening authorities would not accept this type of shoddy staff work from any other officer on his staff, and he should not be expected to accept it from his SJA. See *United States v. Lee*, 50 M.J. 296, 298 (1999). See also *United States v.*

[44] *See* United States v. Smith, 30 M.J. 1022 (A.F.C.M.R. 1989). R.C.M. 1114(c) requires the CMO to identify such things as type of court-martial, charges (and specifications), pleas and findings, sentence, and convening authority action.

[45] Article 60(c)(2); United States v. Craig, 28 M.J. 321 (C.M.A. 1989); R.C.M. 1107(b)(3)(A)(iii). *See* United States v. Hardy, ACM S31780 (A.F. Ct. Crim. App. 17 August 2011) (unpub. op.) (missing SJAR addendum).

[46] United States v. Foy, 30 M.J. 664 (A.F.C.M.R. 1990) (en banc).

[47] *Id*. at 665-66.

[48] United States v. Thompson, 43 M.J. 703 (A.F. Ct. Crim. App. 1995). Case law also permits the United States to "enhance the paper trial" when there is doubt as to what happened during the clemency and Action phases of post-trial processing. *See* United States v. Blanch, 29 M.J. 672 (A.F.C.M.R. 1989). To "enhance the paper trail," AFLOA/JAJG will contact the legal office to obtain sworn statements from the convening authority and/or legal office explaining what happened during clemency and Action to ensure that no error actually occurred.

[49] United States v. Baker, 54 M.J. 774 (A.F. Ct. Crim. App. 2001).

> *Coffman*, 50 M.J. 52, 53 (1998) (mem.) (Crawford, J., dissenting) (suggesting The Judge Advocate General track post-trial errors and note who was serving as SJA when the errors occurred). We had hoped that [*United States v. Chaney*, 51 M.J. 536 (A.F. Ct. Crim. App. 1999)] would have sufficiently raised the consciousness of SJAs to preclude the recurrence of the type of easily avoidable dereliction that occurred in this case. Because it has not, we intend to forward information copies of our decisions in such egregious cases to TJAG for appropriate action. *Coffman*, 50 M.J. at 53.[50]

The judicial reprimand from AFCCA notwithstanding, the outcome in *Baker* was much better than that in *United States v. Cook*, in which AFCCA held, "[t]his is yet another case where the government quickly garners the conviction but shoots itself in the foot during the post-trial review. To remedy prejudicial errors, we set aside appellant's bad conduct discharge."[51] In *Cook*, there were questions about whether the convening authority reviewed and considered the accused's clemency submissions prior to taking action and the government conceded that new matters were submitted to the convening authority without an opportunity to comment by the accused.[52] The United States requested AFCCA to order a new action be done; however, AFCCA was so frustrated with the government that it granted the most serious remedy possible—set-aside of the punitive discharge.[53] The takeaway from *Cook* is that what is usually considered correctable SJAR error, in the right set of circumstances, can result in significant relief for the accused.

Errors in Action Language are the Most Dangerous

Case law makes clear that action language must be "clear and unambiguous."[54] In *United States v. Wilson*,[55] the convening authority's action stated what portion of the adjudged sentence was approved and disapproved. Unfortunately for the government, the action stated that the dishonorable discharge was not approved.[56] The action in *Wilson* read in pertinent part: "…[t]hat part of the sentence to confinement in excess of 3 years and 3 months is disapproved. The remainder of the sentence, *with the exception of the Dishonorable Discharge*, is approved and will be executed." CAAF held that the convening authority action in *Wilson* was "clear and unambiguous."[57] As such, this error resulted in the dishonorable discharge in a litigated rape case being set-aside on appeal.[58] Undoubtedly a mistake was made in the action. Given the facts of the case, one can only assume the convening authority intended to remit the dishonorable discharge to a bad conduct discharge, but the error had tragic consequences. It is hard to imagine a more difficult conversation the SJA could have with the victim and convening authority when the rapist's punitive discharge was set-aside in its entirety due to sloppy staff work.

Similarly in *United States v. Davis*,[59] the convening authority's action only approved reduction in rank, forfeitures, and confinement, but was silent on whether the dishonorable discharge was approved.[60] The action in *Davis* read in pertinent part: "…only so much of the sentence as provides for the reduction to airman basic, forfeiture of all pay and allowances, and 48 months confinement is approved and will be executed."[61] AFCCA held that the action was "clear and unambiguous" on its face, and will be effectuated, resulting in no dishonorable discharge for a nineteen-year technical sergeant found guilty

[50] *Id*. at 775-76.

[51] United States v. Cook, 43 M.J. 829 (A.F. Ct. Crim. App. 1996). On appeal, CAAF rejected the United States' argument that AFCCA did not have remedial authority under Article 66(c), UCMJ, to grant corrective relief for post-trial errors. United States v. Cook, 46 M.J. 37, 39 (C.A.A.F. 2007). CAAF also held that AFCCA did not abuse its discretion in ordering relief when prejudice to the appellant was established on the record. *Id*. at 40. Moreover, CAAF approved of one of AFCCA's purposes for the corrective relief: "apparent dissatisfaction with the number and repetitive nature of post-trial processing errors in other cases." *Id*. CAAF stated, "[w]e find nothing inappropriate, however, in that court's consideration of the vital supervisory role it plays in the administration of military justice in fashioning a remedy in this case." *Id*. *See also*, United States v. Thompson, 43 M.J. 703 (A.F. Ct. Crim. App. 1995) (providing post-trial relief by disapproving forfeitures because it believed that providing "meaningful relief" rather than returning the case for new convening authority action will hopefully "spur more attention to post-trial requirements.").

[52] *Id*. at 830.

[53] *Id*.

[54] United States v. Politte, 63 M.J. 24 (C.A.A.F. 2006).

[55] United States v. Wilson, 65 M.J. 140 (C.A.A.F. 2007).

[56] *Id*. at 141. (emphasis added).

[57] *Id*. at 141-42.

[58] *Id*.

[59] United States v. Davis, ACM 37212 (A.F. Ct. Crim. App. 24 February 2009) (unpub. op).

[60] *Id*. at pg. 2.

[61] *Id*.

of possession and distribution of child pornography and attempting to communicate indecent language to a child under the age of 16.[62] Again, like in *Wilson*, the SJA had to go back to the convening authority to explain why a child pornographer was still on active duty serving on his/her base.

Errors Involving Reprimand Language

Periodically AFCCA issues opinions related to reprimands that bear mentioning. In *United States v. Belton*,[63] citing R.C.M. 1003(b) (1) and 1107(f)(4) (G), AFCCA held that unless the action provides reprimand language, it will not approve a reprimand on appeal.[64] The action in *Belton* did not include reprimand language so the adjudged sentence was not fully effectuated.[65]

Errors Involving "Mandatory" and "Automatic Forfeitures" (e.g., United States v. Emminizer Error)

In Article 58b, UCMJ, Congress has determined as a matter of public policy that an accused sentenced to a punitive discharge and less than 6 months confinement and/or sentenced to confinement greater than 6 months should not receive pay and allowances, regardless of whether forfeitures are adjudged.[66] Many times a convening authority desires to waive mandatory forfeitures at action for the benefit of named dependents in cases in which the mandatory forfeitures are applicable. In order to do so, the action must address both adjudged and automatic forfeitures in the action. In *United States v. Emminizer*,[67] the convening authority created a conflict by waiving mandatory forfeitures at action and approving the adjudged forfeitures.[68] CAAF held that approval of the adjudged forfeitures nullified the convening authority's waiver resulting in no waiver of the forfeitures.[69] In cases in which this nullity occurs, AFCCA usually returns the case back to the convening authority for a new action to occur.[70] The way to avoid an *Emminizer* problem is to have the action language include the relevant waiver language and also "defer, reduce, or suspend adjudged forfeitures in order to establish the basis for [waiver of] mandatory forfeitures.[71] AFI 51-201, Figure 9.10, provides sample language for a convening authority to properly draft action language to ensure there are no *Emminizer* problems.

How does a legal office prevent action errors?

The problems identified in the action cases discussed above are easily preventable. Legal offices are encouraged to follow the action guidance and language provided in Appendix 16 of the Manual for Courts-Martial (MCM) and AFI 51-201, Chapter 9, specifically Figure's 9.9 and 9.10. In *United States v. Araki*,[72] AFCCA has also recommended a legal office consider breaking the action into three sentences, a separate sentence for: approval of sentence, execution of sentence, and an identification of those portions of sentence that cannot be completed until appellate review is completed. Whatever method is used to express the action language, it must be clear and unambiguous.

Conclusion

A military justice revival in post-trial processing is important. The number and types of errors can be reduced if legal offices process cases with a greater sense of professional pride and attention to detail. If military justice practitioners have any questions about how to properly accomplish post-trial processing, AFLOA/JAJM or AFLOA/JAJG are available to assist. However, practitioners are encouraged to first look at the relevant source documents for post-trial processing: Article 60, UCMJ; R.C.M. 1103-1109; and AFI 51-201, Chapter Nine. These source documents should answer most practitioners' questions. AFLOA/JAJM has also uploaded great resources on FLITE and CAPSIL that the practitioner might find helpful.

[62] *Id*. at pg's 1, 3. AFCCA relied upon CAAF's decision in United States v. Burch, 67 M.J. 32, 33-34 (C.A.A.F. 2008), which provides that "[w]hen the plain language of the convening authority's action is facially complete and unambiguous, its meaning must be given effect, without reference to circumstances not reflected in the action itself." *Id*. at 3.

[63] United States v. Belton, ACM 37484 (A.F. Ct. Crim. App. 19 May 2010) (unpub. op).

[64] *Id*. at pg. 6.

[65] *Id*.

[66] Article 58b(a)(2), UCMJ.

[67] United States v. Emminizer, 56 M.J. 441 (C.A.A.F. 2002). *See also*, United States v. Ambriz, ACM 37675 (A.F. Ct. Crim. App. 5 December 2011); United States v. McKinney, ACM 37559 (A.F. Ct. Crim. App. 17 December 2010) (unpub. op.); United States v. McDaniel, ACM 36649 (A.F. Ct. Crim. App. 16 March 2010) (unpub. op.).

[68] Emminizer, 56 M.J. at 444-45.

[69] *Id*. at 445.

[70] *See* United States v. Smith, ACM 37672 (A.F. Ct. Crim. App. 9 March 2011). However, there are instances in which AFCCA fixes the problem on appeal without remand by not approving the adjudged forfeitures on appellate review. *See* Ambriz, ACM 37675 at pg. 3.

[71] Emminizer, 56 M.J. at 445.

[72] United States v. Araki, ACM 28009 (A.F. Ct. Crim. App. 8 February 2012) (unpub. op.).

5 Tested Sentencing Case Techniques for Trial Counsel

by Major Greg J. Thompson and Captain Sarah L. Kress

A common yet formidable court-room challenge: How can trial counsel package and deliver a meaningful sentencing case following a guilty plea? Recently, we had the opportunity to explore this question in *United States v. SrA Lorin Grigsby*, a complex money laundering and drug distribution case at Davis-Monthan Air Force Base. We felt our experiences and lessons learned were worth sharing with the field. As we prepared for the *Grigsby* challenge, we recognized that both of us had tried plenty of cases, but this one was going to be different. The charges were different, the evidence was different, and the players were different. Law enforcement trailed this accused for months. They tracked his movements, identified his accomplices, and slowly gathered intelligence on his operation. That was the easy part. It took even more time to figure out exactly how the accused schemed to outsmart federal banking laws. After scouring hundreds of pages of the accused's bank records, in addition to a handful of accomplice bank records, we were left bleary eyed and confused. How was our panel going to understand this complex drug distribution and money laundering scheme, layered with levels of deception and confusion in days when it took us months of study to begin to understand this complex criminal scheme? This question was compounded because the bulk of our evidence (the bank records) looked more like an encyclopedia than a smoking gun. In this article we will share the elements of the strategy that we eventually settled on to present our case to the panel. As we looked back, we realized that the techniques we used are techniques that can be employed in all sentencing cases. We hope you will find them useful in your practice.

In this case, we took a calculated approach to call witnesses to teach the panel how to unravel the case themselves.

#1: TEACH DON'T TELL

The problem with many lawyers is we think we know it all, we are very smart, and we do not trust others to come to the proper conclusions. That is why, if left to us, our panels would be comprised of sheep that would listen and do exactly what we say. Of course, in the military, that will never reflect our panel of members. Our panels are highly educated, many with experience in disciplinary issues and leadership. Why then do we typically insult them, by explaining everything to them as if they could not figure it out on their own? Most ironic is that we love to comment in our arguments on the panel member's ability to use common sense and knowledge of the ways of the world, but the course of our litigation strategy treats our members like sheep rather than the pillars of common sense that we invite them to be in closing or sentencing arguments.

The reality is, in the military justice system, the panel could be our greatest asset.

In this case, we took a calculated approach to call witnesses to teach the panel how to unravel the case themselves. We wanted them to engage as students as if in a legal classroom of sorts. For example, we introduced into evidence several hundred pages of bank records from multiple bank accounts. The records were voluminous and deciphering them alone was complicated, let alone establishing their relevance to the case and understanding how the money laundering scheme worked. We approached this project in two steps. Step one: learn how to read the records. We called a branch manager from Bank of America to testify. The records came in five different formats and she explained each format. She did not talk about money laundering. She did not talk about "funnel accounts," a more advanced money laundering scheme employed by our accused. She did not talk about structuring, another advanced money laundering scheme. She simply taught "Accounting 101," or how to read bank records.

Step two: Learn how to launder money. We called an IRS Agent to testify. The agent was an expert in money laundering and had handled hundreds of money laundering narcotics investigations. He described how a person could circumvent bank secrecy laws and reporting requirements. He explained how a person could use nominee or funnel accounts to keep transactions in other people's names and avoid detection. He described common laundering terms like "funnel accounts," and "structuring" to the panel.

With the proper tools in hand, the members were equipped to disassemble the pages of bank records and discover for themselves how this accused was running a complex, large scale marijuana distribution enterprise. In our argument we tied a small part of this together, sort of like a "snapshot," but we intentionally left out all the details. By doing this we invited the panel to see for themselves, in the records, what had transpired. The panel simply had to follow the money trail to guide their decision. After all, our witnesses had taught them how to do it.

This strategy fought against our deeply ingrained, know-it-all legal tendency to walk them through each bank record ourselves and tell them exactly how each transaction occurred and how this scheme worked. That was a difficult decision to make, but we think it was effective in this case. Our fear was, had we taken the alternate route of dissecting the minutiae of each illegal transaction, we would have both bored and insulted the panel over the hours we would have needed to accomplish this task.

#2: SHOW DON'T TELL

In cases where the accused pleads guilty, as trial counsel, we often employ a stipulation of fact (if the plea is pursuant Pre-Trial Agreement) and/or statements made by the accused in the *Care* inquiry during the plea of guilty to the military judge. This is not always the best strategy. The *Care* inquiry is typically sculpted by defense counsel, and stipulations (particularly in financial cases) can be boring and unengaging. Instead, it is often more powerful to take the extra effort to show the members or military judge the evidence against the accused by calling witnesses and admitting exhibits.

Most attorneys appreciate the impact in showing the fact finder actual exhibits, photos, and other evidence that show the body of the offense. But more importantly, this strategy effectively drops the veil from the defense's standard plea argument. Now, the trial counsel is back in the driver's seat. The

defense argument that their client pled guilty and took responsibility becomes a hollow shell. In our case, we called a variety of witnesses to testify in sentencing, to include a latent fingerprint expert. This scientist discussed how he pulled the accused's print off a bale of marijuana. By showing the evidence against the accused, we did much to deflate the defense's argument that the accused should be given significant credit for his guilty plea. Before either side stood to argue, the members were shown that the accused likely pled guilty not out of a compelling sense of social responsibility, but because of evidence that showed he was "caught red handed."

In the process of showing the members or military judge the evidence, the hope is that we will connect with a specific moment that the members or military judge will find memorable and will shape and influence their decision making process. Nancy Duarte[1], an expert on persuasive presentation, terms this a STAR (Something They'll Always Remember) moment. STAR moments are those that your judge or panel cannot get out of their minds after hearing your case. A STAR moment will transform the deliberative process, and hopefully become a key topic of conversation crafted by trial counsel. A STAR moment can only occur if presented evidence is connected with a "word picture" in your sentencing argument. In our case the STAR moment was obvious. We had a photograph of a folded American flag flown in combat laying inside a cardboard box next to a bale of marijuana in the accused's bedroom. It was found during a search of the accused's apartment, and the picture was one that after seeing it, left an indelible visual image. We believe that picture framed the discussion in deliberation.

#3: ENTERTAIN BY MULTI-MEDIA

No sentencing article is complete without a quick nod to the multi-media approach. For most of us, multi-tasking has become second nature. We check our e-mail while we skim through the TV channels. We listen to music while making dinner or driving in our car. Our bodies are constantly registering stimuli on all different levels—sight, sounds, textures, and smells. Why should our experience in the courtroom be any different? If that is what our audience is used to, then that is what we should strive to deliver.

We elected to present ten sentencing witnesses as well as introducing documentary evidence (like the bank records). However, we also presented a variety of multi-media evidence. We started with a slide show of items seized from the apartment to include the American flag with the bale of marijuana. We then displayed a variety of packaging material and followed up with a surveillance video of the accused walking into a post office to mail out a box of marijuana. In the interim we used our fingerprint expert who posted a magnified diagram of the accused's fingerprint, complete with color-coded ridges. For the finale, we wheeled in two very pungent smelling bricks of marijuana. Admittedly, every sentencing case may not provide these opportunities but be careful not to overlook what you have. More importantly, make your evidence count, especially if it is multi-media evidence.

In sentencing argument we spliced the evidence together one more time for the members. We connected phone calls with bank deposit times and amounts. We flashed still shots of the surveillance video along with photos of the contents of the box. We calculated the price per pound of marijuana and totaled the amounts for the members. Everything we admitted had a purpose. Too often our focus is on getting the evidence into court and we lose track of its function. Members are used to a world of media vying for their attention. When we have evidence that allows a multi-media presentation we should not miss the opportunity to leverage it to our advantage.

#4: KEEP IT ORGANIZED, KEEP IT MOVING

Over the course of four days we presented 10 witnesses and a host of different photographic and tangible exhibits. We used two wedded strategies to keep our sentencing case organized and to keep it moving. Our first strategy was to tell a story. No story is complete without a handful of shady characters and plot, or in this case, a crime. In *Grigsby*, we already had the makings of a great drama, we just had to put it together in an organized and meaningful way. We did this, in part, by asking the military judge for and using an opening sentencing statement. Rule for Court-Martial 913(b) allows the military judge to permit the parties to address the court with an opening statement at other times in the court-martial proceeding. An opening statement in sentencing is

[1] Nancy Duarte, *Resonate: Present Visual Stories that Transform Audiences*, 2010

particularly helpful where the panel is coming in cold, with little or no context or background, and where the facts are confusing, detailed, and occurred over months. We used the opening statement to frame our story with a road map. For example, we broke the sentencing evidence up into three "Acts." Act One dealt with the product end of the business, the packaging and shipping of marijuana cross country. We then transitioned into the money side of the business, Act Two, and then finally into the individual characters that would testify, and who the accused used to launder money—Act Three.

Second, we focused our story around a central concept to give it meaning and import. In this case, our goal was to convince the panel that this accused was running a business enterprise, more specifically a illegal marijuana distribution business for profit. We wanted to distinguish this case from a simple "use" or "distro" case. We also wanted to give the case some significance. So we scrapped the theme, which can sometimes be ill-fitting and corny, and let the facts of the criminality drive the discussion with a framework of organization holding the story together. It is the story that holds the attention. Don't lose sight of the story of the case. Organize it and tell it.

#5: MAKE A REASONABLE AND CONNECTED SENTENCE REQUEST

How many times does the defense rail in its argument about how a sentence request is disconnected and is not supported by reason or any principle of sentencing? Why does the defense alone wield this argument. We decided to take this argument from the defense and make it our own. It is worth investing considerable time in connecting a final sentence recommendation to tangible facts of the case along with the principles of sentencing. A logical, easy-to-follow connection means more than almost anything else in your sentencing case presentation. That meant all evidence in our case was designed to be focused and connected to our final recommendation. When the defense argued, they could not rely on comments about our disconnected sentence request. Instead we were able to assault their suggestion of a two to three year sentence being appropriate as failing to take into account the principles of sentencing or giving any other reason for such a low sentence.

Our sentence recommendations should urge the members to make a decision that is meaningful and significant to the accused, the community, and all principles of sentencing. The members want their service to be meaningful, and the only part of this service visible to the public is the sentence they craft. We owe it to them to frame our recommendation in a meaningful manner.

For example, in our case, we challenged the members to determine in their own minds what sentence justice demands for an accused that packages, ships, and finances one pound of marijuana for sale. After allowing time for thought we suggested that the minimum sentence should be one week. Even that may seem intolerably low to some on the panel, but in the interest of selecting a number we could all agree on, we started there. From there we multiplied the weeks against the pounds of marijuana until we reached a baseline sentence. We then talked about the other impacts of the crime to include drafting other Airman into a criminal enterprise as well as committing many of the precatory acts while on-duty and on the installation. This allowed the members to adjust the sentence up or down based on their view of those factors. Finally, we invited the members to ignore our suggestions and come to a sentence that had articulable meaning to them.

CONCLUSION

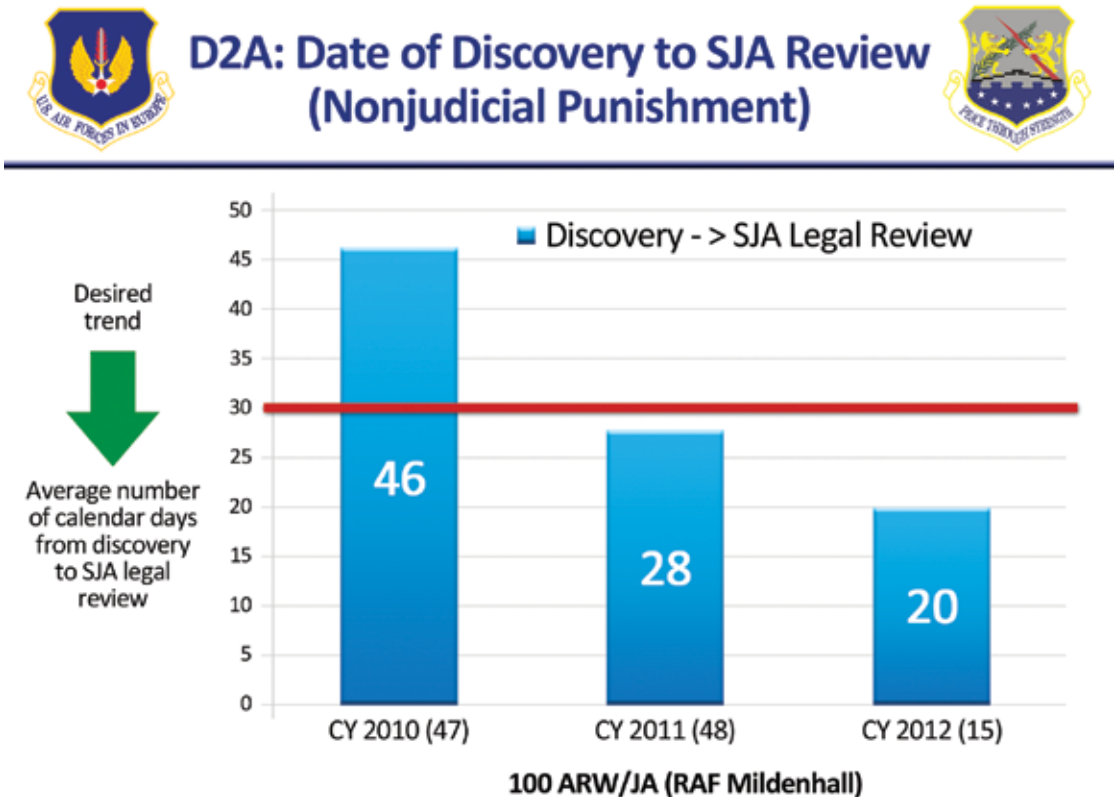
While in this particular case we placed great emphasis into how to make complicated concepts less complicated and easy to understand, we were surprised by the results. The accused was sentenced to 17 years in confinement as well as a dishonorable discharge by the members of the panel. This was particularly surprising since we asked the panel to deliver a sentence of 10 years in confinement and a dishonorable discharge. We are convinced that many factors impacted the member's final decision on the sentence, and we will never know which factors were the most instrumental. However we are even bigger believers in the value of efforts to build trust with the members and to present the case in a manner that does not insult them, but imparts to them the importance of the decision they are about to make.

NJP Processing

Building Relationships, Staying on Message, and Owning the Process: The Keys to a Quality NJP Program and achieving the 30-day metric

by Captain Marc P. Mallone, USAF and Technical Sergeant Andrew P. Wikoff, USAF

Establishing a successful and effective Military Justice Program does not happen overnight. A multi-tiered approach is required for discipline to be both on-target and on-time at your installation. First, build strong relationships between your team and commanders, first sergeants, and investigators. Second, convey a clear and consistent message and continually remind them why timely processing benefits the unit and the member, and any victims and family members involved. Finally, own the process and be aggressive in moving cases through every stage of the action. While adherence to these three principles will result in success in any disciplinary process, this article will focus on their application to Non-Judicial Punishment (NJP) actions and the 30-day goal of date of discovery of an offense to SJA review. Focusing on these three objectives will ultimately result in better communication and trust between your office and the units for which you are responsible. In turn, improved communication and credibility with commanders will result in quicker processing of NJP actions and better overall administration of military justice on your installation. By following these concepts, we have improved the timeliness of our NJP actions —inherently increasing the ability of commanders on our installation to maintain good order and discipline and take care of the Airmen who commit offenses.



Communicating is essential to building quality relationships and obtaining buy-in from First Sergeants and commanders.

BUILDING RELATIONSHIPS

One of the toughest hurdles to processing NJP actions within 30 days is identifying or learning of offenses that will actually be handled through that process. One way is reading your installation's blotter each day. However, much of the misconduct is not public, but occurs within the unit. Once unit leadership learns of misconduct, the clock starts ticking. If a first sergeant or commander does not approach you almost immediately, you will get a late start, and could end up too far behind to mete out timely discipline. Thus, the most important element of meeting the current standard is the relationship between the installation's legal office and other organizations. The better the relationship, the more quickly the first sergeant or commander will seek out your advice on military justice matters.

A solid relationship with the investigative agencies on your installation is crucial. In some cases, the unit gives you all of the evidence needed to move forward. In other cases, the unit identifies potential misconduct and notifies the legal office, but additional investigation is required. The quality of the relationship with your investigative agencies can have a direct effect on your ability to process NJP actions quickly.

Building relationships takes time, and of course, we have better relationships with some units than others. When the new standard was established, our first goal was to educate the installation's first sergeants. A great way to get in front of them is to attend their First Sergeant Council meetings. Once or twice each quarter, members of our military justice section attend these meetings to update the first sergeants on any new guidance or issues and to seek their feedback. Delivering your message in that forum can be very effective. To address the commanders, the Status of Discipline meetings are an excellent forum where you can deliver the message to the highest level of your installation's commands. In addition to these usual opportunities to meet with first sergeants and commanders, seek out other chances to get members of your office in front of these decision makers. Consider other avenues of access to unit leadership, such as a First Sergeant Symposium or training, a Top 3 meeting, or various commander training courses. By taking advantage of these opportunities, you increase your exposure to unit leadership and build credibility. Instead of relying on phone calls or e-mail, visit the commanders in their offices and see how they do business. At the same time, invite commanders and first sergeants to your morale events or PT sessions. Finding ways to connect with unit leadership outside of the office helps strengthen your relationships. Include them as much as you can in your process and they should do the same for you.

For investigators, ask to attend their standing weekly meeting where they to go over current cases. Also, invite the investigators to your military justice meeting, to better inform them about our process and priorities. Work closely with them when compiling information for "Cops and Robbers" briefings. Receiving updates and discussing these cases ensures that your office is aware of misconduct that could result in NJP action early in the investigation.

Once you have good working relationships, maintaining them becomes vital to quality NJP action processing. Quality is about getting the right justice result and getting it on-time. A timely program is only one quality indicator of a strong program. Rushing to judgment and taking action purely for the sake of speed may hurt office credibility and send the message that meeting time goals is more valuable than reaching the correct result. Instead, move quickly, but make sure you have the evidence or information to advise the commander appropriately. Think, "On Target and On Time." As you work with commanders and first sergeants, the more quickly you can give the "right" advice, the more willing they will be to come to you for that advice.

CELERITY BENEFITS THE UNIT

Communicating is essential to building quality relationships and obtaining buy-in from first sergeants

Once you have identified or been notified of misconduct, then you must work quickly to process the NJP action.

and commanders. You may hear from unit leadership that you only care about "your metric." To ensure commanders and first sergeants fully appreciate the benefits of timely NJP actions, we do not use the word "metric" because it sends the wrong message. Granted, you should never lose sight of timeliness goals, but you have to embrace the rationale for such goals to achieve success. If you don't believe that swift justice is the best justice, then it will be hard to articulate its importance to commanders and first sergeants. Never make the NJP action about the legal office. Instead, remind the commander that military justice is his or her program, we simply advise and shepherd the process. Of course, we make known our recommendation and, because of strong relationships, we very rarely run into situations where the desire of the commander is the opposite of our recommendation. Our recommendation should never be linked to timeliness.

Once sufficient evidence is available to move forward, it is in the member's best interest to face that evidence and respond accordingly. Additionally, that response may convince the commander that the evidence is insufficient and thus the commander should find that the member did not commit an offense. There is no harm in a commander being reasonable and finding that a member did not commit the alleged misconduct; the process is working as it should. When a commander understands that guilt can be determined at a later stage, he or she will be more likely to make the offer earlier.

Finally, the most important aspect of communication is educating first sergeants and commanders as to the benefits of timely NJP processing. At first, leadership may not fully understand that taking the right action quickly is not only beneficial to the member but also the unit. If the unit is worried about the well-being of member, then explain that he/she will not have to wait around worrying about what will happen. If the concern is mission effectiveness, stress the benefit of closing out an action that allows the member and the unit to move on quickly and get back to work. A distracted Airman is less effective than one who has faced the music and now has to learn from that experience and move forward.

OWN THE PROCESS

Once you have identified or been notified of misconduct, then you must work quickly to process the NJP action. The commander owns the program and we own the process. You may be in a position where you do not have enough evidence to make a recommendation. To meet this challenge, you can rely on your relationship with unit leadership and your investigators to gather that information more quickly. At times, a commander may want to wait for all of the evidence, or is "waiting on statements" from witnesses before making a decision.

Many times, what they are waiting on is a Report of Investigation (ROI), or at the very least the report or statements taken by Security Forces. Although this can slow the process, it is also an opportunity for your legal team to act as a liaison between the commander and the investigative agency. Use the relationship with investigators and other agencies to get information more quickly. Do not just wait for it, be proactive and pick up the phone to check on the status. By working with investigators, we have been able to get the evidence to the commander long before an ROI is published. We have also worked closely with our international and host-nation partners in law enforcement to expedite the release of information concerning off-base incidents over which we have jurisdiction. At other times, the unit is waiting for statements to come from within the unit. When faced with that situation, remember that swift justice is the best justice, and be willing to hold the unit's feet to the fire to get the documentation you need to advise appropriately. In these cases, do not be afraid to pick up the phone and call the commander or first sergeant. All too often an e-mail is missed or disregarded, while a phone call commands time and attention. Again, educate commanders that

there is still time to consider all the evidence and be the "judge" after service of the NJP action and the obtaining the member's response.

Continuing to stress the importance of timely processing throughout the process strengthens your position with the first sergeants and commanders with whom you work. For instance, if you find you are only 3-4 days after the date of discovery of an offense, work to make your recommendation as quickly as possible. Never have the unit waiting on you to take action. Make something happen in minutes or hours, not days. You will increase your credibility by remaining consistent in your message to unit leadership. Once you have changed the culture and NJP actions are moving quickly and effectively, you will have trouble finding a commander who thinks that he or she rushed to judgment in making a decision and taking NJP action. Those commanders will become your advocates through their actions.

Many times throughout the completion of an NJP action, circumstances arise that are outside of your office's control. For instance, a commander may be going on TDY for a week. If you are on day seven from date of discovery, then waiting until he or she returns will put you at a disadvantage when the NJP action is served. On the other hand, once you serve the NJP action, waiting seven days to take the next step can be detrimental to the member. To combat these issues, inquire about the commander's access to e-mail and availability to sign and scan documents. We have even had a commander review and sign a document on his iPad while he was away. Our commanders exercise command and control 24/7. They are trained to do so, both on- and off-station. However, sometimes there will be nothing we can do to control the processing time on an NJP action, but a strong NJP program will limit the frequency of delays.

In addition to working with outside agencies, create accountability within your legal office for completing the NJP action. Your military justice section has to work together to truly own the process. For instance, our NJP paralegal is responsible for drafting NJP paperwork, tracking the action, and guiding it through the process. However, she is not the only one who takes ownership of the NJP process. Our entire section is invested in the success of our NJP program. Create ownership by effectively communicating and maintaining a visible tracking system. Use white boards for tracking each stage of an Article 15. This provides a comprehensive snapshot of where you are with each action. White boards also allow legal office leadership to have visibility on the workload and any issues we might be having with a unit. Have daily meetings with leadership which allows you to pause and think about each action and what needs to be done to help it progress. Most importantly, the Staff Judge Advocate's perspective allows us to see options we might not have noticed initially.

While white boards are essential to successful tracking, our NJP paralegal also tracks the action with a "Next Two Steps" folder. The folder allows her to map out the next two steps that are needed for each action. Not only does this folder keep the NJP action on track, it allows for excellent continuity for others in the office. If there is a question regarding an action, then the folder can be a resource for others to address any matters that might arise. To really own the process, complete a daily review of investigations that may turn into NJP action, and the NJP actions that are in progress. With a 30-day standard, each day is critical, so a daily run-down of justice matters is very helpful in limiting processing times.

CONCLUSION

The 30-day goal is attainable. To have a successful, quality NJP program, you must build the relationships with the commanders, first sergeants, and investigators on your installation. As you build the relationship, keep in mind the goal of quick action and the benefit to the accused member as well as the unit. Be consistent in delivering that message to get the buy-in from unit leadership. Finally, own the process. Be willing to go above and beyond, get out of your office if necessary, to move an NJP action along. By taking the lead in reducing NJP processing times, you will show that swift justice is the best justice.

Custody & Consent

Revised Family Care Plan Guidance Creates New Requirements for Legal Assistance Attorneys

by Captain Joseph B. Ahlers in collaboration with Major Scott A. Hodges

A noncommissioned officer in the National Guard named Tanya Towne was happily married and raising two sons, the older one from a previous marriage. She received deployment orders to Iraq in 2004. She assumed that the right thing to do was to leave her older son Derrell in his current home and situation. Derrell's father disagreed. He sought and obtained temporary custody during Towne's deployment. Before Towne returned from Iraq, Derrell's father was granted primary custody in a permanent order. In 2010, the plight of Tanya Towne and other mothers whose custody arrangements were changed during deployment began to receive national attention. Their struggle was even highlighted on the Oprah Winfrey show.[1]

The fact that deployed service members may experience a permanent change in their custody arrangements while on the front lines of a contingency operation is a disturbing reality. In response, two recently amended regulations created new requirements for military member parents[2] and legal assistance attorneys regarding Family Care Plans (FCP). Child custody is one of the most emotionally charged and difficult issues our clients face. Discussions about the complexities of dealing with the new FCP requirements have also been emotionally charged.

[1] *Female Soldier's Custody Battles*, Oprah, http://www.oprah.com/oprahshow/Fighting-for-Their-Children/1, last visited 8 June 2012; *see* Brian Mann, *Soldier Loses Custody of Child After Iraq Tour*, National Public Radio, 14 February 2008, *available at* http://www.npr.org/templates/story/story.php?storyId=18966053.

[2] The recent FCP policy changes also broadened the requirements for who must maintain an FCP. However, this article will focus on the issues related to leaving children in the care of someone other than the non-custodial parent during a custodial parent's deployment.

AFI 36-2908, Family Care Plans, now requires that members not only consult with an attorney if they wish to name a third-party as their child's caregiver in the event of a deployment, but also "to the greatest extent possible" obtain written consent to that designation from the other biological parent.

Many parents incorrectly assume that listing their wishes in an FCP and executing an in *loco parentis* power of attorney (POA) is equivalent to a legal transfer of custody. Likewise, some legal assistance attorneys assume that the Servicemembers Civil Relief Act (SCRA), 50 USC Appx. §§ 501 et seq., will provide an absolute shield of protection for parents against changes to their custody orders while deployed. As this article will discuss, neither of these assumptions is entirely accurate.

AFI 36-2908, *Family Care Plans*, now requires that members not only consult with an attorney if they wish to name a third-party as their child's caregiver in the event of a deployment but also "to the greatest extent possible" obtain written consent to that designation from the other biological parent. AFI 36-2908 puts the duty on members to speak with an attorney before completing their FCP. AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, was amended to require legal assistance attorneys to provide competent legal advice to members on how to comply with the new FCP requirements. This article will address the historical background leading up to these regulatory changes, discuss what the SCRA actually provides for Airmen parents, look at best practices for complying with the regulatory guidelines, and close with a discussion of considerations for legal assistance attorneys who are advising deploying parents.

THE IMPETUS FOR NEW REGULATIONS

AFI 36-2908 was revamped in November 2011 to comply with the 2010 amendments to DODI 1342.19, *Family Care Plans*. Changes to the instruction were the product of Congressional pressure to address custody disputes while service members are deployed. In 2007, Congressman Mike Turner of Ohio introduced legislation that became part of the House version of the National Defense Authorization Act (NDAA). The bill sought to revise the SCRA to limit the ability of state courts to permanently modify child custody during deployment and prohibit courts from considering a parent's deployment or the likelihood of a parent's deployment when determining the best interests of a child. The American Bar Association's Standing Committees on Family Law and on Legal Assistance of Military Personnel (LAMP) opposed the proposed legislation. The DOD also opposed the legislation.[3]

There were several concerns motivating the opposition to the bill. Some saw it as an improper federal intervention into the state's family law domain, that it might create a federal cause of action, and that it was inappropriately placed the interests of a military member above the best interests of the child by eliminating the consideration of deployments.[4] Despite

[3] Secretary Robert Gates issued a letter to Congressman Turner in the Fall of 2010 expressing a change in his position, and a belief that appropriate legislation could be crafted that did not allow courts to consider deployments as the "sole factor" in determining the best interests of the child.

[4] *See* 22 May 2012 Letter from ABA President William T. Robinson III to Sen. Carl Levin,

these concerns from the DOD and ABA, a version of the bill has been introduced by Congressman Turner each year since 2007. While it passed the House several times, most recently by a 390-2 vote on 30 May 2012, it has never been approved by the Senate.[5]

In addition, the 2010 NDAA expressed a concern that deployed parents were not being adequately protected by the SCRA with regard to custody disputes and directed the Secretary of Defense to report to Congress on the matter.[6] The NDAA also expressed a need for properly coordinated FCPs as part of military readiness. In response, DODI 1342.19 was overhauled to require properly coordinated FCPs. By forcing members to consider the legal ramifications of their actions long before an absence, the DOD hoped to lower the number of legal disputes that arise while a member is deployed.

The amendments to AFI 36-2908 implement the requirements of DODI 1342.19. To the greatest extent possible, members must inform a child's other biological parent of an absence due to military orders, seek to obtain his or her consent for naming a third-party as the caregiver in their FCP, and consider legal action incorporating their third-party designation into a custody agreement prior to an absence. Paragraph 2.8.2.4.3. of AFI 36-2908 requires that denials of consent, or refusals to seek consent, must be documented in writing, as must the member's awareness of the availability of legal counsel.

The AFI includes an ambiguous requirement for members to consult with an attorney. Since AFI 36-2908 was implemented in 2000, paragraph 2.8.2.4 of the AFI has stated that members will "Consult with an attorney prior to designating a non-custodial parent as the short- or long-term designee/caregiver." While the original intent of this requirement is uncertain, the revision of the AFI in 2011 took DODI 1342.19 requirements and made them subparagraphs to 2.8.2.4. The clear intent of the adopted DODI requirements was to ensure that members consider the ramifications of designating someone other than the non-custodial parent as the caregiver.[7] The Community Legal Services Division advises that this is the appropriate reading of paragraph 2.8.2.4 and its subparagraphs. However, the attorney-client relationship should never be coercive. Members should be required to document their understanding of the availability of legal assistance and could even be directed to visit the legal office, but not compelled to consult with an attorney.

A few months prior to the release of the amended AFI 36-2908, AFI 51-504 incorporated two important clarifications for Air Force legal assistance attorneys in its second interim change (IC-2). Paragraph 1.4.5's subparagraphs require giving clients a full explanation of the consequences of not including the other biological parent in the creation of a FCP and discussing the benefits of incorporating the intended arrangements from the FCP into a court order.[8] Paragraph 1.4.5 states, that "Legal assistance attorneys advise and assist clients in the drafting and execution of documents and with other preparations necessary for the effective transfer of care and custody of dependents in the event the family care plan must be executed." Prior to the IC-2 addition of the subparagraphs to 1.4.5 required by DODI 1342.19, this statement was primarily interpreted to address powers of attorney. Some legal assistance attorneys believe they are now required to create and assist with the filing of custody modification petitions on behalf of clients. If state rules of professional responsibility allow an attorney who will not be appearing in court to draft petitions ("ghost writing"), then this practice would be acceptable, but it is not required.

The regulatory changes address Congressional concerns about the rise in custody changes for deployed service members. Do such changes conflict with the intent of the SCRA? The next section analyzes

Chairman Armed Services Committee, and Sen. John McCain, Ranking Member, *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012may22_ndaamilitarychildcustody_l.authcheckdam.pdf (lays out ABA opposition to the legislation).

[5] Servicemember Family Protection Act, HR 4201; *see also* Tom Philpott, Child Custody Bill for military Advances in House, Stars and Stripes, 7 June 2012, *available at* http://www.stripes.com/child-custody-bill-for-military-advances-in-house-1.179818 (discusses legislative push by Rep. Mike Turner and opposition). Identical language was included in the House Version of the 2013 National Defense Authorization Act, HR 4310, Section 564. Sen. Judd Gregg (R-N.H.) advocated in 2007 for the child custody language addition noted that it would not prohibit courts from entering temporary orders when it was in the best interest of the child, but the Senate has never passed a comparable bill. 153 Cong. Rec. S7900 (daily ed. June 19, 2001) (statement of Sen. Gregg).

[6] National Defense Authorization Act of 2010, S. 1390, 111th Cong. § 555-556.

[7] JACA notified the A1 OPR of the need to change the language in paragraph 2.8.2.4.

[8] AFI 51-504, Assistance, Notary, and Preventive Law Programs, para. 1.4.5.

Child custody presents a unique problem. In addition to the rights of opposing parties, the court must consider the well being of children.

whether the SCRA currently provides sufficient protection for deploying members who are parents.

SCRA

Both Congress and the courts recognize that staying civil proceedings for service members may be a detriment to the opposing parties, but a necessary compromise that keeps military members focused on the mission. Until the 2003 overhaul that rebranded the Soldiers and Sailors Civil Relief Act, stays were within the discretionary power of a court. Congress, however, seeking to protect those who "take up the burdens of the nation," amended the Act to require mandatory stays as long as members, and their commanders, submit a request showing that the "material affect" provisions of § 522(b)(2) are met.[9]

Child custody presents a unique problem. In addition to the rights of opposing parties, the court must consider the well being of children. It is one thing to tell disgruntled spouses they must wait for "Johnny (or Jane) to come home" before they can obtain a divorce, or sue for damages, or any other type of civil dispute between parties. It is quite another thing to say that innocent bystanders to custody disputes, the children, must stay in arguably detrimental situations, at least from the perspective of the non-custodial parent, for the duration of a deployment.

State courts have deemed it unconscionable to leave children of deployed parents in a state of "suspended animation" while a parent was absent.[10] Subsequently, the SCRA was amended in 2008 to explicitly include "child custody hearings" in the procedural protections found in §§ 521 and 522, meaning that a court should not issue a default judgment, and should grant a stay, in a child custody hearing if the respective requirements of those sections are met.

State courts have primarily responded by issuing temporary orders governing only the custody of the child during a deployed member's absence that they contend do not violate the SCRA. That belief is not ill-founded; state custody laws often reflect a preference for placement of a child with a biological parent. One could argue that deployed parents unilaterally leaving children with a third-party completely undercuts the court's prior careful determination of the best interests of the child. The actions that state courts contend uphold the constitutional rights of both parents to "make decisions concerning the care, custody, and control of their children"[11] have created several problems for service members. Temporary orders rarely provide for children to see step-parents or grandparents in the deployed parent's family and often award custody with little to no consideration of the deployed parent's wishes.

Furthermore, absent members frequently worry that their children's temporary custody arrangement could result in a permanent change in custody because of a change in circumstances. A change in the state with jurisdiction over the custody determination is another fear. In short, the SCRA simply cannot be relied upon as a default shield for deploying members who choose to leave their children with custodians other than the non-custodial biological parents. The new AFI requirements recognize this reality and attempt to address the shortcomings that exist in many custody situations, i.e., the custody order does not deal with deployment absences of the custodial parent, or no custody order exists.

COMPLIANCE WITH THE FCP AFI

While the AFI changes provide new guidance to legal assistance attorneys and members on executing proper FCPs, they also, as new requirements often do, create some confusion. AFI 36-2908 does not address whether, or how, units should verify compliance with the requirements of paragraph

[9] That military service prevents the member from being able to appear, and that leave will not be granted. Keep in mind that courts have interpreted this as legal appearance as opposed to physical appearance, meaning that submissions to the court that constitute a general appearance may waive the right to a stay.

[10] *Lenser v. McGowan*, 191 S.W.3d 506 (Ark. 2004).

[11] *Troxel v. Granville*, 530 U.S. 57 (2000).

The significant differences in the child custody laws of the 50 states, U.S. territories, and even foreign jurisdictions, complicates the ability to provide competent legal advice on FCP-related issues for Air Force legal assistance attorneys.

2.8.2.4—notification of impending deployment, obtaining consent to FCP, documentation of consent or lack of consent and knowledge of the availability of counsel—before signing off on a FCP. As a recent opinion by AF/JAA confirms, the mere fact that a military member has consulted with an attorney is itself owed a duty of confidentiality and cannot be waived absent client consent. In most circumstances, attorneys should neither confirm nor deny that a member sought legal assistance.[12] Unless a base legal office makes a regular policy of asking for confidentiality waivers on FCP discussions, the burden remains on members to verify that they have fulfilled their obligation under the AFI.

The revisions also do not dictate how service members should document the consent (or lack thereof) they have been asked to obtain from the other biological parent or how units should track compliance with paragraph 2.8.2.4.[13] Recognizing this, several bases created model forms that capture the requirements in writing and provide guidance to first sergeants and members. Examples and sample forms, as well as a host of other documents relating to pre and post deployment custody issues, are available in the Custody and Family Care Plan Issues Learning Center on Air Force JAG Corps' CAPSIL e-learning website.

When creating a form for your base, consider breaking down the consent forms into at least two separate documents: an internal tracking mechanism for first sergeants, and an external consent document to provide to members. The member should certify on the internal document whether they have sought the consent of the other biological parent, the result of that attempt, a justification if they refuse to seek consent, that they have either consulted with or acknowledge the availability of an attorney to discuss the best course of action, and that they are aware of the notification requirements of paragraph 2.8.2.4.1. The external form should specify that the member has prepared a FCP which designates a third-party as the dependent's caregiver in the event of a military absence and that the other biological parent consents to the FCP designation as evidenced by a notarized signature on the form.[14]

ADVICE FOR PARENTS ON CUSTODY ISSUES

The significant differences in the child custody laws of the 50 states, U.S. territories, and even foreign jurisdictions, complicates the ability to provide competent legal advice on FCP-related issues for Air Force legal assistance attorneys. The first step in any custody discussion is determining the appropriate jurisdiction. This is usually either the home state of the parent where the child primarily resides or where the initial custody determination was made. However, frequent moves among military families creates the potential for jurisdictional battles between former and current residences.

While not the focus of this article, legal assistance attorneys also need to refresh themselves on the Uniform Child Custody Jurisdiction and Enforcement Act. The model law adopted in some form by 49 states governs when a state, other than the one which made the initial determination, can modify a custody arrangement. The general rule is that the court who issued the initial custody order retains exclusive jurisdiction unless all of the parties leave the state. Many of our Airmen parents meet that criteria, and are therefore vulnerable to a change in jurisdiction. By addressing the custody situation before deployment, members can be in their home

[12] Memorandum from AF/JAA to AF/JA, Subject: Advisory Opinion—Duty of Confidentiality and Legal Assistance Matters (30 Aug 2011).

[13] While JACA recommended to A1 during the review of the interim changes to AFI 36-2908 that it adopt a standard form (the approach of the U.S. Army), no form has yet been provided.

[14] AFI 36-2908 is not punitive, but it does provide that separation action may be initiated against members who fail to complete an FCP.

Attorneys should determine whether state statutes contain any special provisions for custody arrangements during military deployments.

court where they are currently raising the child, as opposed to the possibility of the noncustodial parent moving the child to another state and then seeking to transfer jurisdiction there.

Once the attorney identifies the proper forum, they should locate the appropriate statutes governing custody arrangements and temporary orders. No two states are the same when it comes to amending orders and delegating parental rights to a third-party. However, the "best interest of the child" standard, the all-encompassing consideration of several factors relating to a child's life and development, remains the customary test for custody arrangement issues. Focusing parents on these factors in terms of a child's well-being during a deployment, the importance of their connection to the third-party, and the importance of schedule consistency (regardless of a member's absence) will improve their ability to make a persuasive argument to a court for a change to their custody arrangement.

Next, attorneys should determine whether state statutes contain any special provisions for custody arrangements during military deployments. The Uniform Law Commission drafted the comprehensive Deployed Parents Visitation and Custody Act in July of this year. The draft is a model statute for potential adoption by state legislatures. Prior to that effort, the rise in deployments over the past decade coupled with outreach efforts by the DOD and ABA spurred the creation of special provisions in the laws of several states that address parental deployment issues. Some specific examples include:

- In Mississippi, a court shall hold an expedited hearing on custody and visitation issues for members receiving temporary duty or deployment orders.[15]

- South Dakota allows some members of the armed forces to delegate for up to one year almost all of their authority regarding custody and care of a minor child through a properly executed power of attorney.[16]

- Military members in Kansas may delegate their parenting rights, with court permission, to a person with a "close and substantial relationship" to the child for the duration of the deployment.[17] The "close and substantial relationship" test is a prevalent, but not exclusive, standard among those jurisdictions which allow delegation of some (or all) custody rights.

- A presumption in favor of third-parties receiving the visitation rights of a deployed parent and an authorization for reassignment of child support is incorporated into Oklahoma law; however, the third-party must be present at the court hearing modifying the order so the court can judge his or her fitness.[18]

- A non-deployed parent under Virginia's jurisdiction may be required in a temporary order to facilitate a certain frequency of communication between a child and a deployed parent for the duration of the member's absence.[19]

- Upon return, Colorado requires that any modifications to parental plans based solely on the deployment of a member automatically revert to the previous plan that was in place before the deployment.[20]

- Wisconsin protects service members during any court action regarding child placement by

[15] Miss. Code Ann. § 93-5-34(4)-(5) (2011).

[16] S.D. Codified Laws § 33-6-10 (2011).

[17] Kan. Stat. Ann. § 60-1630 (2011).

[18] Okla. Stat. Ann. tit. 43, § 150.3, 150.7, 150.8 (2012).

[19] Va. Code Ann. § 20-124.10 (West 2011).

[20] Colo. Rev. Stat. Ann. § 14-10-131.3(b)(1)-(2) (West 2012).

One well-founded fear clients may have is that the other biological parent may not only refuse to consent but also recognize that not signing may allow him or her to ignore the FCP and seek custody during the deployment.

prohibiting a court from considering whether they have or will be deployed.[21]

This is just a sampling of state laws; each jurisdiction will have different provisions to assist deploying military members with custody issues. A chart outlining the progress among the states in adopting provisions that address parental deployment is also located in the CAPSIL learning center. Chiefs of legal assistance should consider planning office training highlighting applicable local laws so that all attorneys have the same knowledge base from which to draw when their next client faces a deployment-related custody issue. Remember that attorneys are not alone in this fight. The ABA's Military Pro Bono Project (MPBP) website, militaryprobono.org, has a network of civilian practitioners willing to clarify state laws relating to child custody and ensure compliance with local rules and practices through "Operation Stand-By," an attorney-to-attorney consultation resource.

Consider counseling clients on how they should approach the other biological parent to obtain consent. One well-founded fear clients may have is that the other biological parent may not only refuse to consent but also recognize that not signing may allow him or her to ignore the FCP and seek custody during the deployment. The best answer is that regardless of the other parent's consent, action by a court of competent jurisdiction is the only way to ensure that the custody arrangement during deployment will not be subject to change. Signing the consent form makes the process easier for both parties to proceed with obtaining a modified custody order. This reality should also make it easier for members to understand the importance in dealing with the issue prior to deployment.

While AFI 36-2908 contemplates merely incorporating the FCP into a temporary order, there is no guarantee a court will accept a unilaterally-executed Air Force form as the sole proof needed to issue a new order. Few things could be worse for a member than complying with the AFI and finding out days into a deployment that the court refused to base a custody change on an FCP. At the very least, the consent form should be notarized by both parties so a jointly-agreed upon document can be submitted to the court. However, the best practice is to supplement the consent form with a motion and modified order that is ready for a judge's signature without an appearance by either party. If the court accepts it, the member has been saved a lot of time and money that is normally involved in the process of a protracted custody dispute.

CONCLUSION

The revisions to AFI 36-2908 and AFI 51-504 create new requirements for members and legal assistance attorneys. However, fundamental principles of family law have not changed. The regulatory changes have sought to ensure that service members are taking the bare minimum of precautions to avoid a custody dispute arising during a deployment. The change ensures that legal assistance attorneys will be involved in the process. Hopefully, these changes will reap positive results for our service members. Through internal and external education, and an active preventive law program that encourages members to incorporate deployment-related matters in the initial divorce and custody proceedings and complete their FCPs long before a contingency occurs, members tasked to deploy can be confident that their children's living situation will not change while they are deployed.

[21] Wis. Stat. Ann. § 767.451(c) (West 2012).

I...do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same...

– Oath of Office
5 U.S.C. § 3331(2011)

Orders and the Oath:

Understanding a Military Officer's Duty to Support and Defend the Constitution

by Major R. Davis Younts

Every officer in the United States military takes a solemn oath to support and defend the Constitution against all enemies foreign and domestic.[1] The original oath was first adopted in 1789, and the current wording became final in 1962. Despite changes in the wording of the oath, one constant has remained; the commitment to support and defend the Constitution.[2] This portion of the oath is significant because through it every military officer[3] accepts a unique obligation to the Constitution, rather than to a particular political leader or military officer.

[1] 5 U.S.C. § 3331.

[2] Lt Col Kenneth Keskel, *The Oath of Office: A Historical Guide to Moral Leadership*, Air & Space Power J., Vol. XVI, No. 4, 47-57 (2002).

[3] For the purposes of this research "oath" refers to the oath of office for military officers rather than the oath of enlisted military members. The enlisted oath contains significant additional language, "and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the uniform code of military justice." The analysis and conclusions of this research will be applicable to enlisted military members, however, the focus is on the oath of military officers and the Constitutional implications of that oath in light of the fact that the oath for officers does not contain the explicit language regarding following orders. Air Force Doctrine Document 1-1, Leadership And Force Development (Feb. 18 2006), *available at* http://www.au.af.mil/au/lemay/main.htm [hereinafter AFDD].

World history has demonstrated that the loyalty of the military is critical to both the maintenance of a free society and to the implementation of totalitarian regimes. A proper understanding of the U.S. military oath of office and what it means to support and defend the Constitution is critical to the security of our nation and the maintenance of a free society.

HISTORICAL SIGNIFICANCE OF MILITARY OATHS OF OFFICE

> *I swear by God this sacred oath that to the Leader of the German empire and people, Adolf Hitler, supreme commander of the armed forces, I shall render unconditional obedience and that as a brave soldier I shall at all times be prepared to give my life for this oath.*
>
> *– German Military Oath during Hitler's Reign*
> The Encyclopedia of the Third Reich[4]

This German military oath was the reality of Adolf Hitler's regime in National Socialist Germany. His rule over the German people resulted in terrible tragedy that left very little of Europe untouched by death and cruelty. This article begins substantively with this oath and a brief historical discussion of ancient Rome and 20th century Germany. Although neither society had a similar history to that of the United States in the foundation of their Republic as a form of government, each provides important lessons on the critical role that military oaths can have in the transformation of society and in securing the loyalty of the military.

ANCIENT ROME

Emperor Augustus brought about constitutional reform in the Roman Empire. As he accomplished this reform, he encouraged senators, magistrates, and citizens to voluntarily swear an oath of allegiance to the Emperor that mirrored the oath sworn by the military.[5] Critical in this societal transformation was the fact that the Roman military oath had already been altered from an oath to serve the Republic to an oath to serve a general.[6] It was a change that some historians contend altered the honorable service of the Roman citizen's duty to serve the fatherland and that with it, military service became prostituted to the equivalent of mercenary status.

Roman history teaches us that the oath and the loyalty it required were central to the societal and governmental changes that Augustus and his descendents used to consolidate the power of Roman government in the hands of the Emperor. An important aspect of that change was the altering of the traditional military oath demanding allegiance to the Republic to an oath of loyalty to an individual.

NATIONAL SOCIALIST GERMANY

Adolf Hitler placed an extremely high value on the importance of oaths. Immediately upon becoming the holder of the combined offices of Fuhrer and Reich Chancellor, Hitler summoned the commanding general and the commanders-in-chief of the three branches of the armed forces. He required them to swear allegiance with an oath that was unprecedented in German history.[7] While the previous oath demanded loyalty to the constitution and the President, the new oath demanded unconditional obedience to a specific individual, Adolf Hitler, and created a personal link between every soldier and the Fuhrer.[8] Because of this oath, high-ranking members of the German military felt torn between doing what they believed was right for Germany and the obligations imposed by the sacred oath of loyalty sworn to Hitler.

HISTORY OF THE UNITED STATES MILITARY OATH OF OFFICE

The United States adopted a military oath that requires every officer of the military to swear or affirm that he or she will support and defend the Constitution against all enemies foreign and domestic and bear true faith and allegiance to the Constitution.[9] The original oath was first adopted in 1789 and the current wording became final in 1962.

The wording of the oath has remained essentially consistent throughout United States history. This fact is critical because history demonstrates that oaths,

[4] Louis L. Snyder, Encyclopedia of the Third Reich 156, 257 (1989).

[5] Edward Gibbon, The Decline and Fall of the Roman Empire 16, 40-44 (2003).

[6] Flavius Vegetius Renatus, The Military Institutions of the Romans 8-9 (1985).

[7] *Id*. at 356-358.

[8] *Id*. at 356.

[9] 10 U.S.C. § 525 and 5 U.S.C. § 3331.

Examples of military officers who have chosen to follow or defy orders because of their view of the oath and loyalty and the subsequent repercussions provide valuable lessons for current and future officers who may be faced with similar challenges.

like those used by Augustus in Ancient Rome and Hitler in Nazi Germany, are powerful tools for the imposition of societal change. As George Washington noted in his farewell address, "…the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all....the right of the people to establish government presupposes the duty of every individual to obey the established Government."[10]

RELATIONSHIP OF THE OATH TO THE PRESIDENT AS COMMANDER-IN-CHIEF

Articles I-III of the Constitution establish three branches of government with distinct roles and responsibilities.[11] Pursuant to Article II, the President of the United States is the Commander-in-Chief of the military.[12] In addition to establishing the role of a civilian President as Commander-in-Chief, this portion of the Constitution clearly establishes that the military is not a separate or fourth branch of government and that it is controlled and commanded by an elected civilian.[13] The resulting system of government is one in which military leaders serve at the pleasure of the President and fall under the authority of the other branches of government.

The formation of a military that falls under the authority of elected civilians, but swears an oath of loyalty to the Constitution rather than to an individual or a position, raises a potential concern for military officers. Loyalty to the Constitution might require them to disobey or disregard the orders of the President as Commander-in-Chief. Both the importance of the issue and this possibility have been highlighted by the controversy surrounding recent Presidential elections. Controversial election results can undermine the authority of the President and could prompt some members of society, including military officers, to doubt the legitimacy of an electoral outcome.

HISTORICAL ANALYSIS OF MILITARY OFFICER'S DECISIONS TO FOLLOW OR DEFY ORDERS

Examples of military officers who have chosen to follow or defy orders because of their view of the oath and loyalty provide valuable lessons for current and future officers who may be faced with similar challenges.

ROBERT E. LEE

After the election of Abraham Lincoln in 1860, it took only four days for the South Carolina legislature to issue a call for a convention to withdraw the state from the Union.[14] During this turbulent time, it was said of Confederate Army General Robert E. Lee that "[h]is mind was for the Union; his instinct was for his state."[15] As he struggled to balance his loyalty to the United States with his loyalty to Virginia, Lee expressed in his own words a willingness to lay down his life for the preservation of the Union.[16] Ultimately, however, Lee determined that if secession destroyed the Union, he would resign his commission and not fight for either side unless it became necessary to defend Virginia.[17]

The Lincoln administration offered Lee command of the 75,000-100,000 man army that was tasked with enforcing federal law.[18] He did not accept the position but he delayed his resignation in the hopes that the Union could be preserved peaceably. On 19 April 1861, the Virginia legislature voted to secede. In response to that vote and despite his personal opposition to secession, Lee tendered the resignation

[10] Renatus, *supra* note 6, at 56.

[11] U.S. Const. Art. I-III.

[12] *Id*. at art. II § 2.

[13] *Id*.

[14] Douglas S. Freeman, Lee 105 (1997).

[15] *Id*. at 106.

[16] *Id*.

[17] *Id*. at 107.

[18] *Id*. at 110.

of his commission in the United States Army on 20 April 1861.[19]

As the Civil War unfolded, Lee became the South's commander of the Army of Northern Virginia. It could be argued that the interpretation and meaning of the Constitution was determined not in the courts, but on the field of battle where armies of neighboring states fought over the right to secede. In that regard, it is clear that Lee believed his highest loyalty was to his native state of Virginia. In his mind, once Virginia voted to secede, even though he personally opposed secession,[20] his duty to the Constitution of the United States no longer existed because the nation he had sworn to support and defend was one of which he was longer a citizen.

In Lee's example, we see a military officer who chose to resign his commission rather than publicly oppose or criticize his civilian leadership. The fact that he later took up arms against the Union is not as important for the analysis of this research as the point that his actions demonstrate an option that is available for military officers in light of the obligations of their oath—resignation.

BILLY MITCHELL

The career and eventual court-martial of William "Billy" Mitchell provides an example of a military leader who chose to defy orders. Regardless of how individuals view Mitchell, he clearly had a tremendous impact on the modern Air Force. His theories on the potential use of airplanes in combat formed much of the doctrine for World War II and helped to generate many of the intellectual concepts that have become the foundation for America's global air power.[21] What we also know about Mitchell is that his decision to continue to write material for unauthorized publications and his public attacks on military and civilian leadership was a breach of his duties and responsibilities as a military officer and resulted in his conviction at a court-martial.[22]

It could be argued that Billy Mitchell believed he had a duty to support and defend the Constitution by publicly advocating for the creation of an Air Force and increased investment in air power. Arguments over his true motivation aside, his public comments created the impression that he believed he was defying orders and publicly criticizing his leadership, because it was in the nation's best interest to be prepared for future air wars.[23] Therefore, an argument could be made that Mitchell concluded that he was, in fact supporting and defending the Constitution.[24]

The passage of time and the development of air power have led to Mitchell being somewhat exonerated by history.[25] However, the fact remains that he was a military officer who swore an oath and failed as a military officer by disobeying his military and civilian leaders. Mitchell could have resigned his commission and would have been free to criticize whomever he decided and ultimately run for political office.

TERRENCE LAKIN

Lieutenant Colonel Terrence "Terry" Lakin was an Army physician who served his country as a military officer for 16 years and was selected for promotion to Colonel. After the election of President Obama, Lieutenant Colonel Lakin spent over a year requesting, through his chain of command and his Congressional delegation, proof that President Obama was constitutionally eligible to serve. In his requests, Lakin told his superiors he believed that based on their oath of office to protect and defend the Constitution, military officers should be allowed to demand proof of the President's eligibility.[26] Ultimately unsatisfied with his inability to force his superiors or Congress to provide him with proof of the President's eligibility to serve, Lieutenant Colonel Lakin chose to disobey an order to deploy to Afghanistan. He conditioned his deployment on the President providing proof that he was a natural-born citizen eligible to serve as President in accordance with Article II of the Constitution. As a result of his refusal to deploy, Lieutenant Colonel Lakin was convicted by a court-martial and sentenced to six

[19] *Id*. at 110-111.

[20] *Id*. at 105-07.

[21] *Id*. at 8.

[22] *Id*. at 7-8, 324.

[23] *Id*. at 7-8, 317-318.

[24] This concept has been championed by others, such as one of the attorneys that represented Lieutenant Colonel Terry Lakin during his court-martial, Mr. Paul Jensen. Interview with Paul R. Jensen, 11 August 2010.

[25] Douglas C. Waller, A Question of Loyalty: Gen. Billy Mitchell and the Court-Martial That Gripped the Nation 351-364 (2005).

[26] American Patriot Foundation, *Who is Terry Lakin* (25 October 2011), *available at* http://www.safeguardourconstitution.com/who-is-ltc-terry-lakin.html.

months in prison, total forfeiture of all pay and allowances and a dismissal.

According to press releases and statements by his attorney, Lieutenant Colonel Lakin believed his disobedience of an order was necessary to support and defend the Constitution. He believed the disobedience of the order was a matter of personal conscience for him as a military member and concluded that he had an obligation to disobey the order to deploy because it was the only option available to him to fulfil his oath of office.

During the pre-trial stages of his case, Lakin repeatedly attempted to obtain a copy of "[r]ecords in possession of Hawaii State Department of Health's office of Health Status Monitoring pertaining to the birth of Barrack Houssein Obama II."[27] The court denied his requests, ruling that the documents were not relevant to his case because a personal belief that an order is unlawful is not a defense to a charge of disobeying an order. The court cited *U.S. v. New*, noting that "[t]he duty to disobey an unlawful order applies only to a positive act that constitutes a crime that is so manifestly beyond the legal power or discretion of the commander as to admit no rational doubt of the order's unlawfulness."[28] Further rationale for the ruling was the *de facto* officer doctrine and a conclusion by the court that under that doctrine, the actions of the President under "color of office" are valid even if it were later determined that President Obama was not eligible to hold office.[29]

The court's ruling and Lieutenant Colonel Lakin's conviction demonstrate that the likely outcome of any military officer's attempt to defend disobedience to an order based on his/her obligation to support and defend the Constitution will have to be justified by circumstances where the order itself is clearly unlawful. Thus, we learn from Lakin that military courts do not view a military officer's personal beliefs, absent proof of the unconstitutionality or unlawfulness of an order, as justification for disobeying an order. In other words, Lakin, like Mitchell, learned that the oath to support and defend the Constitution does not mean that a military officer may disobey orders because of a personal belief unless that belief is based on clear proof that the order is unlawful or unconstitutional. Lakin, like Mitchell, chose to become involved in policy issues while wearing the uniform and the result was the same as Mitchell's—conviction by a court-martial.

ANALYSIS OF HISTORICAL EXAMPLES

The lessons learned from the actions of historical and contemporary military officers are important to the analysis of the prescriptive moral, legal, and practical options available to military officers today. These examples illustrate two of the options available military officers faced with an order they believe to be illegal or with which they disagree: disobedience or resignation. Further, they demonstrate the decision to defy an order is a serious one which may lead to court-martial. An argument can be made that each of these men acted on the belief he was doing his duty to the nation and the Constitution. Merits of their beliefs aside, this information combined with the historical and legal context of the oath provides the foundation for a discussion of the meaning of the oath and the options available to military officers faced with orders they believe may be unconstitutional or unlawful.

LEGAL RAMIFICATIONS AND PRACTICAL IMPLICATIONS OF THE OATH OF OFFICE

The oath of office and the commitment to serve in the military which corresponds with it, place a military officer in a special relationship with the Constitution. Under the Constitution and the system of checks and balances among the branches of government it established, the military is subject to the authority of the elected executive and subordinate to the legislative and judicial branches of government.[30] Further, the military is not only subject to the control of elected officials, it is without authority or imperative to act as a check or balance to the power of any branch of the government.[31]

[27] Record of Trial: United States v. Lakin, (Headquarters Military District of Washington, December 16, 2010), Ruling: Defense Motion to Compel or For Other Appropriate Relief. Colonel Denis R. Lind, Chief Judge, 1st Judicial Circuit, USA. (2 September 2010).

[28] *See United States v. New* in Mil. Jus. R., Vol. 55 108 (2001).

[29] Record of Trial: United States v. Lakin, (Headquarters Military District of Washington, December 16, 2010), Ruling: Defense Motion to Compel or For Other Appropriate Relief. Colonel Denis R. Lind, Chief Judge, 1st Judicial Circuit, USA. (2 September 2010).

[30] U.S. Const. Art. I-III

[31] Keskel, *supra* note 1, at 47-57.

Regardless of the option that a military officer chooses when faced with the difficult prospect of a potentially unlawful order, the duty of the military officer is to support and defend the Constitution.

OPTIONS AVAILABLE TO MILITARY MEMBERS FACED WITH POTENTIALLY UNLAWFUL ORDERS

History and case law lead to the conclusion that military members have three primary options when faced with a potentially unlawful order. In these circumstances, they can (1) obey the order, (2) disobey the order and accept the consequences or, if possible, (3) resign.

The first option is generally the safest and most practical, presume orders are lawful and presume that the person issuing them has valid authority to do so. Important to this point is that if the officer has concerns or doubts as to the lawfulness of an order, he or she should proceed with caution, seek advice, ask for clarification of the order, or even seek to have the order reduced to writing. If a military officer doubts the authority of the person issuing the order, he or she can respectfully request for clarification of the authority or position of the person giving the order.[32] If after seeking clarification and advice, an officer becomes convinced, using objective standards, that an order is unlawful or unconstitutional, such as an order to slaughter unarmed civilians in order to aid in a coup to install a general as an unelected leader of the United States,[33] then a military officer would have a clear objective obligation to refuse to follow the order as would all government employees and officials who have sworn an oath to support and defend the Constitution.[34]

A final option available to military members faced with an order they believe is unconstitutional, in light of the oath, is to resign from military service. A resignation, if possible, would terminate the obligation of the military member to follow orders as well as to refrain from speaking out against his/her civilian or military leadership. In some respects, even when faced with a clearly unconstitutional order, resignation would still be an appropriate and respectable option.

Regardless of the option that a military officer chooses when faced with the difficult prospect of a potentially unlawful order, the duty of the military officer is to support and defend the Constitution.

CONCLUSION

All military officers are required upon entering service to take an oath to support and defend the Constitution. This oath places a burden and obligation on military members to give their lives, if necessary, in the service of the Constitution.

The fact that the oath carries with it personal, moral, and legal obligations does not require that military officers become individual arbiters of the meaning or interpretation of the Constitution. A military officer supports and defends the Constitution by understanding his/her place and the role of the military in our system of government. Any attempt by a military officer to use their position as an opportunity to criticize civilian leadership, or to undermine or to question the authority of elected leaders endangers the system of government established by the Constitution. An oath to support and defend the Constitution is an oath to a system of government that places the military under the authority and oversight of elected civilian leaders.

[32] E.g. Terry Lakin and Billy Mitchell, respectively.

[33] While seemingly far-fetched, military leaders have written and discussed potential circumstances in which just such a scenario might unfold. One scenario anticipates that the American public might turn to military leaders in a time of chaos because they trust them to provide security and stability. *See* Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, Parameters, 2-10 (Winter 1992-1993).

[34] See *United States v. Calley*, 1973 WL 14570 (ACMR, 1973).

The Science of Victory:

A Case Study in the Enlisted PT Discharge Board

by Captain Jonathan S. Sussman

The objective of this article is to provide some best practices by using a case study of an enlisted PT discharge for Senior Airman John Snuffy. The facts, based on an actual board, are as follows: John Snuffy was a 26-year-old Senior Airman with nine years of service. After four PT failures in 24 months, his commander recommended discharge from the Air Force for failure to meet minimum fitness standards. Additionally, other than his PT failures, his duty performance was very good. He received stepped, progressive discipline for his four failures as follows: (1) deferred promotion; (2) LOR; (3) administrative demotion; and, (4) LOR/UIF. Following his first failure, he was ordered to attend health awareness classes and fitness improvement classes on Tuesdays and Thursdays. Following his third failure, he was ordered to attend health awareness classes three days per week. The unit had a policy of mandatory PT three days per week, one of which was a 5k run every Friday. The case sounds good for the Government, except for one problem: he passed two of six tests over the 24 month period, one of which was *his most recent test*. Consider the following rules of thumb that enabled the Government to win this board despite its shortcomings.

YOUR NOTIFICATION IS YOUR CHARGE SHEET

Do not shrug off your notification letter. You must prove every element of the discharge basis at the board. This is not usually a prime concern at PT discharge boards, because the basis is simply four failures within 24 months without a medical justification or significant improvement. It is nevertheless important enough to require mention. Generally speaking, be sure to use an appropriate basis, know what it means and make sure you can prove it (at least by a preponderance). Where this can become problematic in a PT discharge is where the member had some sort of medical issue. Even if there was an exemption, the Government should take the additional step and get a witness from the Medical Group

There are four questions that members must consider in a discharge board: (1) Is there a basis for discharge? (2) Should the member be discharged? (3) What should the characterization be? and (4) Should there be probation and rehabilitation (P&R)?

to prove this was not a larger problem, impacting other tests or test components.

KNOW THE RULES

AFI 36-3208, paragraph 8.13 requires that evidence be relevant, competent and material. This means hearsay, as a general rule, can be admissible.

There are four questions that members must consider in a discharge board: (1) Is there a basis for discharge? (2) Should the member be discharged? (3) What should the characterization be? and (4) Should there be probation and rehabilitation (P&R)? In a PT discharge board, the basis is easy, four failures, twenty four months. Characterization is easy. It can only be honorable. Spend little time on this, but make it crystal clear to the members that those questions are satisfied and they should not waste their time on them.

Once you get past these two questions, you must convince the board that the member in this case *should* be discharged. This is where the rules truly enable you to win your board. In order for board members to answer this question, the AFI allows the government to address the respondent's *entire record,* so long as it is geared toward answering questions 3 and 4—should he be discharged and whether or not P&R should be granted.

Finally, there is no requirement that a witness be physically present in a board, so know how to use your VTC or phone in the courtroom. It is important that you do a dry run with all witnesses—particularly those who are testifying via VTC or phone. If you want the witness to reference documents during his or her testimony, make sure that the copies the witness is using are the same as the documents in the board and are marked.

In SrA Snuffy's PT discharge board, for purposes of the "should" and "P&R" questions, the Government brought in the fact that over the member's career he had failed PT tests almost 70 percent of the time. In addition, one witness testified entirely by phone to excellent effect.

DEVELOP A STANDARD WITNESS LIST

At least three people should always be involved in a PT discharge board. First, you will need someone from the unit who will describe the unit PT program, as well as discipline and counseling given to the member for their PT failure. This can be the commander, First Sergeant, or Flight Chief. Second, get the unit fitness program manager (UFPM) or someone in the unit who can speak to the member's fitness and diet habits as well as the unit PT program. Third, find the most knowledgeable member of the Health and Wellness Center (HAWC) who can discuss all the "Be Well" or "Healthy Living" classes this member has taken and their attitude during the classes.

In the Snuffy board, the unit commander testified in the hearing and described the PT program he created. He required three days per week of PT, one of which was a 5K run. He also explained that the member received appropriate step discipline. Respondent's counsel argued in closing that the commander was effectively punishing the member twice for administratively demoting him prior to discharge. However, the table on Attachment 19 of AFI 36-2905 acknowledges this as a viable option and further explains, "Unit CCs exercise complete discretion in selecting responsive action(s). Commanders may use more than one action per failure."

SrA Snuffy's direct supervisor had regularly worked out with the member on weekends, in addition to unit PT. It may sound like the member is making a concerted effort to improve. However, argued

properly, that testimony can actually be helpful for the government. As the recorder, you are arguing the member either, *won't* pass and therefore consciously chose to be mediocre, or *can't* pass *despite* all that effort, and frequently you can argue both.

Finally, a representative from the HAWC described all the services provided to SrA Snuffy and that he was educated about his options in weight loss and physical fitness. In this particular board, she also served to describe the member's poor attitude in those classes, which she supported with documentation.

GIVE THEM WHAT THEY WANT

Discharge board members are just people. They have sympathies, compulsions and predispositions like everyone else in the Air Force. Importantly, remember that a discharge board is about firing someone from their job. If you sell it to the members as something that should be easy (at least in a PT discharge board), you will alienate them. Own your weaknesses and do not disregard their potentially similar experiences with PT. Frequently the members are willing to give you precisely what you want so long as you frame it in a way to enable them to feel obligated or even comfortable in taking away this member's job.

In this regard, the Snuffy board had some helpful facts. He had written things like, "I'm lazy," and "the BS PT test" on his surveys to the Health and Wellness Center. As previously discussed, he also failed almost 70 percent of PT tests throughout his career. However, there was one major challenge: *he passed his most recent test*, albeit by 1.5 points. To overcome this, the commander testified that this member occasionally, and quite nominally, passes. In addition, the Government argued that SrA Snuffy passed by a very small margin, even under the pressure of facing a discharge board. The effective argument was: what happens when he doesn't have a discharge motivating him? Finally, the commander went over the *practical* ramifications of being unfit, how it could put the member, as well as other airmen, in danger while deployed.

Make your final argument visual. Do not fear PowerPoint. Used sparingly, it can be very effective. Many military members respond well to checklists. They are familiar and a part of everyday military life. So, in our case, the Government used a PowerPoint checklist for each of the four questions. The basis and the characterization questions should get knocked out first, since they are given. For answering the "should" and "P&R" questions, the Government put up a color copy of his fitness history graph from the Report of Individual Fitness and drew a line at 75% (denoting the fitness cutoff), to show how many of the member's tests were under that line. The Government put up the Individual Test History and identified passing scores with a green highlight and failure with a red highlight. The red was overwhelming. In another slide, the Government highlighted those passing scores which would have been failures under the new PT standards resulting in even more red. In each slide, the Government identified the percentage of failure. All of this data overcame the evidence of the recent passing score.

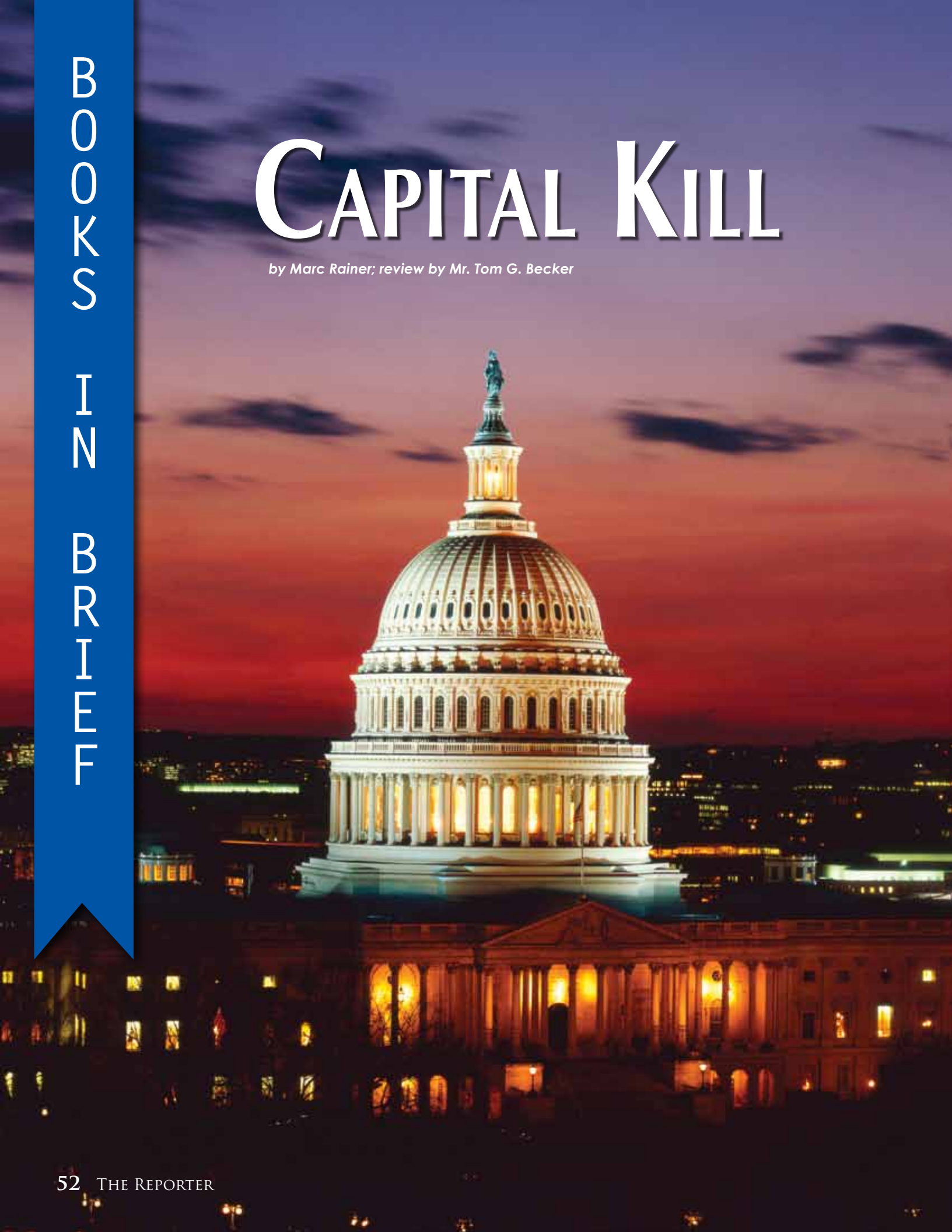
TEAMING

A 3-level paralegal was Assistant Recorder in the Snuffy Board. He conducted voir dire and one direct examination. This can be difficult if a base is low on paralegal support or where there are attorneys available for the position. Neither were true at the time of this board. It turned out to be a tremendous advantage in our board. In a board for a junior enlisted member, a paralegal often will have more in common with the respondent and the enlisted board members than an Air Force Captain. Who better to acquire the true perspectives of the board members and the respondent than an unassuming A1C? Paralegals also provide ready murder-boarding in preparing the board. Most importantly, they gain a sense of involvement and pride that post-trial drafting rarely gives them.

The most important takeaway is that discharge boards are an under appreciated litigation experience. Many of the same strategies used in courts martial are valuable in boards and vice versa. The Government must plan to prove the allegations. We must know the governing rules and develop best practices, particularly in witness selection. Boards allow us the opportunity to hone those very basic trial skills in a less adversarial environment.

Capital Kill

by Marc Rainer; review by Mr. Tom G. Becker



"Capital Kill" is a popular fiction blast. I found myself looking forward to picking it up each evening to see what happens next.

Marc Rainer (the pseudonym of a federal prosecutor and former Air Force JAG) has joined the ranks of trial attorneys turned fiction writers with "Capital Kill," a legal thriller that gives us a worm's eye view of the War on Drugs in the streets and courtrooms of urban America. Along the way, Rainer introduces us to a colorful cast of the goodest of good guys and baddest of bad guys, and what may be the most diabolically inventive method of homicide since the south end of King Edward II met the north end of a red-hot poker. The result is a fun ride for fans of the legal/police procedural genre that will leave them eager for the inevitable sequels.

Rainer's hero is Jeff Trask, a lawyer recently divorced from both his wife and active duty in the Air Force JAG Corps. Trask settles in Washington, D.C., and finds employment as an Assistant United States Attorney and romance with a beautiful Air Force OSI agent. Trask's abilities as a trial attorney quickly mark him for advancement in the U.S. Attorney's Office, and he finds himself assigned to an elite team of prosecutors, D.C. police, and federal agents. The team is hot on the trail of one Demetrius Reid, a Jamaican drug lord and serial killer who, in his spare time between narco-trafficking and serving delicious Caribbean fare at his Northeast D.C. restaurant, dispatches his victims with duct tape. Yes, I said duct tape—after knocking them unconscious and immobilizing them, Reid waits for them to come to and then slowly wraps them up until they suffocate. You won't see that on the Red Green Show.

In the manner of all fictional villains, Reid eventually makes a mistake that lands him in a criminal courtroom and Trask's crosshairs. Reid's case requires Trask to use all his experience and skill to seek a conviction for someone who is his intellectual equal and has planned—carefully planned—for the day he may have to stand trial. The climax of "Capital Kill" is a blockbuster—it's as good as anything I've read in courtroom fiction.

While I liked this book, I want to be clear—if the reincarnation of Mrs. White, my high school Honors English Literature teacher, were to return to the classroom, she would not be kicking "Last of the Mohicans" off her required reading list in favor of "Capital Kill." Rainer's prose isn't consistently good. It sometimes reads like a film noir parody with cringe-inducing lines like, "She was all woman" with "a shapely pair of legs." Much of the character dialogue is clever and funny, reminiscent of Robert K. Tanenbaum's early Karp–Ciampi novels (the recent ones are to be avoided at all costs). Other times, Rainer unfortunately imitates Tom Clancy's technique of using dialogue as an excuse for expressing the author's political views, and to explain things to the reader that the characters already know and, in the real world, would not be talking to each other about. The result is awkward and detracts from the story's realism, which should be the hallmark of any legal/police procedural. One might ask that, if this works for Clancy, who can argue with success? But Clancy did not start doing this until his later novels, after he achieved phenomenal popularity and became pretty much edit proof. Rainer isn't there yet. Nevada Barr and John Sandford are far better sources of inspiration for character dialogue.

That said, "Capital Kill" is a popular fiction blast. I found myself looking forward to picking it up each evening to see what happens next. For JAG Corps members (especially those who have served in the National Capital Region), the references to the "Tuesday Knights" when Major Trask, USAFR, does his reserve duty, and the Bolling and Andrews locales are familiar notes that will add to your reading pleasure. As first novels go, "Capital Kill" is really good. And as an e-reader download, it's a real bargain, too—only $2.99! I'm looking forward to the next installment of the Trask saga, though I might have to pay more for that one.

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Where in the World?

"Jumping out of a perfectly good aircraft"
Malmsheim, Germany

photograph courtesy of Lieutenant Colonel Richard L. Dashiell, 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 mark.mckiernan@us.af.mil or thomasa.paul@us.af.mil.

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