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FOREWORD

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There is no more important function performed by judge advocates than the proper administration of military justice -- for good order and discipline are critical to a combat effective force. Recognizing this, the seventh in our series of "Master Editions" returns to the focus of our first edition published in 1987 -- the practice of criminal law.

Continuing legal education and training in this area are of paramount importance. Our department strives to provide our judge advocates a variety of education and training opportunities to ensure they are well versed and up-to-date in military justice matters. Courses offered by The Air Force Judge Advocate General School at Air University and other educational institutions are the foundation for this effort. Equally important however is the Staff Judge Advocate's personal involvement. This, combined with local training initiatives, is absolutely essential to an effective military justice system.

This "Master Edition" provides another dimension to this effort. It serves not only to enhance an overall understanding of many significant and wide-ranging topics, but also provides an important starting point for researching a specific issue that may arise in this critical area of our practice. I am confident that, like its predecessors, this edition will become a standard reference within our JAG Department.

BRYAN G. HAWLEY Major General, USAF The Judge Advocate General

39 AFLR 01, Environmental Crimes

Title of Article

Environmental Crimes: Recent Case Law and Practice

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Text of Article

I. INTRODUCTION

In recent years, Air Force personnel, both military and civilian, have become increasingly vulnerable to criminal liability for violations of environmental laws. This article explores areas of potential criminal liability for federal employees and addresses the level of culpability typically required to trigger a successful prosecution, particularly in federal courts. It is not intended to address every criminal provision of every major environmental statute, but rather to provide practical guidance to base level attorneys concerning key provisions of the major federal environmental statutes most likely to be encountered in their practice. [1] This article will also analyze the sweeping judicial pronouncements that appear to broaden the scope of potential liability and compare them to the actual policies and practices that determine which cases get prosecuted.

II. BACKGROUND

It is common knowledge that environmental laws and regulations have proliferated over the past 25 years. Initially, criminal enforcement action was rather limited. Beginning in 1980, however, Congress began strengthening criminal provisions of the key pollution control statutes. [2] In 1980, the Resource Conservation and Recovery Act (RCRA) [3] was amended to include felony sanctions for violations of this law, which regulates the management of hazardous waste. In 1986, felony provisions were added to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), [4] and in 1987, criminal sanctions were amended under the Clean Water Act. [5]

In addition to generally broadening the scope of criminal liability under the major environmental laws, Congress has taken steps to minimize the extent to which federal employees and agencies can invoke sovereign immunity as a defense to environmental crimes. For example, the Federal Facilities

Compliance Act (FFCA) [6] amended RCRA to clarify that "[a]n agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law." [7]

Although the FFCA is better known for expanding RCRA's waiver of sovereign immunity to allow the imposition of civil and administrative fines and penalties on federal agencies, the FFCA codifies a principle that is also found in other major environmental statutes: That fines and penalties are intended to be imposed on agencies, not individuals. [8] Conversely, the sovereign immunity of federal agencies has not been waived for criminal purposes in any environmental statute. [9] Because of these overriding statutory considerations, this article focuses on individual, rather than institutional, criminal liability.

While Congress has taken steps to minimize sovereign immunity defenses, at the same time it has provided the Environmental Protection Agency (EPA) and the Department of Justice with more tools to investigate potential environmental crimes. The Pollution Prosecution Act of 1990 [10] mandated that by 1995, the number of EPA criminal investigators would more than triple (from 60 to 200). In addition, federal prosecutions have increased from a total of 25 throughout the 1970s [11] to more than 800 indictments returned between 1983 and 1991. [12] In 1994 alone, 232 cases were filed. [13]

In short, legal impediments to prosecuting federal employees have been removed, resources to investigate crimes have increased, and prosecutors have become more experienced in prosecuting environmental offenses. Consequently, federal employee concerns over potential liability have become realistic. Moreover, the Aberdeen case-the first high profile conviction of federal employees for environmental offenses-paved the way for future prosecutions of such employees.

III. THE ABERDEEN CASE

The case of United States v. Dee [14] arose out of the prosecution of three high-ranking Army civilian employees assigned to the Chemical Research, Development, and Engineering Center at Aberdeen Proving Ground in Maryland. It is commonly referred to as the Aberdeen case. All three defendants were involved in the development of chemical warfare systems. Each of them, as a department head, was responsible for ensuring that the extensive base regulations implementing RCRA requirements were met. More specifically, they were responsible for hazardous waste materials stored in one of the three properly permitted [15] storage facilities prior to being shipped off-base for disposal. [16] They were convicted of violating 42 U.S.C. 6928(d)(2)(A), the RCRA provision which criminalizes the knowing treatment, storage, or disposal of any hazardous waste "identified or listed under this subchapter" [17] without a permit. [18]

The defendants first argued on appeal that their status as federal employees working at a federal facility immunized them from prosecution, noting that because the United States is not a "person" subject to RCRA's criminal provisions, they likewise should not be subject to RCRA. [19] The district court made short work of this argument, holding that they were prosecuted in their individual capacity, not as agents of the Government. Citing the case of United States v. Isaacs, [20] the court stated, "Criminal conduct is

not part of the necessary functions performed by public officials." [21] Therefore, sovereign immunity did not attach to such conduct.

The defendants next argued they did not knowingly commit any offenses under RCRA. The issue of what constitutes a knowing violation is a recurring one in cases involving environmental offenses. Here the court cited the oft-quoted United States Supreme Court case of United States v. International Minerals & Chemical Corp., [22] which states where "dangerous or deleterious devices or products of obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." [23] Therefore, the court in Aberdeen held the Government was not required to prove the defendants knew that violating RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as RCRA hazardous wastes. [24] The Government did, however, have to prove that defendants had "knowledge of the general hazardous character of the wastes." [25]

In addition to the otherwise sobering lessons of Aberdeen regarding the broad scope of potential criminal liability, it should be noted that the Aberdeen defendants had to retain their own counsel, and their attorney fees of $108,000 apiece were not reimbursed by the Department of Justice. [26] Had the case been prosecuted by a state, it is also likely they would not have been reimbursed for attorney fees. Under Department of Justice guidelines, legal representation in a state criminal proceeding may only be provided if the employee's actions reasonably appear to have been performed within the scope of employment and representation is otherwise in the interest of the United States. [27]

IV. SCIENTER AND RCRA

To someone unfamiliar with environmental crimes, this relaxed scienter, or mens rea standard, may seem unusual, but the International Minerals case is illustrative of a body of law relating to public welfare offenses. In International Minerals, the defendant was charged with shipping hazardous materials without properly annotating the shipping documents to reflect this fact. In its ruling, the Supreme Court cited one of the most basic tenets of criminal law: Ignorance of the law- or regulation- is no defense. [28]

As part of the contentious debate over what constitutes a knowing violation, particularly in the context of a relaxed mens rea standard, the criminal provisions relating to RCRA permits have been particularly scrutinized because of their seemingly contradictory mens rea requirements. In the case of United States v. Laughlin, [29] a New York federal district court analyzed the apparent anomaly in 42 U.S.C. Sec. 6928(d)(2), which seems to require less knowledge, or mens rea, to sustain a conviction for failure to get a permit than for a knowing violation of the terms of a permit. Specifically, Sec. 6928(d)(2)(A) deems criminal the knowing treatment, storage or disposal of any hazardous waste without a permit, where, by contrast, Sec. 6928(d)(2)(B) criminalizes the knowing treatment, storage, or disposal in knowing violation of a material requirement of a permit. In other words, failure to obtain a permit appears to be have a "general intent" standard, whereas the violation of permit conditions would appear to be one of specific intent.

The Laughlin court attempted to reconcile these seemingly disparate knowledge requirements through an analysis of case law (having concluded that the legislative history was not illuminating). The Laughlin court cited with disapproval the case of United States v. Johnson & Towers, Inc., [30] which stated that any allegation of failure to obtain a permit must establish that a defendant knew he or she was legally obligated to have a permit and knew that he or she did not have one. [31] In Johnson & Towers, the Third Circuit concluded that either Congress intended a mens rea requirement to be "read into" any charge of failure to obtain a RCRA permit, or that Congress inadvertently omitted the knowing requirement. In effect, the Johnson & Towers court stated the disparate mens rea standards of Secs. 6928 (d)(2)(A) and (B) were irreconcilable and could not stand.

As a matter of statutory interpretation, the Laughlin court found this position to be unpersuasive. Instead, it relied on the case of United States v. Hoflin. [32] The Hoflin court held that knowledge of the absence of a permit is not an element of a Sec. 6928(d)(2)(A) offense. It characterized any effort to read in a knowing requirement as an "evisceration" of the statute. [33] It found no inconsistency in Congress' decision to impose a knowledge element in Sec. 6928(d)(2)(B), RCRA's permit violation provision, but not in Sec. 6928(d)(2)(A), the provision relating to failure to have a permit. It reasoned that "persons who handle hazardous waste materials without telling the EPA what they are doing shield their activity from the eyes of the regulatory agency, and thus inhibit the agency from performing its assigned tasks." [34] Based on this principle, individuals would be criminally liable for failure to get a permit based solely on evidence that they knew they were dealing with hazardous wastes.

It is not difficult to predict how the relaxed scienter approach under Sec. 6928(d)(2)(A) might apply to some of the other RCRA criminal provisions. Section 6928(d)(4) prohibits the knowing transportation of hazardous waste without a manifest. [35] Section 6928(d)(5) prohibits the knowing export of hazardous waste without the consent of the receiving country or not in conformance with any agreement between the United States and the receiving country. Applying the rationale of the International Minerals and Aberdeen cases, those responsible for manifesting or exporting hazardous wastes would be presumed to be aware of relevant regulations governing those activities. Theoretically then, the Government would only be required to prove that those individuals were aware of the hazardous character of the wastes to support a criminal conviction for noncompliance with the transportation or exporting requirements. [36]

V. PRACTICAL PROOF CONSIDERATIONS

Some may perceive the relaxed scienter requirement discussed in the foregoing analysis to be exceedingly harsh on those who manage environmental issues. Environmental managers in particular might ask what type of proof might be offered into evidence to establish a knowing violation was committed. At the risk of being too elementary, military attorneys should counsel their clients that government prosecutors would attempt to prove a state of mind the way they would prove any other fact: through direct or circumstantial evidence. Direct evidence might consist of a confession of wrongdoing, statements against self-interest, or some other obvious "smoking gun" that establishes an individual had the requisite knowledge. Knowledge can also be established through circumstantial evidence; in other words, a prosecutor may attempt to show that because of someone's education, training, and experience

he or she must have known or understood that an offense was being committed or knew of the legal requirements.

In the Aberdeen case, both direct and circumstantial evidence were used to establish knowledge. Direct evidence showed the defendants were warned that the roof of one of the unpermitted storage areas might collapse. After it did, hazardous waste spilled and drained into the floor drains, which led to a nearby river. In addition, employees frequently complained about noxious odors coming from the area, but the two defendants with responsibility for this area did not take proper steps to dispose of this waste for about a year. [37] Other safety and storage problems at unpermitted storage areas, such as broken and corroded containers, hazardous waste spills, and noxious fumes, went unattended for more than six years, despite numerous complaints from employees and safety inspectors. [38] As part of their defense, the Aberdeen defendants argued that "sloppy storage procedures is [sic] not a crime." [39] All this direct evidence tended to establish the defendants possessed the requisite scienter. In addition, the circumstantial evidence of the defendants' extensive education and experience readily supported the presumption that they were aware of the regulations pertaining to hazardous waste management.

An analysis of the facts of the Aberdeen case reveals that the application of the relaxed mens rea standard typical of public welfare statutes did not lead to an unfair or harsh result. In fact, it is the position of the author that in virtually every reported case, the underlying facts are sufficiently egregious that a reasonable person would not be surprised or offended by a criminal conviction, despite ostensibly sweeping criminal provisions or judicial pronouncements that have the potential to ensnare the innocent.

VI. THE COMPREHENSIVE RESPONSE COMPENSATION AND LIABILITY ACT (SUPERFUND)

CERCLA authorizes criminal sanctions against any person "in charge of a facility," who fails to report, or who inaccurately reports, the unpermitted release of a hazardous substance. [40] CERCLA, through statute and implementing regulations, establishes threshold level "reportable quantities." Any spills, leaks, or other unauthorized releases exceeding these levels must be immediately reported to the National Response Center. The only "knowledge" requirement related to the initial report is knowledge that the release occurred, not that threshold reportable quantity levels were exceeded. [41] On the other hand, the criminal provision relating to an inaccurate report requires that the report was known to be false or misleading.

These two criminal provisions parallel the RCRA criminal provisions relating to permit requirements. The failure to report under CERCLA is similar to the failure to obtain a permit under RCRA: there is no requirement that knowledge of CERCLA reporting requirements or RCRA permitting requirements be proven to sustain a conviction. [42] Once a report is made under CERCLA, however, a conviction cannot be sustained absent proof that the report was known to be false or misleading. Likewise, once a RCRA permit is obtained, any allegations of criminality must establish knowing violations of the permit requirements.

The prosecution of one federal employee under this statute sheds further light on the scope of potential liability under CERCLA. The case of United States v. Carr [43] arose out of the conviction of a supervisor of a "relatively low rank" for failure to comply with CERCLA's reporting requirements. Defendant Carr was a supervisor of maintenance who directed a work crew to dispose of waste cans of paint in a man-made pit filled with water. After his subordinates reported that the paint cans were leaking into this pond, Carr then directed one of his subordinates to fill in the pond by using a tractor to dump dirt into it. He was convicted of failure to report the unauthorized release of the substances in the paint cans.

Carr's appeal centered around the concept that he was not a "person in charge" as contemplated by CERCLA, and, therefore, was not responsible for reporting the release. The court responded by reviewing the statutory history of this provision and a parallel one under the Clean Water Act. It stated that CERCLA was enacted to

address the problem of hazardous pollution by creating a comprehensive and uniform system of notification, emergency governmental response, enforcement, and liability [and the reporting requirements] were an important part of that effort, for they ensure that the government, once timely notified, will be able to move quickly to check the spread of a hazardous release. [44]

The court later stated, "Those in charge of an offending facility can make timely discovery of a release, direct the activities that result in the pollution and have the capacity to prevent and abate the environmental damage." [45] The court concluded, "[W]e believe Congress intended the reporting requirements of CERCLA's section 103 [42 U.S.C. Sec. 9603] to reach a person-even if of relatively low rank-who, because he was in charge of a facility, was in a position to detect, prevent, and abate a release of hazardous substances." [46]

At first blush, the court's ruling in Carr may appear to stretch the definition of a "person in charge of a facility." In making the intellectual leap to characterize Carr as a person in charge, the court would have served itself equally well by focusing on the broad definition of "facility" under CERCLA. Facility is defined as "any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond . . . [or] any site or area where a hazardous substance has been deposited, stored, . . . or otherwise come to be located." [47] Given this all-encompassing definition, it is somewhat easier to understand how Carr could be construed to be a "person in charge" of a "facility." In any event, the court used this opportunity to judicially define a "person in charge" as one in a position to detect, prevent, and abate a release of hazardous substances.

In expanding the definition of a person in charge, the court suggests broad CERCLA criminal liability. This is appropriate when viewed in the context of the underlying facts. In Carr, the court appeared to make legal interpretations consistent with the International Minerals line of cases to justify an obviously fair result.

VII. THE CLEAN WATER ACT: A PROSECUTOR'S TARGET OF OPPORTUNITY

The Clean Water Act has been a target rich environment for government prosecutors, particularly against federal employees. The case of United States v. Curtis [48] illustrates that government employees clearly fall within the ambit of the Clean Water Act. The defendant was charged with discharging pollutants into the surface waters of the United States without a permit authorizing him to do so. [49] Curtis was a fuels division director at Adak Naval Air Station in Alaska. He allegedly directed his subordinates to pump jet fuel through a leaking pipeline, causing jet fuel to leak into a stream which drained into the Bering Sea. He was convicted of one count of knowing discharge of a pollutant and two counts of negligent discharge of a pollutant.

Like the Aberdeen defendants, Curtis argued that the court had no jurisdiction over him. He stated that because federal employees were not specifically included within the definition of a "person" subject to the Act, he could not be prosecuted. [50] Citing Aberdeen, the court held that Curtis had no better claim to immunity than the three Aberdeen defendants. It observed that nothing in the Clean Water Act suggested a departure from the ordinary principle that individual government employees are subject to federal law.

Two other prosecutions of federal employees are strikingly similar to each other. A civilian wastewater treatment plant manager at the Army's Fort Meade, Maryland, and a sewage treatment plant foreman at March Air Force Base, California, were both convicted of falsifying treatment plant monitoring reports in violation of section 1319(c)(4) of the Clean Water Act (or in the latter case, the state's version of section 1319(c)(4). [51] Routine monitoring reports are an integral part of the Clean Water Act's regulatory scheme. Upon request, they must regularly be made available to state and federal regulators and the public, unless divulging the data to the public would reveal trade secrets. [52] In both cases, the defendants falsified these reports to reflect that the treatment plants were in compliance when, in fact, they were not.

While these three cases reflect acts of obvious misconduct, there are two aspects of the Clean Water Act that would appear to broaden the scope of criminal liability significantly, particularly compared to other environmental statutes. The first aspect which seems to increase federal employee exposure is the inclusion of the responsible corporate officer within the definition of a person subject to the Act. [53] According to a Department of Justice manual, under the responsible corporate officer doctrine, "high-level supervisory personnel can be held criminally responsible for the acts of subordinates in circumstances in that [sic] it is apparent that the individual is a corporate officer who exercises direct supervisory responsibility and control over the activities giving rise to the violation . . . , notwithstanding an apparent absence of knowledge regarding the specific violations." [54] Despite the manual's language, it does not appear that the responsible corporate officer doctrine has been applied in the environmental arena in the absence of proof that the responsible officer knew of the criminal conduct and did nothing to intervene or actually participated in the offending conduct. [55] As discussed below, perhaps it has also not been applied because other legal theories have achieved the same potential results. [56]

The second aspect of the Clean Water Act that seems to expand the scope of criminal liability is the

large number of offenses that only require proof of negligence to support a conviction. Turning to the negligence offenses, section 1319(c)(1) provides criminal sanctions for any person who negligently violates any number of different Clean Water Act requirements, such as any national pollutant discharge elimination system or wetland permit standards, pretreatment standards, or water quality standards. Potential punishments include fines ranging from $2,500 to $25,000, as well as imprisonment of up to one year for each day of each violation. It is also criminal to negligently introduce any pollutant or hazardous substance into a sewer system when it is known or should be known that such substance could cause personal injury or property damage. [57] All of these offenses have a "knowing" counterpart with criminal sanctions of $5,000 to $50,000 and up to three years imprisonment per day of violation.

To date, there has been one conviction of a federal employee using a Clean Water Act negligence provision. A civilian supervisor at a Navy Exchange Auto Repair Facility who poured radiator fluid contaminated with antifreeze into a storm drain was convicted of negligently discharging pollutants in violation of the Clean Water Act. [58] As this case was a guilty plea, it is necessary to look to cases beyond those involving federal employees to analyze how the criminal provisions of the Clean Water Act are interpreted by courts.

VIII. THE WEITZENHOFF CASE: AN EXPANSION OF POTENTIAL LIABILITY?

Although there is little federal case law interpreting these negligence provisions, the case of United States v. Weitzenhoff [59] is particularly instructive because it gives an expansive interpretation of the concept "knowing violations." Defendants Weitzenhoff and Mariani were convicted of, among other things, knowingly discharging waste activated sludge in violation of the terms of a permit. Defendants Weitzenhoff and Mariani were, respectively, the manager and assistant manager of the East Honolulu Sewage Treatment Plant, close to a popular Oahu beach. As is the case at most sewage treatment plants, sewage was treated at the East Honolulu plant by mixing microorganisms ("bugs") with the waste stream. The bugs feed on solids and pollutants in the waste stream, and then settle to the bottom to form "waste activated sludge." The primary water stream was further cleaned by chlorination and then properly discharged into the ocean. [60]

Normally, the sludge was hauled away or otherwise maintained within the sewage treatment plant. However, when the plant experienced a buildup of excess sludge, the defendants directed subordinates to pump the sludge directly into the ocean, which effectively bypassed the plant's effluent sampler. Thus, the regular monitoring samples did not reflect the sludge discharge. This activity took place over the course of a year and was mostly accomplished at night. The Government also offered evidence that Weitzenhoff instructed an employee not to say anything about the midnight dumping because if they "all stuck together and did not reveal anything," they would be safe.

The key issue on appeal was the district court's interpretation of the term "knowing violation" as only requiring proof that the defendants were aware they were discharging the pollutants in question, not that they knew they were violating the terms of the permit. It should be noted that Clean Water Act permits, unlike RCRA permits, typically allow the discharge of pollutants subject to limitations in the permit

regarding quantities and concentrations of pollutants.

The Ninth Circuit fashioned the issue as whether "knowingly" means a knowing violation of the law or knowing conduct that violates the law. [61] Citing what it perceived to be Congressional intent and the International Minerals line of cases, the appellate court concluded that the Clean Water Act is public welfare legislation and that the Government was not required to prove defendants knew their acts violated the terms of the plant's permit or the Clean Water Act. [62]

Some may argue this holding is an unwarranted expansion of potential liability for violation of environmental statutes. The dissent, in particular, criticized the majority for improperly expanding the holding of Hoflin. [63] The Hoflin court had held that under RCRA, there was a stark contrast between the criminal provision relating to the absence of a permit and the provisions relating to the violation of a permit. [64] As a matter of statutory construction, it was clear to the Hoflin court that knowledge of the absence of a permit was not an element of that offense; it need only be shown that a defendant was knowingly treating, storing, or disposing of hazardous waste. A charge alleging a permit violation, however, must allege both knowing treatment, storage, or disposal and a knowing violation. The Weitzenhoff dissent argued that this distinction was ignored by the majority in its holding that a charge alleging a Clean Water Act permit violation need not establish knowledge of the violation. [65]

To illustrate its point, the dissent looked at the district court's jury instruction, which stated the Government did not have to prove the defendants knew their conduct was unlawful. The district court had also refused to instruct the jury that a mistaken belief that the discharge was authorized by the permit would be a defense. With this instruction, the dissent reasoned, the jury's verdict could be consistent with the defendants' honest belief that their permit authorized the discharges in question. [66] The dissent argued that this level of mens rea was simply insufficient to support a criminal conviction especially where, as here, the amount by which the discharges exceeded the permit levels was relatively small compared to the overall volume of waste water passing through the treatment plant.

The dissent also pointed out that Congress had enacted parallel knowing and negligence offenses under the Clean Water Act. [67] It would make no sense, the dissent argued, for Congress to have created a statute making it a misdemeanor to violate a permit condition negligently when a felony provision for knowing violation of a permit condition did not require proof of knowledge or even negligence-Congress could not have intended such an anomalous result. [68]

Ultimately, the dissent reasoned, the expanded criminal liability typical of the so-called public welfare statutes-which was articulated in International Minerals and its progeny and endorsed by the majority's holding-does not necessarily serve the salutary purpose of protecting the public from water pollution. Instead, it can raise the cost and reduce the availability of public services such as sewage treatment plants, as fewer and fewer people are willing to assume the risk of criminal prosecution for performing this type of work.

Although the dissent in Weitzenhoff has great intellectual appeal, once again it appears that the

underlying facts reasonably appear to have warranted criminal action. More particularly, even though the permit violation was relatively small in percentage terms compared to overall volume of water processed, the pollutant in question was concentrated sludge that was dumped at night and significantly fouled nearby beaches.

IX. THE CLEAN AIR ACT: FUTURE LIABILITY ISSUES?

The Clean Air Act was dramatically amended in 1990, [69] and the new regulatory scheme that is gradually being implemented holds the potential for future criminal exposure of military members. The most significant aspect of the Clean Air Act amendments is the requirement that during 1995, virtually every installation was required to submit an application for a comprehensive operating permit which will contain all of the installation's requirements with respect to this Act. [70] If the installation is not in compliance with the Act's requirements at the time of the application, a plan showing how the installation will come into compliance must also be submitted. In addition, the responsible official must sign a certification of compliance status. [71]

Many of the Clean Air Act criminal provisions find a parallel in the Clean Water Act and RCRA. Having examined mens rea requirements so closely in the context of those laws, it may seem redundant to parse the criminal provisions of the Clean Air Act. However, in light of the Weitzenhoff ruling, it is worth noting that the Clean Air Act makes criminal the knowing violation of just about every regulator-imposed requirement. It may seem intuitively obvious from the foregoing statute and case analysis that the installation environmental engineers have potential liability for permit violations. The Clean Air Act, however, also holds potential liability for wing commanders.

As noted above, the responsible official must sign a certification as to installation compliance status. Unlike RCRA and the Clean Water Act, this responsibility is nondelegable. [72] Further, the Clean Air Act includes "responsible corporate officer" within the definition of a person subject to criminal proceedings. All of these factors tend to point towards potential criminal liability for the installation commander. It is important to note, however, even the Weitzenhoff case implies that criminal provisions may be applied more stringently to a "select group of persons having specialized knowledge." [73] Further, as noted above, the responsible corporate officer doctrine has not been used (to date) in the absence of some mens rea.

One recent case in the area of certifications signed by a responsible official is that of United States v. Hopkins. [74] In this case, a vice president for manufacturing certified the accuracy of monitoring data submitted to the regulator. Evidence introduced at trial revealed that the defendant directed his subordinates to tamper with nearly half of the weekly samples taken over an 18-month period. Clearly, this case would have little factual parallel to a commander acting in good faith.

Thus far, this article has explored the disparity between judicial pronouncements purporting to expand the scope of liability under environmental laws and the underlying facts which typically have obvious evidence of criminal knowledge or, at a minimum, reckless disregard for the consequences. It is

appropriate, therefore, to look at relevant policy to determine what type of activity may whet a prosecutor's interest and what practical measures should be taken to minimize such risks.

X. POLICY CONSIDERATIONS IN ENFORCEMENT ACTIONS

On January 12, 1994, the EPA issued a memorandum establishing principles to guide its Office of Criminal Enforcement in investigating potential violations. [75] It states that in exercising its investigative discretion, the EPA will focus on significant environmental harm and culpable conduct. [76] Environmental harm includes both actual and threatened harm. Failure to report actual or threatened environmental harm can compound the harm and is an additional factor favoring investigation. [77] Culpable conduct can be manifested by several factors. These include a history of repeated violations, deliberate misconduct, concealment or falsification of required records, tampering with monitoring equipment, and operating without required permits. [78]

In addition, the EPA lists mitigating factors that will be considered when a corporation is being investigated. In short, "EPA policy strongly encourages self-monitoring, self-disclosure, and self-correction." [79] It further states that "a violation that is voluntarily revealed and fully and promptly remedied as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal investigative resources." [80]

The EPA memorandum clearly reflects that the Air Force's criminal liability can be minimized though the Environmental Compliance Assessment and Management Program (ECAMP), conducted in accordance with Air Force Instruction (AFI) 32-7045. [81] This instruction provides guidance for establishing a comprehensive self-assessment and program management system to comply with environmental laws and regulations. The instruction states that "ECAMP is a process to help commanders assess the status of environmental compliance and to identify and track solutions to compliance problems." [82]

Clearly, this program is intended to satisfy the self-monitoring and self-correction prongs of the EPA policy. What about self-disclosure? Although the final ECAMP report is releasable, [83] EPA policy is not to request self-audit reports to trigger enforcement investigations. [84] Some information discovered in conjunction with an ECAMP audit, however, may need to be reported to a regulating agency independent of the ECAMP process. For example, if the unauthorized release of a hazardous substance is discovered during the course of an ECAMP audit, it must be reported pursuant to CERCLA.

Although the ECAMP surely offers the opportunity to establish that an installation is serious about environmental compliance, it is not enough to simply be aware of environmental problems. This is particularly true since accountability is intended to be passed up the chain of command. The installation commander must receive an out-brief on assessment results, and Major Commands (MAJCOMs) must follow up by tracking progress on the management actions plans which address the identified problems. [85]

The organizational entity that reviews environmental policies and programs and monitors progress is the Environmental Protection Committee (EPC). [86] EPCs exist at the installation, major command, and headquarters level. Although their obligations to track pending enforcement actions, unfulfilled compliance agreements, administrative orders, and similar regulator-generated enforcement actions are explicitly stated, [87] the Air Force Instruction governing EPCs is rather generic in describing the EPC's functions with respect to ECAMP findings. Nonetheless, it may be fairly deduced from the EPCs' role as the "primary executive steering group for all environmental cleanup, compliance, conservation and pollution prevention," [88] that the tracking of ECAMP findings is encompassed within its functions.

Although the ECAMP program offers the opportunity to demonstrate compliance with environmental regulations, it should not be viewed as an absolute insurance policy against enforcement action. In fact, a self-assessment program that does not have an accompanying self-correction program has the potential to backfire. Although it is EPA policy not to use ECAMP against us, evidence of flagrant violations could clearly lead EPA investigators to set this policy aside and pursue an enforcement action. Quite clearly, evidence of repeat violations without any "self-correction" efforts could indicate that "knowing" violations were occurring. This would certainly ease the burden of proof for a government prosecutor.

XI. ENFORCEMENT FORUM

Although this article has focused on federal prosecutions in U.S. district courts, military attorneys should recognize that environmental crimes committed by military members can be prosecuted under the Uniform Code of Military Justice (UCMJ). [89] Articles which readily come to mind are: Article 92, dereliction of duty; Article 107, false official statements; Article 108, disposing of or destroying military property; Article 109, willful or reckless destruction of non-military property; and Article 134, the general article. Article 134 in particular allows for the prosecution of military members for violations of state criminal laws on areas of exclusive or concurrent federal jurisdiction. [90] Given that some of the major federal environmental statutes encourage states to assume the lead in implementing and enforcing environmental laws, it is clear that the UCMJ contains the basic tools to address many state and federal environmental offenses. Although there have been no courts-martial convictions of any Air Force member for an environmental offense, [91] it could be argued that adverse administrative action in an appropriate case might improve our relations with regulating entities by showing that we take environmental compliance seriously.

XII. CONCLUSION

Even the best of environmental programs cannot ensure that no enforcement actions will ever take place against an installation. As this article has demonstrated, the language of recent case law reflects a trend towards strict liability. The underlying facts of the cases themselves, however, generally reflect the conduct of individuals who were outside the scope of employment and, not surprisingly, were convicted of environmental crimes. In counselling clients, it makes sense to advise them of the potential liabilities under environmental law, even of some of the more draconian judicial language. It also makes sense to advise them of the recently promulgated U.S. Sentencing Guidelines, [92] which would seem to

preclude "sweetheart deals." This way, they are more likely to err on the side of caution and minimize the likelihood that they will raise the ire of an overzealous investigator or prosecutor.

Footnotes

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1. Although many states have criminal provisions relating to environmental offenses, the focus of this article will be on federal statutes and case law because federal employees have thus far been prosecuted more frequently in U.S. district courts than in state courts.

2. Rami S. Hanash, The Legal Grounds for Prosecuting Federal Employees, 1 Fed. Fac. Env. J. 17, 20 (1990).

3. The official name of this statute is the Solid Waste Disposal Act, 42 U.S.C.A. Secs. 6901-6992k (West 1995). This Act is more commonly referred to by its major amendments - the Resource Conservation and Recovery Act.

4. 42 U.S.C.A. Secs. 9601-9675 (West 1995). This law is commonly referred to as "Superfund."

5. The Federal Water Pollution Control Act, 33 U.S.C.A. Sec. 1319 (West 1986 & Supp.1995). It is more commonly referred to as the Clean Water Act.

6. 42 U.S.C.A. Sec. 6961.

7. Id. This amendment supplemented the language of 42 U.S.C.A. Sec. 6961, which merely stated, "Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State of Federal Court with respect to the enforcement of any such injunctive relief." The injunctive relief referred to in Sec. 6961 involves the enforcement of RCRA substantive and procedural requirements.

8. The FFCA states that "No agent, employee, or officer of the United States shall be personally liable for any civil penalty . . . with respect to any act or omission within the scope of . . . official duties." 41 U. S.C. Sec. 6961. Although technically a federal employee could be subject to a civil fine or penalty if he or she acted outside the scope of employment, most "not-in-scope" cases are addressed under criminal provisions. Similar provisions relating to civil liability can be found in the Clean Water Act, 33 U.S.C. Sec. 1323(a), and the Clean Air Act, 42 U.S.C. Sec. 7418(a).

9. Hancock v. Train, 426 U.S. 167 *[cited at]* (1976) established the principle that a waiver of sovereign immunity is found only when and to the extent there is a clear and unambiguous Congressional mandate.

No such mandate can be found in any of the major environmental laws.

10. 42 U.S.C.A. Sec. 4321 (West 1995).

11. Hanash, supra note 2, at 19.

12. Lecture Outline, Lieutenant Colonel Craig Anderson, Enforcement of Environmental Laws and Regulations, from the Environmental Law Course 94-A, Air Force Judge Advocate General School (May 1994).

13. United States Department of Justice, Environment and Natural Resources Division, Statistical Report - Fiscal Year 1994 at 33.

14. 912 F.2d 741 (4th Cir. 1990), cert. denied, 499 U.S. 919 *[cited at]* (1991).

15. The court in the Aberdeen case stated that "'permitted' means an activity for which a valid permit has been issued. Conversely, 'unpermitted' means the activity is not authorized by the facility's permit, or that the facility does not have a permit." 912 F.2d at n.6.

16. Id. at 743-44.

17. Hazardous wastes are classified as such in one of two ways: They are either listed pursuant to 40 C.F. R. pt. 261.30 or they satisfy the criteria for being identified as a characteristic waste under pt. 261.10.

18. 42 U.S.C.A. Sec. 6928(d) reads:

Any persons who-

(1) knowingly transports or causes to be transported any hazardous waste identified under this subchapter to a facility which does not have a permit under this subchapter or . . .

(2) knowingly treats, stores, or disposes of any hazardous waste identified orlisted under this subchapter-

(A) without a permit under this subchapter or . . .

(B) in knowing violation of any material condition or requirement of such permit [or];

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards . . . .

shall, upon conviction, be subject to a fine . . . or imprisonment.

19. 912 F.2d at 743.

20. 493 F.2d 1124, 1142-44 (7th Cir. 1973), cert. denied, 417 U.S. 976 *[cited at]* (1974).

21. 912 F.2d at 744.

22. 402 U.S. 558 *[cited at]* (1971).

23. Id. at 565 (emphasis added).

24. Id.

25. Id.

26. Matter of: William Dee, Requests for Payments of Attorneys' Fees, Op. Comp. Gen. B-242891 (1991).

27. 28 C.F.R. Sec. 50.15. Research reveals only one case in which a determination was made in the defendant's favor. In California v. Lam, BCR 2738 (May 30, 1992), the defendant pleaded no contest to misdemeanor charges. The Department of Justice denied defendant's request for representation. On reconsideration, however, he was reimbursed for attorney fees.

28. 402 U.S. at 562.

29. 768 F. Supp. 957 (N.D.N.Y. 1991), aff'd, 10 F.3d 961 (2d Cir. 1993).

30. 741 F.2d 662 (3d Cir. 1984).

31. Id. at 667.

32. 880 F.2d 1033 (9th Cir. 1989).

33. Id. at 1037.

34. Id. at 1039.

35. A manifest is a shipping document. In principle, this document is similar to what was required in International Minerals.

36. For another case which "read in" an additional mens rea requirement, see United States v. Speach,

968 F.2d 795 (9th Cir. 1992). This case addressed 42 U.S.C.A. Sec. 6928(d)(1), which prohibits the knowing transportation of hazardous waste to an unpermitted facility. In Speach, the Ninth Circuit held that the Government must prove the transporter knew the facility did not have a permit. Id. at 796. Thus, despite statutory language to the contrary, in the Ninth Circuit this offense must be alleged as "knowing transportation of hazardous waste to a facility which is known to not have a permit." Id.

37. 912 F.2d at 746.

38. Id. at 747.

39. Id.

40. 42 U.S.C.A. Sec. 9603.

41. This criminal provision may also seem harsh in view of the far-reaching definition of "release" found at 42 U.S.C.A. Sec. 9601(22). It is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)."

42. United States v. Buckley, 934 F.2d 84, 88 (6th Cir. 1991).

43. 880 F.2d 1550 (2d Cir. 1989).

44. Id. at 1552.

45. Id. at 1554 (citing United States v. Mobil Oil, 464 F.2d 1124 (5th Cir. 1972)).

46. 880 F.2d at 1554.

47. 42 U.S.C.A. Sec. 9601(9).

48. 988 F.2d 946 (9th Cir. 1993).

49. 33 U.S.C.A. Sec. 1311(a) makes unlawful the discharge of any pollutant except in compliance with other sections. Among the standards that must be complied with are: Applicable state water quality standards, Sec. 1312; effluent pretreatment standards, Sec. 1317; and permits issued in accordance with the National Pollutant Discharge Elimination System, Sec. 1342.

50. 988 F.2d at 947.

51. United States v. Pond, No. S-90-0420 (D. Md. Apr. 17, 1991); California v. Hernandez, No. 25148 (Riverside Municipal Ct., May 11, 1992). Section 1319(c)(4) provides that any person who

knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained . . . or who . . . tampers with . . . any monitoring device or method to be maintained under this chapter, shall, upon conviction, be punished by a fine . . . or by imprisonment.

52. 33 U.S.C.A. Sec. 1318.

53. Id. at Sec. 1319(c)(6).

54. Department of Justice, 1 Environmental Crimes Manual VII-54 (1991) (emphasis added).

55. Singer, The Myth of the Responsible Corporate Officer, 6 Toxic Law Reporter (BNA) 1378, 1405 (1992).

56. See text accompanying notes 59 to 68, infra.

57. 33 U.S.C.A. Sec. 1319(c)(1)(B).

58. United States v. Bond, Cr. 91-0287-GT (San Diego Cal. Apr. 9, 1991).

59. 35 F.3d 1275 (9th Cir. 1993), cert. denied, 115 S. Ct. 939 (1995).

60. Id. at 1282.

61. Id. at 1283.

62. Id. at 1284-86.

63. Id. at 1292.

64. 980 F.2d at 1035, 1037.

65. 35 F.3d at 1293.

66. Id. at 1294.

67. Id.

68. Id. at 1295.

69. 42 U.S.C.A. Secs. 7401-4671q (West 1995).

70. These requirements are generally set forth in Sec. 42 U.S.C.A. Sec. 7661a. Because the states are implementing the comprehensive permit program at different rates, it is impossible to provide one date by which time each installation must submit an application for an operating permit.

71. Id. at Sec. 7661b.

72. 40 C.F.R. Secs. 70.5(d) and 70.2. Cf. RCRA, 40 C.F.R. Sec. 270.11(d); Clean Water Act, 40 C.F.R. Sec. 122.22(d).

73. 35 F.3d at 1289.

74. 53 F. 3d 533 (2d Cir. 1995).

75. Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement, The Exercise of Investigative Discretion (Jan. 12, 1994).

76. Id. at 4.

77. Id.

78. Id. at 5.

79. Id. at 6, citing 51 Fed. Reg. 25,004 (1986).

80. Id. at 7.

81. Air Force Instruction (AFI) 32-7045, para 1.2, Environmental Compliance Assessment and Management Program (5 Apr. 1994).

82. Id. at para. 1.2.

83. Id. at para. 3.4.

84. 60 Fed. Reg. 16,876 (1995).

85. AFI 32-7045, para. 2.4

86. AFI 32-7005, Environmental Protection Committees (Feb. 25, 1994).

87. Id. at para. 5.1.

88. Id. at para 4.1.

89. 10 U.S.C.A. Secs. 801-940 (West 1983 & Supp. 1995); Manual for Courts-Martial [hereinafter MCM], app. 2 (1984).

90. 18 U.S.C.A. Sec. 13 (West 1969 & Supp. 1995); MCM, supra note 89, ch. IV, at 91-93.

91. Interview with Lieutenant Colonel David D. Rathgeber, Environmental Division, Air Force Legal Services Agency (Sept. 1995).

92. 18 U.S.C.A. Secs. 3551-3581 (West 1985 & Supp. 1995).

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39 AFLR 19, Redefinition of Rape

Title of Article

A Matter of Force: The Redefinition of Rape

Author

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Text of Article

I. INTRODUCTION

In the past 25 years, rape law has been the target of much criticism, resulting in continuous definitional changes in many jurisdictions. Much of this change is attributable to increasing societal awareness and condemnation of coercive sexual practices, especially between acquaintances. This change also is the result of increased political advocacy by rape victims and an activist feminist philosophical view of gender relations which redefines human sexuality in terms of political power. The primary legal response to these societal pressures has been either to alter the legal definition of rape by changing its elements or to redefine the meaning of terms formulated at common law. The revisionists' efforts have focused primarily on the appropriate definition of the terms "lack of consent" and "force." This article provides an overview of the development of rape law, including the two primary approaches taken in American jurisprudence. This article then discusses judicial interpretations of the military's rape offense, Article 120 of the Uniform Code of Military Justice (UCMJ). [1] This article concludes that military courts have been at the forefront in liberalizing the definition of force. Special emphasis is placed on recent decisions, particularly on the "totality" standard of review for force and consent issues.

II. THE DEVELOPMENT OF RAPE LAW

At common law, rape was defined as "the carnal knowledge of a woman by force and against her will." [2] Although the elements of "force" and "lack of consent" remained distinct, they both focused on the victim's physical resistance to the act of intercourse prior to its accomplishment. The degree of force required for rape depended on the circumstances, but had to be to a degree sufficient to overcome the victim's resistance. Conversely, the level of resistance required by a victim to show lack of consent depended on the degree of force the defendant used and usually required more than verbal protests. When a victim was incapable of consent due to incapacity or lack of consciousness, force was defined solely in terms of the act of intercourse itself. [3]

The primary evidentiary difficulty for any rape prosecution involved, and continues to involve, acts of intercourse between acquaintances or situations where actual physical violence or a threat of violence does not occur. At common law, many jurisdictions created additional requirements in these situations designed to distinguish criminal from consensual activity. These "extra-elemental" factors included: "utmost resistance" on the part of the victim, independent corroboration of the victim's testimony, cautionary instructions to the factfinder highlighting the difficulty in defending an allegation of rape, psychological testing for the victim, or a heightened standard of review on appeal which focused upon the "improbability" of the victim's testimony and the prosecution's evidence. [4] Inquiry into a victim's past sexual behavior was also admissible in many jurisdictions as probative of the element of consent.

Early reforms did little to alter rape law. Nonetheless, many of the "extra-elemental" factors, such as cautionary instructions, [5] corroboration requirements, [6] and a heightened scrutiny on appeal, [7] were successfully eliminated. Moreover, rape shield statutes eliminated generalized inquiry into a victim's sexual behavior. [8] The Model Penal Code, styled as the first major rape reform statute, created varying degrees of rape which continued to consider resistance as relevant to the issue of force and consent, but eliminated it as a legal prerequisite for conviction. [9]

A number of statutory approaches redefine or eliminate some of the elements of rape. Two general approaches have developed. The first, often referred to as the Michigan Model, eliminates the element of consent under the theory that the existence of that element improperly focuses attention on the victim's rather than the accused's conduct. [10] In this statutory scheme, the "force or coercion" is broadly defined to include certain kinds of specific coercive actions committed by the perpetrator, such as use of actual force, actual or implied threats of physical force or of future harm or retaliation, or the "supervisory or disciplinary power" of the defendant over the victim. Severe personal injury by a victim would not be required so long as the act of intercourse was accomplished by "force or coercion." Although inquiry into a victim's consent is eliminated as an element, it remains an affirmative defense. [11]

An alternative statutory approach, first adopted in Wisconsin, redefines consent without eliminating it as an element. Rather than defining it in terms of resistance to a sexual assault, consent is defined as "words or overt actions by a [competent] person . . . indicating a freely given agreement to have sexual intercourse or sexual contact." [12] Hence, simple passivity or acquiescence by a victim to the perpetrator's actions does not constitute consent. The Wisconsin statutory scheme, while retaining the element of force, does not specifically define the term, leaving its development to judicial interpretation. [13] Critics contend that any statutory scheme that requires the Government to prove a lack of consent, even as broadly defined in the Wisconsin statute, unfairly and improperly focuses attention on a victim's conduct. Additionally, these critics contend that the statute's failure to specifically define the element of force could lead to the re-emergence of the resistance standard through judicial interpretation of that term using common law principles. [14]

III. TWO CASES - TWO APPROACHES

Two recent cases demonstrate the extremes to which force and consent have been interpreted. Commonwealth v. Berkowitz, [15] a Pennsylvania case, reestablishes the more traditional view of requiring the prosecution to demonstrate actual force in addition to some show of resistance by the victim. State in Interest of M.T.S., [16] on the other hand, adopts the feminist approach which, for all practical purposes, eliminates the force element in its entirety while considering consent only in the context of an affirmative defense.

The M.T.S. case involved an act of sexual intercourse between a 17-year-old male accused and a 15-year-old female victim. The accused was a house guest in the home of the victim's mother. The victim testified that one night she awoke to find the accused engaged in an act of sexual intercourse with her. She stated that she immediately slapped him and told him to "get off." The victim testified that earlier in the evening, the accused had made several comments to her regarding a "surprise visit" which she dismissed as a joke. She also said that on one occasion during the night, she talked with the accused in the upstairs hallway on a trip to the bathroom. [17]

The accused contended that he and the victim had previously engaged in "kissing and necking" and had discussed having sexual intercourse. He stated that the victim had, on a number of occasions, encouraged him to make a surprise visit to her room. He stated that on the night in question, he and the victim met in the hallway, and proceeded to her bedroom, where they undressed and engaged in "heavy kissing" before he penetrated her. He conceded that after penetration, the victim became upset and told him to get off of her. He immediately complied. [18]

At a juvenile proceeding, the trial court concluded as a factual finding that although the victim had consented to the "kissing and heavy petting," she did not consent to the actual act of intercourse. The court specifically concluded that the victim had not been sleeping when penetrated, [19] but made no specific finding regarding whether the accused reasonably believed the victim consented. The trial judge concluded that the only force required for commission of the offense was "an act of sexual penetration." [20] On appeal, the New Jersey Superior Court reversed, holding that the record was devoid of any evidence of force and specifically rejecting the trial judge's interpretation of force. The court stated such an interpretation would render the term "meaningless." [21]

The Supreme Court of New Jersey reversed the judgment of the Superior Court and reinstated the disposition of the trial court. [22] The court concluded that the word "force" was incapable of any "obvious or plain" meaning, notwithstanding the fact that every definition it cited used the word "power." Other adjectives noted by the court were "strength," "violence," and "compulsion." [23] Turning next to the legislative intent of the New Jersey scheme, the court paradoxically focused on consent, an element specifically eliminated from the New Jersey rape statute, by drawing an analogy between the force necessary for rape and that necessary for criminal assault and battery. Noting that any unauthorized touching constitutes a battery, the court concluded that the force or coercion required by the rape statute was grounded in the unauthorized nature of the penetration. [24] The court contended that the proper focus for the factfinder was whether the victim had either freely given permission for the act or the accused had a reasonable belief that the victim gave permission. The court ruled that the

burden of proving the act of penetration and the nonconsensual nature of the act remained on the prosecution. [25]

The New Jersey Supreme Court appears to hold that all acts of intercourse are presumptively nonconsensual. The trial judge's factual findings focused only on the victim's subjective state of mind, not on the accused's reasonable belief there had been consent. [26] Hence, the M.T.S case creates criminal culpability when a victim, in the recesses of her mind and without regard to any manifestation of lack of consent, fails to actually consent. Such a bizarre and radical conclusion, though supported by the court's ultimate decision, is tempered by its rather tortured reasoning. Although the language of the New Jersey statute was derived from the Michigan Model, the Supreme Court of New Jersey, in effect, judicially adopted the Wisconsin legislative scheme, by rendering the element of force meaningless and establishing the broad interpretation of consent existing in the Wisconsin scheme. Notwithstanding its protestations to the contrary, M.T.S. reestablishes a focus on the victim's conduct by ascertaining whether the victim "authorized" the penetration or acted in a manner such that a reasonable person in the accused's position would have concluded consent was given. [27] Moreover, unlike the Wisconsin judicial definition of force, which requires the State to demonstrate some "generalized concept of conduct" that is "directed at compelling the victim's submission," [28] M.T.S. simply eliminates the element from meaningful consideration. Such a result is puzzling, given the reformist notion that the appropriate focus should be the accused's conduct.

A second case which demonstrates the confusing state of rape law is the Supreme Court of Pennsylvania's decision in Commonwealth v. Berkowitz. [29] Berkowitz and the victim were students at East Stroudsburg State University. One afternoon, while looking for Berkowitz's roommate, the victim entered the accused's dormitory room. The accused was in the room, and he and the victim began talking. The victim was on the floor, the accused was on his bed. At some point, according to the victim, the accused moved off the bed and "kind of pushed" the victim back on the floor. He then straddled her and began kissing her. The victim testified she stated, "Look, I gotta go," and on a number of occasions said "no." She stated she was unable to move because the accused was "shifting" so that "he was over [her]." The victim successfully prevented the accused from having her perform fellatio and continued to say "no" in a "scolding manner." [30]

After some period of time, both the victim and the accused got off the floor and the accused locked the door. The accused then "kind of . . . push[ed]" the victim on the bed, straddled her, removed her sweatpants and underwear, and engaged in sexual intercourse with her. The victim testified that during the act of intercourse, she continued to say "no" in a "moaning kind of way." She also stated she knew that the door could be easily unlocked from the inside. After the accused ejaculated on her stomach, they both got off the bed and the victim began dressing. In response to the accused's suggestion that they got "carried away," the victim stated, "No, we didn't get carried away, you got carried away." [31]

The accused corroborated certain aspects of the victim's testimony. Specifically, the accused admitted "initiating contact" with the victim and that the victim said "no" throughout the various acts described above. The accused also corroborated the conversation with the victim after the act of intercourse. [32]

The accused was convicted of rape and indecent assault. On appeal to Pennsylvania's intermediate appellate court, the accused contended that the facts were insufficient as a matter of law to prove "forcible compulsion" as required by Pennsylvania's rape statute. [33] In response, the Commonwealth argued that the rapidity of the assault which led to the accused's ability to physically constrain the victim was sufficient to satisfy the element. [34] The appellate court, nonetheless, reversed the accused's conviction to both rape and indecent assault.

The Pennsylvania Supreme Court concluded that the record was "devoid" of any evidence of "forcible compulsion" and accordingly affirmed the order of the Superior court reversing the rape conviction. [35] The court rejected the argument embraced in M.T.S. that lack of consent alone was sufficient to establish force. "As to the complainant's testimony that she stated 'no' throughout the encounter with Appellee," the court wrote, "we point out that, while such an allegation of fact would be relevant to the issue of consent, it is not relevant to the issue of force." [36] The court concluded that "where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the 'forcible compulsion' requirement" under Pennsylvania law is not met. [37] The court did, however, reverse the lower court's decision on indecent assault on the basis that the Pennsylvania legislature "did not employ the phrase 'forcible compulsion' but rather chose to define indecent assault as 'indecent contact with another . . . without the consent of the other person.'" [38] The net result for Pennsylvania rape prosecutions is an artificial barrier between consent and "forcible compulsion." Moreover, the court's application of the facts of the case to the statute is logically unconvincing. The court's conclusion that there was a lack of evidence establishing "forcible compulsion," all but ignores the fact that the accused attempted to sodomize the victim and was physically on top of her. Furthermore, the focus on the victim's failure to attempt an escape suggests the court is reading in a requirement that the victim resist, which was not relevant under the Pennsylvania statute.

As the various statutory schemes and the cited cases demonstrate, the attempts to "reform" rape laws have resulted in analytical inconsistencies which have led to unclear definitions, suspect legal reasoning, and as both the M.T.S. and Berkowitz decisions demonstrate the potential criminalization of noncoercive sexual conduct and the decriminalization of sexual conduct that is clearly coercive. Such a mishmash of results requires a clearer understanding of the reasons behind characterizing certain kinds of conduct as "rape," a focus on the evidentiary factors which are relevant to rape cases, and an incorporation of those factors into a logical, legally principled definition of rape. Article 120 of the Uniform Code of Military Justice and the present state of military law in regard to rape have the potential for such a cohesive approach.

IV. ARTICLE 120 AND MILITARY INTERPRETATIONS OF RAPE

The judicial interpretation of Article 120 of the Uniform Code of Military Justice [39] provides an example of a principled development of rape law derived from the theoretical foundations provided by common law. The military approach to defining rape, albeit imperfect, is, nevertheless, consistent with the evolving nature of that crime and is analytically superior to its civilian counterparts. It incorporates an evidentiary-based approach to define the interplay between "force" and "lack of consent" without

establishing artificial barriers to relevant factual inquiry.

The language of Article 120, which is based upon common law, has remained largely unchanged since 1950. [40] The most recent amendment to Article 120 made the offense of rape gender neutral and removed the spousal exception. [41] Otherwise, Article 120 has been driven by judicial interpretation which reflects a consistent flexibility and broadening in the interpretation of the concepts of "force" and "consent."

The Manual for Courts-Martial discussions of Article 120 have consistently indicated that force and lack of consent are necessary to the offense. In its discussion of "force," the 1951 Manual specifically noted that "the force involved in the act of penetration will suffice if there is no consent." [42] While such language, taken literally, seems to indicate a conclusion similar to the M.T.S. formula, case law and subsequent versions of the commentaries have made clear that penetration will suffice only in situations involving constructive force, that is, when the victim is either incapable of consent or when consent would be futile. This language was abandoned in the 1969 [43] and 1984 [44] revisions.

The 1951 Manual for Courts-Martial specifically indicated a requirement for resistance on the part of the victim that included more than "mere verbal protestations." In the 1954 case of United States v. Henderson, [45] however, the Court of Military Appeals interpreted the "resistance" indicating lack of consent as only requiring a showing that a victim's lack of consent was "reasonably manifested" under the "totality of the circumstances." [46] The force required to sustain a conviction for rape, the court concluded, could be either actual or constructive, "and on occasion there may be a combination of the two." [47] The Henderson language was incorporated into the 1969 and 1984 Manual revisions. Significantly, by the time of the 1969 revision, the "mere verbal protestations" language had been eliminated in favor of a permissible inference that the absence of a reasonably manifested lack of resistance could indicate consent. [48]

The increased attention given to child sexual abuse and "acquaintance rape" prosecutions has led to a number of decisions by military courts which further expand and clarify the legal definitions of force and lack of consent and the interaction between these two concepts.The central factor in the military's ability to refine and adapt the meaning of force and lack of consent was the adoption of the "totality of the circumstances" test in Henderson. [49] This test is rooted in an evidentiary approach which examines circumstances surrounding a particular act on a case-by-case basis. Coupled with the judiciary's expansive definitions of force and lack of consent, the totality test has been particularly important in establishing legal boundaries in child sexual abuse prosecutions. For example, in United States v. DeJonge, [50] The Air Force Court of Military Review affirmed the conviction of a father for the multiple rapes of his daughter based on the coercive element inherent in a parent-child relationship. "Consent to sexual intercourse, if induced by fear, fright, or coercion is equivalent to physical force." [51] This is also illustrated in United States v. Palmer, where the Court of Military Appeals validated this interpretation of the force component of Article 120, noting that the parent-child relationship is sufficient to establish the "moral, psychological, or intellectual force" under a constructive force theory. [52]

In a case involving two adults, the Court of Military Appeals in United States v. Hicks, [53] applied an expanded definition of constructive force. The victim was visiting her enlisted boyfriend and staying with him in his barracks room. The accused was her boyfriend's section leader. The accused told the boyfriend he could be in trouble for this arrangement, and suggested that the victim use his room instead. After the victim went to the accused's room alone, the accused entered and advised the victim of his identity, and told her that her boyfriend would "probably get thrown in the brig" because of her visit. He then asked her if she would "like to get [her boyfriend] out of trouble," to which she replied in the affirmative. The accused then suggested a "deal" which included a sexual encounter with the victim. The victim did not respond. The accused then stated, "It doesn't matter if you cooperate or not, I'm going to give it to you anyway." The victim "just stood there" as the accused undressed her and proceeded to engage in sexual intercourse with her. She admitted that she did not offer any resistance, because she "had read articles on rape [that advised] to never fight a man." [54]

In affirming the conviction for rape, Judge Cox listed a number of factors about the encounter which sufficiently demonstrated the existence of "force and lack of consent," including: the nature of the relationship between the accused and the victim's boyfriend, the fact that the accused and victim did not know each other before the encounter, the "coercive atmosphere" created by the accused in threatening to report her boyfriend for a regulatory violation, the authoritative voice the accused used, the impact of what the victim had previously read, and the respective ages and sizes of the victim and accused. [55]

Unlike many of the civilian revisionist statutory approaches, the totality of the circumstances approach does consider a victim's conduct, including whether the victim resisted, in certain contexts. As the cases discussed above demonstrate, that focus is not grounded in "hostility" toward the victim, but rather it is based upon an evidentiary analysis of those factors which make a particular act of intercourse coercive and unwanted. In United States v. Watson, [56] the Court of Military Appeals discussed how a victim's conduct is relevant to the issue of consent. Watson was an Air Force officer who engaged in an act of intercourse with a domestic servant in his dormitory room. The military judge acquitted the accused of rape, but convicted him of indecent assault. [57] The acquittal was based upon the judge's contention that Article 120 required a victim to "manifest her lack of consent in some positive manner." [58] In affirming the conviction for indecent assault, the Court of Military Appeals specifically rejected the military judge's reasoning, stating that the appropriate focus for a factfinder is whether the victim consented or whether a particular accused reasonably and honestly believed the victim consented. The court noted it was "bewildering" that the military judge would conclude that the victim had an independent legal duty to manifest lack of consent. [59] The entire issue of "manifestation of lack of consent" is simply an evidentiary inference, not a separate element of the offense. Evidence of consent, or the lack thereof, is based upon an examination of the totality of the circumstances, of which a victim's "manifestation" is not necessarily determinative. [60]

United States v. Bonano-Torres, [61] while similarly focusing on a victim's conduct, assessed that conduct vis-a-vis the element of force. The accused and the victim in this case knew each other from their respective duty assignments. One evening while on temporary assignment, the two went to dinner together and consumed alcohol. Upon returning to the hotel where they were staying, the victim permitted the accused to use her bathroom. She testified that at some point she became aware that the

accused was in bed with her and attempting to sexually arouse her. On at least two occasions, the victim advised the accused that she did not wish to engage in sexual intercourse with the accused "because [he] was married." After drifting into and out of sleep, the victim testified that she ultimately assented to sexual intercourse "because [she] knew he wouldn't leave [her] alone until he [engaged in sexual intercourse]" and "all she wanted was to go to sleep." [62] On appeal, the Army Court of Military Review set aside the accused's rape conviction finding that the evidence of force was insufficient. In its discussion of the element of force, the court argued that the victim's failure to resist was "highly significant" in assessing whether the act was consensual. Noting that nothing in the record indicated the victim suffered from a physical or mental impairment which would have permitted the prosecution to use the concept of constructive force, the court concluded that the facts demonstrated simply that the victim "acquiesced." [63]

The Court of Military Appeals upheld the decision of the Army Court of Military Review and clarified its position on the appropriate consideration of a victim's "resistance." The court concluded that Article 120 required some assessment of both an accused's and victim's conduct in determining the legal sufficiency of the element of force, which must be "something more" than the incidental force required for penetration. However, while resistance may be a relevant factor in determining this "something more," it is not a legal necessity to a determination of the existence of force. [64] The court also specifically noted that the lower court's decision and analysis were based to a great degree on its fact-finding authority. Thus, while a resistance requirement was improper as a matter of law, it was not irrelevant in a final determination of whether the prosecution had proved its case beyond a reasonable doubt. [65]

The Watson and Bonano-Torres opinions eliminated any per se rule requiring a victim to resist or manifest a lack of consent, but nonetheless validated the relevancy of such conduct. In addition, the opinions seem to recognize the legal and logical interplay between "force" and "lack of consent." On the one hand, the Court of Military Appeals opinion in Bonano-Torres seemed to adopt the rather restrictive interpretation of constructive force articulated by the Army Court of Military Review. [66] In addition to those "classic" situations wherein the degree of force required is grounded in a victim's disability, principles of constructive force were used in the Henderson, DeJonge, and Watson opinions when examining the coercive nature of the relationship between the accused and victim which resulted in the act of unwanted sexual intercourse.

The Court of Military Appeals examined the parameters of constructive force in United States v. Clark. [67] The accused was the victim's direct supervisor at a dining facility. The accused approached the victim during the duty day and ordered her to accompany him into a nearby shed. The accused closed the door after the victim entered the shed, grabbed her arm, and kissed her. He then unbuttoned his trousers and placed the victim's hand on his penis. He told her to unbutton her trousers, and pulled them down and ultimately engaged in sexual intercourse with her. The victim testified that she did not respond to the accused's kiss and "stiffened her body." She stated she only unbuttoned two trouser buttons, hoping that the accused would be unsuccessful in pulling them off. During the act of intercourse, the victim stated "someone may come" in an effort to get the accused to stop. [68]

The Army Court of Military Review affirmed the rape conviction. The court held that the superior-subordinate relationship, the isolated location of the shed, the relative sizes of the accused and victim, and the initiation of contact by the accused by "grabbing" the victim combined to satisfy the requirement of force. Recognizing that the victim did not articulate or manifest any nonconsent, the court specifically rejected the accused's contention that this factor mandated reversal. Citing both Watson and Bonano-Torres, the court concluded that lack of manifestation raised only a permissible inference of consent, which need not be drawn by the factfinder. [69] Noting that the victim testified that she was afraid of the accused, the court concluded that the underlying factors surrounding the incident which satisfied the element of force were also sufficient to corroborate her testimony and establish lack of consent. [70]

The Court of Military Appeals upheld the conviction but could not agree on the legal theory. Judge Crawford, in an opinion joined by Judge Cox, contended that the record did not demonstrate actual force. Rather, the superior-subordinate relationship between the parties created a situation which called for the application of constructive force principles, such that the "force necessary for penetration will suffice." [71] In a detailed examination of military law, Judge Crawford noted that the application of principles of constructive force in military jurisprudence originated in the last century. Thus, the lack of actual "physical violence" did not mandate reversal. Focusing on the factors which the Army Court of Military Review concluded established actual force, Judge Crawford noted that those same factors established constructive force because their existence made it "reasonable for [the victim] to fear for her life, to have a reasonable fear of bodily injury, and to believe that resistance would be futile." [72]

In a concurring opinion, Judge Wiss disputed language in Judge Crawford's opinion which seemed to support the view that the superior-subordinate relationship automatically results in the application of constructive force principles. The practical conclusion of such an approach, Judge Wiss cautioned, is a prima facie case for rape on every occasion when there is sexual contact between a superior and a subordinate. [73]

Chief Judge Sullivan, in his separate concurring opinion, argued that the Army Court of Military Review's legal analysis was correct and that the application of a constructive force theory was improper. Noting that principles of constructive force are analytically accompanied by the "doctrine of implied lack of consent," the Chief Judge, citing Judge Cox's opinion in Palmer, [74] seemed to create a distinction between those occasions when a victim is incapable of consent (such as when the victim is asleep, unconscious, or lacks mental capacity) and those occasions when the intimidating, coercive behavior or environment "created" by the accused results in the submission by the victim. [75]

Judge Gierke contended in his dissent that the prosecution failed to establish either actual or constructive force. With regard to the superior-subordinate relationship, Judge Gierke focused on the lack of any evidence that the relationship was the "operative" factor in the victim's decision to submit. In regard to the issue of consent, Judge Gierke focused on the victim's age and sexual experience in concluding that she could have said "no." [76]

In many respects, the judges' arguments about actual or constructive force are a matter of semantics. The

expansion of constructive force principles to situations in which a victim is "capable" of consent runs the risk, as Judge Wiss points out, of making all superior-subordinate sexual contact definable as rape without regard to the totality of the circumstances surrounding the particular act. [77] A second difficulty with Judge Crawford's approach is its focus on the reasonableness (or lack thereof) of the victim's reaction, as opposed to those coercive acts by the accused which caused that reaction. [78] Exclusive focus on the victim for the establishment of force runs counter to the totality of the circumstances analysis and the goal of eliminating victim resistance as a legal requirement for rape.

Chief Judge Sullivan's opinion, on the other hand, contains the seeds of a workable definition of force which eliminates the focus on the victim and the concerns of Judge Wiss, while at the same time allowing a factfinder to characterize a broad array of coercive, unwanted acts of intercourse as rape. The promise lies in the redefinition of constructive force as existing only in those situations in which a victim is incapable of consent. In such a situation, the doctrine of implied lack of consent is clearly appropriate given the nature of the act, and the "force necessary for penetration" is sufficient given the victim's incapacity. Concurrent with such a definitional restriction of "constructive force" is an expansion of the definition of actual force to include all actions by an accused and surrounding circumstances and factors which indicate that the act is "coercive." These nonexclusive factors would include intimidation, threats of harm, superior-subordinate coercion, creation of a coercive atmosphere (such as refusal to heed a victim's verbal protestations), and other evidentiary factors indicating by the totality of the circumstances that the acts were by "force and lack of consent." Such a definition is consistent with military case law, the development of the crime of rape, and provides the term "force" with practical meaning.

In United States v. Webster, [79] the Court of Military Appeals revisited the legal and evidentiary interplay between "force and lack of consent" and more specifically articulated how to assess the interaction between an accused and victim in determining the sufficiency of those elements. The accused and victim in Webster were involved in the early stages of a "dating" relationship. On one evening at the victim's apartment after approximately an hour and a half of conversation, the accused approached the victim and suggested they "go into the bedroom together." The victim stated "no," but the accused continued to approach her and was ultimately successful in having her sit on a kitchen counter despite her initial attempts to physically avoid him. The accused ignored repeated verbal protest from the victim and removed her shorts and bikini bottom before penetrating her. The victim testified that she asked the accused to ejaculate in her hand, and he complied. She testified that she did not scream, attempt to get away from the accused, or otherwise "physically repel" the accused's advances. She stated that she did not believe that she could move, and was not sexually aroused. The accused, via the admission of his confession, confirmed that an act of sexual intercourse occurred and that the victim had verbally protested on a number of occasions. However, he contended that the victim's physical conduct indicated to him that she was consenting. [80]

The Coast Guard Court of Military Review, in upholding Webster's conviction for rape, specifically concluded that the victim's consistent verbal protests and initial attempts to break off physical contact with the accused were legally sufficient to demonstrate "force more than incidental to the act of intercourse." [81] While recognizing that the victim neither feared nor physically resisted, the court

declined to conclude that those factors were determinative on the issue of force. Likewise, the court concluded that there was ample evidence of the victim's actual lack of consent, and the manifestation thereof, to satisfy the legal requirements of that element. [82]

In an extensive footnote, Judge Edwards of the Coast Guard Court of Military Review lamented the failure of Congress to modify Article 120 and proposed a scheme which recognizes varying degrees of rape depending upon varying degrees of force, coupled with the nonconsent of the victim. Such a scheme, he contended, "adequately balances the rights of both the alleged victim of sexual assault and the accused" by requiring affirmative permission which "may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances." [83] Such a scheme, while consistent with the present approach of assessing the totality of the circumstances, would only benefit a military accused by providing the potential of being convicted of a lesser offense based upon the lesser degree of force. To the extent that differing acts of coercive, unwanted sexual intercourse are deserving of more or less punishment, the present sentencing system serves the interests of the accused by permitting the sentencing authority to consider those factors.

On appeal, the Court of Military Appeals affirmed the decision of the Coast Guard Court of Military Review. Citing both Watson and Bonano-Torres, the opinion by Chief Judge Sullivan once again emphasized that Article 120 does not require a victim to either resist or manifest a lack of consent. [84] The appropriate focus in determining force and lack of consent is an evidentiary assessment based upon the "totality of the circumstances." In this particular case, the Chief Judge noted, the refusal of the accused to heed the victim's verbal protests, the continued nature of those protests, his continued advances toward her, and the physical acts leading up to penetration were sufficient force. On the issue of consent, the opinion noted that the victim said "no" on a number of occasions. [85]

The Webster approach couples the totality of the circumstances test with a broad definition of force and lack of consent. It is a logical, principled analysis. The practical strength of the approach is its flexibility in its definition of rape, permitting a wide variety of coercive and unwanted acts of sexual intercourse to be criminalized. Because the language of Article 120 is directly derived from the definition of rape at common law, the court accepts the view that "the inquiry into consent and force are [sic] virtually identical" [86] without mandating that the common analytical linchpin of that inquiry be a victim's resistance. Rather, all circumstances surrounding a particular act of intercourse are relevant on the issue of coercion. The Webster approach refrains from compartmentalizing various kinds of evidence as either probative of force or lack of consent. Evidence of the verbal protests of the victim in Webster not only demonstrate that the victim did not consent, but those same protests demonstrate the coercion needed to show force. [87]

The Webster opinion is not immune from criticism. Chief Judge Sullivan's opinion, although initially promising in its analysis and application, unfortunately also includes an analysis of the facts using a resistance requirement. As Judge Cox correctly points out in his concurring opinion, "no measure of resistance is required for a rape victim." [88] Judge Cox further points out, however, that a "failure to resist where resistance might be expected might give rise to an inference that the prosecutrix actually consented." [89]

Judge Cox further stated that force only means the amount of force necessary for sexual penetration. He argued that nothing in the language of Article 120 "suggests or implies" that any additional force "beyond penetration" is required, notwithstanding the language contained in the Manual indicating the contrary. [90] Judge Cox's position is not supported by Article 120 or case law. Such an interpretation of force renders that element meaningless and superfluous because Article 120 specifically requires a separate element that an accused commit an act of sexual intercourse with the victim. Such an interpretation is inconsistent with traditional methods of statutory interpretation. [91]

In essence, Judge Cox advocates the approach used by the Supreme Court of New Jersey in M.T.S. However, as noted above, that approach misinterprets New Jersey's own statute and focuses a factfinder's attention exclusively on the issue of whether a victim consented. In short, the New Jersey approach authorizes a factfinder to only consider half the picture -- the victim's conduct. Common characteristics of "acquaintance rape" cases often include initially consensual sexual activity short of intercourse, and little or no indication on the part of the victim that the act is unwanted. [92] Because the act of sexual intercourse, by its very nature, requires an assessment of mutual perception, the M.T.S. approach creates application difficulties and thus should not be adopted by the military.

V. CONCLUSION

The analysis suggested by the majority in Webster is consistent with the statutory language of Article 120 and its judicial interpretation. It is expansive in its assessment of evidence which satisfies the element of force and lack of consent, while avoiding the analytical pitfalls apparent in statutory revisions and cases such as Berkowitz and M.T.S. The greatest strength of the approach is its successful maintenance of the theoretical similarity between force and lack of consent that existed at common law and, at the same time, its elimination of resistance as a legal prerequisite to criminal culpability. It recognizes the logical and legal identity between the two concepts, thus eliminating artificial analytical barriers between the various kinds of evidence used to prove the existence of a coercive, unwanted act of sexual intercourse. The approach is progressive, yet at the same time successfully avoids the suspect legal reasoning, impracticable statutory redefinitions, and radical sociological assumptions which affect the law of rape in the civilian sector. It accomplishes what other jurisdictions have, for the most part, failed to accomplish: a principled approach to criminalizing all sexual intercourse which is coercive and unwanted.

Footnotes

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1. 10 U.S.C.A. Secs. 801-940 (West 1983 & Supp. 1995) [hereinafter UCMJ].

2. See, e.g., Commonwealth v. Burke, 105 Mass. 376 (1870) (citing Co. Lit. 123 b.2 Inst. 180).

3. 65 Am. Jur. 2d, Rape, Secs. 4-14 (1972 & Supp. 1995); See generally Christina M. Tchen, Rape Reform and a Statutory Consent Defense, 74 J. Crim. L. 1518 (1983); Jennifer Trucano, Force, Consent, and Victims' Rights: How In Re M.T.S. Reinterprets Rape Statutes, 38 S.D. L. REV. 203 (1993).

4. Cheryl Siskin, No. The 'Resistance Not Required Statute' and 'Rape Shield Law' May Not Be Enough, 66 Temp. L. Rev. 531 (1993).

5. Id. at 537-39, n. 54.

6. Id. at 538.

7. Susan Estrich, Rape, 95 Yale L.J. 1087, 1090, n.5 (1986); Cynthia A. Wicktom, Note, Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws, 56 Geo. Wash. L. Rev. 399, 411-13 (1988).

8. See Sakthi Murthy, Rejecting Unreasonable Sexual Expectations: Limits on Using Rape Victim's Sexual History to Show Defendant's Mistaken Belief of Consent, 79 CALIF. L. REV. 541 (1991).

9. Model Penal Code, comments, pt. II (1980). For criticisms of the approach taken by the Code, see, e. g., Estrich, supra note 7, at 1134-47; Wicktom, supra note 7, at 414-17. The Model Penal Code divides rape into three separate crimes. Rape is defined as an act of sexual intercourse between a man and a woman, not his wife, when "he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone." Rape is viewed as a first degree felony only if the actor "inflicts serious bodily injury" or the victim was not a "voluntary social companion" who had a prior sexual relationship with the accused. Otherwise it is a second degree felony. "Gross Sexual Imposition," a third degree felony, occurs when a man "compels" a woman to submit to intercourse "by any threat that would prevent resistance by a woman of ordinary resolution." MODEL PENAL CODE at Secs. 213.1(1) & (2). Both Wicktom and Estrich maintain that the MODEL PENAL CODE does not eliminate the focus on the victim's conduct.

10. Mich. Comp. Laws Ann. Secs. 750.520a-5201(West 1985). For discussions of the Michigan Model, see, e.g., Estrich, supra note 7, at 1147-60; Tchen, supra note 3, at 1537-38; Trucano, supra note 3, at 215-20; Wicktom, supra note 7, at 418-20. Michigan defines the "force or coercion" needed to establish "criminal sexual conduct" as follows: "[A]ctual physical force or physical violence" which "overcomes" the victim; threats or use of actual force, and the victim believes that the accused has the "present ability" to carry out those threats; threats of future retaliation (kidnapping, extortion, or physical punishment) by the accused against either the victim or another, and the victim believes that such threats can be carried out; unethical medical treatment; and effecting intercourse by "concealment or surprise." MICH. COMP. LAWS ANN. Sec. 750.520b.

11. Trucano, supra note 3, at 215.

12. Wis. Stat. Ann. Sec. 940.225 (West 1982).

13. See, e.g., State v. Baldwin, 304 N.W. 2d 742 (1981); State v. Bonds, 477 N.W. 2d 265 (1991).

14. See, e.g., Tchen, supra note 3, at 1543-45.

15. 415 Pa. Super. 505 (1992), aff'd in part, vacated in part, 641 A.2d 1161 (1994).

16. 129 N.J. 422 (1992).

17. 129 N.J. at 425-428.

18. Id.

19. Id. at 427.

20. Recent Case: Rape Law, 106 Harv. L. Rev. 969, 969-70, 972-73 (1993). The trial judge concluded that "I think there was petting, heavy petting, and then before the young lady knew it, he was there, he had penetrated her." Id. at 969 n. 8. He also concluded, "[T]hey are both telling the truth." Id. at 973 n. 32.

21. State in Relation to. M.T.S., 588 A.2d 1282, 1285 (N.J. Super. Ct. App. Div. 1991).

22. 129 N.J. at 450.

23. Id. at 430-31.

24. Id. at 439-47. See also N.J. Stat. Ann. Sec. 2C:14-2c(1) ("Sexual Assault" occurs when one sexually penetrates another by "force or coercion;" when the victim is physically helpless, mentally defective or handicapped; when the actor has supervisory or disciplinary power over a hospital patient or prisoner by "virtue of the actor's legal, professional, or occupational status;" the victim is between the ages of 16 and 18; the actor is related to the victim to the third degree; the actor is in the position of a parent, or is a parent, the actor has "supervisory or disciplinary power" over the victim; or the actor is at least four years older than a victim between the ages of 13 and 16.); Trucano, supra note 3.

25. 129 N.J. at 447.

26. Recent Case, supra note 20, at 973.

27. Id. at 972.

28. Wisc. Stat. Ann. Sec. 940.225 (West 1982). 29415 Pa. Super. at 505.

30. Id. at 507-09.

31. Id.

32. Id. at 511-12.

33. Id. at 512-13. 18 Pa. Cons. Stat. Sec. 3121 defines rape as an act of sexual intercourse by an individual with another not his spouse either by "forcible compulsion; " by "threat of forcible compulsion" which prevents resistance by one of "reasonable resolution;" of a victim who is unconscious; or of a victim "so mentally deranged or deficient that such person is incapable of consent." 18 PA. CONS. STAT. Sec. 3107 states, "The victim of a rape need not resist."

34. 415 Pa. Super. at 514.

35. 641 A.2d at 1164.

36. Id. (citing Commonwealth v. Mlinarch, 542 A.2d 1335 (1988)).

37. Id.

38. Id.

39. 10 U.S.C.A, Sec. 920 (West 1983 & Supp. 1995). See also, Manual for Courts-Martial [hereinafter MCM], app. 2 (1995).

40. Article 120(a) states: "Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." Article 120(b), entitled Carnal Knowledge, deals with sexual intercourse between an adult and female under the age of sixteen. Earlier versions provided: "Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct."

41. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315,2506 (1992).

42. MCM, ch. XXVIII, para. 199(a) (1951).

43. MCM, para. 153b(2)(b) (1969).

44. MCM, ch. IV, para. 45(c) (1984).

45. 15 C.M.R. 268 (U.S.C.M.A. 1954).

46. Id. at 273.

47. Id.

48. See MCM, supra notes 43 and 44.

49. 15 C.M.R. at 268.

50. 16 M.J. 974 *[cited at]* (A.F.C.M.R. 1983).

51. Id. at 976 (citing United States v. Jenkins, 16 C.M.R. 781 (A.F.B.R. 1954)).

52. 33 M.J. 7 *[cited at]* , 9-11 (C.M.A. 1991).

53. 24 M.J. 3 *[cited at]* (C.M.A. 1987), cert. denied, 484 U.S. 827 *[cited at]* (1987).

54. Id. at 4-5.

55. Id. at 6.

56. 31 M.J. 49 *[cited at]* (C.M.A. 1990).

57. Id. at 50-51.

58. Id. at 55-56, app.

59. Id. at 52.

60. Id. at 52-54.

61. 31 M.J. 175 *[cited at]* (C.M.A. 1990).

62. Id. at 176-77.

63. 29 M.J. 845 *[cited at]* , 849-51 (A.C.M.R. 1989).

64. Bonano-Torres, 31 M.J. at 178-79.

65. Id.

66. See also, United States v. Townsend, 34 M.J. 882 *[cited at]* , 884 (C.G.C.M.R. 1992). In Townsend, the accused's conviction for rape was overturned primarily because the victim did not manifest "resistance" but "froze" when her verbal protests went unheeded. As in Bonano-Torres, the court used its factfinding powers under Art. 66, UCMJ, supra note 1.

67. 35 M.J. 432 *[cited at]* (C.M.A. 1992), cert. denied, 113 S. Ct. 1948 (1993).

68. 32 M.J. 606 *[cited at]* , 607-08 (A.C.M.R. 1991).

69. Id. at 609.

70. Id. at 609-11.

71. Clark, 35 M.J. at 434-35.

72. Id. at 436.

73. Id. at 436-437 (Wiss, J. concurring in part and in result).

74. 24 M.J. at 3.

75. Clark, 35 M.J. at 437 (Sullivan, C.J., concurring in result).

76. Id. at 437-41 (Gierke, J., dissenting).

77. Id. at 436.

78. Id. at 434-35.

79. 40 M.J. 384 *[cited at]* (C.M.A. 1994).

80. Webster, 37 M.J. 670 *[cited at]* , 671-72 (C.G.C.M.R. 1993).

81. Id. at 673-75. This panel of the Coast Guard Court of Military Review specifically declined to use the resistance-centered analysis found in Bonano-Torres and Townsend.

82. Id. at 675 n.8.

83. Id. (citing State in Interest of M.T.S., 609 A.2d at 1277).

84. 40 M.J. at 386-87. The Chief Judge's opinion was joined by Judges Gierke and Wiss.

85. Id.

86. Id. at 387 n.2 (citing Estrich, supra note 7, at 1107).

87. See also, Mary L. Hahn, Survey in Developments in North Carolina Law, 70 N.C.L. Rev. 2027, 2029 (1992); Hahn discusses the reluctance of North Carolina courts to use an accused's failure to heed verbal protestations of a victim as legally sufficient to satisfy the "force" requirement.

88. 40 M.J. at 388 (Cox, J., concurring).

89. Id. (citing MCM, pt. IV, para 45c).

90. Id.

91. See generally MacCormick & Summers, Interpreting Statutes (1991).

92. Webster, 37 M.J. at 674.

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39 AFLR 37, War Crimes Tribunal

Title of Article

The Thomas P. Keenan, Jr. Memorial Lecture: The International Criminal Tribunal for Yugoslavia

Author

COLONEL BRENDA J. HOLLIS, USAF*

Text of Article

I. INTRODUCTION

It has been very interesting to sit here all week at the Operations Law Course and be reminded of all the different environments judge advocates are operating in today. The flexibility these diverse operating environments require is apparent even from the "uniforms" required for those environments. Several speakers wore their working uniforms. That is why I appear before you today wearing my working uniform for my missions into Bosnia - a United Nations helmet and flak jacket - and carrying a small soft-sided suitcase, a large book bag, and a laptop computer complete with built-in printer. You can see that leaves no hand empty for a weapon, but we are not allowed to carry weapons with us when we go into country, anyway.

I have the computer because we take all our statements on the computer. I have the flak vest and helmet because the U.N. insists we have both when we go into Bosnia. Also, the helmet is useful as a tool in case the computer malfunctions - one good whack and the computer usually works again. We can sit on the flak jacket when we travel by U.N. air. I carry a large book bag to take supplies in and evidence out. The small, soft-sided suitcase is needed because we usually travel by helicopter or four-wheel drive vehicle, so we need durability and "stuffability." It has to be small because if you can't carry your gear, you can't take it. So, the personal items are where we cut back.

I want to talk to you today about who we are at the War Crimes Tribunal, the kinds of crimes we can prosecute, the process we follow, some general comments about the investigations we are currently undertaking, and, finally, some of the problems and issues we face.

II. THE TRIBUNAL

The U.N. Security Council created the International Criminal Tribunal for Yugoslavia (ICTY), the product of a statute that was adopted in May 1993. [1] The seat of the Tribunal is in The Hague, The Netherlands. Thus far, we have U.N. personnel from 34 different countries. Several countries, including the United States, Sweden, Denmark, Norway, the United Kingdom, and Belgium, have loaned - or "seconded" - personnel to the Tribunal as well.

The statute created the Chambers, which includes the judges, as well as the Office of the Prosecutor, where I work. The statute also provides for the Registry, which supports both the Chambers and the Office of the Prosecutor. It includes logistics support, translation and interpretation services, and a victim and witness assistance unit. Serious security and privacy concerns exist for our witnesses and victims, so the statute allows some degree of protection for them, consistent with the fundamental rights of the accused. In the upcoming trial of Dusko Tadic, we plan to use the statute as the basis of a prosecution motion to protect the security and privacy of some of our witnesses.

The Chambers consist of two trial chambers and an appellate chamber. There are three judges in each trial chamber and five in the appellate, for a total of eleven judges from eleven different countries. The trial chamber that hears the Tadic case will consist of an American, Australian, and Malaysian judge. The judges rotate among the chambers. The president must always be a member of the appellate chamber, but the other judges rotate. A judge must confirm indictments; all the judges share this responsibility.

I am going to use the Tadic case as an example throughout my discussion, so let me tell you something about the case now. It is an upcoming case, so I cannot give you a lot of background, although I can give you some general information. Dusko Tadic is a Bosnian Serb arrested by the Germans for war crimes he allegedly committed in the Prijedor district of the former Yugoslavia. After the Office of the Prosecutor began operations, we asked the Germans to give us the case, and they did. Mr. Tadic was transferred from jail in Germany to the Tribunal jail in The Hague in April 1995. We indicted him for murders, beatings, and other crimes in connection with events in the Prijedor area of northwestern Bosnia. We accused him of crimes inside and outside detention camps the Serbs set up in the Prijedor area. We charged some offenses in the alternative because we are unsure about lesser included offenses due to the untested nature of the proceeding. In the same vein, we are charging the same acts as violations of different articles of the statute. Will the charges then be multiplicious? Our position is that they are not multiplicious because different norms are violated and different elements are required. But those issues must be decided at trial. We expect a Fall 1995 trial date for the case.

I am assigned to the Office of the Prosecutor, the largest section of the Tribunal with a current strength of about 130 people. The Prosecutor is the Honorable Richard Goldstone from South Africa. His deputy is Graham Blewitt from Australia. Twenty-two Americans - from the Department of Defense, Department of Justice, and Department of State - are "chopped," or seconded, to the Tribunal. All of us work in the Office of the Prosecutor. Most of us work in the investigations section. Others, mostly State Department personnel, serve as special advisors to the Prosecutor.

We are, as I said, "chopped" to the U.N. We belong to them for the duration of our assignment. The United States pays our salaries and our housing and living allowances, while the U.N. pays TDY costs when we go on a mission.

You'll be happy to know that the six Department of Defense personnel have gone on more missions and gone more times into Bosnia than any other group in the investigations section. We're knocking on doors saying, "We're ready; we'll go tomorrow." We want to go.

The Office of the Prosecutor currently has three senior trial attorneys, all U.N. personnel, who will act as lead counsel in all court cases. At present one of the three is from Australia, one from the United States, and one from Sweden. The lead attorney in the upcoming Tadic case, the only indicted accused we have in custody, is an Australian. The current procedure is that attorneys in the investigation section who worked on the investigation that led to an indictment will serve as co-counsel when the case is tried. That is why I am one of the co-counsel on the Tadic case.

III. SUBSTANTIVE OFFENSES

The offenses over which we have jurisdiction are set forth in the articles of the statute which created the Tribunal. Articles 2, 3, 4, and 5 set forth the categories of punishable offenses. Article 2 says we can prosecute grave breaches of the 1949 Geneva Convention, which provides humanitarian protections intended to minimize harm to noncombatants. It includes such offenses as murder and torture, those types of crimes. The issue this article presents is whether we have to have an international conflict to prosecute these grave breaches. Must we prove an "international armed conflict" for each case in which we allege violations of Article 2? This is an issue because the Geneva Conventions and the prohibition against grave breaches are generally interpreted as applying to international armed conflicts. The Bosnian conflict with its amalgam of factions almost defies description. Some may view the strife as akin to a civil war, while others see a true international armed struggle.

Article 3 describes a category of crimes consisting of violations of the laws or customs of war. This article would include Hague Law violations, such as how weapons are used, proportionality issues, and target selection. Hague Law, based on the Hague Conventions, regulates the means and methods of warfighting in a manner that seeks to minimize unnecessary injury or suffering. Plunder is also included as an Article 3 violation.

Article 4 makes genocide punishable. It is an offense we hear a lot of talk about. We are faced with the issue of more specifically defining the offense of genocide. Article 4 defines it as the commission of a specified act with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such. So, we know we need a specified act plus the requisite intent. But how much destruction of the group is enough to constitute "in whole or in part"? What is the meaning of "as such"? Are we going to charge someone with genocide without regard to rank or degree of participation? Assuming we have evidence of a specified act and the intent, then Article 4 covers the offense of genocide, "attempts" to commit genocide, "conspiracy" to commit genocide, and "complicity" in genocide. Incitement to

commit genocide is also an offense covered by Article 4. This is an aspect of information warfare which will be closely examined since propaganda seemed to play a big part in fanning latent ethnic hatreds and distrust in the former Yugoslavia. It seemed to be a big player in getting people ready to kill, mutilate, and torture people they had grown up with. The prosecution of persons for incitement to commit genocide would certainly add significantly to international law.

Article 5 gives us subject matter jurisdiction over crimes against humanity. This is the only article which specifically identifies rape as a crime. We are getting a lot of attention from the media and the public concerning rape prosecutions. We are going forward with rape as a crime under Article 5, but we will also charge it under the other articles, depending on the facts of each case. For example, it could constitute torture or inhuman treatment, or great suffering or serious injury, all violations of Article 2. I believe we will be doing a great service for women worldwide - and men as well, who are also victims of sexual assault - if we can establish that rape and other sexual assaults are not justified or excused as the "spoils of war," but rather are war crimes just as beatings and murder of protected persons are war crimes.

IV. PERSONAL JURISDICTION

Those are the crimes we prosecute. What about individual criminal responsibility? Article 7 gives us several theories. First, a person is individually liable if he or she is the "chief actor." By chief actor, the article incorporated virtually the whole gamut of the law of principals. If a person is an aider and abettor, then he or she is a chief actor. If he or she is an instigator, then he or she is a chief actor. And again, it poses the question of how this applies to cases involving propaganda. In addition, a person who plans or gives an order for the commission of a crime covered by the statute is a chief actor.

The statute establishes a second theory of liability which is a significant development in the law. It allows for the prosecution of a "superior" in certain circumstances, even when the superior is not necessarily a military superior. For example, if a subordinate commits any of these crimes I talked about, and the superior knew - or in the exercise of his or her authority reasonably should have known - that the subordinate was going to commit a crime, and the superior failed to take reasonable and necessary steps to prevent it, the superior is individually liable for that crime, just as the chief actor is. Under the same theory, if a superior finds out about a subordinate's crime after it was committed, or reasonably should have known, and fails to take reasonable and necessary steps to investigate and/or punish the person responsible, then the superior is individually liable for that crime, just as is the chief actor. Finally, under the statute, obedience to orders is no defense at all to guilt or innocence, but it can be considered for sentencing.

The defense in the Tadic case has put us on notice they will file a motion to contest jurisdiction, but we do not know if it will be based on subject matter jurisdiction or personal jurisdiction. The jurisdiction motion is presently scheduled for argument in July 1995. The loser will undoubtedly appeal it and have a month to file a brief. So, it appears that September/October 1995 is the earliest time frame for the trial to begin, assuming we are successful in proving jurisdiction.

V. PROCEDURES

What is the process we follow at the Tribunal? It starts with an investigation, which leads to an indictment, which must be confirmed by one of the judges. After confirmation, an international arrest warrant is issued for the accused. After arrest, the accused is brought to the ICTY prison in The Hague. Very shortly thereafter the accused has an initial appearance before the trial chamber scheduled to hear the case. The trial, and if the accused is convicted, sentencing, are held in ICTY building in The Hague. After sentencing, the accused is to be held in The Hague or transferred elsewhere to serve the sentence.

The investigation itself can pose many problems. We have many allegations and limited resources so we must prioritize our efforts. We must decide what to investigate and determine where our evidence and witnesses are located. Often we become aware that another country is investigating the same matters and looking at charging the same people. The statute authorizes us to ask that country to defer the case to us. The statute gives us primacy of jurisdiction, so any country working the case outside our auspices ordinarily should defer the case. As a practical matter, if they don't defer to us, we have no real recourse. The President of the Tribunal may report the matter to the Security Council, but we cannot go into the country and take the case from them.

Once we have our investigation going, if we have sufficient evidence to believe these crimes were committed, then we write up the indictment and submit it to a judge. The statute says sufficient evidence is a prima facie case, but what is a prima facie case? The statute does not define it, and there is a difference of opinion as to what that means. Does it mean a probable cause case? Or is it a higher standard? The Tribunal judges appear to be using a probable cause standard. We will see if that is challenged by the defense when cases go before a trial chamber. It may be an issue in our very first trial, the Tadic case.

The submitted indictment goes to one judge for confirmation. That judge has to be satisfied there is sufficient evidence to support the charges before confirming the indictment. Once the indictment is confirmed, appropriate orders can be issued. Arrest warrants are written up, signed, and given to INTERPOL, which attempts to find these people. We can request that the accused be given to us when found, but of course we do not have an international police force assigned to us that can grab them wherever they are. In the Tadic case, the Germans had arrested him because they were going to prosecute him for war crimes. After we indicted Tadic, we asked the Germans to defer their case and to turn him over to us. They did so.

Once we have an accused, what do we do? The accused is brought to the ICTY prison in The Hague. The Dutch have a prison there, and part of it has been made over into a U.N. prison for ICTY. It is a little different than what we are accustomed to. We brought Mr. Tadic to The Hague and put him in our prison. We had guards and the whole system ready for about a year before we had any detainees in it. The guards had little to do, but they didn't have any escapes either. So, in April 1995, we put Mr. Tadic into prison.

His lead attorney is Dutch and accustomed to operating under the inquisitorial system, which is not an adversarial system like ours. Such a system places much more emphasis on the power of the judges and requires serious cooperation between the defense and the court. After the arraignment of Mr. Tadic, we requested an interview. Mr. Tadic and his attorney agreed. We interviewed him in the ICTY prison, which is how I got a chance to see what the prison is like. It is interesting because you cannot lock prisoners in their cell, for fire safety reasons I suppose, but the guard has to have a key to get into the cell - an approach much different than what we're accustomed to.

Once we transfer an accused to The Hague, then we have an initial appearance, which must be done as soon as possible after we get custody, usually a day or two after getting them to The Hague. At that initial appearance the indictment is read to the accused in a language he or she understands. In the Tadic case, that language is Serbo-Croatian. Then the trial chamber will ensure the accused understands his or her rights to counsel and will facilitate the exercise of that right, if the accused hasn't obtained counsel. At that point the trial chamber asks for pleas to be entered, then supposedly sets a trial date. What I believe they will do in most cases, as they did in the Tadic case, is set a preliminary hearing date and perhaps the dates for hearing motions.

The initial appearance and all court proceedings are open to the public, unless a justified request is made that they be held in camera. The whole idea behind this tribunal is that the indictments and the proceedings will be public. It is a public trial and an adversarial proceeding. The assumption is that witnesses will appear for oral testimony. All cases will be heard by a trial chamber. There is no provision for jury trials. The burden is on the prosecution to prove a person's guilt beyond a reasonable doubt. The defense has no burden at all. Assuming we get a conviction, all relevant information will come in during the sentencing phase. As a trial counsel in the United States Air Force today, I'm sure you would love to be in a situation where that's really true. Certainly evidence in aggravation, as well as in mitigation, will be admitted.

Where do judges look for penalties? The statute says they must look to Yugoslav law and practice (presumably law and practice in the former Yugoslavia) to get the basis for their penalties. There is no death sentence authorized. The judges have not yet set any maximum or minimum penalties. Will the sentences be consecutive or concurrent? We are going to have to argue that at trial.

Where is it appropriate for the accused to serve confinement? They can serve it in the U.N. prison in The Hague. The statute authorizes transfer to a country which is on an approved list. The accused would serve confinement there, subject to that country's rules about prisoners and confinement. What happens if, under the applicable country's laws, a person becomes eligible for parole or commutation of his or her sentence? Who determines if that will be approved? These questions are not addressed in the statute.

What about the rights of the accused? They have a right to a defense attorney. If they cannot afford an attorney, one will be appointed for them. We get the names of potential defense counsel from lists submitted from the various countries. Of course, the accused may hire his or her own attorney. In fact, Mr. Tadic has three attorneys - a Dutch attorney appointed for him, an attorney given to him by Serbia,

and an attorney given to him by the Bosnian Serbs.

If we interview an accused - an offer that can be refused - we must videotape those interviews and give the accused a copy of the videotape. We have to transcribe the interview and give the accused a copy of the transcript. The original videotape is then sealed and kept sealed until the trial.

The accused also has the right to the assistance of an interpreter. English and French are the official languages of the Tribunal, but for the most part, in ICTY English is the day-to-day working language. However, the offenses over which we have jurisdiction occurred in the former Yugoslavia. The language spoken there is Serbo-Croatian, and most of our alleged perpetrators speak Serbo-Croatian. The need for interpreters is great. The accused will need interpreters, and probably more than one because of the many statements requiring translation. The Tribunal's Registrar has the responsibility to obtain interpreters. That could become a big ticket item. We ourselves need interpreters in everything we do - to speak with witnesses and to read through the materials we have.

The accused also has the right to prepare a defense. One of the discovery rules is, if they ask for it, we must give them evidence "material to the defense." Sound familiar? They have the right to cross-examine witnesses and call witnesses in their own behalf. They also have the right to be given exculpatory or impeachment evidence. You know, as a trial counsel, this used to be the bane of my existence because the Air Force had such broad disclosure language. If you look at the language used in the Tribunal Rules of Procedure and Evidence, the Air Force has it pretty easy. The Tribunal rule requires us to disclose the existence of evidence known to us which "in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence." What would not be included? This is a very, very broad duty on our part.

VI. INVESTIGATIONS

The ICTY statute mandates that the Tribunal prosecute persons responsible for serious violations of international humanitarian law. We are an equal opportunity Tribunal. We will prosecute anyone, of any ethnic group, who has committed such violations. We are currently investigating alleged offenses committed by Serbs, Croats, and Muslims. In the end, criminal liability may not be equal among all three groups, but we will have conducted our investigations and follow-up proceedings without regard to the ethnic group of the offenders.

VII. ISSUES

We are facing many exciting challenges, many of them the result of being a newly formed unit tasked with investigating and prosecuting offenses whose elements are not yet clearly established. In addition, the procedures are not yet clearly established, nor are the rules of evidence fully developed or tested. One challenge we are facing, however, is not the result of these "growing pains" - the problem of how to deal with information overload. We are indeed in the information age. Unfortunately, we are much better at collecting and disseminating data than we are at storing and retrieving it. The Tribunal is the

recipient of hundreds of thousands of pages of data relating to the conflict in the former Yugoslavia. At present we have some 300,000 pages of data that is not in any type of data retrieval system - except for the time honored system of manual searching. In addition, we have no effective system to access other information that has been loaded into our computer data base. Our current inability to access this information effectively has both investigative and trial implications. We may lose important leads, as well as direct evidence of serious crimes. As for trial, we may fail to meet our broad disclosure obligations. And we may lose cooperation from governments, agencies, and organizations who send us information that gets lost in the information black hole. We are working hard to solve this problem, but it is a real concern.

We have a major logistics problem as well. Tens of thousands of potential witnesses are scattered over the world. We have witnesses who remain in former Yugoslavia, some in areas we do not have access. Locating witnesses in other countries is not always easy, and we have had to get permission from each country to enter their territory and interview the witnesses. As for witness attendance at proceedings, the travel arrangements themselves, including exit and reentry guarantees, will be a real challenge.

Of course, evidentiary issues abound (e.g., rules of evidence that have not yet been tested in proceedings; rules of evidence and procedure that are a blend of the adversarial system and the inquisitorial system). We have even more fundamental issues: What is the definition of a prima facie case, which is required for confirmation of an indictment? What are the elements of the offenses set out in the statute? One thing is certain, the unique procedural and substantive law that evolves from the functioning of this Tribunal will greatly expand the body of international law.

VIII. CONCLUSION

The ICTY is a well-intentioned effort to establish world standards of conduct to use during conflicts and to set the world on notice that persons who violate those standards will be held accountable. Unlike the Nuremberg and Tokyo trials, it cannot be said that the Tribunal is "victors' justice." Tribunal personnel must overcome many challenges to carry out the Tribunal's mandate, but the entire world community benefits if we are successful.

Editor's Note: Since Colonel Hollis' lecture, the Trial Chamber of the ICTY has ruled it has jurisdiction, dismissing Tadic's arguments that its primacy over domestic courts infringed state sovereignty and the court lacked subject matter jurisdiction. The Chamber decided it was not competent to consider the argument the tribunal was illegally established. The Chamber also ruled on a prosecution motion to protect testifying witnesses and victims. While it modified some of the proposed protective measures, it adopted most of them, including allowing anonymous testimony. Trial is scheduled to begin in May 1996. [2]

Footnotes

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This essay is an edited transcript of a lecture delivered by Colonel Hollis to the staff and faculty, their distinguished guests, and students attending the Operations Law Course at the Air Force Judge Advocate General School, Maxwell Air Force Base, Alabama, on 26 May 1995. The lecture honors the contributions of the late Thomas P. Keenan, Jr. to the Air Force Judge Advocate General's Department, particularly in the areas of international and operations law. Mr. Keenan completed a distinguished career as an Air Force Judge Advocate and as a civilian attorney assigned to the Judge Advocate General's Department. He won the Kuhfeld Award as outstanding young judge advocate and held key positions in the Department before retiring in the grade of colonel. After his retirement from active duty, he served as Special Assistant for NATO Legal Affairs, USAFE, and as Deputy Chief of HQ USAF/JAI.

1. See generally International Criminal Tribunal for the Former Yugoslavia, The Army Lawyer 46 (Nov. 1995).

2. Unclassified Message 101003Z from the American Embassy, The Hague (Aug. 1995).

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39 AFLR 47, Drumming Out Ceremonies

Title of Article

Drumming Out Ceremonies: Historical Relic or Overlooked Tool?

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Text of Article

I. INTRODUCTION

Those who watched the television program Branded during the 1960s will recall the opening sequence of every episode. Actor Chuck Connors, portraying a United States Army officer during the late nineteenth century, stood at attention before an assemblage of troops somewhere in the Indian territories. Military drummers beat an ominous rhythm. Having been court-martialed for desertion, Connors remained motionless while his epaulets and jacket buttons were ceremoniously ripped from his uniform and his sword was broken in two. This "drumming out" ceremony marked the end of his military career.

The American military has in fact used various forms of such a ceremony of ignominy, to coin a phrase. They were generally part of an actual court-martial sentence, adjudged by a court in a given case, typically in time of war.

The purpose of this article is to trace the history of ceremonies of ignominy and to place them within a modern context. The possibility of reviving them in some form within today's military will be evaluated, with an analysis of the legal and practical issues this would entail.

II. HISTORICAL BACKGROUND

A ceremony of ignominy is intended to focus a unit's attention on the disloyal, cowardly, or dishonorable nature of the convicted person's behavior. In wartime, acts of cowardice or treachery sometimes led a court-martial to adjudge a ceremony of ignominy as a portion of the punishment. As with any sentence, a ceremony of ignominy has multiple purposes, including the general deterrence of similar misconduct in others, preservation of good order and discipline in the military, punishment of the individual offender, and rehabilitation of the offender. Colonel Winthrop's Military Law and Precedents

[1] lists examples of what these ceremonies have historically entailed:

Dismissal with ignominy. In time of war, courts-martial have sometimes directed in sentences of dismissal that the same be accompanied by certain minor penalties impressing the dismissal with an ignominious character -- such as taking away or breaking the sword of the officer, or cutting off his shoulder straps or other insignia of rank, publicly in the presence of the command to which he is attached. In a few cases, upon conviction of misbehaviour before the enemy, it has been directed in the sentence that the officer be paraded in front of the command bearing a placard inscribed with the word "coward," and further even that he be drummed out of the service. Such additional penalties are commonly executed through the officer of the day or adjutant, after the reading of the order promulgating the approval of the dismissal, at a parade or on some other occasion of the formal assembling of the command.

The corresponding punishment for enlisted persons was "discharge with ignominy." The description is very similar, except for the addition of the playing of Rogue's March. [2]

Colonel Winthrop provides some details about the famous French case of Captain Alfred Dreyfus, who was convicted of treason by court-martial in 1895 under highly irregular circumstances. [3] The sentence provided that, in the presence of the garrison of Paris, Dreyfus' sword was to be broken and his buttons and military insignia stripped from his uniform. Thus degraded, he was to be marched along the four sides of the square in which the troops were formed. [4]

During the War for American Independence, General George Washington approved a sentence of a lieutenant "to be dismissed with infamy" and ordered him "to be drummed out of camp to-morrow morning, by all the drums and fifes in the Army, never to return." [5] Such ceremonies as Dreyfus' and this lieutenant sometimes included the breaking of the officer's sword over his head. [6]

Public disgrace and humiliation have been used in conjunction with military court sentences at least since ancient Roman times. [7] In some American cases, convicted persons had their heads shaved or half-shaved, were tarred and feathered, or wore placards describing their offenses, to include: "Deserter: Skulked through the war," "Mutineer," "Marauder," "Thief," "Habitual Drunkard," "A chicken-thief," "For selling liquor to recruits," "I forged liquor orders," "I presented a forged order for liquor and got caught at it," "I robbed the mail--I am sent to the penitentiary for 5 years," or "The man who took the bribe from deserters and assisted in their escape." [8]

All these ceremonies were part of a sentence adjudged by a court-martial. It is critically important that such ceremonies not precede trial, so as to deprive an accused of the presumption of innocence or result in unlawful pretrial punishment. The case of United States v. Cruz illustrates this principle. [9] An Army installation commander in Germany formally assembled 1,200 of his soldiers in a post-wide formation. He spoke to them about how some members of the unit had betrayed their trust and should be removed from the unit. He told them that drug abuse and drug trafficking adversely affected the readiness of the troops and would not be tolerated. While he was speaking, military police, Criminal Investigative

Division (CID) agents, and German police entered through the gate and surrounded the parade field. Then, as the commander called the names of about 40 soldiers under suspicion for drug abuse, they were escorted from their places in the ranks to a platform where they reported to the commander. Their unit crests were removed, and the commander reportedly called them "bastards" and "criminals." He failed to return their salutes when they reported to him in front of the formation. They were then marched to an adjacent site, where they were required to spread their hands and feet and lean against a building while military police and CID agents searched them in full view of the soldiers remaining in formation. Following the search, they were publicly handcuffed, marched to a waiting bus, and moved to CID district headquarters for questioning.

The United States Court of Military Appeals ruled this ceremony constituted unlawful pretrial punishment and ordered a new hearing on sentence. The court held that "[c]learly, public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute unlawful pretrial punishment" [10] in violation of Article 13 of the Uniform Code of Military Justice, [11] which states,

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to ensure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

There are other reported cases [12] where pretrial public denunciation and military degradation have been held to constitute unlawful conduct in violation of Article 13. For example, in United States v. Latta, [13] a person was called to the front of a unit formation by the first sergeant, who sarcastically referred to the accused as "my favorite AWOL case." Because this was done prior to trial, the court held it violated Article 13. As stated in Cruz and other cases, public denunciation and degradation have historically been a form of punishment reserved for individuals convicted of a crime; its imposition prior to trial is a violation of Article 13. [14]

III. CEREMONIES OF IGNOMINY TODAY: LEGAL ISSUES

With this background, what problems exist with conducting a ceremony of ignominy today? Some problems are legal, others are prudential. We begin with the legal considerations. It would be inappropriate to drum anyone out of the Air Force as a whole in the immediate aftermath of a court-martial because the convicted person remains on appellate leave for about two years after the sentence is adjudged. During this period, the accused is still a member of the Air Force with all privileges except for pay, and it would be inaccurate and misleading to conduct any ceremony where it appeared that all of the person's ties to the military were severed.

Rather than drumming someone out of the Air Force itself, a more tailored ceremony could be used and still obtain the desired results. In a tailored ceremony, the person would be publicly removed from the unit (such as the wing) and its subordinate units (such as the squadron). In this hypothetical case, there

would be no removal of the U.S. Air Force insignia, only those of the local units. For an enlisted member, assuming a reduction in grade is adjudged as part of the sentence, rank could also be removed from the uniform. To ensure maximum punishment and deterrent effect, the ceremony would need to be held immediately after the trial with the original unit as the audience.

As indicated earlier, in the past, ceremonies of ignominy were part of the sentence adjudged by the court-martial. Thus, in our hypothetical case, the ceremony would not be court-ordered. Nonetheless, the ceremony could be made a substitute for part of a court-martial sentence, by mutual agreement of the convening authority and the accused. The vehicle for such an arrangement would be either a pretrial agreement under Rule for Courts-Martial (R.C.M) 705 or as part of the terms and conditions of a post-trial suspension or remission of the sentence under R.C.M. 1108(c). [15] In exchange for an agreed-upon reduction in the adjudged sentence, the accused could agree in writing to participate in a ceremony of ignominy, carefully described in detail. Under these circumstances, the ceremony still would not itself be adjudged by the court. As a substitute for a portion of a lawfully obtained sentence, however, it may fairly be considered the functional equivalent of a court-imposed sentence.

Not surprisingly, modern military appellate courts have never addressed the propriety of using a pretrial agreement to set the terms and conditions for a ceremony of ignominy. If, however, an accused "freely and voluntarily" entered an agreement, [16] it should be permissible. The Rules for Courts-Martial neither expressly prohibit [17] nor specifically allow [18] a provision for a ceremony of this nature, but it is not the type of provision that typically runs afoul of the courts. Rather, it is more akin to a permissible agreement to "conform the accused's conduct to certain conditions of probation," [19] to waive procedural requirements, [20] to agree with trial counsel on the contents of a stipulation of fact, [21] or to waive the right to raise certain motions at trial. [22]

If the ceremony was after trial, Article 13 is not violated. The ceremony would be a valid substitute for part of the court-martial sentence if a written agreement between the accused and the convening authority explicitly stated that a specific portion of the punishment would be suspended or remitted in exchange for the ceremony.

Finally, there remains the argument that such public humiliation is "cruel and unusual punishment" in violation of the Eighth Amendment to the United States Constitution. [23] The United States Supreme Court has stated that the Eighth Amendment's prohibition of cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," and so has few absolute limitations. [24] The Court has indicated that the Eighth Amendment bars not only a barbaric punishment but also one that is excessive, i.e., a punishment that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." [25]

Such standards are inherently imprecise and subjective, and shift over time. [26] What is shocking, uncivilized, and barbarous to one person or at one point in time may be a dignified, historically well-

established military tradition to another.

Existing Eighth Amendment jurisprudence deals in large part with various methods of execution. Although abrupt changes occur over the years, more "humane" forms of even the death penalty have been held to fall within the permissible ambit of the Eighth Amendment. Although a ceremony of ignominy may indeed be embarrassing and very unpleasant for the person so publicly humiliated, it is far less "cruel" than the taking of life. Most of the other Eighth Amendment cases examine issues relating to various degrees of substandard conditions in prison. Here again, the conditions that have been held violative of the Eighth Amendment appear on their face to be much more "cruel" than a ceremony of ignominy. [27]

Moreover, the fact that this particular form of punishment is uniquely military also argues in its favor. Many centuries of military tradition stand in support of ceremonies of ignominy, demonstrating that, at least until the past few decades, they have not been unusual within the military context. This, coupled with the great deference civilian courts show to the military in the area of internal military matters, makes it unlikely a civilian court would find the ceremony unconstitutional.

Civilian court recognition of the uniqueness of the military system, with concomitant deference to the executive branch in military internal matters, has a long history in American jurisprudence in a wide variety of contexts. Orloff v. Willoughby [28] is an oft-quoted case wherein the United States Supreme Court wrote, "[J]udges are not given the task of running the Army." The Court wrote that the military "constitutes a specialized community governed by a separate discipline from that of the civilian." [29] Similarly, in Parker v. Levy, [30] the Court noted that the "overriding demands of discipline and duty" render the military system "a specialized society separate from civilian society." We find a similar result in United States v. Stanley. [31] The Court rejected an analysis that "would call into question military discipline and decision-making" and "would itself require judicial inquiry into, and hence intrusion upon, military matters . . . raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands." [32] The Court in Brown v. Glines [33] wrote, "[T]he special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale." As noted in Rostker v. Goldberg, [34] "perhaps in no other area [than national defense and military affairs] has the Court accorded Congress greater deference." Finally, the Court in United States v. Shearer, [35] stated, "[T]he situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions . . . and whether the suit might impair essential military discipline." This degree of deference to the military in internal military matters [36] bodes well for the prospect of civilian courts upholding ceremonies of ignominy.

It is difficult to predict with absolute certainty what an appellate court will make of a legal issue, especially when a rare or novel situation is involved. Nonetheless, it is highly probable that if a commander held a ceremony of ignominy today, it would become a matter of appellate review even if an accused had agreed to the ceremony in a pretrial agreement. This is the type of highly unusual, if not unique, scenario almost guaranteed to attract instant attention within legal circles.

IV. PRUDENTIAL CONSIDERATIONS

Having established that ceremonies of ignominy are in all likelihood legal, this article addresses some prudential considerations. A ceremony of ignominy is apt to find its way into a congressional inquiry and draw adverse media attention. It could be portrayed as an anachronism of a less enlightened age when military justice was swift, severe, and devoid of due process. [37] In the hands of unsympathetic journalists, such a ceremony would be a happy hunting ground for all manner of lurid analogies and embarrassing examples from military history.

The high probability of instantaneous, widespread, unfavorable publicity and other high-level outside attention, would require any commander considering a ceremony of ignominy to be fully prepared to live with intense public scrutiny. No commander should make such a decision without informing higher headquarters. Additionally, to handle the fallout as effectively as possible, it should be a team effort, including input from public affairs and the office of the staff judge advocate.

Another concern is whether the unit perceives the ceremony as just. Would the unit view it as "tough but fair" discipline, or as an inappropriate or even comical display? In this regard, it is important that the punishment fit the crime. For people such as deserters, who have demonstrated a definite lack of concern for their military status, stripping them of their military emblems may mean nothing. In fact, they may be glad to be free of the military and all that is associated with it. In such a case, a ceremony of ignominy may actually be a reward for the offender, particularly when coupled with the agreed-upon sentence reduction.

Because the key purposes of a ceremony of ignominy are to deter other military members from acts of misconduct and foster good order and discipline, a heavy burden would fall on the commander and all other participants to ensure the ceremony is solemn and dignified. If it appears to be taken less than seriously, the entire enterprise could backfire and bring ridicule upon both the commander and the military justice system. Presumably, the spectators for a ceremony of ignominy would be largely young, junior enlisted members. Such people, while perhaps rather immature and irreverent, typically have a powerful need to be accepted and respected by their peers and to belong to a desirable peer group. A properly conducted ceremony of ignominy could draw on these needs to make a forceful statement in furtherance of good order and discipline. Conversely, a farcical or inappropriate ceremony could unite the troops against what they perceive to be an unjust or incompetent commander and do much more harm than good to military discipline within the unit.

V. A MODEST PROPOSAL

With these legal and prudential considerations in mind, the following scenario is offered as one possible way to conduct a ceremony of ignominy. There are many possible variations on this scenario which could be tailored to the particular characteristics and circumstances of any given commander, accused, and unit.

Initially, there must be a written legal agreement, drafted and thoroughly reviewed by the office of the staff judge advocate, setting forth the terms and conditions. As discussed previously, this could be in the form of either a pretrial agreement [38] or conditions on suspension of the execution of sentence, post-trial. [39] In this agreement, the convening authority must fully apprise the accused of the details of the proposed ceremony. The agreement must offer suspension or remission of a specific portion of the court-adjudged sentence and expressly make this conditional upon the accused's consent to the proposed ceremony. Defense counsel must have adequate opportunity to review the agreement in advance and advise the accused on what course of action to take. If the accused refuses to agree in writing, no ceremony of ignominy should be held under any circumstances.

Once the convening authority, the accused, and counsel sign the agreement and the court-martial is over, the ceremony may proceed. There could be a military formation, either in an auditorium, on a parade field, or by flagpoles. Drummers from the local military band could provide a somber drumbeat while the convicted person marches in front of the assembled troops, escorted by security police, to stand at attention at a central point, perhaps on a raised platform. The commander could then deliver a short speech, discussing what crimes were committed and what impact this had on the unit and the Air Force. As part of this speech, the commander could read the actual charges and specifications.

With the drums beating faster and the entire formation at attention, the senior enlisted advisor or first sergeant could then remove the insignia of rank, if a reduction in grade was adjudged, and any unit patches. If the convicted person has a unit scarf or other unit-related items, they could be removed as well. Then, the convicted person could again march before all the troops under security police escort and exit to the steady, slow beating of the drums. A security police vehicle might await nearby to remove the offender from the unit immediately, with lights flashing and sirens screaming.

VI. CONCLUSION

The military and American public may have changed too much for a ceremony of ignominy to have a positive effect on military order and discipline today. Perhaps we are too sophisticated, too irreverent, or too jaded for the ceremony to be seen as anything but a joke. But it also may be that our young people, particularly those who have joined the military, are starving for structure, discipline, honor, unit integrity, and tradition. If we are willing to "take the heat" and dare to be different, we may be pleasantly surprised by the enhancements to unit morale, cohesion, and discipline that a properly conducted ceremony of ignominy might provide.

Footnotes

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1. Col. William Winthrop, Military Law and Precedents 408 (2d ed. 1920) (footnote omitted).

2. Id. at 433-34.

3. Id. at 408.

4. See J. Bredin, The Affair: The Case of Alfred Dreyfus 3-8 (J. Mehlman trans., George Braziller Inc., N.Y., 1986).

5. Winthrop, supra note 1.

6. A review of General Washington's orderly book from 18 May to 11 June 1778 reveals no instances of anyone sentenced to drumming out, perhaps because of high desertion rates. Many of the punishments, however, did include public lashings and reprimands. ORDERLY BOOK OF GENERAL GEORGE WASHINGTON, COMMANDER IN CHIEF OF THE AMERICAN ARMIES KEPT AT VALLEY FORGE, 18 May - 11 June 1778 (Tamson, Wolffe, & Co. 1898).

7. See United States v. Ohrt, 28 M.J. 301 *[cited at]* , 305-06 (C.M.A. 1989); C. BrAND, ROMAN MILITARY LAW 104-05 (Univ. of Texas Press, Austin & London, 1968). The Romans called ceremonies of ignominy "ignominia" and a dishonorable discharge "missio ignominiosa." They would sometimes require an offender to stand all day before the general's tent holding a clod in his hands, to stand barefoot in public places, or to take his meals standing. Id.

8. See United States v. Cruz, 25 M.J. 326 *[cited at]* , 330 (C.M.A. 1987), quoting Winthrop, supra note 1.

9. 25 M.J. at 326. A more detailed recitation of these facts can be found in United States v. Cruz, 20 M.J. 873 *[cited at]* , 875-78 (A.C.M.R. 1985).

10. 25 M.J. at 330.

11. 10 U.S.C.A. Sec. 813 (West 1983 & Supp. 1995). See also Manual for Courts-Martial [hereinafter MCM], app. 2 (1995).

12. E.g., United States v. Villamil-Perez, 32 M.J. 341 *[cited at]* (C.M.A. 1991); United States v. Fogarty, 35 M.J. 885 *[cited at]* (A.C.M.R. 1992); United States v. Hatchell, 33 M.J. 839 *[cited at]* (A. C.M.R. 1991); United States v. Fitzsimmons, 33 M.J. 710 *[cited at]* (A.C.M.R. 1991). But see United States v. Van Metre, 29 M.J. 765 *[cited at]* , 766-67 (A.C.M.R. 1989) (private, nonceremonious pretrial removal of an accused's "honor guard" tab and United States Army, Europe uniform patch did not constitute a violation of Article 13).

13. 34 M.J. 596 *[cited at]* (A.C.M.R. 1992).

14. See United States v. Walker, 27 M.J. 878 *[cited at]* , 880 (A.C.M.R. 1989).

15. MCM, supra note 11, ch. II.

16. R.C.M. 705(c)(1)(A).

17. R.C.M. 705(c)(1)(B) prohibits terms in pretrial agreements that deprive the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, and the complete and effective exercise of post-trial and appellate rights.

18. R.C.M. 705(c)(2)(A)-(E) allows for pretrial agreements to include a promise from the accused: to enter into a stipulation of fact in support of a plea of guilty; to testify as a witness in another person's trial; to provide restitution; to conform his conduct to certain conditions of probation before the convening authority's action as well as during any period of suspension of the sentence; and to waive procedural requirements such as the pretrial investigation, the right to trial by members or by judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

19. R.C.M. 705(c)(2)(D).

20. R.C.M. 705(c)(2)(E). The list of procedural requirements that may be waived in a pretrial agreement is not exhaustive. MCM, supra note 12, at app. 21 (analysis).

21. United States v. Neal, 3 M.J. 593 *[cited at]* , 594 (N.C.M.R. 1977).

22. United States v. Jones, 23 M.J. 305 *[cited at]* , 307 n. 1 (C.M.A. 1987). See also United States v. Gibson, 29 M.J. 379 *[cited at]* , 382 (C.M.A. 1990).

23. U.S. Const. amend VIII.

24. See Penry v. Lynaugh, 492 U.S. 302 *[cited at]* , 330-31 (1989); Rhodes v. Chapman, 452 U.S. 337 *[cited at]* , 346 (1981).

25. Coker v. Georgia, 433 U.S. 584 *[cited at]* (1977).

26. Even among fairly recent cases, the rhetoric appears to set an extremely high standard for violations of the "cruel and unusual" provision. For example, various federal courts have held that the punishment must be "barbarous," "shocking to the conscience of a reasonable man," "foul, inhuman," or must

"transgress today's concepts of dignity, civilized standards, humanity and decency." See, e.g., Mayberry v. Robinson, 427 F.2d 297 (M.D. Pa. 1977); Morris v. Travisono, 499 F. Supp. 149 (D.R.I. 1980); Willoughby v. Phend, 301 F. Supp. 644 (N.D. Ind. 1969). Additionally, some courts ask whether the punishment constitutes some rational means to reach a permissible end, or whether it is arbitrary because it is greatly disproportionate to the offense for which it is imposed and there is a less severe alternative that would achieve the same legitimate purposes. See, e.g., McCray v. Burrell, 516 F.2d 357 (4th Cir. 1974); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

27. For example, being confined in an cell with broken windows and indoor temperatures not much higher than the outside temperature of 40 or 50 degrees below zero, Del Raine v. Williford, 32 F.3d 1024 (7th Cir. 1994); unjustified beatings by prison guards, McLaurin v. Prater, 30 F.3d 982 (8th Cir. 1994); deliberate indifference of prison officials to prisoners' medical needs, Brown v. Nix, 33 F.3d 951 (8th Cir. 1994); and as punishment for attacking a guard, stripping and hog-tying a prisoner on a bare bed in a dark room for eight hours, during which he was deprived of bedding, toothpaste and toothbrush, and use of toilet paper, Littlewind v. Rayl, 839 F. Supp. 1369 (D.N.D. 1993).

28. 345 U.S. 83 *[cited at]* (1953).

29. Id.at 93-94.

30. 417 U.S. 733 *[cited at]* , 743-44 (1974).

31. 483 U.S. 669 *[cited at]* (1987).

32. Id. at 683.

33. 444 U.S. 348 *[cited at]* , 358 (1980).

34. 453 U.S. 57 *[cited at]* , 64 (1981).

35. 473 U.S. 52 *[cited at]* , 57 (1985).

36. There are many other such examples, some with truly egregious facts, where civilian courts refrained from intruding into military affairs. See, e.g., Solorio v. United States, 483 U.S. 435 *[cited at]* (1987); Goldman v. Weinberger, 475 U.S. 503 *[cited at]* (1986); Greer v. Spock, 424 U.S. 828 *[cited at]* (1976); Schlesinger v. Councilman, 420 U.S. 739 *[cited at]* (1975); Gilligan v. Morgan, 413 U.S. 1 *[cited at]* (1973); and Burns v. Wilson, 346 U.S. 137 *[cited at]* (1953).

37. Such viewpoints are not necessarily confined to the past. For example, in Parisi v. Davidson, 405 U. S. 34 *[cited at]* , 53 n.4 (1972) (Douglas, J., concurring), Justice Douglas stated, "Despite these

advances, however, the military justice system's disregard of the constitutional rights of servicemen is pervasive." It was in this same opinion that Justice Douglas cited a work entitled Military Justice is to Justice as Military Music is to Music.

38. R.C.M. 705.

39. R.C.M. 1108(c).

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39 AFLR 57, Victim and Witness Assistance

Title of Article

The Victim and Witness Assistance Program

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Text of Article

I. INTRODUCTION

Providing assistance to victims and witnesses throughout the military justice system is not a radical innovation because Air Force investigators and prosecutors have generally kept victims and witnesses informed as to the status of cases, if only to ensure a more cooperative witness at trial. Moreover, family advocacy, mental health, family services, and chaplains traditionally provided a wide array of services to victims. Nonetheless, these efforts were neither formalized nor coordinated, and victims sometimes were unaware of the services available to them. Additionally, after completion of a court-martial, a victim or witness frequently did not know how to find out the results of trial, changes in the verdict or sentence, [1] or changes in the accused's status once sentenced to confinement. [2] This situation was as prevalent in the civilian criminal justice system as it was in the military. Victims, however, began organizing in the second half of the 1900s to obtain their rightful place in the system. This article briefly discusses the evolution of victim rights and examines recent legislation and guidance affecting the way business is done in the military justice system.

II. A BRIEF HISTORY OF VICTIM RIGHTS

Although recent attention to victim rights within the military and civilian criminal justice systems seems to be a fairly new development, the concept of victim rights can be traced back many centuries to early tribal cultures. The basis of early tribal law was revenge on and compensation by the offender to the victim. An offense against a tribal member was considered an offense against the whole tribe. Blood feuds and direct compensation between tribes and families were common means of administering punishment. In effect, victim and tribe took the law into their own hands, acting as victim, lawmaker, prosecutor, and judge. The Code of Hammurabi, circa 2500 B.C., [3] is arguably the first record in which this concept was formalized in the harsh form of taking an "eye for an eye and a tooth for a tooth." The purpose was to hold offenders accountable for their actions and to deter future violations. [4]

As societies developed into formalized governments and states, the exchange of currency began to replace the barter system of exchanging goods and services. Along with this new way of doing business, payment of currency also began to replace the old system of direct revenge or provision of goods and services as methods of victim compensation. In medieval England, the practice of providing direct compensation to victims of crimes was replaced by a new system in which crimes became offenses against the state. In turn, the state received all fines and penalties rather than the victims. From this point on, victim rights took a back seat until recent times. [5]

Victim rights issues in the United States surfaced in the 1960s and 1970s when crime soared and the alienation and dehumanization of crime victims became a potent political issue. The women's rights and civil rights movements helped to advance efforts to personalize victims and involve them in the criminal justice system. [6] The victim rights movement started at the community level, then moved to the state and federal levels through the court system. Today, all 50 states, the District of Columbia, most United States Territories, and the federal system have victim and witness protection laws. [7]

III. LEGISLATIVE AND REGULATORY BACKGROUND

The Victim and Witness Protection Act of 1982 (VWPA), [8] the Victims of Crime Act of 1984 (VOCA), [9] and the Victim's Rights and Restitution Act of 1990 (VRRA) [10] require federal agencies administering the criminal justice system to enhance and protect the role of crime victims and witnesses in the criminal justice process. Federal agencies are also required to do all that is possible, within available resources, to assist victims and witnesses without infringing on the Constitutional rights of an accused.

In 1994, victim rights laws were implemented throughout the Department of Defense (DoD) by DoD Directive 1030.1 [11] and DoD Instruction 1030.2. [12] This directive and instruction replaced earlier DoD guidance to the armed services on providing assistance to victims and witnesses. [13] In addition to stating the responsibilities of the military services at all levels, DoD Instruction 1030.2 requires all military services to report to the DoD the number of victims and witnesses who were advised of their rights and roles in the military justice system. DoD then forwards, on an annual basis, a consolidated report to the Department of Justice (DoJ). The DoD instruction also establishes the DoD Victim/Witness Assistance Council and requires that a similar council be established on every major military installation. [14]

The Air Force implemented its current victim and witness assistance program (VWAP) in November 1993 with the approval of the Air Force Chief of Staff. It is incorporated into Air Force Instruction (AFI) 51-201 [15] and replaces the earlier program contained in Air Force Regulation (AFR) 111-1. [16] It applies to victims of all offenses under the Uniform Code of Military Justice (UCMJ), [17] including all types of sexual offenses. It also applies to witnesses before UCMJ proceedings and to victims in other jurisdictions where the criminal investigation is conducted primarily by Air Force law enforcement agencies. [18] Under this program, The Judge Advocate General (TJAG) is the service component

responsible official (CRO). [19] The installation commander is the local responsible official (LRO), although this can be delegated to the installation staff judge advocate (SJA). Any such delegation must be in writing. [20] The responsibilities at the installation level are discussed in greater detail below.

Both DoD Instruction 1030.2 [21] and AFI 51-201 [22] contain the "Victims' Bill of Rights," which gives all victims the right: To be treated with fairness and respect for their dignity and privacy.

To be reasonably protected from the accused offender.

To be notified of court proceedings.

To be present at all public court proceedings related to the offense, unless the court determines their testimony would be materially affected if they, as victims, heard other testimony at trial.

To confer with the attorney for the Government in the case. [23] To receive available restitution.

To be informed about the conviction, sentencing, imprisonment, parole eligibility, and release of the offender.

Additionally, during trial proceedings, both instructions direct trial counsel or a designee to provide additional assistance and services to victims and witnesses. Some examples of these services are: providing, if possible, waiting areas separate from the accused or other defense witnesses to avoid embarrassment, coercion, or similar emotional distress; providing appropriate assistance in obtaining available services, such as transportation, parking, child care, lodging, and courtroom translators or interpreters; safeguarding any personal property held as evidence, and returning it as soon as possible; and, if requested, providing assistance in working with employers and creditors relating to hardships resulting from victimization or cooperation in the investigation and/or prosecution. [24]

To help installations explain their rights and roles to victims and witnesses, the DoJ funded the printing of several forms for the DoD. Three of these forms - DD Form 2701, Initial Information for Victims and Witnesses of Crime, [25] DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime, [26] and DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime [27] - are really pamphlets or handouts which provide a quick overview of the military justice system. These three forms also list local points of contact such as the criminal investigator, legal office (prosecutor), victim/ witness liaison, and state office for crime victim compensation. DD Form 2701 specifically informs victims of the "Victims' Bill of Rights" [28] and is intended to be distributed by the agency which first makes contact with a victim or witness. [29] While this will usually be a law enforcement agency, it might also be the base chapel, family support center, medical group, or the base legal office. DD Forms 2702 and 2703 are intended to be distributed by the trial counsel or a designee during the prosecutorial process and provide victims and witnesses with numerous details surrounding pretrial, trial, and post-trial procedures. [30]

DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status, [31] must be completed by trial counsel in all cases where confinement is adjudged. This form serves to document the fact that victims and witnesses were notified of their rights to receive information about the status of the inmate, including: length of sentence; anticipated earliest release date; likely place of confinement; the possibility of transfer; the right to receive notification of a new place of confinement; the possibility of parole or clemency and an explanation of these terms; the right to notification of the inmate's parole hearings, release from confinement, escape, or death. Also, victims and witnesses must be informed that, to receive this information, they must provide a current address and telephone number and must update this information in the event they move or their telephone number changes. [32] The DD Form 2704 is not releasable under the Freedom of Information Act (FOIA) [33] and must not be attached to any portion of any record to which the convicted member may have access. This is to ensure the safety of victims and witnesses as well as to keep their decisions with respect to notification confidential. [34] The completed DD Form 2704 must be sent to the confinement facility as well as to the military service's central repository. [35]

Victim/witness assistance coordinators at confinement facilities use DD Form 2705, Victim/Witness Notification of Inmate Status, [36] to inform victims and witnesses of any changes in an inmate's status. Finally, the CRO (TJAG) uses DD Form 2706, Annual Report of Victim and Witness Assistance, [37] to provide information to the DoD concerning the services provided victims and witnesses. This report tracks these services by specifically listing the number of DD Forms 2701-2705 used throughout the calendar year.

IV. INSTALLATION LEVEL PROGRAM

The most important facet of the VWAP to emphasize at all levels of command is that it is not just a "JAG program" - it is a program for "everyone." Both the DoD and Air Force instructions stress the need for a multidisciplinary/interdisciplinary approach in this area, [38] reflecting the Congressional requirement that every major military installation establish a Victim and Witness Assistance Council. [39] While various individual Air Force agencies retain much of the responsibility for the VWAP, the program is a coordinated effort among all agencies providing services to individuals. [40] The LRO is responsible for developing and implementing a program at each installation as well as for ensuring all agencies receive the required training. The installation staff judge advocate, chief of security police, AFOSI detachment commander, medical facility commander, family support center director, installation chaplain, commanders, and first sergeants are all responsible for developing local training programs to ensure compliance with the VWAP. While each individual agency is responsible for training personnel about the VWAP, the SJA is specifically tasked for training commanders and first sergeants. However, because the installation commander will, in almost all cases, delegate LRO responsibilities to the SJA, the SJA will be responsible for overseeing all aspects of the VWAP, including all training. [41]

Air Force Instruction (AFI) 51-201 [42] and DoD Instruction 1030.2 [43] formalize what many installations have done for years. A major difference made by the instructions is that the informal, ad hoc working relationships between the various base agencies are now formalized through the

installation's victim/witness assistance council. [44] The membership of the council ensures agencies which can and do provide important services to victims and witnesses are part of a formal, coordinated process. For example, many victims may be more comfortable talking to a chaplain than to an investigator, yet a chaplain may not realize an individual is the victim of a crime or to which agency a victim of a crime should be referred. In the past, law enforcement and legal office personnel may have recognized individuals as crime victims, but may not have properly referred the victims to the proper agencies for religious, emotional, or financial counseling, and assistance. This lack of interdisciplinary coordination and training led to victims and witnesses failing to receive the help and support they should have, which may have caused them to recant their testimony or refuse to cooperate in subsequent proceedings. Other witnesses may have decided it was costing them too much time and money and chose "not to get involved." With all the "helping" agencies sitting on the installation council alongside law enforcement agencies and the legal office, there will be a greater awareness of the quantity and types of offenses affecting the installation, the needs of the victims and witnesses, and the resources available-on and off the installation- to meet those needs.

Just as importantly, the council allows for greater interaction with local civilian agencies. Many services which the installation may not be able to provide, such as foster care and shelters, [45] may be available off base in the local civilian community. This interaction should lead to better coordination between military and civilian authorities, allowing for maximization of services without unnecessary duplication of effort.

V. AFTERCARE

Perhaps the most significant change in the system is that concern for the victims and witnesses does not end when the trial does. If the perpetrator is convicted and sentenced to confinement, the victims and witnesses can choose whether they want to continue to participate in the program. If they choose to participate, the victims and witnesses have the right to be notified of any changes in the prisoner's status. They have the right to submit matters to the Air Force Clemency and Review Board, including written statements, voice tapes, or video tapes. [46] These inputs provide a needed balance for the parole board members, who can then weigh the progress the prisoner has made toward rehabilitation against the impact the offense had-and may continue to have-on the victim.

Another aspect of "aftercare" for victims and witnesses is advising them of the various methods of compensation available to them for the losses they suffered and expenses they incurred as a result of both the crime and their participation in the justice system. These methods include CHAMPUS, private insurance, possible claims under Article 139 of the UCMJ, [47] or civil action against the offender(s).

Another resource available in the continental United States (CONUS) is each individual state's victim compensation program. [48] These programs can pay for the otherwise unreimbursed expenses victims of violent crimes incur as a direct result of their personal injuries. Some examples of the type of expenses these programs cover are medical expenses, mental health counseling, lost wages, funeral expenses, and loss of support for a victim's dependents. As a general rule, property loss is not covered,

with the exception of medical devices such as glasses and hearing aids. Compensation is only awarded when other sources of payment-such as medical or auto insurance, other public benefits, or restitution-are not readily available to the victim. [49] For example, if a family member is referred to a civilian health care provider, the state crime victim compensation fund may cover the 20 percent of the bill not covered by CHAMPUS. While some states use general appropriations to fund their programs, many states use no tax dollars. The money comes instead from sources such as fines assessed against convicted criminals or surcharges on traffic violations. [50] Additionally, the federal Crimes Victims Fund, financed entirely from federal criminal fines and fees, including those collected through an installation's Magistrate Court program, provides substantial grants to each state, with the exception of Nevada. [51]

VI. OTHER FORMS OF COMPENSATION FOR MILITARY DEPENDENTS

Two additional forms of compensation may be available to victims who are family members of an offender who is a military member-the "Victims of Abuse" provisions of the Uniformed Services Former Spouses' Protection Act (USFSPA) [52] or the Transitional Compensation for Abused Dependents program. [53]

Under the Victims of Abuse provisions of USFSPA, a spouse or former spouse [54] of a military member or former military member [55] may receive a portion of a member's retirement pay even if the member is separated from the military and loses the right to receive retirement pay. Several conditions, however, must be met before a spouse receives these benefits. First, the member must be retirement eligible. [56] Second, the member must be discharged as a result of either a court-martial or administrative discharge action. [57] Third, the basis of the action leading to discharge must be abuse of a spouse or dependent child. [58] Fourth, the spouse must obtain a court order [59] awarding a portion of the member's retirement pay as a division of property of the marriage. [60] And finally, the spouse and member must have been married for 10 years or more during which the member performed 10 years of active military service. [61]

Spouses who qualify under the Victims of Abuse provisions of USFSPA may receive up to 50 percent of the retirement pay the member would have been entitled to receive had the member not lost the entitlement as the result of the discharge. [62] They are also entitled to receive medical and dental care, to use the commissary and base exchange, and to receive any other benefit the spouse of a retired member would be entitled to receive. [63] Additionally, dependent children of the member who lived in the member's residence at the time of the misconduct which resulted in the discharge are also entitled to receive medical and dental care, to use the commissary and base exchange, and to receive any other benefit normally provided to dependents where the member is entitled to receive retirement pay. [64]

In cases where victims are not eligible to receive benefits under the Victims of Abuse provisions of USFSPA, [65] they may, nevertheless, be eligible to receive benefits under the Transitional Compensation for Abused Dependents program. [66] As with the Victims of Abuse provisions of USFSPA, there are several conditions that must be met before a victim will be eligible to receive

benefits under this program. First, the member must have served more than 30 days of active duty. [67] Second, the member must be separated from active duty as the result of a court-martial sentence or administrative discharge action. [68] And third, the underlying conduct of the court-martial or administrative discharge must be an offense involving dependent abuse. [69]

Victims who are eligible for the Transitional Compensation for Abused Dependents program can receive monthly payments for a period not to exceed 36 months. If the unserved portion of the member's obligated active duty service is less than 36 months, payments will be paid for the remainder of the unserved portion or 12 months, whichever is greater. [70] Payments may be paid to the spouse and/or a dependent child or children of the member and will be based on the dependency and indemnity compensation rates set forth in Title 38 U.S.C. [71] Spouses and dependent children must also recertify their eligibility on an annual basis in order to continue receiving benefits. [72]

Payments under the Transitional Compensation for Abused Dependents program will cease in the event a conviction is reversed, if the punishment is remitted, set aside, or mitigated to a lesser punishment that does not include a punitive discharge, or, in cases involving an administrative discharge, if the administrative separation is disapproved. [73] Payments will also be terminated if the spouse remarries or if the spouse later resides in the same household with the member. In such a case, dependent children who qualify for payments under the program may continue to receive payments provided they do not live in the same household with the spouse. [74] If payment is stopped for any of these reasons, recoupment action will not be taken on amounts previously paid unless the spouse or child received payments as a result of some type of misrepresentation or fraud. [75] Additionally, if payments are terminated due to remarriage or because the member resides in the same household as the spouse or dependents to whom payments are made, payments will not be resumed in the event the spouse is later divorced or the member discontinues living in the same household. [76]

Spouses or children who are receiving payments under the Transitional Compensation for Abused Dependents program are entitled to use commissary and exchange stores throughout the period in which they receive payments. [77] They may also be eligible, subject to availability, to receive limited medical and dental care for a period of up to one year following the member's discharge from active duty. The medical or dental care, however, must be for the treatment of an adverse health condition, injury, or illness resulting from the abuse. [78]

The Victims of Abuse provisions of USFSPA and the Transitional Compensation for Abused Dependents program are mutually exclusive. [79] Therefore, victims who are eligible to receive benefits under both programs must elect to participate in one or the other. Since the Transitional Compensation for Abused Dependents program is limited in the amount of compensation as well as its duration when compared to the Victims of Abuse provisions of USFSPA, [80] spouses who have the option of choosing should be advised to select the USFSPA.

VII. CONCLUSION

The purpose of the Air Force VWAP is not to dilute or take away the accused's Constitutional rights and due process protections. Nor is it to give victims control of the justice system by allowing them to determine how a commander or convening authority should proceed in a given case. Rather, the purpose of the program is to restore order and balance to the system. It allows those making the decisions on the disposition of cases to consider the full impact - physical, emotional, and financial - a crime has had on the victim, and weigh that impact against any matters submitted by the offender. Most importantly, it allows victims to have a voice, have that voice be heard, thereby ensuring they will not be forgotten or lost in the shuffle of the military justice system.

APPENDIX: CRIME VICTIM COMPENSATION PROGRAMS [81]

ALABAMA* (334) 242-4007

ALASKA (800) 764-3040

ARIZONA (602) 542-1928

ARKANSAS (501) 682-1323

CALIFORNIA* (800) 777-9229

COLORADO* (303) 239-4442

CONNECTICUT (203) 529-3089

DELAWARE (302) 995-8383

DISTRICT OF COLUMBIA (202) 576-7706

FLORIDA* (904) 488-0848

GEORGIA (404) 559-4949

GUAM (671) 475-3406

HAWAII* (808) 587-1143

IDAHO* (208) 334-6000

ILLINOIS* (312) 814-2581

INDIANA (317) 232-7103

IOWA* (800) 373-5044

KANSAS (913) 296-2359

KENTUCKY (502) 564-2290

LOUISIANA* (504) 925-4437

MAINE (207) 624-7882

MARYLAND (410) 764-4214

MASSACHUSETTS (617) 727-2200

MICHIGAN (517) 373-7373

MINNESOTA (800) 247-0390

MISSISSIPPI (601) 359-6766

MISSOURI* (314) 526-6006

MONTANA (406) 444-3653

NEBRASKA (402) 471-2828

NEVADA (702) 486-7259

NEW HAMPSHIRE* (603) 271-1284

NEW JERSEY* (201) 648-2107

NEW MEXICO (505) 841-9432

NEW YORK CITY: (212) 417-5160 ALBANY: (518) 457-8727 BUFFALO: (716) 847-7992

NORTH CAROLINA (919) 733-7974

NORTH DAKOTA* (701) 328-6195

OHIO* (800) 824-8263

OKLAHOMA (405) 557-6704

OREGON (503) 378-5348

PENNSYLVANIA (717) 783-5153

RHODE ISLAND (401) 277-2500 (401) 277-2397

SOUTH CAROLINA (803) 737-8140

SOUTH DAKOTA* (605) 773-3478

TENNESSEE (615) 741-2734

TEXAS (512) 462-6400

UTAH* (801) 533-4000

VERMONT* (802) 828-3374

VIRGIN ISLANDS (809) 774-0930 ext. 4104

VIRGINIA (804) 367-8686

WASHINGTON (206) 956-5355

WEST VIRGINIA (304) 347-4850

WISCONSIN* (800) 446-6564

WYOMING* (307) 635-4050

* If a resident of one of these states is victimized in a foreign country, the resident is eligible to receive benefits from the state program. Victims, however, are required to first use any available coverage from other sources such as foreign victim assistance compensation programs, private insurance, or military insurance programs. [82]

Footnotes

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1. This would include such changes as set asides of findings or punishment by an appellate court, as well as action by a convening authority to disapprove a finding or sentence or to grant clemency.

2. This would include such changes as transfer to another confinement facility, parole hearings, death, and release.

3. See generally Code of Hammurabi (L. W. King trans. 1915), available through INTERNET at www.pitt.edu/~novosel/hammurab.html.

4. California Youth Authority, Impact of Crime on Victims, Student's Manual 4 (July 1992).

5. Id.

6. Morton Bard, Ph.D., Professor Emeritus of Psychology at the Graduate School of the City University of New York, Address at Victim Assistance in the Federal System Conference (Sept. 12, 1993).

7. National Association of Crime Victim Compensation Boards, Crime Victim Compensation Program Directory (1995).

8. 18 U.S.C.A. Secs. 1501 note, 1503, 1505, 1510, 1512 note, 1512-15, 3146, 3579, 3580 (West 1984 & Supp. 1994); 18 App. Rule 32 (1988).

9. 42 U.S.C.A. Secs. 10601-03 (West 1995).

10. Id. at Secs. 10606-07.

11. Dept. of Defense Dir. 1030.1, Victim and Witness Assistance (Nov. 1994) [hereinafter DoDD 1030.1].

12. Dept. of Defense Inst. 1030.2, Victim and Witness Assistance Procedures (Dec. 1994) [hereinafter DoDI 1030.2].

13. Dept. of Defense Dir. 1030.1, Victim and Witness Assistance (Aug. 1984).

14. DoDI 1030.2, supra note 12, sec. E.

15. Air Force Inst. 51-201, Administration of Military Justice, ch. 7 (July 1994) [hereinafter AFI 51-201]. It is important to note that AFI 51-201 predates DoDI 1030.2, supra note 12, and DoDD. 1030.1, supra note 11, and is currently being revised to incorporate the reporting requirements of DoDI 1030.2, including enclosures 3 - 8 (DD Forms 2701 - 2706) of that instruction. Major H. Rick Russell, AFLSA/JAJM, Talking Paper on Air Force Victim and Witness Assistance Program (7 Sept. 1995).

16. Air Force Reg. 111-1, Military Justice Guide, ch. 11 (Sept. 1988).

17. 10 U.S.C.A. Secs. 801-940 (West 1983 & Supp. 1995). See also Manual for Courts-Martial, app. 2 (1995).

18. AFI 51-201, supra note 15, para. 7.1.

19. DoDD 1030.1, supra note 11, encl. 1. AFI 51-201, supra note 15, para. 7.6 designates The Air Force Judge Advocate General as the Responsible Official (RO).

20. AFI 51-201, supra note 15, para. 7.7. As a practical matter, the installation commander will, in virtually all cases, delegate this responsibility to the SJA.

21. DoDI 1030.2, supra, note 12, sec. D.

22. AFI 51-201, supra note 15, sec. C.

23. AFI 51-201, para. 7.10.10., supra note 15, indicates that, under ordinary circumstances, victims should be consulted to obtain their views on: decisions not to prefer charges; dismissal of charges; pretrial restraint or confinement; pretrial agreement negotiations and terms; plea negotiations; discharge in lieu of trial by court-martial; and scheduling of judicial proceedings where the victim is required to attend. Although victims' views should be considered when making these decisions, responsible officials involved in the military justice process have the final say in taking whatever action is deemed necessary in the interest of good order and discipline.

24. DoDI 1030.2, supra, note 12, sec. F3; AFI 51-201, supra note 15, para. 7.10.7.

25. Id. at encl. 3.

26. Id. at encl. 4.

27. Id. at encl. 5.

28. See supra notes 23 and 24 and accompanying text.

29. DoDI 1030.2, supra, note 12, at sec. F, para. 1.

30. Id. at sec. F, para. 3.

31. Id. at encl. 6.

32. Id.

33. 5 U.S.C. A. Sec. 552 (West 1977).

34. DoDI 1030.2, supra note 12, sec. F, para. 4.

35. Id. See also at encl. 2. Enclosure 2 defines the central repository as, "A headquarters office, designated by the Secretary for each Military Department to serve as a clearing house of information on confinee status and to collect and report data on the delivery of victim and witness assistance including notification of confinee status changes." The central repository for the Air Force is HQ AFSPA/SPC, 8601 F Ave SE, Kirtland AFB NM 87117-5516. Send DD Forms 2704 to that address, Attn: Victim/ Witness Coordinator.

36. Id. at encl. 7.

37. Id. at encl. 8.

38. Id. at sec. E. See also AFI 51-201 supra note 15, para. 7.1.1.

39. DoDI 1030.2, supra note 12, sec. E.

40. AFI 51-201, supra note 15, para. 7.1.1.

41. Id. at sec. H.

42. Id.

43. DoDI 1030.2, supra note 12.

44. Id at sec. E.

45. OpJAGAF 1994/7 (24 Jan. 1994) addressed the appropriateness of using Operations and Maintenance (O&M) funds to pay for lodging and per diem in order to protect the wife of an escaped accused who had previously threatened the wife. The opinion indicated it was a proper expenditure of O&M funds and based the rationale, in part, on installation commanders' broad powers to "[protect] personnel and property under their jurisdictions and for maintaining order on installations, to ensure the uninterrupted and successful accomplishment of the Air Force mission . (AFR 355-11, paragraph 1(a))."

46. DoDI 1030.2, supra note 12, encl. 5; AFI 51-201, supra note 15, para. 7.10.

47. 10 U.S.C.A. Secs. 801-946.

48. Crime Victim Compensation Program Directory, supra note 7. As of this writing, all 50 states, the District of Columbia, Guam, and the Virgin Islands have victim compensation programs. The appendix to this article also indicates a number of states that will consider claims from state residents who become victims of crimes outside the United States. Some foreign countries also have victim assistance programs that may provide certain services and assistance to United States citizens who are victims of crimes in a particular country. Judge advocates, however, should be aware that the availability of these programs is generally limited and may often involve special access problems due to such things as language difficulties and societal customs.

49. Id.

50. Crime Victim Compensation Program Directory, supra note 7.

51. Id. This amount is up to 40 percent of the amount the state paid in compensation the preceding fiscal year. For additional information on this resource, contact the National Association of Crime Victim Compensation Boards at (703) 370-2996 or the program in your state. A list of phone numbers for the state programs can be found in the appendix to this article.

52. 10 U.S.C.A. Sec. 1408(h). This section, entitled "Benefits for Dependents Who Are Victims of Abuse by Members Losing Right to Retired Pay," is often referred to as the "Victims of Abuse" provision of the USFSPA.

53. Id. at Sec. 1059. See also DoDI 1342.24, Transitional Compensation for Abused Dependents (May 23, 1995). AFI 36-3024, when published, will contain guidance for the Air Force. Pending publication of that instruction, the Defense Finance and Accounting Service is making payments in accordance with DoDI 1342.24. AFLSA/JAJM Letter to all Staff Judge Advocates, Transitional Compensation Payments (17 Oct. 1995).

54. For purposes of this article, the term "spouse" includes "former spouse" where appropriate.

55. For purposes of this article, the term "military member" includes "former military member" where appropriate.

56. 10 U.S.C.A. Sec. 1408(h).

57. Id. This section, as amended by the FY 93 DoD Authorization Act, Pub. L. No. 102-484 Sec. 653(a)(2), authorizes a spouse or former spouse of a service member to be eligible to receive retirement benefits at the point where the service member becomes ineligible to receive the benefits. As a result of this amendment, the effective date for computing retired pay (and thus the spouse or former spouse's share) could not occur until the member's actual separation. In cases involving punitive discharges, this would be after the appeals process had run its course. Congress once again amended Sec. 1408(h) in the FY 94 DoD Authorization Act, Pub. L. No. 103-160 Sec. 555(a)(2), which authorizes a spouse or former spouse to become eligible for payments upon a convening authority's approval of the sentence under Art. 60, UCMJ, 10 U.S.C.A. Sec. 860(c). No similar provision exists for cases involving administrative discharges. Therefore, the spouse or former spouse of a retirement eligible enlisted member who is administratively discharged will not be eligible to begin receiving benefits until the "lengthy service" review of the discharge proceedings, required by AFI 36-3208, Administrative Separation of Airmen (14 Oct. 1994) is completed. Under para. 6.35 of that instruction, Secretary of the Air Force review is required for all lengthy service discharges cases. Similar review is required for cases involving officers who are administratively separated.

58. Under 10 U.S.C.A. Sec. 1408(h), a spouse or former spouse must be the victim of the abuse and married to the member or former member at the time of the abuse, or must be the natural or adoptive parent of a dependent child of the member who was the victim of the abuse.

59. 10 U.S.C.A. Sec. 1408(a), defines "court order" in part as a final decree of divorce, dissolution, annulment, or legal separation issued by a court [of competent jurisdiction], or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which . . . is issued in accordance with the laws of the jurisdiction of that court.

60. Id. at Sec. 1408(c) and (e).

61. Id. at Sec. 1408(d). This is often referred to as the "10/10 rule" that must be met under USFSPA before direct payments of a portion of a former member's retirement pay may be made to an eligible spouse or former spouse. In a cases not involving the "Victims of Abuse" provisions of USFSPA (10 U.S.C.A. Sec. 1408(h)), a court could award a portion of a member's retirement pay to a spouse even though the "10/10" rule is not met. While direct payments to a spouse would not be authorized, the spouse could attempt to collect payments through the courts or other means. On the other hand, in cases involving the "Victims of Abuse" provisions of USFSPA, if the "10/10" rule is not met, the spouse is not eligible to receive any benefits.

62. Id. at Sec. 1408(c) and (e).

63. Id. at Sec. 1408(h).

64. Id.

65. For example, where the member is not retirement eligible, the "10/10" rule is not met, or there is no court order awarding a property division share of a member's retirement pay.

66. 10 U.S.C. Sec. 1059 and DoDI 1342.24, supra note 53.

67. DoDI 1342.24, supra note 53, para. B.2.

68. Id. See also 10 U.S.C.A. Sec. 1059. Subsections (b)(1)(B), (e)(1)(A) and (h)(1) of 10 U.S.C.A. Sec. 1059 appear to authorize transitional compensation benefits in cases where the member receives a sentence in a court-martial sentence that includes forfeiture of all pay and allowances. However, 10 U.S. C.A. Sec. 1059(d) only directs payments to be made in cases involving separation from active duty. Despite what may have been the intent of the law, because it did not specifically authorize payments in cases involving total forfeitures, DoDI 1342.24, paras. B.2. and F.2.a.(1) do not include total forfeitures as a basis for receiving compensation. As a practical matter, however, this is not really an issue as a member will rarely receive total forfeitures in a court-martial without also receiving a punitive discharge. In cases involving punitive discharges, para. F.2. of DoD Instruction 1342.24 authorizes the victim to begin receiving payments upon the convening authority's approval of the sentence, similar to the provisions of the Victims of Abuse section of USFSPA , supra note 57). There is, however, an anomalous rule with respect to administrative discharges set forth in this paragraph-the victim may begin receiving payments at the point where the member's commander initiates the administrative separation action, rather than having to wait until the discharge is approved.

69. DoDI 1342.24, supra note 53., para. C.1. Crimes that qualify as dependent abuse offenses are ones such as sexual assault, rape, sodomy, assault, battery, murder, and manslaughter. The dependent abuse offense must involve a then-current spouse or dependent child of the member who was residing with the member at the time of the offense.

70. Id. at para. F.2.a. For enlisted personnel "obligated active duty service" is the time remaining on their terms of enlistment. For officers, unless they have a date of separation, "obligated active duty service" is indefinite. Additionally, under this section, no payments may be made for any period before Oct. 19, 1994.

71. Id. at para. F.2.b. and 38 U.S.C.A. Sec. 1311-14 (West 1991 & Supp. 1995). Payments paid under the provisions of 38 U.S.C.A. Sec. 1311 are based on the pay grade of the member.

72. DoDI 1342.24, supra note 53, para. F.3.d.

73. Id. at para. F.2.c.

74. Id.

75. Id. at para. F.3.b.

76. Id. 77Id. at para. F.7.

78. Id. at para. F.8.

79. Id. at para. F.4.

80. The Transitional Compensation for Abused Dependents program appears to have been created as a sort of "safety net" for those cases that did not fall under the Victims of Abuse provisions of USFSPA.

81. Crime Victim Compensation Program Directory 1995, supra note 7.

82. Single page handout provided by Mr. Dan Eddy, Director, National Association of Crime Victim Compensation Boards, to attendees at Military Community Assisting Crime Victims training session, Patrick Henry Village, Federal Republic of Germany (6-8 Nov. 1995).

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39 AFLR 73, Magistrate Court

Title of Article

Prosecuting Civilian Misdemeanor Offenders Before United States Magistrate Judges: A Guide for Air Force Judge Advocates

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Text of Article

I. INTRODUCTION

The ability to prosecute civilian offenders is a valuable option for commanders and their staff judge advocates to have at their disposal when lesser measures are inadequate. It enables commanders to better protect their installations, personnel, resources, and ultimately their mission. A collateral, but not insignificant, benefit is the opportunity for judge advocates to sharpen their skills as advocates and increase their familiarity with the federal civilian court system-a system wherein a variety of other Air Force interests are ultimately protected.

This article provides Air Force judge advocates an introduction to, and useful reference guide for, [1] prosecuting civilian misdemeanor cases before United States magistrate judges. It traces the development of the office and powers of United States magistrate judges, as well as Air Force policy concerning prosecutions before them. This article explains the basis for the exercise of jurisdiction over civilian offenders, including a survey of common offenses, and then summarizes pretrial, trial, and sentencing procedures for such prosecutions. The focus is practical guidance, not proposals for change. The practices of other branches of the Armed Forces are sometimes discussed for purposes of illustration. Readers should keep in mind that Air Force policy may differ and, of course, controls.

II. HISTORICAL BACKGROUND

A. Evolution of United States Magistrate Judges

United States magistrate judges, or their predecessors, have been with us throughout almost all our country's history. According to one writer on the subject,

The "magistrate system" in the United States originated in 1793, when Congress authorized the federal courts to allow designated "discreet persons learned in the law" to take bail in criminal cases. In 1812, the "discreet persons" were given the power to take bail and affidavits in civil cases and by 1817 they had been named "commissioners." Congress established a fee schedule for their services and gave them four-year terms of office and the title "United States commissioner" in 1896. [2]

In 1940, United States commissioners were given authority to try petty offenses committed on federal reservations. [3] The Federal Magistrates Act of 1968 [4] abolished the Office of United States Commissioner, created in its place the position of United States magistrate, and expanded a magistrate's jurisdiction to include all minor offenses committed within the applicable judicial district. [5] The Federal Magistrate Act of 1979 [6] further expanded the jurisdiction of magistrates to include the authority to try all misdemeanors, not just minor offenses. [7]

The Judicial Improvement Act of 1990 [8] changed the official designation of United States magistrates to United States magistrate judges. [9] Consistent with the enhanced status of magistrate judges, and their increasing integration into the mainstream of federal district court operations, the separate Rules of Procedure for the Trial of Misdemeanors before United States Magistrates were replaced in 1990 by new provisions in the Federal Rules of Criminal Procedure. [10]

B. Development of Air Force Policy and Practice

When the Air Force was established as a separate service, it initially continued to follow Army procedures concerning the prosecution of civilian offenders. The first Air Force Regulation (AFR) on the subject was not published until 1952, [11] and it essentially restated earlier Army guidance. [12] This regulation, which was effective for 15 years, established several principles which remain in force today. First, prosecution was limited to offenses committed by individuals not subject to military law. [13] Second, prosecution was limited to offenses committed on military installations which were within a state or territory and over which the United States had either exclusive or concurrent jurisdiction. [14] Third, within those parameters, the regulation authorized prosecution of any offense over which a United States commissioner had jurisdiction. [15]

Although these principles have remained relatively constant, Air Force policy regarding who may actually conduct the prosecution has undergone two complete reversals. The 1952 regulation authorized Air Force personnel to actually represent the United States "when no representative of the Department of Justice [was] available." 16 However, the next version of the governing regulation [17] completely reversed this policy and specifically provided that "Air Force judge advocates will not . . . be authorized to act as prosecutors before commissioners." [18] This prohibition remained in force for six years, [19] then was deleted when the third version AFR 110-15 was published in 1972. [20] Three years later, this version of the regulation was changed to again make it clear that prosecution by judge advocates was limited to those cases where no Department of Justice representative was available. [21] This change also added a second restriction in the form of a requirement for prior approval by the appropriate Major Command Staff Judge Advocate before judge advocates actually conducted such prosecutions. [22] This

remained Air Force policy until very recently. [23] Now, the policy seems to have come full circle. Prior approval by the Major Command Staff Judge Advocate is no longer required for prosecutions before United States magistrate judges, [24] and prosecutions by judge advocates before a United States district judge are even a possibility, albeit with the case-by-case approval of The Judge Advocate General (TJAG). [25]

III. CURRENT AIR FORCE POLICY

Current Air Force policy regarding prosecution of civilian offenders by judge advocates is found in three separate documents: a broad policy directive, [26] a specific instruction, [27] and a TJAG Policy Letter. [28] Together, they provide the following major guidance.

Air Force officials are authorized to initiate and conduct prosecutions of civilians who commit misdemeanors on Air Force installations in the United States and Puerto Rico, [29] provided the installation is one over which the United States has either exclusive or concurrent legislative jurisdiction. [30] Installation commanders determine whether civilian offenses should be disposed of in this manner. [31] The commander should first consider whether lesser administrative actions are "adequate and appropriate." [32] In so doing, the commander may make a blanket determination, "based on safety, discipline, or other considerations" that such administrative disposition is not adequate and appropriate. [33] If the appropriate United States Attorney advises that a Department of Justice representative is not available, judge advocates are authorized to conduct the actual prosecutions. [34] It is important to remember, however, that the United States Attorney retains "prosecutorial authority" in all such cases. [35] Accordingly, close coordination with the United States Attorney is a necessity. [36]

IV. JURISDICTION OVER CIVILIAN OFFENDERS

The outer limits of our ability to prosecute civilian offenders before United States magistrate judges are defined by the statutory limits on magistrate judge jurisdiction. [37] Within those limits, there are several different categories of offenses which judge advocates may, depending upon the particular circumstances, be able to prosecute. [38]

A. Jurisdiction of Magistrate Judges

United States magistrate judges are, "when specially designated to exercise such jurisdiction by the district court," authorized to try and sentence federal misdemeanors "committed within that judicial district." [39] Such jurisdiction can be defeated by a defendant's election to instead proceed before a district judge [40] or by district court order based on either its own motion or a petition by the Government. [41]

B. Offenses Defined by the United States Code

The United States Code defines a variety of misdemeanors [42] which Air Force Judge Advocates may

use to prosecute civilian offenders. Some include, within their statutory definition, a requirement that they be committed within the "special maritime and territorial jurisdiction of the United States." [43] These include assault and battery, [44] simple assault, [45] abusive sexual contact, [46] and theft of personal property of a value of $100 or less. [47] A variety of other offenses are federal misdemeanors even if not committed within the special maritime and territorial jurisdiction of the United States. [48] Those probably most familiar to judge advocates include theft of government property of a value of $100 or less, [49] unauthorized entry on a military installation, [50] first-time simple possession of a controlled substance, [51] and free distribution of a "small amount" of marijuana. [52]

There also are a number of other federal misdemeanors that, while less common, may also be of interest to Air Force judge advocates. They include: forgery of military discharge certificates, [53] possession of counterfeit foreign obligations or securities, [54] unauthorized manufacture, sale, or possession of federal badges, identification cards, or insignia, [55] unauthorized wear of a United States [56] or foreign [57] military uniform or United States military decoration, [58] the unauthorized photographing and sketching of designated defense installations, [59] extortion of $100.00 or less by an officer or employee of the United States, [60] unauthorized possession of a firearm in a federal facility, [61] unauthorized removal and retention of classified documents or materials, [62] theft of $100 or less from a federally insured bank, credit union, or savings and loan, [63] and a relatively new offense, the failure of certain specified professionals and officials to report suspected child abuse. [64]

Finally, although civilians may normally not be prosecuted for violations of federal regulations, there is one important exception relevant here-installation traffic regulations promulgated pursuant to the authority delegated installation commanders in Department of Defense Directive 5525.4, Enforcement of State Traffic Laws on DoD Installations. [65] Violations of such regulations are punishable as federal criminal offenses, [66] and violations may be punished by up to 30 days imprisonment or a $50 fine. [67]

C. Assimilative Crimes Act Offenses

As the reader can see, misdemeanors defined in the United States Code cover a great deal of potential civilian misconduct and give Air Force officials a variety of potential theories for prosecution. However, there are also large gaps in the coverage provided by the United States Code. The Assimilative Crimes Act (ACA) [68] provides a means for plugging many of those gaps. It provides, in part

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment. [69]

The "places" referred to are federal enclaves over which the United States exercises exclusive or concurrent legislative jurisdiction. [70] For such places, the ACA adopts, as federal law, the crimes and

corresponding punishments of the surrounding state. [71]

The ACA is obviously a powerful tool for dealing with civilian misconduct. However, judge advocates need to watch for several potential stumbling blocks. First, only conduct which occurs in a place over which the United States exercises exclusive or concurrent jurisdiction can be the subject of an ACA prosecution. Because "federal reservations on land under exclusive or concurrent jurisdiction frequently contain substantial areas under some other form of jurisdiction, [t]his places in issue the jurisdictional status of the specific piece of ground upon which the offense is alleged to have occurred." [72] Judge advocates must, therefore, be prepared to establish this element before the magistrate judge. [73] A second potential stumbling block in ACA prosecutions is the prohibition in the Act against assimilating state law when the conduct in question has been "made punishable by any enactment of Congress." [74] Although this most often refers to criminal offenses defined in the United States Code, it has also been held to refer to punitive regulations issued by federal agencies. [75] Accordingly, judge advocates must take care to ensure that the conduct in question is not already addressed by federal law.

Finally, because the ACA provides for the assimilation of the state law prohibiting the conduct, as well as the state law punishing the conduct, judge advocates must ensure that they select a state offense which, when assimilated, does not exceed the jurisdiction of a United States magistrate judge. [76]

V. PRETRIAL, TRIAL, AND SENTENCING PROCEDURES

Although there are substantial procedural variations, trial of criminal cases in federal court is based on the same fundamental principles as courts-martial. The purpose of the remainder of this article is to highlight for judge advocates, many of whose criminal trial experience may be limited to courts-martial, the basic procedures used to prosecute civilian offenders before United States magistrate judges.

Rule 58 of the Federal Rules of Criminal Procedure is the starting point for this discussion. It "governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to judges of the district courts in such cases tried by United States magistrate judges." [77] Rule 58 distinguishes between "petty offenses for which no sentence of imprisonment will be imposed" and "all other proceedings." [78] For the former, Rule 58 provides some special, streamlined procedures. [79] For the latter, Rule 58 provides that "the other [Federal Rules of Criminal Procedure] govern except as specifically provided in this rule." [80]

A. Charging Documents.

Because the right to indictment by a grand jury does not apply to misdemeanors, [81] the judge advocate's task is greatly simplified. Although "the trial of a misdemeanor may proceed on an indictment," [82] such is not required. The rules also authorize the use of an "information, [83] or complaint, [84] or in the case of a petty offense,. . . a citation or violation notice." [85] It is Air Force policy to use a complaint, [86] or in the case of a petty offense, a DD Form 1805 Violation Notice. [87]

B. Service of Process and Arrests

The most streamlined procedures involve petty offenses prosecuted on the basis of a DD Form 1805 Violation Notice, which is normally given to the defendant by the security police officer who observed the alleged offense. The violation notice tells the defendant when he or she is required to appear before the magistrate judge. If the offense is one which can be disposed of through a forfeiture of collateral procedure, [88] the violation notice tells the defendant how to do so. If the defendant fails to pay the fixed sum, request a hearing, or appear, the rules allow for a notice from the court, served by mail on the defendant. [89] The magistrate judge is also authorized to issue a summons [90] or warrant [91] based on a showing of probable cause in the DD Form 1805 Violation Notice. [92] Normally, such an arrest warrant will be executed by the United States Marshal and "[u]nder no circumstances will Air Force personnel execute such warrants." [93]

In cases prosecuted on the basis of a complaint, [94] the magistrate judge is likewise authorized to issue a summons or warrant. [95] As a practical matter, it is most convenient to seek the summons or warrant at the same hearing as the complaint. The same provisions and restrictions on service and execution apply.

C. Consent to Proceed

At a defendant's initial appearance before the magistrate judge, the court must advise the defendant of a variety of rights, [96] including "the right to trial, judgment, and sentencing before a judge of the district court, unless the defendant consents to trial, judgment, and sentencing before a magistrate judge." [97] The defendant's consent must be in writing. [98] If the defendant consents, the magistrate judge proceeds with arraignment; if not, the magistrate judge orders the defendant to appear before a district court judge. [99]

D. Trial Procedures

In the event the defendant's case is one which either cannot, or will not, be disposed of by forfeiture of collateral proceedings, and the defendant has consented in writing to proceed before the magistrate judge, the case then generally proceeds according to the same procedures as would apply in district court. [100] A thorough discussion of federal criminal trial procedure is beyond the scope of this article. [101] However, judge advocates should keep in mind that, aside from the procedures specifically related to jurors and jury verdicts, [102] the greatest difference between military and civilian practice will be the timing of when various events take place, rather than the substance of them. [103] Because such timing varies from district to district and is generally governed by published local rules, [104] judge advocates must become familiar with those rules and rely on the local United States Attorney for further guidance.

E. Sentencing

While trial procedures in federal civilian court generally resemble those in courts-martial, sentencing is

dramatically different. Available punishments differ greatly, and in at least some of the cases judge advocates prosecute before magistrate judges, they must contend with the United States Sentencing Guidelines. [105] In addition, the United States Probation Officer, who has no counterpart in a court-martial, plays a key role in sentencing in federal civilian court.

First, it is important to have an understanding of the punishments available to the magistrate judge. In addition to the special forfeiture of collateral procedures discussed earlier, [106] a full range of traditional and non-traditional punishments are available. They include probation, [107] imprisonment, [108] supervised release, [109] and fines. [110] Magistrate judges also can order restitution [111] and are required to impose a special assessment, which is a payment of a specified amount for each count of conviction. [112]

Second, in some cases it will be necessary to apply the United States Sentencing Guidelines. Again, a thorough discussion of the Sentencing Guidelines is beyond the scope of this article. For our purposes, it is sufficient to explain that the Sentencing Guidelines, promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984, [113] establish a determinate sentencing system wherein complex formulas are used to calculate, first, an "offense level" for the particular offense, based both on the offense and a variety of surrounding facts, [114] and, second, a "criminal history category" for the particular defendant, based on a variety of facts about the individual's prior criminal record. [115] The offense level and criminal history category are then plotted on a "sentencing table" which specifies, for each possible combination, a relatively narrow range within which the court may impose a sentence of imprisonment. [116] The Sentencing Guidelines also provide ranges for probation, [117] fines, [118] and supervised release. [119] Fortunately for judge advocates practicing before United States magistrate judges, "[f]or the sake of judicial economy, the [Sentencing] Commission has exempted all Class B and C misdemeanors and infractions from the coverage of the guidelines." [120] However, some of the offenses judge advocates may be called upon to prosecute are Class A misdemeanors, [121] so at least some familiarity with the Sentencing Guidelines will probably be required.

Third, Air Force judge advocates must understand the role of the United States Probation Officer and the presentence report he or she prepares. In cases involving petty offenses for which no sentence of imprisonment will be imposed, "[t]he court shall . . . immediately proceed to sentence the defendant," unless in the court's discretion sentencing should be continued to "allow an investigation by the probation service or submission of additional information by either party." [122] In many such cases, there will be no presentence report, and no significant probation officer involvement. In other cases, however, "[t]he probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed," unless the court makes a specific finding that there is already adequate information in the record to enable it to "exercise its sentencing authority meaningfully." [123] These reports, which can be quite lengthy, include detailed information about the defendant, the offense, and statutory and guideline provisions relevant to sentencing. [124] The copy of the report provided to the court may also include a confidential recommendation by the probation officer on the sentence. [125] The probation officer discloses the report to the prosecution and the defense at least 35 days before sentencing, and both sides have an opportunity to make objections to it. Objections not resolved

beforehand are disposed of by the court at the sentencing hearing. [126] As a practical matter, these presentence reports frequently become the primary source of information at the sentencing hearing. Judge advocates must not forget, however, that they are still the Government's advocate, and that the Government bears the burden of proving those matters in the presentence report which the defendant contests.

F. Appeals

Decisions, orders, judgments, and sentences by magistrate judges are appealable to the district court in the same manner as those of a district court are appealable to a circuit court of appeals. [127] Unlike some two-tiered state trial court systems, there is no right to trial de novo before a district judge. [128]

VI. CONCLUSION

By authorizing the prosecution of civilian misdemeanor offenders before United States magistrate judges, Air Force policy provides commanders and their staff judge advocates a powerful, and very useful, option for addressing civilian misconduct on their installations. As the jurisdiction of magistrate judges has expanded, so has the range and severity of offenses we can prosecute. Although the local United States Attorney retains final prosecutorial authority, there are many opportunities for judge advocates to conduct the actual prosecutions. This requires, for many judges advocates, learning a system which differs in many ways from the courts-martial wherein they normally practice. The underlying principles of the two systems, however, are quite similar, and both ultimately require the same advocacy skills. Participation in such prosecutions not only contributes to the mission, it also presents many opportunities for professional growth and development.

Footnotes

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1. See also John B. Garver III, A Legal Guide to Magistrate's Court, Army Lawyer (Aug. 1987).

2. Id. at 27 (citations omitted).

3. Pub. L. No. 76-817, 54 Stat. 1058 (1940).

4. Pub. L. No. 90-578, 82 Stat. 1107 (1968).

5. Id. Title III, Sec. 302(a) (amending 18 U.S.C. Sec. 3401).

6. Pub. L. No. 96-82, 93 Stat. 643 (1979).

7. Id. Sec. 7 (amending 18 U.S.C. Sec. 3401).

8. Pub. L. No. 101-650, 104 Stat. 5117 (1990).

9. Id. Sec. 321 (amending 28 U.S.C. Sec. 631).

10. Fed. R. Crim. P. 58.

11. Air Force Regulation [hereinafter AFR] 110-7, Petty Offenses Committed by Civilians on Federal Reservations (11 May 1951).

12. Army Regulation 490-5 (6 July 1942).

13. AFR 110-7, para. 1. Accord Air Force Instruction [hereinafter AFI] 51-905, Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians, para. 1.1.4 (19 July 1994).

14. AFR 110-7, para. 2. Accord Air Force Policy Directive [hereinafter AFPD] 51-9, Civil Law for Individuals, para. 1.6 (5 Nov. 1993).

15. At that time, United States commissioners had jurisdiction only over petty offenses. AFR 110-7, para. 3. Now United States magistrate judges have jurisdiction over all misdemeanors. AFI 51-905, para. 1.2.

16. AFR 110-7, para. 5. Interestingly, although the regulation expressed a preference for judge advocates, it also authorized prosecution by other "officers possessing the requisite legal knowledge and ability." Id. at para. 6.

17. AFR 110-15, Use of U.S. Commissioners for Trial of Petty Offenses Committed by Civilians (31 May 1966).

18. Id. at para. 4a.

19. AFR 110-15, Use of U.S. Magistrates for Trial of Minor Offenses Committed by Civilians, para. 4a (22 June 1970).

20. AFR 110-15, Use of U.S. Magistrates for Trial of Minor Offenses Committed by Civilians (4 May 1972).

21. AFR 110-15, chg. 2, para. 4.1 (7 Apr. 1975).

22. Id.

23. AFR 110-15, Use of U. S. Magistrates for Trial of Minor Offenses Committed by Civilians, para. 4c (30 Aug. 1978); AFR 110-15, Use of U.S. Magistrates for Trial of Misdemeanors Committed by Civilians, para 4c (1 Nov. 1982).

24. AFPD 51-9, Civil Law for Individuals (5 Nov. 1993); AFI 51-905, Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians (19 July 1994).

25. TJAG Policy No. 15, Prosecutions by Judge Advocates Before U.S. Magistrate Judges and in U.S. District Courts, para. 3 (6 Jan. 1995). This is also a return to earlier policy: "When trial in the District Court of the United States is demanded, Air Force officers are not authorized to represent the United States without the approval of the Judge Advocate General, USAF." AFR 110-7A, para. 7 (30 Oct. 1952).

26. AFPD 51-9.

27. AFI 51-905.

28. TJAG Policy No. 15, supra note 25.

29. AFPD 51-9, para. 1.6.

30. AFI 51-905.

31. Id. at para. 1.1.1.

32. Examples include "disciplinary action under civilian personnel regulations, suspension of base driving privileges, or restricting base access." AFI 51-905, para 1.1.2.

33. Id. at para. 1.1.7. Authorization for such a blanket determination first appeared in AFR 110-15, para. 1(b) (30 Aug. 1978).

34. AFI 51-905, para. 1.3. The installation staff judge advocate should, through the United States Attorney, seek the designated officer's appointment as a Special Assistant United States Attorney. TJAG Policy No. 15, supra note 25, at para. 2; 28 U.S.C.A. Secs. 515, 516, and 543 (West 1993). In the event the defendant elects trial before a United States district judge, judge advocates may still be authorized to conduct the prosecution. See supra note 25 and accompanying text.

35. AFI 51-905, para. 1.3.

36. For an excellent discussion of such coordination in a large and aggressive felony prosecution program, see David J. Fletcher, Federal Criminal Prosecutions on Military Installations, Part I: Establishing the Fort Hood Program, Army Lawyer (Aug. 1987) at 21.

37. 18 U.S.C.A. Sec. 3401 (West 1985 & Supp. 1995).

38. Of course, any federal offense can be prosecuted in United States district court by the United States Attorney. Current provisions for judge advocate participation notwithstanding, it appears that in the majority of misdemeanor cases in which the defendant demands trial before a United States district judge, and in all felony cases, the Department of Justice will conduct the entire prosecution. See supra note 25 and accompanying text.

39. 18 U.S.C.A. Sec. 3401(a) (West 1985 & Supp. 1995).

40. 18 U.S.C.A. Sec. 3401(b) (West 1985 & Supp. 1995). See infra notes 96-99 and accompanying text.

41. 18 U.S.C.A. Sec. 3401(f) (West 1985 & Supp. 1995). Such government petitions are made on a case-by-case basis because of a case's "novelty, importance, or complexity . . . or other pertinent factors." Id.

42. A misdemeanor is any offense for which the maximum authorized term of imprisonment does not exceed one year. Misdemeanors are subdivided into Class A misdemeanors, punishable by not more than one year imprisonment, Class B misdemeanors, punishable by not more than six months imprisonment, Class C misdemeanors, punishable by not more than 30 days imprisonment, and infractions, punishable by not more than 5 days imprisonment. 18 U.S.C.A. Secs. 3559(a)(6) - (a)(9) (West Supp. 1995). Class B misdemeanors, Class C misdemeanors, and infractions are considered "petty offenses" if the maximum authorized fine does not exceed $5000.00. 18 U.S.C.A. Sec. 19 (West Supp. 1995). See also 18 U.S.C.A. Secs. 3571(b)(6)-(7) (West Supp. 1995).

43. 18 U.S.C.A. Sec. 7 (West 1969 & Supp. 1995).

44. 18 U.S.C.A. Sec. 113(a)(4)(West Supp. 1995).

45. 18 U.S.C.A. Sec. 113(a)(5) (West Supp. 1995).

46. 18 U.S.C.A. Sec. 2244(a)(4), (b) (West Supp. 1995).

47. 18 U.S.C.A. Sec. 661 (West Supp. 1995).

48. Note that while these offenses may be federal misdemeanors regardless of where committed, that does not mean Air Force policy allows us to prosecute them, regardless of where committed.

49. 18 U.S.C.A. Sec. 641 (West Supp. 1995).

50. 18 U.S.C.A. Sec. 1382 (West Supp. 1995).

51. 21 U.S.C.A. Sec. 844(a) (West Supp. 1995).

52. 21 U.S.C.A. Sec. 841(b)(4) (West Supp. 1995).

53. 18 U.S.C.A. Sec. 498 (West 1976 & Supp. 1995).

54. 18 U.S.C.A. Sec. 480 (West Supp. 1995).

55. 18 U.S.C.A. Sec. 701 (West Supp. 1995).

56. 18 U.S.C.A. Sec. 702 (West Supp. 1995).

57. 18 U.S.C.A. Sec. 703 (West Supp. 1995).

58. 18 U.S.C.A. Sec. 704 (West Supp. 1995).

59. 18 U.S.C.A. Sec. 795 (West 1976 & Supp. 1995). It is also an offense to use an aircraft to perform such unauthorized photographing or sketching and to publish or sell such materials. 18 U.S.C.A. Secs. 796-97 (West Supp. 1995).

60. 18 U.S.C.A. Sec. 872 (West Supp. 1995).

61. 18 U.S.C.A. Sec. 930(a) (West Supp. 1995).

62. 18 U.S.C.A. Sec. 1924 (West Supp. 1995).

63. 18 U.S.C.A. Sec. 2113(b) (West Supp. 1995).

64. 18 U.S.C.A. Sec. 2258 (West Supp. 1995).

65. See AFI 51-905, para. 1.1.6.

66. 40 U.S.C.A. Sec. 318a (West Supp. 1995).

67. 40 U.S.C.A. Sec. 318 (West Supp. 1976). Such violations are, therefore, considered petty offenses. See supra note 42. Trial of such violations may be based on a citation or violation notice such as a DD

Form 1805. Fed. R. Crim. P. 58(b)(1).

68. 18 U.S.C.A. Sec. 13(a) (West Supp. 1995). For a more in-depth discussion of issues arising in Assimilative Crimes Act cases, see John B. Garver III, The Assimilative Crimes Act Revisited: What's Hot, What's Not, Army Lawyer (Dec. 1987) at 12.

69. 18 U.S.C.A. Sec. 13(a) (West Supp. 1995).

70. Such enclaves are part of the "special maritime and territorial jurisdiction of the United States." 18 U. S.C.A. Sec. 7(a) (West 1969 & Supp. 1995).

71. United States v. Williams, 327 U.S. 711 *[cited at]* , 718 (1946).

72. Garver, supra note 68, at 14.

73. Because of its conclusive effect, a stipulation is the most desirable approach. Judicial notice is at least a theoretical possibility. Fed. R. Evid. 201. However, the defense may well rely on this issue in hopes of defeating an otherwise strong prosecution case, and judge advocates must be prepared to prove the jurisdictional status of the area in question. The necessary documents and witnesses may be available at the Base Civil Engineering office, or more likely, the Army Corps of Engineers district office. Although not something that can be put together the morning of trial, once this portion of the case is assembled, it can easily be repeated as required in later prosecutions.

74. 18 U.S.C.A. Sec. 13(a) (West Supp. 1995).

75. United States v. Baker, 603 F.2d 104, 105 (9th Cir. 1979) (Veterans Administration regulation). See supra notes 65-67 and accompanying text.

76. See supra notes 39 and 42.

77. Fed. R. CRIM. P. 58(a)(1).

78. Fed. R. Crim. P. 58(a)(2).

79. Fed. R. Crim. P. 58(b)(2), (c).

80. Fed. R. Crim. P. 58(a)(2).

81. U.S. Const. amend. V.

82. Fed. R. Crim. P. 58(b)(2).

83. An information, like an indictment, is "a plain, concise and definite written statement of the essential facts constituting the offenses charged . . . signed by the attorney for the government." FED. R. CRIM. P. 7(c)(1). It includes in each count "the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." Id.

84. A "complaint is a written statement of the essential facts constituting the offense charged . . . made upon oath before a magistrate judge." FED. R. CRIM. P. 3.

85. Id.

86. AFI 51-905, paras. 1.1.9. and 3.1. Attachment 3 to AFI 51-905 is a suggested complaint format.

87. AFI 51-905, paras. 1.1.10. and 3.1.1. Although the instruction provides that "[a] DD Form 1805 issued by the security police does not require review by the office of the staff judge advocate," as a practical matter, it is important for the judge advocate who prosecutes those cases to ensure that security police personnel are properly trained in how to prepare a legally sufficient violation notice. Id.

88. Fed. R. Crim. P. 58(d)(1) reads: When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable cases in lieu of appearance and as authorizing the termination of the proceedings. Local rules may make provision for increases in fixed sums not to exceed the maximum fine which could be imposed.

This is an efficient means of disposing of, for example, minor traffic violations.

89. Fed. R. Crim. P. 58(d)(2) provides: If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk or magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to the defendant's last known address.

(Emphasis added.)

90. A summons is a document, signed by the magistrate judge, which names the defendant, describes the offense charged, and summons the defendant to appear at a particular time and place. Fed. R. Crim. P. 4 (c). It "may be served by any person authorized to serve a summons in a civil action." Fed. R. Crim. P. 4 (d)(1). However, it may not be served by Air Force personnel. See infra note 93 and accompanying text.

91. A warrant contains the same information as a summons except that it "commands that the defendant be arrested and brought before the nearest available magistrate judge." Fed. R. Crim. P. 4(c)(1). Warrants are executed by a United States Marshal "or by some other officer authorized by law." Fed. R. Crim. P. (d)(1).

92. Fed. R. Crim. P. 58(d)(3). "The showing of probable cause shall be made in writing upon oath or under penalty for perjury, but the affiant need not appear before the court."

93. AFI 51-905, para. 3.2. Execution by Air Force personnel would violate the Posse Comitatus Act, 18 U.S.C.A. Sec. 1385 (West Supp. 1995).

94. See supra note 84 and accompanying text.

95. Fed. R. Crim. P. 58(d)(3).

96. Fed. R. Crim. P. 58(b)(2).

97. Fed. R. Crim. P. 58(b)(2)(E). See also 18 U.S.C.A. Sec. 3401(b) (West 1985 & Supp. 1995). Although defense counsel may wish to avoid a particular magistrate judge or litigate a particular issue in district court, there is rarely anything for a defendant to gain by not consenting to proceed before a magistrate judge. On the contrary, there may be a lot to lose if there are multiple misdemeanor counts and the aggregate statutory maximum terms of imprisonment exceed one year or if there is conduct for which the Government could seek a felony indictment.

98. 18 U.S.C.A. Sec. 3401(b) (West 1985 & Supp. 1995). See also AFI 51-905, paras. 3.3. and 3.3.1. Attachments 1 and 2 to the instruction are suggested formats for the written consent.

99. Fed. R. Crim. P. 58(b)(3).

100. Fed. R. Crim. P. 58(a)(2). In the event the case involves "a petty offense for which no sentence of imprisonment will be imposed," there are abbreviated procedures for pleas of guilty or nolo contendere, waiver of venue, and sentencing. FED. R. CRIM. P. 58(c).

101. James C. Cissell, Federal Criminal Trials (3d ed. 1992) is an extremely helpful primer. In addition, a current copy of West's Federal Criminal Code and Rules, which is updated annually, is a virtual must for any judge advocate who handles cases before magistrate judges.

102. Fed. R. Crim. P. 23 (trial by judge or jury, number of jurors); Fed. R. Crim. P. 24 (examination and selection of jurors); Fed. R. Crim. P. 31 (unanimous verdict, poll of jury).

103. For example, pretrial motions are generally filed and heard days or even weeks before the trial on the merits. See generally Fed. R. Crim. P. 12.

104. Fed. R. Crim. P. 57 specifically provides for such local rules.

105. 28 U.S.C.A. Sec. 994 (West 1993 & Supp. 1995).

106. See supra note 88 and accompanying text.

107. See 18 U.S.C.A. Secs. 3561-66 (West 1985 & Supp. 1995). The maximum authorized term of probation for a misdemeanor is five years, and for an infraction, one year. 18 U.S.C.A. Secs. 3561(c)(2), (3) (West Supp. 1995). In addition to certain mandatory conditions, the court may impose a variety of discretionary conditions, including ones which require the defendant to serve intermittent imprisonment, reside in a community corrections facility (halfway house), or perform community service. 18 U.S.C.A. Secs. 3563(a), (b)(11)-(13) (West Supp. 1995).

108. 18 U.S.C.A. Sec. 3581(a) (West 1985). Subsection (b) sets out the same range of maximum terms of imprisonment as are described in 18 U.S.C.A. Sec. 3559(a) (West Supp. 1995). See supra note 42.

109. 18 U.S.C.A. Sec. 3583 (West Supp. 1995). Supervised release is a period of supervision after imprisonment. The maximum term of supervised released in all misdemeanor cases (except petty offenses) is one year. Id. Sec. (b)(3).

110. 18 U.S.C.A. Sec. 3571(a) (West Supp. 1995). Subsection (b) specifies the maximum fine in individual cases: $250,000 for a misdemeanor that results in death, $100,000 for a Class A misdemeanor that does not result in death, $5000 for a class B or C misdemeanor that does not result in death, and $5000 for an infraction. Under certain circumstances, the particular provision of the United States Code that defines an offense may specify a lower fine. Id. Sec. (e).

111. 18 U.S.C.A. Sec. 3663 (West 1985 & Supp. 1995).

112. 18 U.S.C.A. Sec. 3013 (West 1985 & Supp. 1995). Subsection (a)(1)(A) specifies the amount, per count of conviction, for individual defendants: $25.00 for a Class A misdemeanor, $10.00 for a Class B misdemeanor, and $5.00 for a Class C misdemeanor or an infraction.

113. Pub. L. No. 98-473, Title II, 98 Stat. 2017 (1984).

114. United States Sentencing Commission, Guidelines Manual, chs. 2 and 3 (Nov. 1994).

115. Id. at ch. 4.

116. Id. at ch. 5, pt. A.

117. Id. at pt. B.

118. Id. at pt. E.

119. Id. at pt. D.

120. U.S.S.G. Sec. 1B1.9, comment.

121. This includes some of the most important, e.g., theft of government property of a value of $100 or less. 18 U.S.C.A. Sec. 641 (West Supp. 1995).

122. Fed. R. Crim. P. 58(c)(3).

123. Fed. R. Crim. P. 32(b)1).

124. Fed. R. Crim. P. 32(b)(4).

125. Fed. R. Crim. P. 32(b)(6)(A).

126. Fed. R. Crim. P. 32(b)(6)(B)-(D), (c)(1).

127. Fed. R. CRIM. P. 58(g)(2).

128. Fed. R. Crim. P. 58(g)(2)(D).

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39 AFLR 87, Guilty Pleas

Title of Article

Guilty Pleas: A Primer for Trial Advocates

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Text of Article

I. INTRODUCTION

Why think twice about guilty pleas? Once the accused agrees to plead guilty, trial advocates are on easy street, right? Think again. Guilty pleas require pre-trial preparation. The military judge may shoulder most of the burden of ensuring the record reflects a provident plea, but the trial counsel also plays a key role, and perhaps to a lesser extent, the defense counsel. Counsel must pay attention to the details during a guilty plea inquiry and ensure the record contains a factual basis covering all the elements of the specifications, as well as the appropriate advisements by the military judge. Otherwise, the Government may be faced with a case overturned on appeal and the prospect of a rehearing years after the original incident, when memories have faded and witnesses are long gone. For the defense, the client may lose the benefit of strong sentencing arguments about rehabilitation potential and accepting responsibility, or worse, the loss of a pre-trial agreement.

A substantial body of case law on improvident guilty pleas illustrates the many stumbling blocks and pitfalls that await the unwary advocate. It is said that the best way to learn is through mistakes. The trick is to learn from someone else's mistakes and avoid the pain yourself. This article guides trial advocates through the more troublesome areas, beginning with an overview of the basic rules and followed by an analysis of the key components of these rules as established through case law.

II. RULES FROM THE MANUAL FOR COURTS-MARTIAL

Guilty pleas are governed by Article 45 of the Uniform Code of Military Justice (UCMJ) [1] and Rule for Courts-Martial (R.C.M.) 910. [2] Article 45 is the basic provision governing guilty pleas, whereas R. C.M. 910 breaks down the requirements of a guilty plea in a step-by-step process. [3]

A. Article 45, Pleas of the Accused

Article 45 requires the court to proceed as if the accused has pleaded not guilty in a number of scenarios, to include situations where the accused makes an irregular pleading after arraignment or fails or refuses to plead. In addition, if after pleading guilty, the accused "sets up a matter inconsistent with the plea, or if it appears that he has entered a plea of guilty improvidently or through lack of understanding of its meaning and effect," the judge must proceed as if the accused pleaded not guilty. [4]

B.R.C.M. 910, Pleas

R.C.M. 910 is longer and outlines the "how to" for guilty pleas. There are several requirements for ensuring a provident guilty plea. Below are the basic provisions, which will be broken down and analyzed later in this article.

Advice to the Accused. Before accepting a guilty plea, the judge personally addresses the accused to ensure he or she understands: (1) the nature of the offense(s) and the maximum possible penalty; (2) the accused's rights to counsel; [5] (3) the right to plead not guilty, to be tried by a court-martial, confront and cross-examine witnesses, and the right against self-incrimination; (4) that pleading guilty means there will not be a trial as to those offenses the accused pleaded guilty to, and that as a result of the plea of guilty, the accused waives the Constitutional rights to confront, cross-examine, and avoid self-incrimination; (5) that the judge will question the accused under oath and on the record about the offenses to which the accused pleads guilty, and the accused's answers may later be used against him or her in a prosecution for perjury or false statements. [6]

Ensuring the Plea is Voluntary. The judge must ensure the plea is voluntary by personally addressing the accused to determine that no force, threats, or promises-apart from a plea agreement-were made to convince the accused to plead guilty. The judge asks the accused about prior conversations with the convening authority, a representative of the convening authority, or the trial counsel. [7]

Determining the Accuracy of the Plea. The judge must ensure the accuracy of the plea by placing the accused under oath and inquiring about the offenses. The judge must be satisfied that there is a factual basis for the plea. [8] The discussion to R.C.M. 910(e) sets forth special areas of concern:

(The elements of the offense should be explained to the accused.

(The accused must admit every element of the offense to which he or she is pleading guilty.

(The judge must listen for any potential defenses raised by either the accused's account of the offense or any other matter presented to the judge.

(If any defenses are raised, the judge should explain the defense to the accused. The accused must admit facts that negate the defense before the judge can accept the plea.

(The accused does not need to describe all the elements of the offense from a personal recollection, but must be convinced of and be able to describe all the facts necessary to establish guilt.

Plea Agreement Inquiry. The judge should ask if there is a plea agreement. Any plea agreements must comply with R.C.M. 705 and be disclosed to the judge. If an agreement exists, the entire agreement must be disclosed to the judge, unless it is a judge alone trial, in which case the "military judge ordinarily shall not examine any sentence limitation. . . until after the sentence . . . has been announced." [9] The judge makes sure the accused understands the plea agreement and the parties agree to its terms.

Withdrawal by the Accused/Statements Inconsistent with the Plea. The parties must be alert to the accused either withdrawing the plea or making later statements that are inconsistent with the plea. If the accused requests to withdraw the guilty plea after the judge has accepted the plea, but before the sentence is announced, at his or her discretion, the judge may allow the accused to do so. [10] If the accused makes a statement inconsistent with the plea or if any other matter coming before the court is inconsistent with the plea after the findings, but before the sentence is announced, "the judge must inquire into the providence of the plea." [11] If it appears that the accused entered a plea improvidently or because he or she didn't understand the meaning or effect of a guilty plea, a plea of not guilty shall be entered. The discussion to R.C.M. 910(h) notes that counsel should be given "a reasonable time" to prepare to proceed, but the definition of "reasonable" may vary under the circumstances and from judge to judge. It is this possibility that counsel should anticipate in order to proceed to trial quickly.

III. CASE LAW

Having set out the basic rules governing guilty pleas, let us turn now to case law. Although there is a plethora of interesting cases, here are a few to highlight each of the problem areas. To put it into some sort of logical order, this article will follow the pertinent sections of R.C.M. 910.

A. Advice to the Accused

The military judge must ensure the accused knows why he or she is there, what his or her rights are, and the ramifications and consequences of a guilty plea. This is referred to as a providence inquiry, or more commonly as a Care inquiry. The name refers to the 1969 case of United States v. Care, [12] the seminal military case on guilty pleas.

Private Care pleaded guilty to desertion pursuant to a pretrial agreement, but later challenged his conviction on the basis that the law officer failed to set forth the essential elements of the offense of desertion. In addition, Private Care alleged that the law officer's failure to establish the factual basis of the plea was error. Private Care's conviction was nonetheless upheld on appeal despite the law officer's omissions because of overwhelming evidence of guilt and the voluntariness of the plea appeared on the record. [13] The United States Court of Military Appeals [14] went on, however, to set out the requirements for all future cases: a personal interrogation of the accused by the military judge, who will

explain the elements and the waiver of fifth and sixth amendment rights. [15] The court noted that previous admonitions to trial practitioners had "received less than satisfactory implementation as is evidenced by review of many records of trial in which the law officer or the president fails to explain personally the elements of an offense and to establish factual guilt directly." [16] The court's new requirements are now incorporated into R.C.M. 910. These requirements ensure the accused's waiver of rights is voluntarily and understandingly made and included in the record for appellate review.

One area where trial participants can go wrong is in incorrectly advising the accused of the maximum punishment. It is imperative for all trial participants to take a look at the maximum possible sentence prior to trial. Although the judge advises the accused of the maximum possible sentence, both counsel have the opportunity to correct misunderstandings.

The case of United States v. Walker [17] illustrates how confusing this can get. The accused pled guilty to an offense for which the maximum sentence was 10 years and 6 months. The military judge recognized that one of his rulings might be reversed on appeal and that, as a consequence, the maximum punishment would be 5 years and 6 months. During the pretrial agreement inquiry the judge asked the defense counsel:

MJ: Let's put it this way. You entered into a pretrial agreement with the Government with a view towards a possible maximum punishment of 10 years, 6 months, is that right?

DC: Yes, Sir.

MJ: If I were to rule that the maximum was 5 years, 6 months, do you still think you've got a good pretrial agreement?

DC: I would need a few minutes to talk that over with my client, sir.

* * * *

ACC: I wouldn't have accepted the deal, Sir.

* * * *

MJ: So, what I'm saying is I'm really talking to the appellate authorities and saying look, if you find that that really is not an offense, I wasn't putting much stock in it anyway.

* * * *

But you could get, I mean, I could sit right here and go out there, after I hear everything, I could come in and say, Mr. Walker, you are sentenced to 10 years and 6 months. I could do that legally.

* * * *

I'm not likely to is what I'm saying. Does that answer your question?

* * * * ACC: Somewhat, sir. [18]

Not surprisingly, the Court of Military Appeals found the accused's uncertainty about the maximum possible punishment rendered his plea improvident. The case was reversed and the findings and sentence set aside.

While Walker may appear to be a unique case of courtroom confusion, incorrect sentencing advice can happen fairly easily. In United States v. Castrillon-Moreno, [19] the United States Court of Military Appeals vacated and set aside a guilty plea because the trial judge, with the concurrence of both trial and defense counsel, incorrectly stated that the maximum authorized punishment included 10 years confinement at hard labor when it was actually two years. This case was tried in February of 1977, but case law had reduced the maximum confinement to two years the prior summer. All of the courtroom players were unaware of the change. On appeal, the Army Court of Military Review upheld the conviction, ruling that the eight-year difference played no significant part in the accused's decision to plead guilty. [20] The Court of Military Appeals disagreed, however, and reversed, noting there was no evidence on the record that the accused was "intelligently indifferent" to the judge's mistake. [21] The court reasoned that the eight extra years probably did weigh heavily on the accused's mind when he chose to plead guilty. This is another example of all the courtroom players overlooking something important on a "simple guilty plea," and looking foolish on appeal.

Another facet in the judge's advice to the accused is the right to plead not guilty. On the other hand, the accused does not have the converse right to plead guilty. The judge decides to accept the plea based on the facts admitted by the accused, the evidence of record, and the judge's belief that the plea is provident. If, however, the accused fails to admit to all elements, raises a defense, or suggests the plea is not voluntary, the judge cannot accept the plea, and the case proceeds to trial.

The appellate courts will not reverse a judge for refusing to accept a guilty plea as improvident unless there was an "abuse of discretion." Shortly after the Care decision, United States v. Williams [22] made its way up to the Court of Military Appeals. The court noted, "[T]his case apparently reflects but another instance of the concerted effort by certain trial judges to circumvent compliance with the mandate of the United States Court of Military Appeals in United States v. Care." [23] At the trial the defense counsel noted the accused was pleading guilty, and rather than conduct the inquiry required by Care, the judge simply replied,

[A]t this time I am disinclined to accept a plea of guilty. A plea of not guilty will be entered. However, if we go as far as sentencing, I will consider the fact that he did offer to plead guilty and I will afford him the same presumption I would normally had I accepted his plea of guilty. [24]

The Court of Military Appeals noted that even though a judge "may refuse to accept a plea of guilty, the record of trial must reflect the basis for the refusal with sufficient specificity to test for abuse of the exercise of that discretion." [25] The record of trial revealed no reason why the judge was "disinclined" to accept the plea of guilty. The Court of Military Appeals affirmed the findings of guilty, but reassessed the sentence. [26]

B. Oath Requirement and Use of Statements

R.C.M. 910(c)(5) requires the judge to question the accused under oath and advise that answers can be used against him or her later for prosecution of perjury or false statement. One crucial point omitted in R. C.M. 910, but found in case law, is that the accused's sworn statements made during the Care inquiry may also be used during sentencing. There is no requirement for the military judge to advise the accused of this. Trial counsel should be alert for statements by the accused that can be used in sentencing.

In United States v. Holt, [27] for example, the accused made a statement under oath during the providence inquiry that was later contradicted by a sentencing witness. This was a bench trial and the trial counsel highlighted the apparent contradiction during the sentencing argument to the judge. The Court of Military Appeals reasoned that this type of evidence could be used during sentencing under R.C. M. 1001(b)(4), which allows evidence of aggravating circumstances related to the offense. [28] "[S]uch testimony can be received as an admission by the accused and can be provided either by a properly authenticated transcript or by the testimony of a court reporter or other persons who heard what the accused said during the providency hearing." [29] The court also noted the accused was on notice that his sworn testimony could be used against him and the use of that testimony during sentencing was a reasonable expectation. "[I]f the sworn testimony during the providence inquiry is sufficiently reliable to support findings of guilt, it would seem reliable enough to be considered in connection with sentencing." [30]

On the other hand, the accused's sworn Care testimony cannot be used to support findings on other contested offenses. The accused in United States v. Cahn [31] entered pleas of guilty to AWOL, extended failure to go, and thefts of $200 and $300 by using his roommate's Automated Teller Machine (ATM) card. He pled not guilty to the theft of the ATM card itself. The case was tried by a judge alone. The judge heard the accused's sworn testimony in the Care inquiry, and later heard evidence on the contested offense. The judge indicated he would rely only on the evidence presented on the merits when deliberating on findings for the contested offense. Nonetheless, the judge found the accused guilty of theft of the ATM card. On appeal, the appellate defense fashioned an argument, based on Holt, that the judge improperly failed to consider the accused's statements made in the earlier Care inquiry. The Air Force Court of Military Review did not agree with that argument:

Allowing Care inquiry statements to be considered in sentencing is a far cry from approving the use of such statements on the merits of an offense to which the accused has pled not guilty and, thus, has chosen to place on the government the burden of producing evidence to prove his guilt. . . . Allowing such use would not only serve as a deterrent to guilty pleas where related offenses were to be contested,

but would inhibit the accused's willingness to speak freely in establishing a factual basis for pleas of guilty in such situations. . . . [T]his practice would tempt an accused to "garnish" his Care testimony with favorable statements, thereby placing such statements before the court without being subject to cross-examination. [32]

C. Ensuring the Plea is Voluntary

Another safeguard built into R.C.M. 910 is the judge's duty to determine voluntariness of the accused's plea. As noted above, the judge personally addresses the accused to make sure the accused has not pled guilty as the result of force, threats, or promises other than those in a pretrial agreement (PTA).

The judge should inquire into the existence of a PTA, and failing to do so, "counsel have an obligation to bring any agreements or understandings in connection with the plea to the attention of the military judge." [33] The case of United States v. Cooke [34] illustrates the problems that can arise when trial participants fail to raise this issue properly at trial. The accused thought he had a pretrial agreement despite his defense counsel's assurances on the record to the military judge that there were none. The accused apparently made no mention of his belief that he had a PTA. On appeal, he claimed a pretrial agreement was entered into with the convening authority, but not typed or signed. The Court of Military Appeals held that there was no PTA, and even if Cooke believed there was one, that belief was unreasonable. Although the plea was saved, to avoid these appellate issues, trial counsel must ensure, to the greatest extent possible, that there are no mistaken beliefs about either the existence of a PTA or its terms. In addition, the judge should personally inquire of the accused about threats, promises, and PTAs.

In addition to determining the existence of a PTA, the military judge should ensure the accused understands the meaning and effect of a PTA and that all parties agree to its terms. [35] As part of his or her pretrial preparation, the trial counsel should ensure the PTA has clear terms in order to avoid any confusion at trial. The entire agreement must be disclosed before the plea is accepted, except that in trial before military judge alone, the judge ordinarily does not examine the sentence limitation until after the sentence is announced. [36]

D. Accuracy of the Plea

In addition to being satisfied a guilty plea is truly voluntary, the military judge must be satisfied the plea is accurate. [37] An accurate plea must have a factual basis. The military judge will determine the factual basis for the plea by placing the accused under oath and questioning the accused about the offenses. If the inquiry "indicates not only that the accused himself believes he is guilty but also the factual circumstances as revealed by the accused himself objectively support that plea, then the plea may be accepted by the military judge as provident." [38]

United States v. Care [39] and its progeny require the military judge to explain and the accused to admit every element of the offenses to which the accused is pleading guilty. Trial counsel must remain alert to ensure the explanation and the accused's responses cover every element. Omission of an element during

the inquiry can kill a guilty plea on the spot or on appeal. In United States v. Eddy, [40] the accused pled guilty to indecent acts with his 10 and 16-year-old stepdaughters. During the judge's inquiry, the accused hedged on the fifth element-that he committed the acts with the intent to gratify his sexual desires. [41] Despite the judge's best efforts, the accused would only admit that he committed his acts "to become intimate and close with Jessica. . . . To share a loving relationship . . . . Emotionally and closely with one another." [42] The accused denied having an intent to gratify his sexual desires at the time of the acts. [43] Unfortunately, the stipulation of fact did not address the accused's intent. Because the accused would not admit the intent element on the record, on appeal the Air Force Court of Criminal Appeals set aside the findings of guilty to indecent acts with a child, but affirmed findings of guilty to the lesser-included offense of indecent acts. [44]

Several situations merit special attention during guilty plea inquiries, to include cases where the accused is charged with conspiracy. In addition to covering all elements of conspiracy, the judge's inquiry also must address the elements of the substantive offense which was the object of the conspiracy. In United States v. Pretlow, [45] the accused pled guilty to conspiracy to commit robbery. The judge's inquiry explained the elements of conspiracy, but did not address the elements of robbery, the substantive offense which was the object of the conspiracy. [46] As a result, the Court of Military Appeals held the plea of conspiracy to commit robbery was improvident.

How detailed should the factual inquiry be? In United States v. Sweet, [47] the accused pled guilty to indecent acts with a child under 16. The military judge conducted a brief providence inquiry, reading the elements to the accused, but omitting the facts alleged in the specifications. The judge then questioned the accused about a fairly detailed stipulation of fact, obtaining "yes" and "no" answers from the accused that the acts described in the stipulation of fact described what he did. The judge then added specific facts to the elements and repeated to the accused the elements as tailored, again obtaining "yes" answers from the accused. Ensign Sweet did not give a narrative description of his offenses. On appeal, the accused claimed his pleas were improvident because they lacked a factual basis in the record. In the initial appellate decision, the Navy and Marine Court of Military Review held the pleas provident. The court considered the stipulation of fact and the judge's reading of the elements adequate to support the plea, but advised judges to tailor the elements of the offense to the acts alleged in the specification. [48] The U.S. Court of Appeals for the Armed Forces also upheld the plea, holding that the military judge's inquiry satisfied R.C.M. 910 and Care. The court wrote:

We acknowledge that a more detailed inquiry in many instances may be advisable or even necessary in order to resolve questions surrounding the providence of pleas. Here, however, we take into consideration that appellant is an officer who was represented by qualified counsel, that appellant agreed to a stipulation of fact which describes his criminal acts in detail, and that his "yes" and "no" answers to the military judge's inquiry responded to questions of fact and not conclusions of law. Thus, we are persuaded to agree with the Court of Military Review that the "facts contained in the stipulation along with the inquiry of appellant on the record fully support the military judge's determination that a factual basis existed for those pleas." [49]

While the accused must admit every element of the offenses to which he or she is pleading guilty, the

accused does not have to describe from personal recollection all the circumstances necessary to establish the factual basis for the plea. The accused must, however, be convinced of and be able to describe all facts necessary to establish guilt. [50] If an accused cannot recall certain events, he or she still may be able to describe the offense sufficiently based on witness statements or similar sources which the accused believes to be true, [51] as long as that belief is based on reliable evidence, [52] and not simply because the Government alleges it to be so. [53]

For example, in United States v. Whelehan [54] the accused pled guilty to willful damage of government property, but during the Care inquiry said that because he was drunk at the time, he couldn't remember kicking in the door he was accused of damaging. Whelehan told the judge he believed he had caused the damage to the door because the two people he had been with on the night of the damage told him he had broken the door. The Air Force Court of Military Review held that the accused's inability to recall the factual basis for the charge does not cause an improvident plea when the accused is in fact convinced of his guilt based on the evidence against him and he has been otherwise properly advised. [55] Additionally, the court advised that when the accused does not recall the offense clearly, a stipulation of fact may be used in addition to the accused's responses to establish the factual basis for the accused's offenses. [56] Trial counsel should be alert to the accused's inability to recall the essential events during an offense and be ready to suggest to the military judge further inquiry.

E. Defenses Raised During the Inquiry

In addition to listening carefully to ensure the accuracy of the plea, prudent counsel will also listen for potential defenses the accused raises. If the accused does raise a defense, the judge must inquire further. [57] The potential defense may be raised by the accused or through other matters presented to the judge, who should explain the defense to the accused and determine whether the accused admits facts which negate the defense. If the accused will not admit facts which negate the defense, the judge must refuse to accept the plea.

In United States v. Rios, [58] Private Rios pled guilty to two separate attempted robberies. During the inquiry, Rios made statements which could have indicated he had abandoned his pathetic attempts to rob a fast-food restaurant and a convenience store. Rios first went to a fast food restaurant and handed the cashier a note saying he had a gun and would use it. The cashier walked away and came back with the manager, who asked Rios what he needed. Rios mumbled about what he was doing and put his hand in his pocket. The manager became frightened and fled, as did Rios. [59] Shortly after that bungled attempt, Rios went to a convenience store and presented another note to the cashier. Rios told the cashier "[he] could get in trouble if somebody saw this." [60] The cashier agreed, but did nothing, and Rios again left. The store manager then called to Rios in the parking lot before he reached his car and convinced him to return to the store, whereupon local authorities arrested the hapless Rios.

The issue was whether the defense of abandonment was raised by these facts. At trial, the judge did not elicit responses from Rios during the inquiry which would have negated the defense of abandonment, and the Army Court of Military Review held the plea improvident. [61] The Court of Military Appeals,

however, reversed the lower court, holding that the defense of abandonment was unavailable to Rios. The court ruled that Rios' display of the note to the fast food cashier was an overt act, and that Rios had never completely abandoned his attempted robbery of the fast food restaurant. [62] Although not all potential defenses will be as notable as Private Rios' asserted abandonment, an alert trial counsel will bring inconsistencies or potential defenses to the court's attention so they may be fully addressed during the inquiry instead of on appellate review.

United States v. Schoof [63] also illustrates a judge's need to conduct further inquiry after the accused raises a defense. In Schoof, the accused pled guilty to conspiracy to commit espionage and attempted espionage, but during the inquiry said he changed his mind before actually delivering classified material to the Soviet Embassy in Washington, D.C. After the accused raised this potential defense of abandonment by saying he changed his mind, the judge asked the accused further questions about what the accused did after he supposedly changed his mind. The accused's answers established that the accused had taken a substantial step sufficient to establish the attempt by later the same day asking another person to drive him to the Soviet Embassy (after he had supposedly changed his mind about delivering the classified material). [64] The Court of Military Appeals held that the accused's comments during the inquiry did not raise a "substantial inconsistency" with his plea of guilty to attempted espionage. [65]

United States v. Prater [66] shows the need for further questioning of the accused when the accused raises a potential defense during the inquiry. Sergeant Prater pled guilty to larceny of more than $12,000 of military benefits, making false official statements, and several other offenses. On appeal, Sergeant Prater argued that his plea inquiry responses raised the "exculpatory no" defense with respect to his false official statements. [67] Fortunately, during the inquiry the military judge had elicited from Prater sufficient evidence to make the defense unavailable. The judge's questions established that Prater knew the agents who questioned him were investigating him and had advised him of his Article 31 rights. The Court of Military Appeals upheld Prater's plea, finding no applicability to Prater's case of the "exculpatory no" defense, thanks in part to the judge's timely questioning of Prater about the potential defense during the inquiry. [68]

F. Other Defenses and Inconsistencies Raised During the Inquiry

Sometimes an accused, after findings, but before sentence is announced, may make a statement or present evidence inconsistent with the guilty plea. In such a case, the military judge must inquire into the matter. If, after the military judge inquires into the providence of the plea, it appears the accused entered the plea improvidently or through lack of understanding of the plea's meaning and effect, the military judge must enter a plea of not guilty to the affected charges and specifications. [69]

Although the military judge is responsible for inquiring into inconsistencies, trial counsel can and should assist the military judge by listening closely for inconsistencies the accused presents during an unsworn statement or through any other evidence during sentencing. The military judge's duty to inquire, however, does not require him or her to determine or negate all possible inconsistencies or defenses. For

example, in United States v. Clark, [70] the accused pled guilty to distributing cocaine, and the military judge accepted his plea. During sentencing, testimony from a government witness raised the issue of entrapment. The military judge inquired of the defense counsel, who told the judge there was not a viable entrapment defense for the accused. [71] The judge did not question the accused at that point. Clark then testified that the government informant had repeatedly called him about getting cocaine for him, and that he tried to get the cocaine because he was tired of the informant's nagging. [72] Again, the judge did not question Clark about the potential entrapment defense. The Court of Military Appeals stated that the military judge can give weight to the defense's evaluation of the evidence and that the mere tactical possibility of raising a defense does not of itself warrant rejection of an otherwise provident plea. [73] The court went on to hold that Clark had not raised any defense inconsistent with the guilty plea and the plea, therefore, was properly received. This case should be interpreted cautiously, however, because the judge should have inquired of the accused, not just the defense counsel, when the accused raised his possible defense.

The accused's unsworn statement is fertile ground for an accused to raise a defense or a matter inconsistent with the guilty plea. In United States v. Ellerbee, [74] the accused pled guilty to breaking restriction, larceny of an airline ticket, and unauthorized absence. The Care inquiry went smoothly and surfaced no matters inconsistent with the guilty plea. During his unsworn statement, however, the accused recounted the beatings from, and his fear of, his ex-wife's boyfriend. The accused said he fled Hickam AFB to go to California because he feared for his life. [75] Unfortunately, the military judge never questioned the accused regarding his understanding of the defense of duress. The Air Force Court of Military Review set aside the findings and sentence, holding that the accused's unsworn statement raised a question of a defense which never was resolved at trial. [76]

In United States v. Wood, [77] the accused pled guilty to wrongful use of cocaine. During the accused's unsworn statement, he said he told his first sergeant, section commander, supervisor, and security police that he'd used cocaine and wanted to be placed in a drug rehabilitation program. [78] The military judge did not inquire into the accused's possible protection from judicial action as a self-identifying drug abuser under military regulations. [79] According to the Air Force Court of Military Review, the judge should have reopened the inquiry into the factual basis for the guilty plea and received a satisfactory explanation of the inconsistency. The findings and sentence were set aside. [80] While not all inconsistencies the accused raises will be as obvious as Wood's, trial counsel must be prepared to point out inconsistencies even though it may mean the loss of an "in the bag" guilty plea.

IV. CONCLUSION

Advocates should prepare thoroughly for a guilty plea case and be alert throughout the proceeding for any issue that goes to the voluntariness or providency of the plea. Military judges know their jobs and will cover each component of a guilty plea inquiry, but it never hurts to back them up because they also prefer to have guilty plea problems resolved at trial rather than on appeal. Counsel should consider the following when preparing for and participating in a guilty plea case:

(Know the law-Care, R.C.M. 910, and the elements of the offenses to which the accused is pleading guilty.

(Review the stipulation of fact, if there is one, to ensure it covers all elements of the offenses and contains facts, and not just conclusions of law, for each element. Take time before trial to screen out inconsistencies in the stipulation of fact.

(Double check the maximum sentence the accused faces so there will be no misunderstanding by the accused or counsel.

(Review the evidence for possible defenses which the accused could raise during the Care inquiry and be prepared to listen for them.

(If the judge plans to use it, review DA Pamphlet 27-9 and go over the instructions on elements, then follow along during the inquiry.

(If you are involved in negotiating and/or drafting a PTA, ensure the terms are clear-eliminating any ambiguities before trial will save time and effort during the trial.

(Follow closely the responses by the accused as the military judge tailors the facts to cover each element of the offenses. Also, ensure every act alleged in the specification is covered, not just the elements in the specification.

(Ensure the judge asks for a narrative description of the offenses.

(Listen carefully for defenses and inconsistencies the accused may bring up during the providence inquiry or through testimony or an unsworn statement. Also, listen for defenses and inconsistencies other witnesses may bring up during sentencing.

(Remember, trial counsel may use the accused's statements from the providence inquiry for sentencing purposes.

Footnotes

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1. Manual for Courts-Martial, Uniform Code of Military Justice, app. 2 (1984) [hereinafter MCM].

2. MCM, supra note 1, pt. II, ch. IX, Rules for Courts-Martial [hereinafter R.C.M.].

3. See Major Terry L. Elling, Guilty Plea Inquiries: Do We Care Too Much? 134 Mil. L. Rev. 195 (1991) for a comparison of military and federal practices.

4. MCM, supra note 1, UCMJ, Article 45(a).

5. Although R.C.M. 910(c)(2) references only general or special courts-martial, Air Force InstructioN 51-201, para 5.2.2.4, Administration of Military Justice (4 Oct. 1994) requires that military defense counsel be made available to the accused in a summary court-martial. See also Lieutenant Colonel Michael H. Gilbert, Summary Courts-Martial: Rediscovering the Spumoni of Military Justice, 39 A.F. LAW REV. (1996) (this issue).

6. R.C.M. 910(c)(3).

7. R.C.M. 910(d).

8. R.C.M. 910(e).

9. R.C.M. 910(f)(3).

10. R.C.M. 910(h)(1).

11. R.C.M. 910(h)(2).

12. 40 C.M.R. 247 (1969).

13. Id. at 252-53.

14. Effective Oct. 5, 1994, pursuant to Pub. L. No. 103-337 Sec. 924, 108 Stat. 2663, the United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces and each Court of Military Review was renamed the Court of Criminal Appeals.

15Id. at 253.

16. Id.

17. 34 M.J. 264 *[cited at]* (C.M.A. 1992).

18. Id. at 265-66.

19. 7 M.J. 414 *[cited at]* (C.M.A. 1979).

20. United States v. Castrillon-Moreno, 3 M.J. 894 *[cited at]* (A.C.M.R. 1977).

21. 7 M.J. at 416.

22. 43 C.M.R. 579 (A.C.M.R. 1970).

23. Id. at 580.

24. Id.

25. Id. at 582.

26. In United States v. Johnson, 12 M.J. 673 *[cited at]* (A.C.M.R. 1981), the Army Court of Military Review found an abuse of discretion when the judge refused to accept a guilty plea because the accused would not reveal the name of his drug supplier. The accused did not want to name his supplier because he was afraid of physical harm. The court noted that the judge arbitrarily "imposed an unnecessary condition on the acceptance of the plea." Id. at 674. See also United States v. Penister, 25 M.J. 148 *[cited at]* (C.M.A. 1987) (military judge should have accepted a plea if accused was convinced, based on reliable evidence, that he shot victim; not important that he did not remember doing it).

27. 27 M.J. 57 *[cited at]* (C.M.A. 1988).

28. Id. at 59.

29. Id. at 61.

30. Id. at 59.

31. 31 M.J. 729 *[cited at]* (A.F.C.M.R. 1990).

32. Id. at 730-31. The court cited an earlier case, United States v. Collins, 17 M.J. 901 *[cited at]* (A.F.C.M.R. 1983), to support this ruling. The court in Collins noted: "[J]ust as the Care procedure cannot be used to provide evidence to support findings of guilty on the merits, neither can the proceedings be used to provide a defense on the merits." Id. at 904.

33. R.C.M. 910(f)(2)(discussion).

34. 11 M.J. 257 *[cited at]* (C.M.A. 1981).

35. R.C.M. 910(f)(4).

36. R.C.M. 910(f)(3).

37. R.C.M. 910(e).

38. United States v. Davenport, 9 M.J. 364 *[cited at]* (C.M.A. 1980).

39. 40 C.M.R. at 247.

40. 41 M.J. 786 *[cited at]* (A.F.Ct.Crim.App. 1995).

41. Id. at 789.

42. Id.

43. Id.

44. Id. at 790.

45. United States v. Pretlow, 13 M.J. 85 *[cited at]* (C.M.A. 1982).

46. Id. at 88.

47. 42 M.J. 183 *[cited at]* (1995).

48. United States v. Sweet, 38 M.J. 593 *[cited at]* (N.M.C.M.R. 1993).

49. 42 M.J. at 185-86.

50. United States v. Luebs, 43 C.M.R. 315 (C.M.A. 1971).

51. R.C.M. 910(e) (discussion).

52. United States v. Penister, 25 M.J. 148 *[cited at]* (C.M.A. 1987).

53. See United States v. Martin, 39 M.J. 183 *[cited at]* (1994). The Martin court found an adequate

factual basis for the plea "where the record of trial establishes 'an accused's assessment' that other government evidence exists on this question." Id. at 185. Cf. United States v. Morrison, ACM 29310, slip op. at 3 (A.F.C.M.R. 24 Dec. 1993) ("[A] guilty plea does not ultimately rest on the state of the evidence, but on what the accused actually admits on the record").

54. 10 M.J. 566 *[cited at]* (A.F.C.M.R. 1980).

55. Id. at 568.

56. Id.

57. R.C.M. 910(e).

58. 33 M.J. 436 *[cited at]* (C.M.A. 1991).

59. Id. at 437.

60. Id.

61. Id. at 440.

62. Id. at 441.

63. 37 M.J. 96 *[cited at]* (C.M.A. 1993).

64. Id. at 101-02.

65. Id. at 104. Cf. United States v. Smauley, 39 M.J. 853 *[cited at]* (N.M.C.M.R. 1994) (Schoof criticized but reluctantly followed).

66. 32 M.J. 433 *[cited at]* (C.M.A. 1991).

67. Id. at 436.

68. Id. at 437.

69. R.C.M. 910(h)(2).

70. 28 M.J. 401 *[cited at]* (C.M.A. 1989).

71. Id. at 403-04.

72. Id. at 404.

73. Id. at 407.

74. 30 M.J. 517 *[cited at]* (A.F.C.M.R. 1990).

75. Id. at 518-19.

76. Id. at 519.

77. 29 M.J. 852 *[cited at]* (A.F.C.M.R. 1989).

78. Id. at 853.

79. AFI 36-2701, Social Actions Program (superseding AFR 30-2) contains in para. 5.5 provisions granting limited protection from UCMJ action to an individual who seeks assistance and voluntarily discloses evidence of personal drug use or possession to the individual's unit commander, first sergeant, Social Actions, or a designated military medical authority.

80. 29 M.J. at 853-54.

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39 AFLR 103, Discovery in Courts-Martial

Title of Article

Discovery in Courts-Martial

Author

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Text of Article

I. INTRODUCTION

Discovery in military courts-martial is "quite liberal." [1] It is intended to promote full discovery and eliminate gamesmanship from the discovery process. [2] The starting point for any discussion of discovery is Article 46 of the Uniform Code of Military Justice (UCMJ), [3] which provides that "[t]he trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence." [4] Congress intended more generous discovery for the military accused [5] based upon the belief it has many advantages. As stated in the Manual for Courts-Martial,

Providing broad discovery at an early stage reduces pretrial motion practice and surprise and delay at trial. It leads to better informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and the efficiency with which it functions. [6]

Whether you are trial or defense counsel, the effective use of discovery will greatly assist the preparation and presentation of your case. Trial practitioners need to understand the rules in order to achieve its primary purpose-to uncover the truth during the litigation process. Moreover, it is important for practitioners to know the rules because the military judge has broad discretion to impose sanctions if counsel do not fully disclose all discoverable matters in a timely fashion. [7] In addition, failure to understand discovery requirements may subject counsel to sanctions for violating ethical rules.

A variety of authorities govern the discovery process, including the Rules for Courts-Martial (R.C.M.), [8] the Military Rules of Evidence (M.R.E.), [9] federal statutes, [10] military ethical rules and standards, [11] case law, and the Federal Constitution. [12] This article provides a broad overview of the

law, with a primary focus on the R.C.M. and M.R.E. For purposes of most of this discussion, the author assumes the evidence is in existence, [13] relevant, [14] and necessary. [15] Although there are areas where the defense and prosecution discovery responsibilities overlap, for ease of discussion, this article is divided into two major sections-the prosecution's responsibilities and the defense's responsibilities. These main sections are subdivided into several categories of discovery, including evidence that must be disclosed even in the absence of a request, requirements to notify opposing counsel of the intention to use certain types of evidence or advance certain theories, and, finally, evidence that must be disclosed only when the opposing party requests it.

II. PROSECUTION'S DISCOVERY RESPONSIBILITIES

A. Disclosure in the Absence of a Request

A number of provisions in the Manual for Courts-Martial require trial counsel to provide certain information to the defense counsel-even when there has been no request. The discussion below covers the R.C.M. and M.R.E. which address this category of discovery.

Rule for Courts-Martial 701(a) is a key provision for trial counsel. The first deadline for trial counsel is as "soon as practicable" after charges are served on the accused. [16] Even if defense counsel does not ask for discovery, R.C.M. 701(a)(1) requires trial counsel to disclose any papers which accompanied the charges when referred. This includes any document the convening authority considered when referring the charges-to include investigative reports and the pretrial investigation report required by Article 32 of the UCMJ (if not previously provided). [17] In addition, trial counsel also must provide the convening orders and any amendments, [18] as well as any sworn or signed statements relating to the charges which are in the possession of the trial counsel. [19] If the statement is given under oath or signed by the person making the statement, and the statement relates to the charges, trial counsel must provide defense counsel with a copy, even if the statement is minimally relevant.

The second deadline for mandatory disclosure is prior to the beginning of trial. Rule for Courts-Martial 701(a)(3) requires trial counsel to notify the defense of the names and addresses of the witnesses the trial counsel intends to call in the prosecution's case-in-chief or to rebut any affirmative defense. [20] The notice should be in writing and must be given before the beginning of trial on the merits. It is a much better practice, however, to give proper notice of witnesses well in advance of trial. Early notice will allow for thorough trial preparation and minimize delay requests. Again, there is no requirement that defense counsel specifically ask for the names and addresses of case-in-chief witnesses; it is trial counsel's responsibility to provide them. [21]

Trial counsel also has a duty under R.C.M. 701(a)(4) to notify the defense counsel if the accused has a prior civilian or court-martial conviction and whether trial counsel intends to offer the conviction on the merits for any purpose, including impeachment. Trial counsel must give this notice before the accused is arraigned. [22] If prior convictions exist and trial counsel has the records in his or her possession, defense counsel has the right to inspect them. [23]

Under R.C.M. 701(a)(6), trial counsel has an affirmative duty to disclose any evidence favorable to the defense "as soon as practicable." Evidence favorable to the defense is anything which "reasonable tends to" negate the guilt of the accused, reduce the degree of guilt, or reduce the punishment. [24] This rule also has substantial ethical [25] and constitutional [26] implications.

Although R.C.M. 701 is the major provision dealing with discovery, other Rules for Courts-Martial also require trial counsel to serve reports on the defense, even when there is no specific request. For example, R.C.M. 405 requires prompt delivery to the accused of the completed pretrial investigation report required by Article 32 of the UCMJ. [27] Another service requirement is found in R.C.M. 706(c)(3)(B), which entitles the defense to a full report of any sanity board.

In addition to the Rules for Courts-Martial, Military Rules of Evidence impose many disclosure requirements, even in the absence of a specific defense request. In this regard, one must consider M.R.E. 304 (d)(1), M.R.E. 311(d)(1), and M.R.E. 321(c)(1), which are similar procedurally, albeit substantively distinct. Military Rule of Evidence 304(d)(1) requires the prosecutor to disclose the contents of all statements "made by the accused that are relevant to the case, known to the trial counsel and within the control of the armed forces." Military Rule of Evidence 311(d)(1) requires the prosecution to disclose all evidence "seized from the person or property of the accused or believed to be owned by the accused, that it intends to offer into evidence against the accused at trial." Under M.R.E. 321(c)(1), trial counsel must disclose all evidence of a prior identification of the accused-such as a lineup or other identification process-which trial counsel intends to offer at trial.

The procedures under all three rules are the same. First and foremost, they do not require the defense to make a specific request for the information. The deadline for providing the information is also the same-prior to arraignment. If trial counsel is timely, the defense must move to suppress the statement or evidence prior to submission of pleas. [28] However, if evidence is not given prior to arraignment, yet the prosecution nonetheless wants to offer the evidence, trial counsel must promptly notify the military judge and the defense counsel. [29] The defense counsel then gets a chance to challenge trial counsel's use of the information, and the military judge may make any orders that are required in the interests of justice. [30]

Additional issues frequently arise with disclosure of statements made by the accused under M.R.E. 304, and trial counsel needs to be attuned to the rule's specific terms. The rule applies even when the Government does not intend to use the statement and regardless of whether the trial counsel intends to use it in rebuttal or sentencing. Moreover, it applies to oral [31] or written statements, both formal and informal.

Additional issues arise because the disclosure requirement for M.R.E. 304 applies only to "relevant" statements." The relevance of some statements may not become apparent until during or after the defense's case. Where relevancy is not immediately apparent, trial counsel has no duty to disclose the statement or evidence. However, the better practice is to disclose any statement that has a "reasonable prospect" of being offered as evidence at trial. [32] This practice reduces the possibility of interrupting

the trial for consideration of defense objections to the statement and in some instances may actually induce a guilty plea and avoid a contested trial. [33]

The Court of Military Appeals case of United States v. Dancy [34] is a good illustration of relevancy under M.R.E. 304(d)(1). It also illustrates the broad discretion granted military judges to remedy discovery violations, as well as the courts' refusal to countenance sandbagging of the defense and gamesmanship. In Dancy, the victim alleged that the accused used his military position to coerce her into having sexual intercourse. [35] The appellant denied the allegations, testifying that his relationship with the victim was purely professional. On cross-examination, the trial counsel confronted the accused with a letter written to the victim's sister, in which the accused described his relationship with the victim as being very friendly. The trial counsel had not disclosed this letter to defense prior to trial. Defense objected to the letter and asked for a mistrial. The military judge ruled that the trial counsel had "ambushed" the defense by failing to provide the statement in accordance with the provisions of M.R.E. 304(d)(1). Although the trial judge did not grant a mistrial, rather severe sanctions were imposed, including a detailed instruction to the members informing them that trial counsel had ambushed the defense by not disclosing the letter. The Court of Military Appeals readily agreed that the trial counsel had erred in not disclosing the letter and supported the remedy used by the trial judge. [36] The court went on to note: "In the area of discovery, military law has been preeminent, providing broader discovery than is granted to most civilian defendants and zealously guarding the right of an accused to prepare his case by openly disclosing the Government's evidence." [37]

B. Notice Requirements Absent a Defense Request

Several rules impose an affirmative duty on trial counsel to give the defense notice of specific information intended to be used at trial. [38] For example, R.C.M. 1004(b)(1) requires the trial counsel to give the defense written notice of the aggravating factors the prosecution intends to prove in death penalty cases. Trial counsel must give this notice to defense before arraignment, but failure to give timely notice does not preclude later notice, or proof of additional or different aggravating factors, unless the accused proves specific prejudice and that a continuance or a recess is not a sufficient remedy. [39]

Under M.R.E. 301(c)(2), trial counsel must notify the defense of any prosecution witness who has been granted immunity or leniency in exchange for testimony. The rule requires the grant of immunity or leniency be in writing and served on the defense prior to arraignment, or within a reasonable time before the witness testifies. The remedy for failure to give proper notice is also spelled out in the rule: the military judge can grant a continuance until notification is made, strike the testimony of the witness, or enter any other order that may be required.

Several notice requirements apply to both the defense and prosecution. Military Rule of Evidence 201A (b) requires either party who intends to raise an issue concerning the law of a foreign country to give a reasonable written notice to the other party. Military Rule of Evidence 609 allows either trial or defense counsel to attack the credibility of a witness by using evidence that the witness was convicted of a crime

punishable by death, dishonorable discharge, or imprisonment in excess of one year. In addition, it permits the use of a conviction involving dishonesty or false statement, regardless of the punishment. The conviction must not have been more than 10 years old. If the conviction is more than 10 years old, the person seeking to introduce evidence of the conviction must give "sufficient advance written notice" of the intent to use the conviction to the opposing party. [40]

C. Disclosure Upon Request

Once charges have been served on the accused, R.C.M. 701(a)(2) gives defense counsel the right to inspect specific information upon request, including the right to photograph and to copy:

Any books, papers, documents, photographs, tangible objects, buildings, or places. . . within the possession, custody, or control of military authorities and which are material to the preparation of the defense, or which are intended for use by the trial counsel in the prosecution's case-in-chief at trial, or which were obtained from or belong to the accused; and

Any results or reports of physical or mental examinations, and of scientific tests or experiments . . . which are within the possession, custody, or control of military authorities, the existence of which is known to the trial counsel, and which are material to the preparation of the defense or which are intended for use by the trial counsel as evidence in the prosecution case-in-chief. [41]

The issue of what is "material to the preparation of the defense" was raised in the case of United States v. Trimper. [42] This case illustrates that the clause "material to the preparation of the defense" does not necessarily include favorable or exculpatory evidence, and emphasizes that its application is not limited to evidence the trial counsel intends to use in the Government's case-in-chief. Captain Trimper was charged with drug use, which he consistently denied during his testimony. During cross-examination of the accused, the Government revealed for the first time that it had evidence he had obtained a private urinalysis at a local hospital. This private urinalysis, accomplished only a few weeks after the time period charged in the specifications, was positive for drugs. The Government learned about this private urinalysis through one of the accused's co-workers, who learned about it from the accused. On appeal, the accused averred that this evidence should have been suppressed because the Government failed to disclose it-despite a defense request for all laboratory reports made pursuant to R.C.M. 701. The Court of Military Appeals agreed that the Government should have disclosed this information to the defense in accordance with R.C.M. 701(a)(2)(B) and M.R.E. 304(d)(1), but ruled that the remedy was not suppression of the evidence where there was no evidence of bad faith. [43] The court stated that in view of the very short period of time between the dates in the specifications and the time the private urinalysis was performed, the urinalysis was "material to the preparation of the defense." [44] The court noted that "even though trial counsel did not intend to use the report in his case-in-chief, he should have recognized its materiality to the defense and disclosed it," [45] adding that if "there is a reasonable prospect that the statement might be offered in evidence during the trial, then disclosure is required." [46]

In United States v. Meadows, [47] the Court of Appeals for the Armed Forces discussed how this rule is

triggered. In Meadows, the appellant challenged his conviction because the trial counsel used a lease agreement at trial which differed from the lease agreement offered during the Article 32 investigation. [48] The appellant argued that the use of a different lease agreement misled the defense and prevented him from presenting a proper defense.49 However, the accused had failed to make any sort of discovery request. Appellant, nonetheless, argued that the prosecution failed to meet its discovery responsibilities when it did not inform the defense of the existence of the second lease. [50] In analyzing the "more generous" discovery available to the military accused, the court found that R.C.M. 701(a)(2) is meant to satisfy the statutory mandate that trial and defense counsel have equal access to witnesses and evidence. [51] The court also found that the rule, while generous, is "triggered only by a defense request for such access." [52] The court found no request for the evidence, and, consequently, held that there was no prejudice to the accused when the trial counsel used a different lease from what had been presented at the pretrial investigation. [53]

In instances where there is a defense request for discovery, the Court of Military Appeals has interpreted Rule 701(a)(2) broadly. In United States v. Simmons, [54] the Court of Military Appeals found that the prosecution had violated R.C.M. 701's disclosure provisions when it did not provide the defense counsel with inadmissible government polygraph reports containing material arguably favorable to the accused, even though defense counsel knew of the polygraph reports and chose not to examine them. The court found a violation of discovery requirements even though the defense counsel did not specifically ask for the polygraph reports, instead making only a general request for "any and all information . . . that may be favorable to the defense." The court did, however, rule that "[w]e are not requiring trial counsel to search for the proverbial needle in a haystack. He need only exercise due diligence in searching his own files and those police files readily available to him." [55]

Pursuant to R.C.M. 701(a)(5), defense counsel also may ask to inspect any written material the prosecution will present in presentencing proceedings, and may ask for the names and addresses of those witnesses the trial counsel intends to call at presentencing proceedings. The Navy-Marine Court of Review recently discussed this rule in United States v. Clark. [56] The defense counsel in Clark made an oral request for "general" discovery, prompting trial counsel to disclose those things trial counsel intended to present during the presentencing case-in-chief. Before trial, defense counsel provided trial counsel with a copy of a favorable letter, purportedly from an official for the City of Los Angeles representing that the accused had a firm job offer with the city. Defense counsel intended to offer this letter as a matter in mitigation. Trial counsel checked on the letter's authenticity and received a telefax from a city official saying the letter was a forgery and that the accused had not been offered a job. Trial counsel did not disclose the telefax to defense counsel until after the accused's presentencing case, when the letter was offered in rebuttal. Defense counsel moved for a mistrial, which was denied. The Navy-Marine Court found that trial counsel had no obligation to disclose written matter which the Government may offer solely to rebut the accused's evidence of extenuation and mitigation during presentencing. [57]

Another notice requirement exists in M.R.E. 404(b), which allows uncharged misconduct to be used for proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Upon request, the trial counsel must provide reasonable notice to the defense counsel of the general nature of any uncharged misconduct trial counsel seeks to admit into evidence. The notice must

be given before trial, unless the judge excuses the pretrial notice requirement for good cause. [58]

Several rules apply to both trial and defense counsel. For example, M.R.E. 612 allows either trial or defense counsel to have any writing used to refresh a witness' memory produced at trial. It does not matter whether a witness refreshes his or her memory while testifying or before testifying. If the writing is not produced, the military judge may enter any order that justice requires. However, if it is the prosecution that refuses to comply with an order to produce a writing, then the military judge must enter an order striking the testimony or, in the military judge's discretion, declare a mistrial. [59] Similarly, under M.R.E. 613, when counsel examines a witness on a prior statement, counsel must show or disclose the prior statement to the opposing counsel, if opposing counsel requests. However, the statement need not be shown to the witness before the witness is examined on the statement. [60]

Although not intended to provide a general right of discovery, [61] R.C.M. 914 allows a party to make a motion to compel production of any statement made by a witness which relates to the subject matter of the witness' testimony on direct examination. The rule applies to both trial and defense counsel. If the statement relates to the subject matter of the witness' testimony and is in the possession of the party calling the witness, the statement must be produced. If the party elects not to comply with the order to produce, the military judge must order the trier of fact to disregard the witness' testimony. If the trial counsel refuses to comply with the judge's order, the military judge may declare a mistrial, if justice requires. [62] Rule for Courts-Martial 914 is based on the Jencks Act, [63] which is applicable to courts-martial. The purpose of both the rule and the Jencks Act is "to prevent a party from gaining an unfair advantage in the trial arena by withholding evidence that could impeach that party's witness." [64] Not every violation of the Jencks Act or the disclosure provisions of R.C.M. 914 results in prejudice to an accused. Absent bad faith on the part of the Government, the courts generally have not found the failure to disclose to violate the Jencks Act. [65]

III. DEFENSE'S DISCOVERY RESPONSIBILITIES

As the prior discussion reveals, defense counsel do have some of the same responsibilities as trial counsel. In addition, military practice has specific rules allowing the Government to discover certain defense matters. [66] Again, the primary source for practitioners is R.C.M. 701, but several Military Rules of Evidence also come in to play. The discussion below focuses on requirements to disclose information even in the absence of a request, reciprocal discovery responsibilities, and mandatory notice requirements. Defense counsel who ignore these responsibilities face possible sanctions, including the suppression of otherwise relevant information.

A. Disclosure in the Absence of a Request

Rule for Courts-Martial 701(b) governs disclosure by the defense. Mandatory disclosure by the defense is intended to "foster the truth-finding process." [67] The defense is required to provide, even though there is no written request, the names and addresses of all witnesses the defense intends to call in its case-in-chief. [68] The accused is, of course, exempt from this requirement, [69] but the rule is broad enough

to require the defense to provide "all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case." [70]

The recent Navy case of United States v. Province [71] illustrates how ethical rules may place an affirmative duty on defense counsel to disclose documents existing prior to the attorney-client relationship. One of the issues in the case was whether the appellant received ineffective assistance of counsel because his defense counsel disclosed a "stragglers order" to the trial counsel, who was otherwise ignorant of its existence. The net result of the disclosure was that the charge sheet was amended to include an additional specification of absence without leave. The Navy court held that the defense counsel had an obligation to provide the Government with pre-existing documentary evidence obtained from his client, [72] especially when the documents were created by a government agency. The appellant, nonetheless, argued that even if the stragglers order was "discoverable," the defense counsel had no obligation to provide it if the trial counsel was unaware of its existence. The court used Navy ethical rules to resolve this issue, citing JAGINST. 5803.1, Rule 3.3(d), Candor and Obligations Toward the Tribunal, [73] as well as the Government's right to equal access to relevant evidence under R.C.M. 703(f)(1),(4). To hold otherwise, the court stated, "might encourage defense counsel to race the police to seize critical evidence." [74]

B. Notice Requirements

Numerous rules require the defense to notify the prosecution of certain matters. Rule for Courts-Martial 701(b)(2) requires defense counsel to notify the trial counsel of his or her intention to use certain affirmative defenses, including the defenses of alibi, innocent ingestion, or lack of mental responsibility. Defense counsel must also give notice of the intent to offer expert testimony as to the accused's mental condition. [75] Defense counsel must give notice of these defenses prior to the start of the trial on the merits, and it "should be in writing except when impracticable." [76] The notice of an alibi defense must disclose the place where the defense claims the accused was at the time of the alleged offenses, along with the names and addresses of any witness the defense intends to call. [77] If innocent ingestion is to be raised, the defense counsel must disclose where and under what circumstances the defense claims the accused innocently ingested the substance in question, along with the names and addresses of any witnesses the defense intends to call. [78]

The Military Rules of Evidence require notice of other matters. [79] A few examples will illustrate. For example, M.R.E. 412(c)(1) requires defense counsel to file a written motion with the court and give notice to all parties if the accused intends to offer evidence of a victim's past sexual behavior. [80] The notice must be served on both the trial counsel and the military judge and be accompanied by an offer of proof as to what evidence the defense seeks to have admitted. Another example can be found in the notice requirement of M.R.E. 505(h). If the defense reasonable expects to disclose or cause to disclose any classified information, the defense must notify the prosecution in writing. [81] Again this notice must be in writing, with a copy provided to the military judge. The defense must give the notice either before arraignment or before the deadline established by the military judge for discovery of classified information.

C. Disclosure Upon Request/Reciprocal Discovery

As discussed earlier, R.C.M. 701(b)(1)(A) requires the defense to provide the names of witnesses the defense intends to call in its case-in-chief, without the need for the trial counsel to make a specific request. When it comes to sentencing witnesses, however, R.C.M. 701(b)(1)(B) requires the defense to provide the names and addresses of sentencing witnesses only if trial counsel makes a specific request. [82] The trial counsel also has the right to inspect any writing the defense will offer at presentencing. [83]

In what is frequently referred to as reciprocal discovery, if the defense counsel has requested the right to inspect matters, the defense must also allow the trial counsel to inspect any books, papers, documents, photographs, tangible objects, or copies of these items which are in the control, possession or custody of the defense and which the defense intends to introduce as evidence in its case-in-chief. [84] The defense counsel's obligation is triggered by the Government's compliance to the defense counsel's request for the same type of information.

Under R.C.M. 701(b)(4), the same procedures apply for reports of examinations and tests. [85] If the defense has requested disclosure of these items, the trial counsel may ask to inspect any results or reports of physical or mental examinations and scientific tests or experiments made in connection with a particular case. This evidence must be in the possession, custody, or control of the defense, and the defense must intend to introduce it as evidence in the defense case-in-chief. Disclosure is also required when the defense intends to call a witness who has prepared results or reports which relate to that witness' testimony. [86]

Finally, under M.R.E. 302, if defense counsel offers statements made by the accused to a sanity board convened under the auspices of R.C.M. 706, the trial counsel may move the military judge to order the disclosure of all of the accused's statements contained in the sanity board report, if the disclosure is necessary in the interests of justice. The other portions of the sanity board report, however, remain protected as long as the accused's sanity is not litigated. Military Rule of Evidence 302 also permits trial counsel to move the military judge to release the full contents of the sanity board report, if the defense offers expert testimony of the accused's mental condition. Unless they are releasable under other circumstances, the accused's statements remain protected if the full report is released.

IV. CONCLUSION

Discovery in military courts-martial is generous to the defense as well as the prosecution. Notwithstanding this broad mandate, it is often good practice to provide even more expansive discovery than is absolutely required by the rules. By doing so, litigators lessen the risk of violating disclosure deadlines, as well as allegations of "trial-by-ambush." When evidence is not timely disclosed to defense, counsel run the risk of sanctions, including a delay in the case, exclusion of the evidence, or even a mistrial. As the Court of Military Appeals said in United States v. Trimper, "trial-by-ambush tactics are discouraged; and where clearly they have been employed, we will recognize them for what they

are." [87] Clearly the better practice is to avoid any questions and give early discovery of those materials that are clearly discoverable, although stricter adherence to the rules may be in order when the circumstances of your case dictate, such the existence of privileged or classified material.

Discovery is a critical part of any case. It should not be taken for granted or ignored because

[c]ourt-martial discovery practice serves several values: efficiency of process, integrity in fact-finding, and fairness to the parties. Pretrial discovery alerts the parties to the contentions they must be prepared to address and the case they must marshal; it makes it more likely that the evidence necessary for a full exposition of the facts will be available and that an informed decision will be made; it makes it more likely that the trial, once underway, will proceed to completion without distraction or delay; and, it precludes one party from taking unfair advantage over another with a consequential loss of confidence in the integrity and fairness of the disciplinary process. [88]

If counsel comply with discovery, the issues in the case will be properly framed and the trial will proceed smoothly, something that can only benefit the fair administration of justice.

Footnotes

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1. Manual for Courts-Martial [hereinafter MCM], A21-32, Analysis of Rules for Courts-Martial (1995).

2. Id.

3. Id. at A2-13, Uniform Code of Military Justice [hereinafter UCMJ]. Article 46 can also be found at 10 U.S.C.A. Sec. 846 (West 1983 & Supp. 1995).

4. MCM, supra note 1, at A21-32 (emphasis added).

5. United States v. Eshalomi, 23 M.J. 12 *[cited at]* (C.M.A. 1986).

6. MCM, supra note 1, at A21-32.

7. Id. at ch. II, Rule for Courts-Martial 701(g)(3) [hereinafter R.C.M.]. Sanctions can include ordering the trial counsel to provide discovery or granting a continuance, as well as not allowing the trial counsel to offer evidence or call a witness. The rules also allow the military judge to craft any other remedy considered fair under the circumstances. Id. See, e.g., United States v. Manuel, C.M.R. No. 30025 (29 Sept. 1995) (holding that R.C.M. 702(g)(2) allows the military judge to fashion an appropriate remedy

when evidence of central importance to the case is lost or destroyed such as when a positive urine specimen is destroyed through gross negligence); United States v. Clark, 37 M.J. 1098 *[cited at]* (N.M. C.M.R. 1993) (ruling that selection of a remedy for discovery noncompliance is committed to the discretion of the military judge and will not be reversed absent an abuse of discretion).

8. R.C.M. 701 is the basic authority for pretrial discovery.

9. MCM, supra note 1, ch. III, Military Rules of Evidence [hereinafter M.R.E.].

10. See UCMJ, supra note 3, art. 46 (Opportunity to obtain witnesses and other evidence). See also Jencks Act, 18 U.S.C.A. Sec. 3500 (West 1985 & Supp. 1995).

11. Office of The Judge Advocate General, Letter No. 95-26, Air Force Rules of Professional Conduct 3.2 (Expediting Litigation) and 3.4(a) & (d) (Fairness to Opposing Party and Counsel) (6 Jan. 1995). See also id., AIR FORCE STANDARDS FOR CRIMINAL JUSTICE, ch. 5 (Discovery and Procedure Before Trial).

12. U.S. Const. amend XIV. For key cases interpreting constitutional issues on discovery, see Brady v. Maryland, 83 S.Ct. 1194 *[cited at]* (1963); United States v. Green, 37 M.J. 88 *[cited at]* (C.M.A. 1993); United States v. Romano, 43 M.J. 523 *[cited at]* (A.F.Ct.Crim.App. 1995).

13. There is no duty to create evidence to satisfy a discovery request. R.C.M. 703(f)(2); United States v. Birbeck, 35 M.J. 519 *[cited at]* (A.F.C.M.R. 1992).

14. See R.C.M. 703(f)(1) and discussion (citing M.R.E. 401). R.C.M. 703(f)(1) provides that "[e]ach party is entitled to the production of evidence which is relevant and necessary."

15. "Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as fact." R.C.M. 703 (f)(1)(discussion). Of course, nothing in the Rules for Courts-Martial or the Military Rules of Evidence requires disclosure of privileged information such as attorney work product or confidential communications. Any notes, memoranda, or working papers prepared by counsel or their representatives are also protected from disclosure. R.C.M. 701(f). See also M.R.E. 501(b).

16. R.C.M. 701(a)(1). Recently, The Air Force Judge Advocate General established new time requirements which are stricter than R.C.M. 701. Memorandum from The Judge Advocate General for all Staff Judge Advocates and Chief Circuit Judges (13 Nov. 1995). The memorandum encourages staff judge advocates to provide basic discovery even before preferral, to include: the charge sheet, transmittal with attachments, any reports of investigation, and any signed or sworn statements relating to the charge. Id. at 2. The new policy allows defense counsel the opportunity to inspect physical evidence upon request at preferral or a reasonable time thereafter. Id. These changes were effective immediately

and will be incorporated in the next revision of Air Force Instruction (AFI) 51-201, The Administration of Military Justice (28 July 1995).

17. R.C.M. 701(a)(1)(A).

18. R.C.M. 701(a)(1)(B).

19. R.C.M. 701(a)(1)(C).

20. R.C.M. 701(a)(3).

21. Id. Standard military practice is to include a witness' phone number and/or squadron when possible.

22. R.C.M. 701(a)(4).

23. Id.

24. R.C.M. 701(a)(6).

25. MCM, supra note 1, at A21-32.

26. Compare Brady v. Maryland, 83 S.Ct. 1194 *[cited at]* (1963) (if the defense requests evidence favorable to the accused, nondisclosure violates due process when the evidence is material to either guilt or punishment) with Kyles v. Whitley, 115 S.Ct. 1555 *[cited at]* (1995) (materiality is not determined by whether or not disclosure would have resulted in an acquittal; instead, the undisclosed evidence need only put the case in a different light so as to undermine confidence in the verdict) and United States v. Watson, 31 M.J. 49 *[cited at]* (C.M.A. 1990) (appellant entitled to relief only if the disclosed information casts a reasonable doubt on the validity of the proceedings). See also United States v. Bagley, 473 U.S. 667 *[cited at]* (1985); United States v. Hart, 29 M.J. 407 *[cited at]* (C.M.A. 1990); United States v. Eshalomi, 23 M.J. 12 *[cited at]* (C.M.A. 1986); United States v. Agurs, 427 U.S. 97 *[cited at]* (1976); United States v. Gabrels, 33 M.J. 622 *[cited at]* (A.F.C.M.R. 1991).

27. See United States v. Meadows, 42 M.J. 132 *[cited at]* (1995), cert. denied, 116 S.Ct. 190 *[cited at]* (1995). (holding that R.C.M. 405(j)(3) requires a copy of the investigating officer's report to be delivered on the accused, while R.C.M. 405(g)(1)(B) requires any document considered as evidence to be attached to the report).

28. M.R.E. 304(d)(2)(A); 311(d)(2)(A); 321(c)(2)(A).

29. M.R.E. 304(d)(2)(B); 311(d)(2)(B); 321(c)(2)(B).

30. Id.

31. This includes remarks made during informal conversations, and regardless of whether the oral remark is subsequently transcribed in a written report. United States v. Callara, 21 M.J. 259 *[cited at]* , 262 (C.M.A. 1986).

32. Id. at 263 (disclosure requirement of M.R.E. 304(d)(1) applies only to relevant statements, and relevance of some statements may not be foreseen until defense presents its case; under those circumstances there is no penalty for nondisclosure).

33. Id.

34. 38 M.J. 1 *[cited at]* (C.M.A. 1993).

35. Id. at 2.

36. Id. at 5-6. In addition to several provisions from the Manual for Courts-Martial, supra note 1, the court relied on the ethical obligations of trial counsel to support its decision. Id. at 5 n.3.

37. Id. at 5.

38. See generally R.C.M. 701(discussion).

39. R.C.M. 1004(b)(1).

40. M.R.E. 609(b).

41. R.C.M. 701(a)(2).

42. 28 M.J. 460 *[cited at]* (C.M.A. 1989).

43. Id. at 461.

44. Id. at 468.

45. Id.

46. Id. (citing Callara, 21 M.J. at 263).

47. 42 M.J. 132 *[cited at]* (1995).

48. Id. at 133.

49. Id.

50. Id. at 136.

51. Id.

52. Id.

53. Id. at 138.

54. 38 M.J. 376 *[cited at]* (C.M.A. 1993).

55. Id. at 382 n.4.

56. 37 M.J. 1098 *[cited at]* (N.M.C.M.R. 1993).

57. Id. at 1099.

58. M.R.E. 404(b).

59. Id.

60. M.R.E. 613(a). See generally Captain Earl F. Martin III, Prior Inconsistent Statements and the Military Rules of Evidence, 39 A.F. LAW REV. (1996) (this issue).

61. United States v. Roxas, 41 M.J. 727 *[cited at]* , 730 (N.M.Ct.Crim.App. 1994).

62. R.C.M. 914(e). The discussion to this rule emphasizes that "[c]ounsel should anticipate legitimate demands for statements under this and similar rules and avoid delays in the proceedings by voluntary disclosure before arraignment."

63. 18 U.S.C. Sec. 3500. See also United States v. Lewis, 38 M.J. 501 *[cited at]* , 508 (A.C.M.R. 1993), aff'd, 42 M.J. 1 *[cited at]* (1995).

64. Lewis, 38 M.J. at 508.

65. See, e.g., Roxas, 41 M.J. at 730 (when witness' handwritten statement lost by investigators was

largely identical to a typewritten version disclosed to the defense, and Government had done everything possible to locate the handwritten statement, there was no bad faith and no prejudice to accused).

66. R.C.M. 701(b).

67. MCM, supra note 1, at A21-33.

68. R.C.M. 701(b)(1)(A).

69. Id.

70. Id.

71. 1995 CCA LEXIS 175; 42 M.J. 821 *[cited at]* (N.M.C.Ct.Crim.App. 1995).

72. 1995 CCA LEXIS at *13 (citing United States v. Rhea, 33 M.J. 413 *[cited at]* , 419 (C.M.A. 1991)).

73. Air Force Rule of Professional Conduct 3.3 (d), supra note 11, states: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

74. 1995 CCA LEXIS at *17 (quoting People v. Meredith, 631 P.2d 46, 53 (Cal. 1981)).

75. R.C.M. 701(b)(2).

76. R.C.M. 701(b)(2)(discussion).

77. R.C.M. 701(b)(2).

78. Id.

79. The discussion to R.C.M. 701(b) lists the evidence the defense is required to give notice of or disclose as follows: Mil.R.Evid. 201(A)(b) (judicial notice of foreign law), 304(f) testimony by the accused for a limited purpose in relation to a confession), 311(b)(same, search), 321(e) (same, lineup), 412(c)(1) and (2) (intent to offer evidence of sexual misconduct by a victim), 505(h) (intent to disclose privileged government information), 609(b) (intent to impeach a witness with a conviction older than 10 years), 612(2) (writing used to refresh recollection), and 613(a) (prior inconsistent statements).

80. M.R.E. 412 applies to "any party" who intends to offer evidence of a victim's past sexual behavior or alleged sexual predisposition. It is included in this section on defense responsibilities because in practice

this motion is most often raised by the defense rather than the prosecution.

81. M.R.E. 505(h).

82. R.C.M. 701(b)(1)(B)(i).

83. R.C.M. 701(b)(1)(B)(ii).

84. R.C.M. 701(b)(3).

85. R.C.M. 701(b)(4).

86. Id.

87. 28 M.J. 460 *[cited at]* , 468 (C.M.A. 1989), cert. denied, 110 S.Ct. 409 *[cited at]* (1989).

88. United States v. Clark, 37 M.J. 1098 *[cited at]* (N.M.C.M.R. 1993) (citations omitted).

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39 AFLR 119, Summary Courts-Martial

Title of Article

Summary Courts-Martial: Rediscovering the Spumoni of Military Justice

Author

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Text of Article

I. THE MENU

It is time to rediscover a long-neglected option available to commanders: the summary court-martial. [1] Much like spumoni is ignored by folks buying ice cream - unless they are thrust a scoop after eating a meal at an Italian restaurant - summary courts-martial have been overlooked by most judge advocates and, consequently, by most commanders.

Speedier than a special court-martial and more deadly than nonjudicial punishment under Article 15 of the Uniform Code of Military Justice, [2] a summary court-martial is a great option for a commander who is looking at an offense that is in the gray area between an Article 15 and a special court-martial. The summary court-martial also is valuable when the a military member needs to be taught a swift lesson that will serve as a message to others about to fall off the precipice of good order and discipline.

Mountain Home Air Force Base, for example, started experiencing young, first-term airmen engaging in misconduct after their requests for early separations were disapproved. These cases went into that gray area, and the offenders deserved punishment that could not be accomplished under Article 15. In addition, their commanders wanted to send a message that resorting to criminal misconduct would not simply result in nonjudicial punishment followed by an administrative separation, [3] but would include more severe consequences.

Our legal prescription was a trial held in a courtroom with a prosecutor and a defense counsel, a federal criminal conviction, and a sentence that can include confinement and reduction to E-1 - all watched by other young enlisted members who were in the zone of danger. After the trials, articles including the names of the accuseds were placed in the base newspaper. The accuseds, who were not administratively discharged after their trials, were returned to their units to be given a second chance and to serve as

examples for those who might think they can end run their commitments. We thus relearned the value of a summary court-martial.

A summary court-martial has many of the trappings of its cousins, the special and the general courts-martial, but is less encumbered by the formalities of due process because its consequences are much less severe. A summary court-martial is a supercharged Article 15 that is dressed up in a courtroom. In a nutshell, a commissioned officer on active duty comprises the court, enters findings, adjudges the sentence in the event of a conviction, and authenticates the record of trial, which is a one-page Department of Defense form.

A member convicted by a summary court-martial - like one found guilty under Article 15 - is not necessarily someone whom the commander is adamant about discharging. This makes it one of the strongest rehabilitative tools available to a commander.

This article contains a step-by-step discussion of summary courts-martial. It is written as a primer on summary courts-martial for all judge advocates who practice military justice.

II. SPUMONI, PLEASE

A. Composition and Purpose of Summary Courts-Martial

Convening Authority and Convening Order. Special and general court-martial convening authorities may convene a summary court-martial. [4] The Rules for Courts-Martial (R.C.M.) also permit the commander of a detached squadron or other detachment of the Air Force, or the commander or officer in charge of any other command when empowered by the Secretary of the Air Force, to convene a summary court-martial. [5] Air Force Instruction (AFI) 51-201, however, limits this by prescribing that summary courts-martial for members of detached squadrons or other detachments of the Air Force may be convened only with the express authorization of the Air Force general court-martial convening authority over the detached squadron or other detachment. [6]

If the convening authority or the summary court-martial officer is the accuser, the convening authority may, in his or her discretion, forward the charges to a superior authority with a recommendation to convene the summary court-martial. The jurisdiction of the summary court-martial, however, is not affected by this situation. [7]

The convening order must designate that it will be a summary court-martial and name the summary court-martial officer. The convening order is not required to, but may, designate where the court-martial will meet. [8] The convening order may be by notation signed by the convening authority on the charge sheet. [9] The charges and specifications are referred to a summary court-martial in accordance with R.C. M. 601, which also governs special and general courts-martial. An example of a summary court-martial convening order is included as an appendix to this article.

Summary Court-Martial Officer. A summary court-martial is meant "to promptly adjudicate minor offenses under a simple procedure." [10] It is composed of one commissioned officer on active duty. [11] The officer should be a captain (O-3) or above and, unless otherwise prescribed by the Secretary of the Air Force, must be an Air Force officer. The officer is not required to be a judge advocate.

The officer must serve as an impartial court, thoroughly examining evidence offered by the Government and the defense. The officer also must safeguard the interests of the Government and the accused, and ensure justice is done. Although the officer is not required to be a judge advocate, ordinarily summary court-martial officers should be judge advocates whenever possible because they will be more confident in questions of law, a review of the facts, and maintaining order in the court. This should result in greater due process for the accused.

Exercise caution. The judge advocate you recommend to the convening authority should not be involved in the preparation of the case for the prosecution or in advising the commander on what action to take. Staff Judge Advocates should recommend attorneys who have the experience and maturity to serve as neutral and independent summary court-martial officers. Moreover, Staff Judge Advocates should maintain the appropriate distance from the summary court-martial officer to ensure the proper appearance for the court. Finally, after the conclusion of the court-martial, as with any other court-martial, Staff Judge Advocates should not criticize the summary court-martial officer for his or her findings or sentence.

Jurisdictional Limitations. Summary courts-martial are courts of limited jurisdiction. The Rules for Court-Martial limit who may be brought before the court, the offenses that may be the subject of such a court, and what punishment may be judged based upon the rank of the accused. A defining jurisdictional limitation, which is similar to nonjudicial action under Article 15, is that an accused may not be brought before a summary court-martial over his or her objection prior to arraignment. [12] Moreover, an accused must be given "a reasonable period of time" to decide whether they want to submit to the jurisdiction of a summary court-martial. [13]

A summary court-martial has jurisdiction only over enlisted personnel [14] who are accused of noncapital offenses. [15] It was created to adjudicate minor offenses. [16] The commander determines whether the alleged misconduct is a "minor offense" based upon several factors, including: (1) the nature of the offense and circumstances surrounding its commission; (2) the offender's age, rank, duty assignment, record, and experience; and (3) the maximum sentence authorized for the offense if tried by a general court-martial. Ordinarily, an offense is "minor" if the maximum sentence possible would not include a dishonorable discharge or confinement for longer than one year if tried by a general court-martial. [17]

Punishments. The jurisdiction of a summary court-martial also is restricted in terms of the authorized punishment. If the accused is in the rank of E-1 through E-4, the court may not adjudge confinement for more than 30 days, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds pay per month for one month. Reduction

to the lowest pay grade (E-1) is also authorized for E-1 through E-4. [18]

If the accused is an E-5 or above, however, the court may not order confinement, hard labor without confinement, or reduction except to the next pay grade. [19] The maximum punishment the court may order is reduction of one pay grade, restriction to specified limits for two months, and forfeiture of two-thirds pay per month for one month. Consequently, the value of convening a summary court-martial for a member who is E-5 or higher is not as compelling as it is for a lower ranking member.

If the court orders both confinement and hard labor without confinement, the total of the two punishments may not exceed the maximum authorized period of confinement, calculating 1.5 days of hard labor without confinement as equivalent to one day of confinement. [20] For example, if the court believes 20 days of confinement are appropriate, the court also may order no more than an additional 15 days of hard labor without confinement. This is computed by subtracting the 20 days of confinement from the authorized maximum of 30, which leaves 10 days. The remaining 10 days are then multiplied by 1.5, which is the equivalency ratio; the result is a maximum of 15 days of hard labor without confinement that may be ordered as part of the sentence by the court.

If both confinement and restriction are adjudged, the total of the two punishments may not exceed the maximum authorized period of confinement. For this calculation, the equivalency ratio is two days of restriction for one day of confinement. [21] For example, if the court believes 20 days of confinement are appropriate, the court also may order no more than an additional 20 days of restriction to specified limits. This is computed by subtracting the 20 days of confinement from the authorized maximum of 30 days, which leaves 10 days. The remaining 10 days are then multiplied by 2.0, which is the equivalency ratio; the result is a maximum of 20 days of restriction to specified limits that may be ordered as part of the sentence by the court.

If the court adjudges both reduction in rank and forfeiture of pay, the maximum forfeiture is calculated at the grade to which the accused is reduced. [22] Finally, the court may not suspend all or part of the sentence, although the summary court-martial officer may recommend the convening authority suspend all or part of a sentence. [23]

Counsel. Although R.C.M. 1301(e) expressly denies the accused the right to counsel, AFI 51-201, paragraph 5.2.2.4, requires that a military defense counsel be made available for the accused. [24] Military defense counsel should not be designated on orders. Counsel may be detailed to represent the Government. [25]

As in other courts-martial, the accused may hire, at his or her own expense, civilian defense counsel, who must be qualified under R.C.M. 502(d)(3). [26] If civilian counsel represents an accused in a summary court-martial, include the counsel's qualifications, specifically the counsel's bar membership and standing, on the record. [27]

AFI 51-201, paragraph 5.3, permits an accused to request representation by an individual military

defense counsel (IMDC) at a court-martial. Summary courts-martial are not excluded from this provision. Accordingly, an accused may request an IMDC, who will represent him or her if the counsel is "reasonably available." [28]

B. Trial Procedure for Summary Courts-Martial

Pre-Trial Duties. The summary court-martial officer should ensure the court is properly convened and that he or she has been correctly appointed by an appropriate convening authority. The officer then should review the guide (or "script") for summary courts-martial [29] and make the necessary modifications, such as the accused's right to be represented by qualified defense counsel or by civilian counsel at the accused's own expense, as required by AFI 51-201.

The officer also must review the charge sheet, allied papers, [30] and immediately available personnel records [31] of the accused before the court-martial is convened. [32] For example, each charge and specification should be checked to ensure that each alleges an offense under the UCMJ. The officer must report to the convening authority any substantial error or irregularity found in the charge sheet or other papers and records. [33] The summary court-martial officer may correct minor errors on the charge sheet and amend charges and specifications; such changes must be initialed by the summary court-martial officer. [34]

Appearance and Preliminary Hearing. The summary court-martial should be held in a courtroom, and the accused, counsel, and summary court-martial officer should wear service dress. Although these formalities are not required, a stronger impression will be made, and a stronger message will be sent, if the summary court-martial is similar to any other court-martial.

The summary court-martial officer must conduct a preliminary hearing in which the accused is provided a copy of the charge sheet and informed of certain specified rights. These rights are listed in R.C.M. 1304 (b)(1) and on the DD Form 2329, which should be annotated as the summary court-martial officer conducts the preliminary hearing to avoid any issue of not providing all the required notification of rights.

As discussed earlier, the accused has the right to object to trial by summary court-martial. If the accused objects, the court returns the charge sheet and all documents to the convening authority. Note that the accused must initial block 6 of DD Form 2329 as to whether or not he or she objects to trial by summary court-martial. The accused should initial this block during the preliminary hearing.

Arraignment. After the preliminary hearing and before arraignment, the accused is given an opportunity to make motions to dismiss or for other relief. [35] After disposition of any such motions, the summary court-martial officer arraigns the accused. The court should read and show the charges to the accused, unless the accused waives the reading. [36] The court should ensure that the accused understands the charges and specifications, and that the accused has discussed the charged offenses with his or her counsel. The accused must plead to each specification and charge.

The court proceeds to trial if the accused pleads not guilty to any specification and charge. If the accused pleads guilty to an offense, however, the court conducts a providency inquiry in accordance with the procedures set forth in R.C.M. 910. As with a special or general court-martial, the court must ensure that the plea is "voluntarily and understandingly" made. [37] If possible, the Government and accused should enter into a stipulation of fact, which the court can use to explore the factual basis of the guilty plea. Although not required, attach the stipulation of fact to the record of trial (DD Form 2329) to protect the record from post-trial attack.

If the court doubts the "accused's pleas of guilty are voluntarily and understandingly made, or if at any time during the trial any matter inconsistent with the pleas of guilty arises" that cannot be resolved, the court must enter not guilty pleas to the affected charges and specifications. [38] Similarly, if the accused refuses to plead during arraignment, the court shall enter not guilty pleas. [39] Finally, the accused has the right to change any plea at any time before the court announces findings; the accused may change a guilty plea to not guilty after findings are announced only for good cause. [40]

Presentation of Evidence. Evidence is presented the same as in any other court-martial. The Military Rules of Evidence [41] apply in summary courts-martial, thus requiring the court to rule on motions and objections. [42] In addition, the defense has the same opportunity to obtain witnesses and may request that the court produce witnesses under R.C.M. 703 (production of witnesses and evidence).

If the Government does not produce requested witnesses for the defense, the court may order the Government to produce those witnesses whose testimony on a matter in issue on the merits is relevant and necessary, [43] or in sentencing if the testimony is of substantial significance to the determination of an appropriate sentence. [44] As in any other court-martial, witnesses ordinarily should be excluded from the courtroom until they are called to testify. [45]

The examination of witnesses is the same in a summary court-martial as in either a special or general court-martial. Government witnesses are called first and are examined under oath. Defense counsel may then cross-examine. If the accused is not represented by counsel, the court must assist the accused in cross-examination of witnesses if the accused requests assistance or it appears necessary in the interest of justice. At the conclusion of the Government's case-in-chief, the accused may call witnesses who are similarly examined under oath by both parties. [46]

A unique feature of summary courts-martial is that the court is required to obtain evidence that "tends to disprove the accused's guilt or establishes extenuating circumstances." [47]

Findings. The summary court-martial officer applies the principles contained in R.C.M. 918 in determining findings. The court announces findings to the accused in open court. [48] Note that in addition to announcing the findings in the format required for all courts-martial, the Government or accused may request that the court make special findings on matters of fact reasonably in issue as to an offense for which the accused was found guilty. [49]

Sentencing. Sentencing is conducted the same manner as in a special or general court-martial. [50] If the court sentences the accused to confinement, the court is required to inform the accused of his or her right to apply to the convening authority for deferment of the confinement. [51] Regardless of whether the sentence includes confinement, the court is required to advise the accused of his or her rights to submit written matters for clemency to the convening authority [52] and to request review of the final conviction by The Judge Advocate General. [53]

Notifications. The summary court-martial officer is required, as soon as practicable, to inform the convening authority of the findings, sentence, and recommendations, if any, for suspension of the sentence. The court also must inform the convening authority of a request by the accused for deferment of confinement. If the sentence includes confinement, the court shall arrange for the delivery of the accused to the accused's commander or the commander's designee. [54] Finally, the court should ensure that the accused's commander is notified of the findings, sentence, and any recommendations concerning the sentence. [55]

Record of Trial. The record of trial in a summary court-martial is simply the DD Form 2329, unless the convening authority imposes additional requirements. [56] The court must prepare an original and at least two copies of the record of trial, which must contain certain specific information, all of which is contained on the DD Form 2329. [57] The summary court-martial officer authenticates the record of trial by signing the DD Form 2329 in block 12. [58] After the record of trial is authenticated, the court is required to serve a copy on the accused. The accused acknowledges receipt, which is attached to the original record of trial. If the accused did not sign a receipt, the court must attach to the original record a certificate that the accused was served a copy of the record. The accused's counsel may be served, and receipt for, the record of trial for the accused. The original record of trial and one copy are then forwarded to the convening authority. [59]

Submission of Matters. As in other courts-martial, the accused is entitled to submit written matters to the convening authority in accordance with R.C.M. 1105. [60] The accused has seven days after the sentence is announced in a summary court-martial to submit written matters that may reasonably tend to affect the convening authority's decision on approving the findings or sentence. [61] The convening authority may extend, for good cause, this period of time to an additional 20 days if the accused shows that additional time is required to submit such matters. [62] The convening authority may not take action before this period expires. [63]

Final Action. The convening authority's final action is annotated on all copies of the record of trial, except the copy earlier provided to the accused. The convening authority must sign the original and all other copies of the record of trial, or prepare and certify true copies of the original. [64] A copy of the action is then forwarded to the accused; an order promulgating the result of the summary court-martial does not need to be issued. [65]

Review. The original record of the summary court-martial then is reviewed by a judge advocate in accordance with R.C.M. 1112. [66] The review is accomplished by a judge advocate who has not been

involved in any capacity in the case, and must include conclusions as to the jurisdiction over the accused and each offense for which the accused was found guilty, whether each specification for which there is an approved finding of guilty states an offense, and whether the sentence was legal.

The review also must respond to each allegation of error made in writing by the accused and, if the case is sent for action to the general court-martial convening authority, a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law. [67] Copies of the review are attached to the original and all copies of the record of trial. A copy of the review is then forwarded to the accused or his or her counsel. [68]

Finally, the accused may request review by The Judge Advocate General of the final action in accordance with R.C.M. 1201(b)(3). [69] The accused may request vacation or modification of the findings or sentence on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. [70]

III. THE TIP

All too often commanders find themselves in the conundrum of having a young enlisted troop - whom they believe is worth keeping - engage in misconduct that falls into a gray area. The commander is torn between taking action under Article 15, which may not provide the appropriate punishment or message, or preferring charges with a view toward a special court-martial, which may be too strong. A summary court-martial is an intermediate rehabilitative tool that has been ignored too long by the Air Force.

Staff judge advocates should incorporate this important option into their discussions with commanders when such a situation occurs. This author finds that commanders like the summary court-martial's formality, speed, and jurisdictional limits. Moreover, a conviction by summary court- martial does not mandate an end to the member's enlistment, allowing the commander to retain the member for rehabilitation. Next time, think about a scoop of spumoni.

APPENDIX

The following is an example of a convening order for a summary court-martial.

DEPARTMENT OF THE AIR FORCE HEADQUARTERS 366TH WING (ACC) MOUNTAIN HOME AIR FORCE BASE, IDAHO 83648-5297

SPECIAL ORDER AB-08

A summary court-martial is hereby convened. It may proceed at this station to try such persons as may be properly brought before it. The summary court-martial will be constituted by Captain John Doe, 366th Wing, this station.

JANE A. SMITH Brigadier General, USAF Commander

Distribution 1-Ea Individual 1-Ea Organization 15-366 WG/JA

Footnotes

*Lieutenant Colonel Gilbert (B.S., United States Air Force Academy; MSBA, Boston University; J.D., University of the Pacific, McGeorge School of Law; LL.M. Harvard Law School) is the Staff Judge Advocate of Gunfighter Legal Office, Mountain Home Air Force Base, Idaho. He is a member of the California and Nebraska State Bars.

1. See generally Manual for Courts-Martial, pt. II, ch. XIII (1995) [hereinafter MCM]. In comparison to other branches of the military, the Air Force has ignored summary courts-martial. In Fiscal Year 1993, the Army held 364 summary courts-martial, and the Navy-Marine Corps held 2,898. By comparison, the Air Force held six during the same time frame. Annual Report Submitted to the Committees on Armed Services of the U.S. Senate and House of Representatives for Fiscal Year 1993, Military Justice Reporter, Vol. 39.

2. Uniform Code of Military Justice, 10 U.S.C.A. Sec. 815 (West 1983 & Supp. 1995). Article 15 authorizes nonjudicial punishment for minor criminal offenses.

3. See generally Air Force Instruction (AFI) 36-3208, Administrative Separation of Airmen (4 Oct. 1994).

4. Article 24, Uniform Code of Military Justice, 10 U.S.C.A. Sec. 824 (1983 & West Supp. 1995). See also MCM, supra note 1, Rule for Court-Martial [hereinafter R.C.M.] 504(b); R.C.M. 1302(a); AFI 51-201, ch. 2, Administration of Military Justice (28 July 1994).

5. R.C.M. 1302(a).

6. AFI 51-201, paragraph 2.3.1, supra note 3. See also R.C.M. 504(b)(2)(B), which provides that if a commander is in doubt whether the command is separate or detached, the matter is determined by the general court-martial convening authority.

7. R.C.M. 1302(b).

8. R.C.M. 504(d)(2). See also R.C.M. 1302(c).

9. R.C.M. 1302(c).

10. R.C.M. 1301(b).

11. R.C.M. 1301(a).

12. R.C.M. 1303. See generally R.C.M. 201 (jurisdiction for courts-martial).

13. R.C.M. 1304(b)(2).

14. R.C.M. 1301(c) (excludes commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen).

15. R.C.M. 103(3) (definition of capital offenses).

16. R.C.M. 1301(b).

17. See MCM, supra note 1, pt. V, Nonjudicial Punishment Procedure, para. 1e.

18. R.C.M. 1301(d)(1).

19. R.C.M. 1301 (d)(2).

20. R.C.M. 1003(b)(7). "Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve the member from performing his regular duties." The member's immediate commander ordinarily designates the character of the hard labor to be performed. Id.

21. R.C.M. 1003(b)(6). See also 10 U.S.C.A. Sec. 858.

22. R.C.M. 1301(d)(1) (discussion).

23. Id.

24. The instruction also requires that defense counsel be certified according to Article 27(b), UCMJ.

25. See AFI 51-201, paragraph 5.2.2.4, supra note 6.

26. R.C.M. 502(d)(3) requires the civilian counsel to be a member of the bar of a federal court or of the bar of the highest court of a state. If the civilian attorney is not the member of one of these bars, he or she must be authorized by a recognized licensing authority to practice law and be found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law that apply in courts-martial.

27. AFI 51-201, paragraph 5.2.2.5, supra note 6. As discussed later in this article, the record for a summary court-martial is simply the DD Form 2329. Block 7 asks particular information concerning the defense counsel. Base legal offices should ensure they have copies of DD Form 2329 in their files; it is not currently available on the PerformPro software.

28. AFI 51-201, para. 5.3.1, supra note 6, defines "reasonably available." Paragraph 5.3.2, further narrows which military counsel are reasonably available by specifically excluding certain judge advocates.

29. MCM, supra note 1, app. 19.

30. "Allied papers" include "convening orders, investigative reports, correspondence relating to the case, and witness statements." See R.C.M. 1304 (discussion).

31. "Personnel records" are the accused's personnel records that are maintained locally and are immediately available. See R.C.M. 1304.

32. R.C.M. 1304.

33. R.C.M. 1304 (a)(2). Substantial defects are those that, if corrected, would state an offense not otherwise stated, or included an offense, person, or matter not fairly included in the specification as preferred. Substantial defects or errors in the charges and specifications must be cured by preferring and referring the affected charges and specifications anew in proper form, unless waived by the accused. See R.C.M. 1304 (a)(2) (discussion) and R.C.M. 603(d).

34. R.C.M. 1304(a)(3). Minor changes are defined by R.C.M. 603(a) as "any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." Examples of minor changes are inartfully drafted or redundant specifications, typographical errors, and misnaming the accused.

35. R.C.M. 1304(b)(2)(C).

36. R.C.M. 1304(b)(2).

37. R.C.M. 1304(b)(2)(D). For more information concerning the providency inquiry, see generally Major Bruce Haddenhorst and Captain Maryalice David, Guilty Pleas: A Primer for Trial Advocates, 38 A.F. Law Rev. 87 (this issue) (1996). Note that R.C.M. 910(i) refers the reader to R.C.M. 1305 for the record of trial requirements for a guilty plea proceeding. R.C.M. 1305 does not require verbatim transcription of the providency inquiry.

38. R.C.M. 1304(b)(2)(D).

39. Id.

40. R.C.M. 1304(b)(2)(D)(v).

41. MCM, supra note 1, pt. III, Military Rules of Evidence [hereinafter M.R.E.].

42. R.C.M. 1304(b)(2)(E)(i).

43. R.C.M. 703(b). Note that R.C.M. 703(e)(2)(C) authorizes a summary court-martial officer to secure witnesses or evidence by subpoena.

44. R.C.M. 1001(e).

45. See M.R.E. 615, which provides that the prosecution or defense may request that the witnesses be excluded from the courtroom so they cannot hear the testimony of other witnesses. A judge or summary court-martial officer may make this order sua sponte.

46. R.C.M. 1304(b)(2)(E).

47. R.C.M. 1304(b)(2)(E)(iv).

48. R.C.M. 1304(b)(2)(F)(i).

49. R.C.M. 918(b). This rule for court-martial requires that special findings be requested before the general findings are announced by the court. If these are made, they should be made part of the record of trial by attaching them to the DD Form 2329.

50. R.C.M. 1304(b)(2)(F)(ii). See also R.C.M. 1001 (presentencing procedures); R.C.M. 1003 (punishments).

51. R.C.M. 1305(b)(2)(F)(iii). See 10 U.S.C.A. Sec. 858 (execution of confinement); R.C.M. 1101(b) (post-trial confinement); R.C.M. 1101(c) (deferment of confinement is requested in writing by the accused to the convening authority).

52. R.C.M. 1306(a) states such submissions will be in accordance with R.C.M. 1105.

53. R.C.M. 1306(a). See also 10 U.S.C.A. Sec. 869(b) (c) (Review in the Office of The Judge Advocate General); R.C.M. 1201(b)(3) (action by The Judge Advocate General).

54. R.C.M. 1304(b)(2)(F)(v)-(vi).

55. R.C.M. 1304(b)(2)(F)(vi) (discussion).

56. R.C.M. 1305(a). An example of a summary court-martial record of trial can be found at MCM, supra note 1, app. 15.

57. R.C.M. 1305(b) requires the record to include the pleas, findings, sentence, if the accused was represented by counsel, the fact the accused was advised of the information required to be given during the preliminary hearing under R.C.M. 1304(b)(1), and, if the summary court-martial is the convening authority, a notation to that effect. All this information is readily reflected on DD Form 2329.

58. See also R.C.M. 1103(i)(2) (requiring the summary court-martial to examine and correct the summary court-martial record of trial as prescribed in R.C.M. 1305(a)).

59. R.C.M. 1305(e).

60. R.C.M. 1306(a).

61. R.C.M. 1105(c)(2).

62. R.C.M. 1105(b) & (c).

63. R.C.M. 1306(b)(1) (stating the convening authority takes action in accordance with R.C.M. 1107 except as provided in R.C.M. 1306).

64. R.C.M. 1306(b)(3).

65. R.C.M. 1306(b)(2). See also R.C.M. 1114(a)(3).

66. 10 U.S.C.A. Sec. 864; R.C.M. 1306(c). See also R.C.M. 1112(a)(3).

67. R.C.M. 1112(c) & (d).

68. R.C.M. 1112(d)(3).

69. R.C.M. 1306(d).

70. R.C.M. 1201(b)(3). See also R.C.M. 1201(b)(4) (rehearing).

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39 AFLR 133, Avoiding the Profile Trap

Title of Article

Expert Testimony in Child Sexual Abuse Cases: Avoiding the "Profile" Trap

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Text of Article

I. INTRODUCTION

Evidentiary dangers lurk in the shadows of expert testimony in child sexual abuse cases. The unwary counsel, venturing forth in good faith to educate the finder of fact about specific issues, may snag a trap, causing the case to come to grief, a victim of unfair prejudice to the accused, improper opinion testimony, or other impermissible evidence. Below are some survival tips for counsel who present expert testimony in child sexual abuse cases, from avoiding the pitfall dug by "profile" evidence concerning the accused, to refusing the poisoned lure of expert comments on victim truthfulness.

Expert testimony is inevitably required to assist in the understanding of facts and issues presented in a child sexual abuse case. Unfortunately, the testimony intended to inform or educate can easily become as confusing as the evidence it seeks to illuminate. In addition, expert testimony in child sexual abuse cases seems peculiarly susceptible to a variety of evidentiary evils, ranging from comments on the credibility of either the alleged victim or the accused, to opinions that the offense actually occurred. Finally, the impact of expert testimony can be considerable, with a heightened risk of unfair prejudice to the accused if the testimony is improper. These factors all contribute to the difficulty in presenting expert testimony in child sexual abuse cases and require prosecutors in particular to structure presentation of such evidence with an eye to possible appellate issues.

Expert testimony in child sexual abuse cases may involve descriptions of the child abuse accommodation syndrome, [1] rape trauma syndrome, [2] post-traumatic stress disorder, [3] battered woman syndrome, [4] or any one of a number of names given to describe the symptoms or behavior of a victim. The expert witness typically describes examples of behavior that victims of an offense (rape, sexual assault, domestic abuse, incest) generally tend to exhibit. [5] The expert explains why the behavior or symptoms in question occur, and may compare the actions or symptoms of the victim in the case to the general picture described. Used correctly, such testimony becomes an educational process for

the finder of fact, enabling the judge or members to understand seemingly contradictory or inexplicable behavior.

II. PROFILE EVIDENCE

The same expert testimony, however, dealing with the same facts, may encroach upon forbidden territory. One such danger lies in presenting evidence of a pattern of behavior relating to the accused, evidence that amounts to a "profile" of a child abuser. The case of United States v. Banks [6] is a classic example of the "profile trap." In Banks, a prosecution for sodomy and rape of a seven-year-old, the Government presented the testimony of the child and five expert witnesses. The experts testified about interviews and therapy of the victim, clinical findings of the victim's medical examination, and videotaped interviews of the victim with social workers. Finally, the Government presented an expert psychologist who testified concerning "risk factors" which "increase the risk for a child to be the victim of sex abuse." [7] These factors included the presence of only one biological parent, the presence of a stepfather, and evidence of sexual dysfunction between the parents. Neither the expert witness nor trial counsel ever used the word "profile" in front of the members.

The Government used the "risk factors" evidence in closing argument, arguing that the sexual dysfunction between the accused and his wife was "consistent with what you would expect in families where the dad is abusing the child." [8] The United States Court of Military Appeals found that use of the expert testimony amounted to impermissible use of a "profile" of a family containing a child abuser and set aside the findings and sentence. [9] Note, however, it was not the admission of the so-called "risk factors" that led to reversal, but the Government's improper use of that testimony.

The chain of deduction that the court objected to was simple. By presenting expert testimony that factors A, B, and C increased the risk of child abuse in the home, and by then arguing that factors A, B, and C were established in the case at hand, the logical deduction was that abuse occurred.

Comparing the "risk factors" to the criminal profiles used in federal drug-courier cases, [10] the court denounced the use of this type of evidence as substantive evidence of guilt or innocence: "We find error. . . in trial counsel's use of expert opinion to proffer to the members a characteristic 'profile' of child sexual abuse and then reliance on this 'profile' to bolster the Government's case to establish . . . guilt." [11] This reliance, compounded by the trial judge's specific instruction to consider "factors which increase the probability of sexual abuse in the family," [12] led to the court's decision.

Throughout his opinion, Judge Wiss indicated that the same facts the expert testified about would have been admissible under a different theory. [13] The fact that sexual dysfunction existed in the accused's marriage, for example, could have been introduced not to show that the accused fit a category of potential abusers, but to establish motive for the charged offenses. Similarly, the court suggested that the evidence used to build the "profile" could have been used to support the credibility of the victim or to explain the victim's unusual behavior. Although the court does not specify how the evidence could have been used in such a fashion, there is clearly the suggestion that such evidence should focus on the victim

rather than the accused.

Finally, the court reaffirmed its holding of some six years earlier in United States v. August [14] that "use of any characteristic 'profile' as evidence of guilt or innocence in criminal trials is improper." [15] In August, the Government presented a Family Advocacy counselor who testified that the "usual" child sexual abuser was in the grade of E-6 or above, had 15 or more years in military service and was considered to be one of the commander's best troops, all of which factors the accused met. The court ruled it error to admit such testimony. Citing August, the court in Banks stressed that inadmissible profile evidence does not merely address a profile where the factors relate only to a "character trait" of the accused. The factors in the profile may be any information or data so as to place appellant in an alleged "group" of persons who have committed offenses in the past. [16]

Banks may be viewed as a cautionary tale about the use of expert testimony in child sexual abuse cases. Expert testimony may explain, educate, and illustrate symptoms of behavior, but it may not be presented in such a way that forces the logical conclusion of guilt. Equally, expert testimony may not deal with the character of the accused, i.e., that the accused fits a recognized "profile," when the accused has not first put character in issue. [17]

III. OTHER USES OF EXPERT TESTIMONY

With the warning given by Banks in mind, some typical uses of expert testimony in child sexual abuse cases are outlined below. It should be noted that expert testimony must always meet the test as set out in United States v. Houser. [18] This six-part test includes (1) a qualified expert; (2) a proper subject matter; (3) a proper basis for the expert's opinion; (4) the relevance of the testimony to the particular case; (5) the reliability of the evidence; and (6) whether the probative value of the testimony is substantially outweighed by the considerations outlined in Military Rule of Evidence (M.R.E.) 403. Moreover, with regard to the reliability of the evidence, practitioners by now should be aware of the demise of the old standard that evidence had to be generally accepted within the scientific community. [19] General acceptance within a scientific community is now merely one factor of several to be considered with regard to the relevancy and reliability of the proffered evidence. [20] This six-part test incorporates the interconnected requirements of M.R.E. 401 (relevant evidence), [21] M.R.E. 403 (not resulting in unfair prejudice, confusion or misleading the finder of fact), and M.R.E. 702 (a qualified expert who can assist the finder of fact). Once the six-part Houser test has been met, expert testimony can be presented. Below are some areas where expert testimony may cause a trial to come to grief.

A. Steering Clear of the "Profile Trap"

Testimony which discusses any aspect of the accused, whether marital or family status, [22] rank or time in service, [23] or relationships within the family [24] and which is then compared to generalized opinions or statistics about offenders is to be avoided. Virtually any attempt to explain an accused's behavior or action by expert testimony as to what offenders "normally" or "habitually" do runs the risk of being classified as inadmissible profile testimony. This caveat extends not only to the findings portion

of a case, but to sentencing as well. In United States v King, [25] an expert witness testified as to different "types" of pedophiles generally and went on to diagnose the accused as a "regressive pedophile." [26] The court was so incensed at the "gratuitous generalizations" of the expert that it reversed the sentence, adding, "People accused of a crime - as well as their alleged victims - are discrete individuals . . . They are not some mosaic or composite of 20 or 30 years worth of other people." [27]

B. Avoiding the Snare: Using Family Dynamics Testimony

As Banks illustrates, the use of testimony concerning family dynamics in child abuse situations is fraught with danger. Such testimony can easily evolve on the stand into a profile of a family that includes a child abuser. A similar situation arose in United States v. Johnson, [28] where a government witness testified regarding the "dynamics of an incest family's interrelationship." The court noted its concern with this whole area, writing, "The problem with much of this testimony is that it proves nothing. It is meaningless that circumstances A, B, C, D and E are often found in incestuous families or in sexually abused children if the same patterns are also present where there has been no sexual abuse." [29]

A safer approach in dealing with expert testimony on family dynamics is to use such testimony to prove motive for the misconduct. [30] Another use is to provide the family dynamics as a background for an explanation of the victim's behavior. [31] With either of these approaches, a tailored instruction limiting members' consideration of the family dynamics to counsel's intended use will go a long way towards avoiding potential prejudice. [32]

C. Staking Out the Territory: Explaining Victim Behavior

Expert testimony on characteristics shown by child sexual abuse victims is by now generally accepted. [33] Sometimes presented under the label "accommodation syndrome" and sometimes not labeled at all, the United States Court of Military Appeals (known as the United States Court of Appeals for the Armed Forces since 1994) outlined the use of this type of evidence in United States v. Suarez: "If a proper foundation is laid, use of certain types of syndrome evidence has been permitted to see if a victim's story mirrors patterns of consistency found in other victims." [34] Such failure can explain facts that may be otherwise confusing to finders of fact, such as a victim's recantation; a failure to report the incident; keeping the events secret (or "accommodation"); claimed loss of memory about traumatic events; and the victim's perceived "consent" to the acts. The courts have found evidence about behavior patterns in other victims as "logically relevant," noting that "[w]ithout the [expert] testimony the members are left with their own intuition." [35] The victim's behavior patterns may in fact be counter-intuitive to a layperson's perception of how a victim should react, making the need for expert testimony all the more apparent.

D. Scenting Danger: The Expert Comment on Credibility

It has long been established in military courts that an expert witness may not comment upon the

credibility of a witness or become a "human lie detector." [36] This is no less true in cases involving child sexual abuse. Thus, where an expert opines that the victim is "not faking" symptoms of a stress disorder, the courts have found it an improper comment on the victim's credibility. [37] Similarly, where an expert testifies that it was "doubtful" a victim would make threats as the accused alleged her to have done, the court has found plain error for the same reason. [38] Finally, when an expert comments on the "reliability" of the testimony of a victim he examined, the court has found such comment improper. [39]

There is no prohibition against testimony about the credibility of children in general and their ability or inability to tell elaborate lies at a young age. Thus in United States v. Tolppa, [40] the court allowed an expert to address the area on a hypothetical basis ("Would it be likely for a child of five to say . . . .?"). The court stated: "Although an expert should not be allowed to testify about the truthfulness of a particular child victim's report of sexual abuse, he may be allowed to testify about a child's ability to separate truth from fantasy." [41] Expert testimony about the truth-telling capabilities of a particular age group is thus admissible.

One caveat: an unfortunate choice of words used in questioning an expert in this area can lead to the very comment on credibility that trial counsel is trying to avoid. In United States v. King, [42] trial counsel asked the expert witness whether five-year-olds were "capable of fabricating any or all of this" and "[D]o five year olds make this up?" [43] Use of one word, "this," took the testimony from admissible general testimony about the types of things five-year-olds are capable of fabricating, to inadmissible testimony about whether the victim could fabricate the alleged incident. [44]

E. Refusing the Bait: Avoiding a Diagnosis that "It Happened"

An actual diagnosis that the victim is suffering from a "syndrome" is to be avoided. [45] Although it may be difficult to resist after the expert has testified as to the general behavior pattern of an abuse victim and then identified specific traits of the victim which correlate, the one question too many - "Is this witness suffering from this syndrome?" - is improper. The error arises because the expert is inferentially testifying that the event occurred. [46] Note that the expert can testify that the victim bears the symptoms of one who has been sexually abused, [47] or "show[s] characteristics consistent with" a syndrome, [48] or "act[s] in conformity with" characteristics of a disorder. [49] These types of opinions, which stop just short of testifying that the victim shows the effects of the alleged offense, are relevant and admissible.

F. Staying Downwind of Danger: Using Limiting Instructions.

Perhaps the most effective use of expert testimony in this field involves pairing tightly-focused expert testimony with tailored limiting instructions. [50] Suarez continues to be a good example of this practice. There the trial judge instructed the members no less than three times regarding how the expert testimony (in that case, on the accommodation syndrome) should be received. [51] It is important that both expert and counsel avoid use of the testimony for anything other than its stated purpose. As the holdings in both Banks and King illustrate, trial counsel's use and reliance upon certain types of

evidence can turn otherwise admissible testimony into a profile - whether or not the expert actually intended that conclusion. The act of drafting a tailored instruction can serve to focus counsel on the proper areas for consideration.

G. Defense and Other Permissible Uses of Profile Evidence

Despite the many admonitions of caution surrounding this type of evidence, there are indications that profile evidence can be used in two situations: when offered by the defense under the provisions of M.R. E. 404(a) or when offered by the Government to rebut potentially misleading evidence. [52] With regard to defense use of profile evidence, the same six-part test for expert testimony set out in Houser applies. An important case in this area is United States v. Combs. [53] On trial for the unpremeditated murder of his infant son, the accused sought to produce a forensic psychologist to testify that he fit the profile of a child abuser and that child abusers use force to discipline, rather than to kill, their victims. The court found this line of testimony to constitute inadmissible profile evidence. However, the court concluded that much of what the psychiatrist had to say about the accused's mental condition and symptoms associated with diagnosis was admissible. [54] As to use of profile evidence in rebuttal, the court in Banks pointed out the "narrow and limited" circumstances of admissibility. [55] One possible use might be to rebut the "good soldier" defense; but again, the testimony would be better presented in general terms - Is it unknown for a child abuser to be a stellar troop? - and paired with appropriate instructions.

IV. CONCLUSION: STAYING ALERT

In presenting expert testimony in child sexual abuse cases, trial counsel must take an active role in determining the shape and content of the evidence presented - more, perhaps, than in virtually any other area of criminal law. It is, after all, the role of trial counsel to be attuned to the dangers associated with improper expert evidence. At trial, the expert must be kept on safe ground, where his or her testimony will educate the finder of fact and explain puzzling or misleading facets of victim behavior. Inattention on the part of trial counsel may result in an expert wandering into dangerous territory, causing confusion, prejudice, and reversible error. By staying alert, by paying careful attention to the content of the testimony, and, as Banks teaches, by proper use of expert testimony, the "profile" and other traps can be avoided.

Footnotes

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1. See generally United States v. Coleman, 41 M.J. 46 *[cited at]* (C.M.A. 1994); United States v. Suarez, 35 M.J. 374 *[cited at]* (C.M.A. 1992); Josephine A. Bulkley, The Prosecution's Use of Social Science Expert Testimony in Child Sexual Abuse Cases: National Trends and Recommendations, J. CHILD SEXUAL ABUSE 73 (1992); John E. B. Myers ET. AL., Expert Testimony in Child Sexual Abuse Litigation, 68 NEB. L. REV. 1 (1989); and Roland C. Summit, The Child Sexual Abuse

Accommodation Syndrome, 7 CHILD ABUSE AND NEGLECT 177 (1983). But cf. Summit, Abuse of the Child Sexual Abuse Accommodation Syndrome, J. CHILD SEXUAL ABUSE 153 (1992) (author clarifies the uses and nature of child sexual abuse accommodation syndrome).

2. See generally United States v. Houser, 36 M.J. 392 *[cited at]* (C.M.A. 1993); United States v. Reynolds, 29 M.J. 105 *[cited at]* (C.M.A. 1989); United States v. Carter, 26 M.J. 428 *[cited at]* (C.M. A. 1988).

3. U.S. v. Johnson 35 M.J. 17 *[cited at]* (C.M.A. 1992).

4. See generally Richard B. O'Keeffe, Jr., Uses of Battered Person Evidence in Courts-Martial, The Army Lawyer (Sept. 1993); Joan M. Schroeder, Note, Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer, 76 Iowa L. Rev. 553 (1991).

5. See, e.g., United States v. Pollard, 38 M.J. 41 *[cited at]* (C.M.A. 1993) (expert testimony was used to explain why a child victim might recant a former disclosure of abuse and explain that recantation was part of a "pattern of behavior" seen in child abuse cases).

6. 36 M.J. 150 *[cited at]* (C.M.A. 1992).

7. Id. at 154.

8. Id. at 162.

9. Id. at 170.

10. See, e.g., United States v. Beltran-Rios, 878 F.2d 1208 (9th Cir. 1989); United States v. Hernandez-Cuartas, 717 F.2d 552 (11th Cir. 1983).

11. 36 M.J. at 163.

12. Id. at 163-64.

13. Id. at 163.

14. 21 M.J. 363 *[cited at]* (C.M.A. 1986).

15. 36 M.J. at 161.

16. Id. at 163.

17. See Manual for Courts-Martial, Military Rules of Evidence [hereinafter M.R.E.] 404(a) pt. III (1984).

18. 36 M.J. 392 *[cited at]* (C.M.A. 1993).

19. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

20. United States v. Garcia 40 M.J. 533 *[cited at]* , 536 (A.F.C.M.R. 1994), citing Daubert v. Merrell Dow Pharm., 113 S.Ct. 2786 *[cited at]* (1993).

21. Manual for Courts-Martial, supra note 17, pt. III.

22. Banks, 36 M.J. at 150 (accused's status as stepfather).

23. August, 21 M.J. 363 *[cited at]* (accused's grade of "E6 or above" and "fifteen or more years in service").

24. United States v. Pagel 40 M.J. 771 *[cited at]* (A.F.C.M.R. 1994).

25. 35 M.J. 337 *[cited at]* (C.M.A. 1992).

26. Id. at 342.

27. Id. But see United States v. Stinson, 34 M.J. 233 *[cited at]* (C.M.A. 1992), where an expert testifying during sentencing, having never interviewed the accused and knowing little of his background or personal history, stated that the accused had a high risk of reoffending. This was admitted into evidence. This was a judge-alone case in which the judge himself commented on the expert's lack of personal knowledge. Under these facts, the court found no abuse of discretion in allowing the testimony. See also United States v. Talbert, 33 M.J. 244 *[cited at]* (C.M.A. 1991), another sentencing case, where an expert referred to the accused as a type of "preferential child molester." The court found this evidence "questionable," but harmless.

28. 35 M.J. 17 *[cited at]* (C.M.A. 1992).

29. Id. at 21 (footnote omitted).

30. Banks, 36 M.J. at 163.

31. United States v. Palmer 33 M.J. 7 *[cited at]* (C.M.A. 1991).

32. See United States v. Johnson, 35 M.J. 17 *[cited at]* , 22 (C.M.A. 1992).

33. Garcia, 40 M.J. at 533.

34. 35 M.J. 374 *[cited at]* , 376 (C.M.A. 1992).

35. United States v. Houser, 36 M.J. 392 *[cited at]* , 399 (C.M.A. 1993). See also United States v. Hansen, 36 M.J. 599 *[cited at]* (A.F.C.M.R. 1992).

36. United States v. Arruza, 26 M.J. 234 *[cited at]* (C.M.A. 1988); U.S. v. Petersen, 24 M.J. 283 *[cited at]* (C.M.A. 1987).

37. United States v. Bostick, 33 M.J. 849 *[cited at]* (A.F.C.M.R. 1989).

38. United States v. Partyka, 30 M.J. 242 *[cited at]* (C.M.A. 1990).

39. United States v. Harrison, 30 M.J. 330 *[cited at]* (C.M.A. 1990).

40. 25 M.J. 352 *[cited at]* (C.M.A. 1987).

41. Id. at 354 (citation omitted).

42. 35 M.J. 337 *[cited at]* (C.M.A. 1992).

43. Id. at 341.

44. Id. at 342.

45. United States v. Savage, 30 M.J. 863 *[cited at]* (1990).

46. Bostick, 33 M.J. at 849; Harrison, 30 M.J. at 849.

47. Palmer 33 M.J. at 12.

48. Suarez, 35 M.J. at 376.

49. Johnson, 35 M.J. at 21.

50. Id. at 22.

51. 35 M.J. at 376.

52. Pagel, 40 M.J. at 776.

53. 39 M.J. 288 *[cited at]* (C.M.A. 1994).

54. Id. at 291.

55. 36 M.J. at 162.

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38 AFLR 141, Fighting Fraud Illustrated: The Robins AFB Case

Title of Article

Fighting Fraud Illustrated: The Robins AFB Case

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Text of Article

I. INTRODUCTION

In July 1990, two managers of hardware stores close to Robins AFB (located near Warner Robins, Georgia) met, as they often did, to discuss business. They discovered each had been involved in unusual, but similar, encounters with Larry Albert, a government employee at Robins AFB.

The first manager had received three contracts from Robins AFB for hardware items priced at $2435. He delivered what was ordered and was paid. Later, Albert came to his store and returned these items, explaining they were no longer needed. But Albert did not want the Air Force's money back. Instead, Albert wanted a line of credit to use in getting other items he said the Air Force did need. The manager agreed, and for the next year Albert picked up a variety of items, charging $2235 against the line of credit. The practice stopped when the manager asked Albert if Robins AFB really needed salt blocks for deer.

The second manager had received two contracts from Robins AFB priced at $628. Soon after, Albert came to the store and told the manager the Air Force no longer needed these items. Albert asked him to bill the Air Force for the undelivered items and, with the money received, to establish a line of credit for Albert to use in getting other items he said the Air Force did need. Albert explained this procedure saved time and paperwork. The manager agreed, billed the Air Force for the undelivered items, and used the money received from the Air Force to establish a line of credit. Over the next two days, Albert obtained several items, charging $238 against the line of credit.

Comparing their experiences, the two managers decided to report Albert's activities to the Air Force Office of Special Investigation (OSI) at Robins AFB; thus began the unravelling of a major fraud ring operating at Robins AFB. What modestly began as an investigation into fraud involving a few thousand

dollars and one Air Force employee, ultimately uncovered a complicated fraud scheme involving $2 million, nine Air Force employees, four vendors, and six vendor employees.

This article describes the investigation, criminal prosecution, and civil and administrative actions taken in the Robins AFB fraud case. The handling of fraud cases in general is reviewed by examining principles derived from the Robins AFB experience. This article confirms what can be done when government agencies cooperate and aggressively pursue criminal, civil, and administrative remedies in parallel.

II. THE ROBINS AFB FRAUD CASE, INVESTIGATION AND REMEDIES A. The First Phase of the Investigation

The OSI and Federal Bureau of Investigation (FBI) already had established a team approach for investigating fraud at Robins AFB when the OSI received the report of Albert's suspicious activities. As a result, the investigation was conducted jointly from the beginning by the OSI and FBI, each contributing an agent.

These two agents interviewed Albert. He admitted that the items he acquired from the hardware stores and charged against the lines of credit were for his personal use. The two agents also interviewed Albert's supervisor, Emmitt Long. The investigators learned that Long had accompanied Albert one time to pick up items charged against a line of credit. After an initial denial, Long admitted he knew about Albert's irregular practice of using lines of credit created from Air Force payments for items returned or undelivered. But he denied any fraud, asserting that the Air Force received the items charged against the lines of credit.

At this point, the investigators briefed the United States Attorney's office for the Middle District of Georgia and the Robins AFB judge advocate office. About the same time, Albert and Long, at their request, met with the Assistant U.S. Attorney (AUSA) handling the case. Both offered to plead guilty to criminal charges based on the fraud involving the two hardware stores. The AUSA, however, concluded that Albert and Long were too quick with their offer and requested the investigation continue.

The investigation now needed to address the contracting process at Robins AFB and how Albert and Long fit into that process. The investigators interviewed the people involved in the contracting process and reviewed contract files. Their principal source of information, however, was the contract law division in the Robins AFB judge advocate office. The investigation revealed the following facts.

Long was in charge of the material warehouse for the maintenance directorate at Robins AFB. Some years earlier, the decision had been made for the maintenance directorate to handle the base's minor civil engineering work. To do this, maintenance established a material warehouse to order and store items needed for this civil engineering work. Because Long was in charge of the warehouse, he had the authority to order items for the warehouse. In the language of government contracting, Long had authority to certify a government requirement for an item. He did this by signing a purchase request.

In the second step of the contracting process, Long submitted the purchase request to the Robins AFB contracting office for issuance of a contract. Long could, and usually did, recommend a vendor who could supply the item, but he had no authority to contract on behalf of the Government. Only a contracting officer has that type of authority. [1] In issuing contracts for the items Long ordered, the contracting office followed the procedures for small purchase contracting. For contracts under $2500, the contracting office awarded the contract to the source Long recommended, if the price was determined fair and reasonable. For contracts over $2500, but under $25,000, the contracting office was required to solicit bids from at least three sources -- one could be the source Long recommended -- and award the contract to the lowest bidder. [2]

In the third step, the contractor delivered the items ordered on the contract, obtained a certification from an Air Force employee that the items had been delivered, and billed the Robins AFB finance office. Long and Albert had authority to sign delivery certificates, although Albert usually signed. In the fourth and final step of the contracting process, the Robins AFB finance office paid the contractor. The finance office required three documents: a contract, a delivery certificate, and an invoice. [3]

In addition to learning the contracting process and Long's and Albert's role in it, the criminal investigators identified other persons to be interviewed. One was Long's former secretary. She told the investigators that Long often instructed her not to enter certain purchase requests into the maintenance warehouse computer system. When she left Air Force employ, she took copies of these purchase requests with her. During the interview, she gave these to the investigators. Most of the purchase requests, totalling more than $250,000, identified the seller as the C.C. Dickson Co., a nationwide distributor of materials for refrigeration, heating, and air conditioning. C.C. Dickson Co. was the source Long recommended. Many of the purchase requests had Long's signature, but several had been signed by James Garrett, another Air Force employee at Robins AFB.

The investigators next interviewed Garrett. This meeting proved to be a pivotal step in the investigation. Until early 1989 Garrett had worked for Long in the material warehouse. Garrett also had authority to order materials and certify their delivery. Garrett admitted to participating in a scheme with Long, Albert, and an off-base vendor that, from July 1987 to early 1989, defrauded the Air Force of approximately $70,000. The off-base vendor was the C.C. Dickson Co. store in Warner Robins, Georgia. The manager was John Hyams.

The scheme Garrett described worked in this manner. Long or Garrett prepared a purchase request for a fictitious requirement and submitted it to the contracting office. The purchase request identified the C.C. Dickson Co. as the recommended source. A contract was issued to C.C. Dickson Co. Garrett then went to the C.C. Dickson Co. store in Warner Robins and signed a form certifying that the items ordered on the contract had been delivered when in fact they had not. Next, Hyams sent an invoice with the false delivery certificate to the Robins AFB finance office which then paid the C.C. Dickson Co. Hyams arranged for the C.C. Dickson Co. to keep thirty percent markup for profit and overhead. He shared the balance with Garrett, Long, and Albert. Garrett admitted to receiving from $12,000 to $15,000 as his share.

The next person to interview was clear: John Hyams. This interrogation also proved to be a pivotal step in the investigation. Hyams admitted the fraud scheme basically as Garrett described it. He also admitted that the scheme did not end until October 1990, although Garrett dropped out in early 1989. Hyams identified as fraudulent thirty-five invoices that totaled more than $250,000. Later, Hyams would admit that $200,000 of these charges were fraudulent.

Hyams also described a money laundering feature not previously known to the investigators. This feature was necessary because the Air Force paid C.C. Dickson Co. headquarters in Charlotte, North Carolina -- not the Warner Robins store. Hyams' problem was how to get this money out of Charlotte and into the hands of the participants in the fraud scheme. He solved the problem by setting up a money laundering operation through his friend, James Rentz.

Rentz operated a company called Rentz, Inc. Periodically, as instructed by Hyams, Rentz -- through Rentz, Inc. -- billed the C.C. Dickson Co. in Charlotte for items Rentz supposedly sold to the C.C. Dickson Co. store in Warner Robins. In fact, Rentz delivered nothing. On each occasion, Hyams told Rentz the amount to charge, a price based on seventy percent of C.C. Dickson Co.'s price to the Air Force. In this way, Hyams ensured C.C. Dickson Co. received its thirty percent markup. The check would be received from Charlotte and Rentz deducted his cut, which ranged from ten to twelve percent. Rentz then transferred the balance into a bank account he had established in the name of J & J Salvage, a paper company. Hyams and Rentz used this account to make payments to the participants in the fraud scheme, sometimes by check and sometimes in cash.

B. The First Round of Remedies

At this stage, the investigation stalled. Long and Albert had only admitted fraud involving the two hardware stores. They refused to be questioned about participating with Hyams to defraud the Air Force of $200,000. Hyams obtained an attorney who demanded immunity for Hyams' further cooperation with the investigation. Garrett had told all he knew. Rentz also got a lawyer and refused further cooperation.

The U.S. Attorney's Office for the Middle District of Georgia and the Robins AFB staff judge advocate office decided to initiate criminal prosecution, as well as civil and administrative actions. These offices, with the criminal investigators participating, coordinated a strategy to concurrently pursue the investigation and criminal, civil, and administrative remedies. The principal targets were Long, Albert, Rentz, the C.C. Dickson Co., but particularly Hyams. The Government's objective was to pressure the individual defendants to accept deals to which they would pled guilty to reduced charges in exchange for their cooperation with the Government.

The first step was to indict Albert and Long on nine counts of conspiracy, false claims, theft, false statements, and extortion. [4] The Government had a good case against both. Each had admitted fraud involving the two hardware stores. And, the Government had Garrett's testimony against both for the $200,000 fraud involving C.C. Dickson Co., which was corroborated by Long's secretary and the payoffs through J & J Salvage.

Acting in parallel, Robins AFB indefinitely suspended Long and Albert from their employment without pay because the indictment provided reasonable cause to believe that each had committed a crime punishable by imprisonment. Civil service and Air Force regulations allow indefinite suspension without pay in these circumstances. [5] Both employees were also barred from Robins AFB. [6]

Finally, the U.S. Attorney and Robins AFB legal offices asserted written demands for payment against Long and Albert. Robins AFB asserted a single damage claim of more than $200,000 for repayment of a debt. This action created an allowance for an administrative offset later. Eventually, Robins AFB seized Long's final pay and retirement funds totaling $21,000 to help offset the $200,000 claim. [7] The U.S. Attorney's office asserted a demand for $1.1 million in triple damages and forfeitures under the False Claims Act. [8] In short, the Government presented Long and Albert with the triple threat of prison, unemployment, and bankruptcy.

The pressure worked. Long and Albert agreed to plead guilty to a reduced two-count charge of conspiracy and theft [9] and agreed to cooperate with the continued investigation and to testify in any proceeding. They also agreed to repay the Government what they had received as their share of the proceeds from the fraud scheme, and, for its part, the Government agreed to limit their liability to that amount. No agreement was made concerning their Air Force employment; the indefinite suspensions became permanent removals. [10]

The Air Force also stepped up the pressure on C.C. Dickson Co. by suspending its Warner Robins store from doing business with the Government. [11] At the same time, the company was advised of its liability under the False Claims Act [12] and the potential for criminal prosecution. [13] In these circumstances, the company began exploring the possibility of settlement and cooperating with the Government's investigation.

The last set of this first round of remedies was taken against Hyams, the principal target. He was suspended from doing business with the Government [14] and barred from Robins AFB. [15] C.C. Dickson Co. identified Hyams as the cause of its own problems and fired him. Finally, the Robins AFB legal office asserted a demand for payment of more than $200,000 in single damages, [16] and the U.S. Attorney's office asserted a demand for $1.1 million under the False Claims Act for triple damages and forfeitures. Hyams was a retired Air Force master sergeant. Using the Robins AFB demand for single damages as the basis, the Air Force administratively offset Hyams' debt against his Air Force retired pay. [17]

The combination of these factors should have forced Hyams to accept a plea agreement similar to that negotiated with Long and Albert. The case against Hyams was excellent. He had confessed and the Government had the admissions of Long, Albert, and Garrett and other corroborating evidence. At the time, Hyams would have been allowed to plead guilty to conspiracy and theft, although he faced the more serious charges of bribery and money laundering. [18] He also could have made a deal on his civil liability. Hyams, however, held out for immunity -- a decision he would regret.

C. The Investigation and Remedies, Phase Two

Even as the first round of remedies was in progress, the criminal investigators had begun the second phase of the criminal investigation. They did so with the addition of a new team member -- the Criminal Investigation Division of the Internal Revenue Service (IRS). Its criminal investigative charter includes money laundering when the underlying conduct would be subject to investigation under the Internal Revenue Code. [19]

The second phase of the investigation started with an Air Force employee suspected of participating in Hyams' fraud scheme. This employee was Larry Benton, an Air Force employee in civil engineering at Robins AFB until he retired in late 1990. The criminal investigators requested an interview. Benton's response, delayed for a few days to consult an attorney, was an offer to cooperate if allowed to plead to reduced charges and to limit his civil liability to $75,000, the amount he personally received from the fraud. The Government agreed. Benton pled guilty to conspiracy and theft. Robins AFB administratively offset Benton's debt against his $33,000 in retirement funds still held by the Government, [20] and, with Benton's consent, also seized an $8000 savings account. Benton signed an agreement to pay the balance of $34,000 over a three-year period.

Having made the agreement with the Government, Benton then told investigators that he and John Hyams had defrauded the Air Force of $260,000 from September 1987 through the Fall of 1990. Benton had authority to certify purchase requests for civil engineering to the contracting office. Benton used this authority more than twenty times to create fictitious purchase requests. The scheme operated in the same manner as the plan Hyams, Long, Garrett, Albert, and Rentz had used. Benton submitted the fictitious purchase request to the contracting office recommending C.C. Dickson Co. as the source. The contracting office awarded the contract to C.C. Dickson Co. Hyams supplied nothing, while Benton falsely certified delivery. Hyams submitted a false invoice with the signed delivery certificate to the Robins AFB finance office. After Robins AFB paid for the undelivered items, Hyams received the money and split the proceeds with Benton. Benton knew Rentz was involved, but was not sure how. Benton admitted receiving $75,000 from the scheme.

Benton identified three other Air Force civilian employees and an Air Force sergeant as participants in Hyams' fraud schemes. One employee was George Underwood, who worked in the Robins AFB contracting office. He handled small purchase requests from civil engineering. Under Federal and Air Force procedures, Underwood was required to solicit at least three sources if the contract amount was over $2500. [21] Underwood, as the regulations permitted, solicited the bids by telephone, making a written record for file. [22]

Underwood was interviewed and told the investigators he had disclosed the bids of C.C. Dickson Co.'s competitors to Hyams. Thus, he could bid just under the bids of the competitors. Underwood admitted to accepting $95,000 in bribes from Hyams starting in 1985 and ending in the fall of 1990. Most of the time Hyams paid him in cash. Several times, however, Hyams gave him a check on J & J Salvage's account signed by Rentz. Underwood agreed to plead guilty to conspiring to launder money. [23] Robins

AFB fired him and used the remedy of administrative offset to seize his retirement pay of $24,500. [24]

Underwood identified two others as participants in the bribery arrangement: Annette Franks, an employee in the Robins AFB contracting office, who accepted bribes from Hyams, and Paul George, a C. C. Dickson Co. employee, who often delivered cash to Underwood. Franks and George were interviewed. Franks admitted accepting $4500 in bribes from Hyams and George in exchange for disclosing the bids of C.C. Dickson Co.'s competitors to Hyams and George, who then submitted a bid that was low enough to receive the contract. George admitted delivering bribes to Franks and Underwood. Franks agreed to plead guilty to accepting gratuities. [25] Robins AFB fired her [26] and administratively seized her final pay, $3250. [27] George agreed to plead guilty to paying gratuities to federal officials, [28] and C.C. Dickson Co. fired him.

The second Air Force employee Benton identified as a participant in the fraud scheme was Charlie Billings, a supervisor in the Robins AFB civil engineering office. He ultimately admitted accepting $27,000 in cash and property from Hyams in exchange for remaining silent about his subordinates' circumvention of required contracting procedures. Billings agreed to plead guilty to conspiracy to commit money laundering. [29] Robins AFB fired him [30] and used administrative offset to seize Billings' retirement and final pay of $20,339. [31]

The third Air Force employee Benton identified was Master Sergeant Loren Driskell. Driskell, until his retirement in 1988, was the noncommissioned officer in charge of the air conditioning and refrigeration shop in the Robins AFB civil engineering office. By this time, the investigators had enough information to obtain a search warrant for Driskell's business records. These records were seized, disclosing that Driskell and Hyams had defrauded the Air Force of almost $900,000 between 1985 and August 1988.

Faced with this evidence, Driskell, through his attorney, offered to cooperate with the Government if allowed to plead to reduced charges. An agreement was reached allowing Driskell to plead to two counts -- signing a false income tax return and conspiracy to commit money laundering. [32] The Air Force administratively offset its claim against Driskell's military retirement pay. [33] Driskell described how he and Hyams defrauded the Government of $910,000 between 1985 and 1988. In the same manner as the other schemes, Driskell created purchase requests for fictitious requirements and submitted them to the contracting office. That office awarded a contract to C.C. Dickson Co. in Warner Robins. Hyams delivered nothing, but Driskell certified receipt. Hyams used this false certificate to invoice Robins AFB, which paid C.C. Dickson Co. in Charlotte. To receive the money from Charlotte, Driskell and Hyams devised a money laundering operation. While on active duty, Driskell had started a private air conditioning business. Through this business, Driskell submitted invoices to C.C. Dickson Co. falsely representing sale of various items to C.C. Dickson Co. Based on instructions from Hyams, the amount Driskell charged Dickson was set at seventy percent of the amount the Air Force paid Dickson on the fraudulent invoices Hyams had submitted to Robins AFB. After receiving payment from Dickson, Driskell paid half to Hyams.

At this stage, with various defendants cooperating, the Government was ready to proceed beyond

demand letters with its civil case. A civil complaint was filed against C.C. Dickson Co. and individual defendants for $4.5 million in treble damages and forfeitures under the False Claims Act. [34] The complaint also cited civil fraud, [35] inducing breach of fiduciary duty, [36] breach of fiduciary duty, [37] and constructive trust [38] as a basis for the Government's recovery of damages.

D. Third Phase, Investigation and Remedies

With the revelations disclosed by Driskell and Benton, Hyams was now in an untenable position. He had confessed to $200,000 in fraud, and now Driskell and Benton had added another $1.3 million. Long, Albert, Garrett, Driskell, Benton, Underwood, and Franks had either pled or agreed to plead guilty to significant charges, each was prepared to testify against Hyams, and substantial evidence was available to corroborate their testimony. Among other things, the Air Force had obtained Rentz's, J & J Salvage's, and Hyams' bank records with administrative subpoenas. [39] Moreover, the IRS's criminal investigator stepped up the pressure with administrative remedies. He seized Hyams' motor home and race car as proceeds of illegal money laundering and made it plain to Hyams that this process would continue, including seizure of Hyams' residence. [40]

Hyams had no choice and accepted the inevitable. He agreed to plead guilty to bribing federal officials and conspiracy to commit money laundering. As part of the agreement, Hyams now described the entire fraud scheme, confirming the statements of the other participants. The bribery was not limited to Underwood and Franks, but included the money paid to Long, Garrett, Albert, Benton, and Driskell as their share of the fraud scheme. [41] He also identified another participant, Technical Sergeant James Watkins.

Watkins, who had replaced Driskell as the noncommissioned officer in charge of the refrigeration shop in August 1988, had been a suspect for several months, but evidence establishing his guilt was inconclusive. Hyams now showed that Watkins had picked up where Driskell had left off. Hyams supplied direct evidence that he and Watkins had defrauded the Government of $50,000 with false invoices submitted by Hyams to the Robins AFB finance office. Watkins supplied the necessary fictitious purchase requests and false delivery certificates. Rentz, through the J & J Salvage account, provided the means to receive the money from Charlotte. After deducting his eleven percent cut, Rentz disbursed the balance to Hyams, who in turn paid half to Watkins.

Watkins was still on active duty; thus, he was tried by court-martial. He pled guilty to conspiracy to defraud the United States, [42] larceny of $50,000, [43] false official statements, [44] and dereliction of duty. [45] He was sentenced to a dishonorable discharge, confinement for five years, total forfeitures, and a fine of $5,000.

The last defendant was Rentz. By this time, the investigators, especially the criminal investigator from the IRS, had compiled an excellent case proving money laundering and tax evasion. Rentz agreed to pled guilty to conspiracy to commit money laundering and signing a false income tax return. [46]

E. The Civil Cases Conclude

Shortly after Rentz pled guilty, C.C. Dickson Co. agreed to settle the Government's civil claim and paid the Government $2 million. The Government had earlier reached satisfactory repayment arrangements with Benton, Billings, Long, Albert, Garrett, Underwood, and Franks. Through these agreements and administrative offsets, the Government collected another $170,000. This left Hyams, Driskell, Rentz, George, and Watkins liable for $2.1 million, the balance owed on the Government's $4.5 million claim under the False Claims Act. Civil claims against these defendants were pending in 1994.

F. Sentencing of the Civilians Defendants

Because of his early and substantial cooperation in the investigation, Garrett was allowed to plead to one count of conspiracy to commit money laundering. [47] Shortly before his sentencing, Robins AFB fired him. Garrett also settled the civil claim against him and paid the Government $80,000.

Hyams, as the ringleader, drew the heaviest prison sentence and fine. Most of the prison terms imposed on the civilian defendants must actually be served. Good time of fifty-four days per year is subtracted for sentences of more than one year, but parole in the federal system has been abolished. [48] The table below sets out the prison sentence and fine for each defendant.

Punishment Received DEFENDANT SENTENCE FINE Garrett 8 months $4000 Franks 5 years probation i with 6 months in a half-way house None George 1 year $3000 Benton 15 months None Long 22 months $5000 Albert 2 1/2 years $2500 Rentz 2 1/2 years $7500 Underwood 4 years None Billings 4 1/3 years None Driskell 5 years $12,500 Hyams 8 3/4 years $150,000

III. PRINCIPLES FOR HANDLING FRAUD CASES

The Robins AFB experience taught or confirmed several principles about how to investigate and pursue remedies in fraud cases. This section examines seven principles.

A. Principle No. 1: Never Accept a Defendant's Statement as Completely True [49]

Few criminals willingly admit wrongdoing. Even when they admit guilt, they limit their admissions to what they believe investigators already know. In short, defendants lie. Billings, Underwood, Franks, and Rentz denied any wrongdoing when first questioned. Only when confronted with evidence did they confess. Watkins maintained his innocence until two days before trial even though confronted with overwhelming evidence. He did not accept reality until the evidence amassed against him became irrefutable.

Albert, Long, and Hyams are the classic cases illustrating this principle. Albert and Long from the beginning admitted they defrauded the Government of a few thousand dollars involving the two hardware stores. They admitted this amount of fraud because they believed that was all the Government

knew -- and they were right. Hyams, when first questioned, was willing to admit to defrauding the Government of $200,000 in a conspiracy with Long, Garrett, and Albert. Again, he believed that was all the Government knew, and at the time, he also was right.

One of the turning points in the investigation occurred when the AUSA handling the criminal prosecution refused to accept an offer from Long and Albert to plead guilty to defrauding the Government of several thousand dollars. She rightly sensed that the offer came too easily. Applying the principle that most criminals will admit only what they believe the Government already knows, she directed the criminal investigation to continue.

By the time the investigation reached Hyams, everyone on the Government's team was convinced of the validity of the principle that defendants lie. No one believed Hyams' fraud was limited to $200,000, and no question existed about continuing the investigation. The principle of lying defendants has a corollary: there are no small cases. Every fraud case should be treated as having the potential of involving major fraud.

The conclusion is not to stop investigating just because a defendant admits some wrongdoing. An investigation should be pushed to its logical limits. Only when all reasonably available leads have been examined should the investigation stop.

B. Principle No. 2: Do not Treat White-Collar Criminals as Criminals When Interviewing Them [50]

Even more than other criminals, white-collar criminals do not want to believe they are criminals. Of course they are criminals, but that does not change how they view themselves. At best, they may acknowledge their fraudulent acts are criminal, but they will still see themselves as good people who sometimes do bad things. Consequently, white-collar criminals are offended if their conduct is bluntly labeled criminal or if the interviewers are hostile or threatening.

Investigators and lawyers who interview white-collar criminals need to understand how white-collar criminals perceive themselves and their fraudulent acts. Individuals are more likely to disclose their criminal conduct in interviews conducted in a friendly manner and the fraudulent acts are discussed in neutral terms. Avoid emotion-laden terms such as steal, fraud, or bribery. Be friendly, and at least in the beginning, do not use any threats.

To achieve a friendly interview where criminal conduct is discussed in neutral terms, avoid giving a rights advisement. That is no problem if the white-collar criminal is a civilian who is not in custody during the interview and has not been arraigned or indicted. The rights advisement required by Miranda v. Arizona [51] applies only when the subject is in custody. [52] The Sixth Amendment right to counsel applies if the subject has been arraigned or indicted. [53]

But if the white-collar criminal is a military member whose interview is part of a military criminal investigation, the rights advisement required by Article 31 must be given. This requirement applies even

though the subject is not in custody and has not been charged. [54] If the ultimate aim is a court-martial, do not try to avoid the Article 31 requirement by having someone, such as an FBI agent who is handling the civilian part of the criminal investigation, conduct the interview. An Article 31 rights advisement is required when military and civilian investigators conduct a joint investigation or when the civilian investigator acts as part of the military investigation. [55] Even when a rights advisements is required, investigators and lawyers should nevertheless strive to keep interviews friendly using neutral terms to discuss a defendant's criminal conduct.

The investigators in the Robins AFB fraud case repeatedly demonstrated the success of this approach. When Garrett was first questioned, the available evidence established only a few thousand dollars of fraud involving the two hardware stores. Yet Garrett admitted the entire fraud scheme in maintenance. From the beginning, Hyams also admitted the entire fraud scheme in maintenance although he did conceal the scheme as it applied to civil engineering. Benton admitted his participation in the civil engineering fraud, concealing nothing.

This is not to suggest that Garrett, Hyams, and Benton confessed simply because they liked the investigators who questioned them. In each case, the investigators had evidence of the defendants' criminal conduct. They had enough information to discuss the defendants' criminal conduct so that the subjects could not be sure just how much the investigators actually knew. Moreover, although the interviews were friendly and criminal conduct was discussed in neutral terms, the defendants understood they were in trouble because the matter under discussion was their criminal conduct. They knew the full range of criminal, civil, and administrative penalties they faced. They also understood their cooperation, or lack of it, would be reported to the government lawyers who would decide what action to take against them. Incriminating statements obtained from defendants after advice along these lines are voluntary and admissible in evidence. [56] The results were three confessions. These three defendants confessed to more than the Government was able to prove at the time.

This approach does not work in every case. Long, Albert, and Watkins never admitted anything until they were sure the Government could prove their guilt. After he got a lawyer, Hyams adopted the same posture. Four defendants initially denied guilt when the investigators had little evidence against them. But later, when confronted with some evidence, they admitted to participating in the fraud scheme.

On balance, the investigators' friendly approach to the white-collar criminals in the Robins AFB fraud scheme was an outstanding success. Seven participants confessed all or a significant part in the fraud scheme when confronted with some evidence and three individuals confessed at the first interview. Not only did they admit their complicity, they provided important evidence against other participants in the scheme.

The effectiveness of a friendly approach to interviewing white collar criminals applies to lawyers. Of course, by the time the lawyers are interviewing white collar criminals, usually investigators already have obtained the basic admissions. Even so, lawyers need certain additional details to perfect criminal, civil, and administrative cases. They are more likely to obtain those details from defendants who regard

the lawyer as a reasonably civil individual rather than a hostile adversary. Even if the setting is a trial and the interview is the cross-examination of a white-collar criminal, a nonhostile approach usually obtains better results. [57]

C. Principle No. 3: Pursue Criminal, Civil, and Administrative Remedies Concurrently

Most people agree that criminal, civil, and administrative remedies should be taken eventually. Those who defraud the United States should be prosecuted, forced to pay restitution, separated from federal service if an officer or employee, and barred from doing business with the Government if a contractor. These remedies should be pursued concurrently. Unfortunately, all too often the practice is to take them sequentially, if at all. The result is that many actions fall short of their goal, or worse, are never taken.

Unquestionably, criminal remedies have priority over civil remedies which, in turn, have priority over administrative remedies. But this priority should not mean sequential pursuit of remedies, i.e., civil claims begin at the end of the criminal prosecution and administrative remedies start only when the civil claims are complete.

Three things happen when remedies are taken sequentially, all of them unsatisfactory. First, remedies delayed become lost during the period of delay. If C.C. Dickson Co. and Hyams had not been suspended from contracting with the Government, they would have continued to receive and benefit from government business. If Long, Albert, Billings, Underwood, and Franks had not been fired or suspended without pay, they would have continued to draw government salaries.

Some remedies when delayed are lost forever. Benton, for example, had retired from federal service a few months before his participation in the fraud scheme could be proved. He was about to receive $17,300 as the first installment on his lump sum retirement. Prompt administrative offset prevented him from receiving that money. Otherwise, the recovery of the $17,300 would have been lost because Benton was insolvent. Both Hyams and Driskell were retired military members when their fraud was discovered. Until administrative offsets were taken, each continued to receive his full military retirement pay. A classic way to lose a remedy forever is to delay a civil claim beyond the statute of limitations. [58] No statute of limitations applies to administrative actions under a government contract, [59] and the limitation period for administrative offsets under 31 U.S.C. Sec. 3716 is ten years. [60] But the Government may be similarly barred by the doctrine of laches or waiver if it fails to exercise due diligence in taking such actions and this failure prejudices the other party. [61]

Government delay in filing a lawsuit under the False Claims Act also increases the risk that an individual qui tam relator will file first entitling the relator to a significant part of any eventual recovery. [62] This procrastination occurred at Robins AFB when the Department of Justice delayed filing a claim under the False Claims Act long after the criminal case had concluded. In the interim, a relator filed a lawsuit and, as a result, collected $75,000 of a $600,000 settlement.

Pursuing remedies in sequence has a second disadvantage. The resulting delay leads to stale evidence

and loss of interest in the case. Memories of witnesses fade, and records are lost or destroyed. Interest in pursuing remedies diminishes as federal officials move to new jobs and take on new assignments.

Fraud cases, especially the more complex, consume huge quantities of time even when pursued diligently. The Robins case took more than two years and was not completely finished. But at least all remedies were initiated and pursued concurrently. If remedies had been taken sequentially, initiating civil remedies would have been delayed a year, and the administrative remedies would have not yet begun within a two year period.

Another case at Robins AFB illustrates these problems. The Justice Department insisted on finishing the criminal case before the civil or administrative remedies could begin. The criminal case took three years. As a result, the civil case under the False Claims Act was barely filed before the statute of limitations expired, and the administrative remedies remain unstarted. Meanwhile, the contracting officials, inspectors, auditors, and lawyers who originally worked the fraud case for the Government were reassigned to new jobs or started new projects. Witnesses needed to prove the fraud, whether they worked for the contractor or the Government, need to recall events that occurred four or more years prior. A more ineffective way to pursue fraud remedies is hard to imagine.

The third disadvantage of taking remedies sequentially is the loss of pressure on defendants to cooperate with the Government. When remedies are pursued in parallel, however, the Government confronts those who defraud the Government with a triple threat: imprisonment, impoverishment, and unemployment.

The False Claims Act, with its penalties of triple damages and forfeitures between $5000 to $10,000 per false claim, is a formidable weapon. [63] It applies to individuals and to corporations that are liable for the acts of their employees acting within the scope of their employment and for the benefit of the corporation. [64] The Act is especially useful in a fraud case involving a corporation which, although criminally liable for its employees acting within the scope of their employment and for the benefit of the corporation, [65] cannot be imprisoned. Moreover, the Act applies not only to the obvious fraudulent billing for goods and services not delivered, [66] but also to fraudulent overcharging and mischarging, [67] product substitution, [68] and collusive bidding. [69]

Other remedies pursued with claims under the False Claims Act [70] are useful because they apply in ways the False Claims Act does not. A constructive trust claim allows the Government not only to trace fraud proceeds to the defendant, but also to third parties who have not given value. [71] A common law claim for civil fraud, unlike a claim under the False Claims Act, permits the Government to recover consequential damages. [72] In bribery and illegal gratuities cases, claims for breach of fiduciary duty and inducing breach of fiduciary duty permit the Government to recover the amount of the bribe or illegal gratuity. [73]

The Government also may cancel a contract when the formation or performance is tainted by fraud, bribery, conflicts of interest, collusive bidding, subcontractor kickbacks, or false claims. [74] Monetarily, this remedy more severely affects a defendant when the Government's damages under the

False Claims Act or common law are small or nonexistent.

Other important civil remedies are claims for breach of contract and payment by mistake. [75] Although recovery is limited to single damages, the Government does not have to prove fraud. Moreover, these two remedies may be used to support an administrative offset. This remedy is particularly useful when the amount available for offset is less than single damages.

Using the triple threat of criminal, civil, and administrative actions, the Government is often able to bargain for a defendant's cooperation by agreeing to accept less than what the Government might receive if it pursued all remedies in full. Some remedies are not properly the subject of bargaining. A security clearance is one example. The continued employment in federal service by an employee who defrauds the United States cannot be bargained. On the other hand, some remedies are suitable for bargaining. Justice seldom requires that a defendant be charged with every crime committed. Nor is it necessary to have full civil damages. In the Robins case, the Government was willing to accept pleas to reduced charges that nevertheless reflected the defendants' criminal activity and furnished the basis for adequate sentences. The Government also was willing to accept less than full civil damages from individual defendants as long as these defendants agreed to return at least as much money as they had personally received from the fraud scheme.

What the Government received in exchange was the discovery of the civil engineering fraud. The key bargains were those struck with Long, Albert, and Benton. Before that, the Government had reasonably good cases against Long and Albert for their part in the maintenance fraud based on evidence from Garrett and Long's secretary. The Government had an excellent case against Hyams and Garrett for their part in the maintenance fraud as each had confessed. But the Government had little information concerning the civil engineering fraud, and that knowledge was limited to Benton. Benton's cooperation opened up the civil engineering fraud, and, combined with Long's and Albert's cooperation, made the case against Hyams irrefutable, thereby forcing him at last to make his own deal. Hyams' cooperation then led to the rest of the case in civil engineering: Driskell and Watkins, and the identification of two employees in contracting, another C.C. Dickson Co. employee, and Rentz's full involvement in the fraud scheme.

The concurrent pursuit of fraud remedies and the willingness of defendants to cut deals also led to the $2 million settlement with C.C. Dickson Co. The defendants who had made bargains with the Government were the source of the evidence against C.C. Dickson Co. In addition, C.C. Dickson Co.'s Warner Robins office was suspended from doing business with the Government. The Air Force made it plain to C.C. Dickson Co. that ending the suspension depended, in part, on the company's willingness to cooperate in the Government's investigation and to make restitution. Cooperation is a legitimate factor in debarment and suspension decisions. [76]

Once a defendant is cooperating, further pressure is unnecessary and may be counterproductive. For example, Garrett cooperated from the beginning and not until the end was he fired and compelled to pay partial civil damages. Similarly, no action to offset Driskell's military retired pay was taken while he was

cooperating in the Government's investigation.

In summary, pursuing remedies in parallel works to the Government's advantage. Remedies are not lost and actions can be taken while evidence and interest are fresh. Because of the triple pressure of taking remedies concurrently, defendants are more likely to cooperate with the Government, thereby revealing the full extent of the fraud and supplying evidence against others.

D. Principle No. 4: Use the Team Approach

In a team approach, Government investigators and lawyers join together to investigate fraud and pursue remedies. The team approach first requires assembling the right team members. These members are the investigators who will investigate the fraud and the lawyers who will handle the criminal, civil, and administrative proceedings. One of the three military criminal investigative agencies, such as the OSI, furnishes agency investigators. The FBI provides investigators if criminal prosecutions or civil claims are involved. [77] The Department of Justice (DOJ) is represented by the attorneys who will conduct the prosecution of the criminal cases and pursue civil claims. Agency attorneys complete the team. They include military prosecutors, if court-martial proceedings are contemplated, and attorneys who will handle administrative actions.

Investigators and attorneys from the agency and from DOJ are the core team members, but others may be added depending on the nature of the investigation. In fraudulent defective pricing cases, for example, someone from the Defense Contract Audit Agency (DCAA) should be part of the team. In the Robins AFB fraud case, representatives from the IRS's Criminal Investigative Division were part of the team because remedies pursued included forfeitures under money laundering statutes.

The team approach also requires that team members participate throughout the investigative and remedy phases of the cases. Attorneys responsible for the criminal, civil, and administrative cases participate from the start of the investigation, and investigators continue their participation through conclusion of the criminal, civil, and administrative cases. This does not mean every team member participates equally in all phases of a fraud case. In the investigative phase, investigators supply most of the effort. Attorneys serve to advise the investigators on what is needed to support criminal, civil, and administrative remedies. As the case shifts to the remedy phase, more work is undertaken by attorneys, but investigators remain involved as sources of information and for further investigation as needed. But regardless of the phase, continuous communication is required among team members from the start of the investigation to the conclusion of the remedy phase.

Two reasons exist for using a team approach to pursue fraud remedies. First, it prevents interference among remedies. Having criminal, civil, and administrative remedies available in a fraud case carries with it the potential for interference among remedies. One issue is whether remedies will be pursued in sequence or in parallel, even though pursuing remedies in parallel increases the potential for interference.

A common instance of interference occurs when, in pursuing criminal, civil, and administrative remedies, Government officials take conflicting positions. These officials can use different legal theories, assert different facts, or claim different amounts. Interference among remedies can occur in other ways as well and is discussed in the next three sections.

A team approach prevents this interference because team members communicate with each other. Before adopting positions on legal theories, facts, or amounts, team members check with each other. This ensures consistent positions regardless of the remedy pursued. Similarly, before an action is taken in investigating a fraud case or pursuing a remedy, team members evaluate what effect that action will have on the investigation and on other remedies. At best, this avoids interference altogether. At a minimum, it allows advantages and disadvantages of a contemplated action to be weighed and a conscious decision made on the best course to take. When team members are fully involved and informed, they can advise other team members if some action might interfere with the investigation or with the pursuit of a remedy.

The second reason for a team approach is to bring to the case those who make fraud remedies work. At one level, this means bringing to the case those who are responsible for the remedy involved. The DOJ attorneys, supported by FBI agents, enforce criminal statutes, other than the Uniform Code of Military Justice (UCMJ), and pursue civil claims. Agency attorneys, supported by agency investigators, conduct criminal prosecutions under the UCMJ and handle administrative actions. Simply put, pursuing criminal, civil, and administrative remedies requires participation on the team by those who will take these remedies.

But DOJ and agency officials using a team approach do more than make their own remedies work. They help make all remedies work. The evidence gathered in a criminal investigation, with some exceptions involving grand jury secrecy, is available to support civil and administrative actions. A criminal conviction, under the doctrine of collateral estoppel, establishes as proved in a later civil case those facts necessary to the criminal conviction. [78] And, as discussed below, a criminal conviction can be used to support several different administrative actions. [79] The DOJ attorneys and investigators also have experience in investigating and proving fraud that helps in prosecutions under the UCMJ and administrative actions taken by agencies.

Agency investigators and attorneys better understand agency procedures. This knowledge is important to criminal prosecutions and civil actions, especially if the fraud involves the complexities of agency contracting, as it often does. In the Robins fraud case, agency contract lawyers, early in the case, set out for investigators and DOJ attorneys how the small purchase contracting process was supposed to work. Understanding this process was essential to investigating the case and pursuing fraud remedies. After all, before the fraud scheme could be understood, the process the defendants subverted had to be known.

Finally, agency investigators and attorneys have experience in investigating and proving fraud that also helps in criminal prosecutions and civil actions. The role of IRS criminal investigators in the Robins AFB fraud case again shows how specialists in one area help make all remedies work. At the same time

criminal, civil, and other administrative remedies were being pursued, IRS investigators took those administrative remedies for which they were responsible -- forfeitures under money laundering statutes. Moreover, evidence they developed while investigating money laundering helped prove large parts of the fraud scheme. Analyzing thousands of financial records, they traced the fraud scheme and its proceeds from start to finish with straightforward summaries of complex fraudulent transactions. This evidence was used, not only to support forfeitures under money laundering statutes, but also to support the criminal prosecutions, civil cases, and other administrative actions.

In the Robins AFB fraud case, the agency and DOJ lawyers were involved at the beginning of the investigation, and the criminal investigators participated to the end of the last remedy. Communication among team members was continuous and usually daily. It is no overstatement that the team approach and resulting coordinated strategy was the key to the Government's success in the Robins AFB fraud case.

E. Principle No. 5: Pursue Civil and Administrative Remedies to Avoid Conflict with the Criminal Case

As a legal matter, the Government may generally pursue criminal, civil, and administrative remedies in parallel. The Government's right to pursue these remedies in any order it chooses has been repeatedly upheld. [80] Some exceptions exist. A court may stay civil or administrative proceedings or impose protective orders when justice so requires. [81] Contracting officers are prohibited from issuing final decisions in a case involving fraud. [82]

In a rare case, the Double Jeopardy Clause [83] prohibits the Government from criminally prosecuting a defendant and also imposing civil forfeitures bearing no rational relation to the amount of the Government's loss. [84] This rule should cause no problem as it applies only to actually imposing, not just suing for, statutory forfeitures. In some cases, circumstances may require the a civil claim for statutory forfeitures to be filed while the criminal case is pending or before it begins. But the consequences of this Double Jeopardy rule can be avoided by waiting for the criminal case to conclude before proceeding to a judgment in the civil case.

Legally, the Government may pursue civil and administrative remedies in parallel with criminal proceedings. As a matter of policy, however, criminal proceedings have priority. One way to interfere with the criminal case is to take positions in civil and administrative proceedings that are inconsistent with the Government's positions in the criminal case. For this reason, in taking civil and administrative actions concurrently with criminal proceedings, actions that would interfere with the criminal case must be avoided. As previously discussed, however, the team approach prevents this problem.

The other principal cause of interference is to prematurely disclose the Government's criminal case to a defendant. This problem, too, can be prevented. As a first rule, no remedy is initiated until the prosecutor is willing to disclose to a defendant that an investigation even exists. This disclosure usually happens when a defendant is indicted or interviewed as a subject. Disclosure can occur in other ways. The timing of remedies to avoid prematurely disclosing an investigation varies from case to case. The

Robins AFB case, for example, was complicated by the presence of many defendants. The decision was made to proceed against those defendants who had been interviewed as subjects even though the investigation had not reached that stage with other defendants. The reasoning was that interviewing some defendants as subjects alerted the remaining defendants to the investigation.

Interviewing a defendant as a subject of a criminal investigation and indicting a defendant disclose the existence of a criminal investigation. These actions, however, do not reveal the Government's evidence. This leads to the second rule: in pursuing civil and administrative remedies, team members should not prematurely disclose evidence supporting the criminal case.

Pursuing civil and administrative remedies can disclose evidence supporting the Government's criminal case in two ways. First, the Government may have to present some evidence to support its request for a civil or administrative remedy. Second, by initiating certain civil or administrative remedies, the Government's case may be subject to discovery. The rules vary depending on the remedy. Through coordination, however, civil and administrative remedies can be pursued without prematurely disclosing evidence supporting the Government's criminal case. This problem requires a three-part analysis.

First, the attorneys handling the civil and administrative remedies decide what evidence is needed to support civil and administrative remedies. They also will know what evidence will be available to the defendant through discovery. In some instances, nothing more than an indictment is required. Federal employees may be indefinitely suspended without pay from their government jobs when reasonable cause exists to believe an employee has committed a crime punishable by imprisonment. An indictment for such a crime is reasonable cause. [85] Similarly, people and companies may be suspended from doing business with the Government based on adequate evidence of fraud. Again, an indictment is adequate evidence. [86] Other remedies, however, require something other than an indictment.

Second, the prosecutor decides what evidence can be revealed and in what form. In some instances, evidence may be disclosed without adverse effect because it is already known to the defense. In other instances, the prosecutor is willing to disclosed it because disclosure will not adversely affect the criminal case. Even though prosecutors may be willing to disclose evidence, they may be unwilling to allow witnesses, other than criminal investigators, to testify under oath in civil or administrative proceedings before the criminal case is tried. This situation existed in the Robins AFB fraud case.

To answer this problem, the technique of the criminal investigator's affidavit was developed. This affidavit is a sworn statement by an investigator providing enough evidence for the remedy in question. This device is particularly effective if the defendant has admitted fraud. It also works well when nontestimonial evidence is available to establish a defendant's fraudulent activity. For example, stolen government property may have been recovered from the defendant's possession.

In the Robins fraud case, an investigator's affidavit provided the evidence needed to suspend C.C. Dickson Co. and its employee, Hyams, from doing business with the Government. The affidavit supplied adequate evidence of fraud, the standard of proof required by regulation. [87] That affidavit

needed to do no more than recite Hyams' confession to the maintenance fraud, including Rentz's money laundering role, and the corroborating bank records Hyams had obtained from Rentz and given to investigators. It was unnecessary for the affidavit to say anything about evidence unknown at the time to Hyams, i.e., Garrett's corroborating statement and the documents Long's secretary supplied.

In contractor suspension cases, the Government may prevent further disclosure of its evidence beyond the affidavit it chooses to submit. By regulation, further proceedings to determine disputed facts are prohibited if DOJ advises that substantial interests of the Government in other legal proceedings would be prejudiced. [88]

A criminal investigator's affidavit may also be used to support administrative offset against the pay of civilian employees and military members. By statute and implementing regulations, federal agencies may administratively offset debts of their employees and military members against pay otherwise due. [89] This offset requires an administrative record sufficient to establish the debt. The debtor has the right to review this record and submit evidence in response, but has no right to an oral hearing unless the validity of the debt turns on the credibility of witnesses. [90] If no oral hearing is held, the debtor is entitled to an administrative review on the written record. [91] An investigator's affidavit satisfies this standard when the validity of a disputed debt does not turn on the credibility of witnesses. In the Robins case, this method was used to take the administrative offset against the retired pay of several civilian defendants and the retired pay of two military defendants.

An affidavit is useful as long as proof of some part of the fraud does not turn on credibility of witnesses. Some administrative offset is better than none. The affidavit need only establish a debt based on fraud that equals the amount available for offset. For example, the $250,000 debt owed by Hyams based on the maintenance fraud was more than enough to offset the value of Hyams' retirement pay, although later investigation established Hyams' fraud at $1.5 million.

The second way pursuing civil and administrative remedies can prematurely disclose the Government's criminal case is through discovery. For this reason, filing a civil lawsuit before the criminal case is tried is generally inadvisable. A civil lawsuit, however, should be filed when the statute of limitations is about to expire or if the defendant is dissipating significant assets.

Availability of discovery to a defendant in administrative cases varies depending on the administrative remedy involved. Discovery is not available in suspensions from employment based on an indictment, administrative offsets against employees or military members, or suspensions from doing business with the Government. As previously discussed, the agency may choose how much evidence to use, and its form, to support these remedies. Availability of discovery in other administrative actions is not an issue. In these actions, the Government will almost always have to present more evidence than an investigator's affidavit. Administrative action should be delayed until after the criminal case is over, absent other compelling considerations.

After conviction, civil and remaining administrative actions ordinarily may be initiated without

adversely affecting a criminal case. Further delay until sentencing is unnecessary unless the conviction has left the amount of fraud unresolved and the defendant will dispute this matter at a hearing on sentencing. In this situation, disadvantages of further delaying civil and administrative actions must be balanced against any adverse effect on the criminal case. Often, a pre-sentencing report will disclose evidence of the amount of fraud to a defendant. At this point the further delay of civil or administrative actions is not necessary.

F. Principle No. 6: Pursue Administrative Remedies to Avoid Conflict with the Civil Case

Pursuing administrative remedies in parallel with civil remedies can create conflict in three ways. The first is to take a position in the administrative action inconsistent with the Government's position in the civil case. Inconsistencies can be factual or legal. In an extreme case, the Government may be held to have elected between two inconsistent remedies. This happened in Baldredge v. Hadley. [92] The agency had proceeded administratively to cancel several contracts for fraud and to recover what it had paid the defendants under the contracts. The court barred a civil action under the False Claims Act, holding such a claim inconsistent with the agency's earlier action cancelling the contract.

This questionable decision involving cancellation of a contract for fraud is not inconsistent with a claim under the False Claims Act. Fortunately, it has limited scope. Administrative and civil remedies are generally consistent and no election is required. [93] In United States v. Thomas, [94] for example, the agency, in an administrative proceeding, had recovered from the defendant subsidy payments obtained by fraud. Afterwards, the Government brought an action under the False Claims Act for the same fraud. The court found the two remedies consistent and sustained the False Claims Act action. [95] In determining how much the defendant owed under the False Claims Act, however, the defendant was entitled to a credit for amounts recovered by the agency. [96] The credit is applied after tripling the amount of the Government's single damages, not before. [97]

Although pursuing a consistent administrative action does not bar a later civil claim for fraud, collateral estoppel may apply in certain cases to preclude relitigation of issues. The doctrine of collateral estoppel precludes relitigating issues of fact or law actually litigated and determined in a prior lawsuit. The causes of action from one lawsuit to the second need not be the same. [98] The effect of collateral estoppel attaches not only to judicial proceedings, but also to administrative proceedings if certain conditions are met. The administrative proceeding must meet judicial standards of due process, and the administrative findings must be on material issues supported by substantial evidence on the administrative record as a whole. [99] Proceedings before agency boards of contract appeals, for example, meet the test for applying collateral estoppel. [100] The effect of collateral estoppel cuts both ways. If the Government prevails in the administrative action, the defendant will be barred from relitigating issues in a later civil case. If the defendant prevails, the Government will be barred.

Avoiding inconsistent positions, factual or legal, requires coordination among government officials who take administrative and civil actions. As previously described, preventing inconsistent positions is a principal reason for using a team approach in fraud cases.

The second way that parallel civil and administrative actions can cause conflict is to disclose that a civil case may be pursued prematurely, but this is an issue only in narrow circumstances. It is not an issue after the civil lawsuit is filed. At this point, the Government's civil case is subject to disclosure through discovery. It is not an issue if the administrative remedy is based on an indictment or conviction. An indictment, as previously seen, allows suspension of government employees from employment and suspension of contractors from doing business with the Government. A conviction for fraud, by itself, furnishes the basis for permanently removing an employee from government service [101] and permanently barring a defense contractor from doing business with the Government. [102] If the credibility of witnesses was an issue in an administrative offset against the pay of military members or government employees, it is no longer an issue after a conviction. A conviction alone supports these administrative offsets. In sentencing a defendant for fraud, the court must determine the amount of the Government's loss in order to apply the federal sentencing guidelines. [103]

A criminal case, however, might not be prosecuted or could result in an acquittal. It may result in a conviction for a crime that is insufficient to support an administrative remedy. Yet the Government still may intend to pursue a civil action for fraud and administrative remedies. Without an indictment or conviction, taking administrative remedies before the civil lawsuit is filed could risk prematurely disclosing the civil case.

For two administrative remedies, however, this problem can be avoided by using an investigator's affidavit. As previously described, this technique may be used for taking administrative offsets against the pay of government workers, if credibility of witnesses is not an issue, and for suspending defense contractors. An investigator's affidavit allows the Government to control what evidence is used to support the administrative remedy and the form of that evidence. Neither an oral hearing nor discovery is involved. Coordinating the affidavit with the attorney handling civil remedies insures consistency with the Government's position in civil litigation and avoids premature disclosure of the civil case.

Those administrative remedies involving an oral hearing or discovery should ordinarily wait for the filing of the civil lawsuit. An exception, however, should be considered when delay will cause loss of a substantial administrative offset.

The third area of conflict in concurrently pursuing civil and administrative remedies involves government contract claims that, absent fraud, would be processed under the Contract Disputes Act of 1978. [104] This Act establishes a dispute resolution process for claims involving a government contract. Among other things, it requires all claims against a contractor relating to a government contract to be the subject of a final decision of the contracting officer. [105] The contractor can appeal the final decision to an agency board of contract appeals or to the Court of Federal Claims. [106]

The Act also prohibits agencies from settling, compromising, paying, or otherwise adjusting any claim involving fraud. [107] Citing this provision, the DOJ has taken the position in litigation that the dispute resolution process under the Contract Disputes Act does not apply to government claims against contractors if any part of the transaction involves fraud. For the most part DOJ has been successful.

[108] If a transaction gives rise to fraud allegations, the Contract Disputes Act does not apply. The Government may bring an action in Federal District Court alleging not only fraud, but also breach of contract, unjust enrichment, and payment under mistake of fact. Absent fraud allegations, these claims would be subject to dispute resolution under the Contract Disputes Act. [109]

The DOJ's position, in effect, prevents an agency from pursuing a government claim under the Contract Disputes Act concurrently with a civil fraud case. The Department's position has the advantage of consolidating all theories of recovery in one case, eliminating duplication of effort, and assuring consistent results. However, two potential problems are created.

First, the DOJ may drop the civil case. If the civil suit is not pursued, the agency will have to bring a claim under the Contract Disputes Act with the attendant disadvantages caused by lengthy delay as previously described. [110] This problem can be avoided if DOJ includes contract claims not requiring proof of fraud in its civil case and pursues those claims even if the fraud claims are later dropped. Whether the courts will permit this course of action is unclear. The courts that have allowed contract claims to be consolidated with fraud claims in a civil case have not addressed what will happen if the fraud claims are dropped.

The second potential problem is the loss of administrative offsets. This loss stems from DOJ's position coupled with provisions of the Federal Acquisition Regulation (FAR) addressing contract debts owed by contractors to the Government. The FAR distinguishes between determining the amount of any debt and demanding its payment. Contracting officers determine the amount of any debt, fairly considering government and contractor claims. But the debt determination is neither a settlement of these claims nor a contracting officer's final decision under the Contract Disputes Act. [111] A demand for payment of the debt, however, requires a final decision by the contracting officer. [112] The demand for payment, not the debt determination, provides the basis for administrative offset. [113] The demand for payment also starts the interest period if no contract provision provides for an earlier date. [114] In a fraud case, the contracting officer can make a debt determination, but cannot issue a final decision because, as interpreted by the DOJ, the Contract Disputes Act does not apply to fraud cases. Without a final decision, the FAR prohibits administrative offsets. For the same reason, the interest period will not begin to run unless a contract clause separately provides for interest.

One solution is to change the FAR to allow administrative offsets without a contracting officer's final decision. Another is to take administrative offsets under the Debt Collection Act. The Contract Disputes Act poses no obstacle because it does not apply to government claims arising from fraud transactions. Unlike the Contract Disputes Act, the Debt Collection Act does permit agencies to attempt to collect government claims -- even those involving fraud. [115] If fraud is involved, however, an agency may not compromise or end collection action. [116] After the required coordination with DOJ, [117] the contracting officer or other responsible official should assert a demand for payment and use that as a basis for administrative offset. As in any debt collection case, the contractor is entitled to inspect and copy what the Government relies on to establish the debt and to an oral hearing if credibility of witnesses is an issue. [118]

The process for taking administrative offsets under the Debt Collection Act is less favorable to the Government than the process under the FAR. The Debt Collection Act requires due process before taking administrative offsets. The FAR calls for due process after administrative offsets are made. Contractors know this. In the past, they have argued for applying the Debt Collection Act to administrative offsets for contract claims, but without success. [119] Consequently, the preferred solution is to amend the FAR to allow administrative offsets without a contracting officer's final decision.

G. Principle No. 7: Pursue the Criminal Case to Avoid Conflict withCivil and Administrative Remedies

This principle has two parts. First, a grand jury should be used to obtain evidence only as a last resort. Under Rule 6(e) of the Federal Rules of Criminal Procedure, "matters occurring before the grand jury" may be disclosed, with limited exceptions, only to enforce federal criminal law. Only one of these limited exceptions is relevant here. Grand jury materials may be disclosed for purposes of civil litigation, but only if disclosure is by a court order finding that disclosure of specific materials is needed to prevent injustice and outweighs the need for continued grand jury secrecy. [120] This limited exception applies only to judicial proceedings; it does not apply to administrative proceedings. [121] Legally and practically, evidence obtained by a grand jury will be unavailable to support civil and administrative remedies when needed, if at all. To obtain this evidence from the grand jury, a court order is required.

Matters occurring before the grand jury include the names of the witnesses who testified before the grand jury and what they said. [122] It does not include, however, what these witnesses have said outside the grand jury, such as statements obtained by government investigators. [123] Matters occurring before the grand jury also include the documents presented to the grand jury and documents prepared for the grand jury. [124] Not included are documents obtained from sources independent of the grand jury proceeding, such as a prior government investigation. [125] The rule of secrecy only prohibits disclosing these matters in a way that would reveal grand jury proceedings. [126] It does not apply to witnesses or documents merely because they have been presented to the grand jury. [127]

Avoiding problems caused by grand jury secrecy is straightforward. Statements from individuals and documents should be obtained independently of grand jury proceedings whenever possible. Obtaining statements from individuals requires little elaboration because it simply means interviewing them apart from grand jury proceedings. These witnesses may also testify before the grand jury. Regardless, statements obtained apart from the grand jury proceedings may be used to support civil and administrative remedies without violating the rule of grand jury secrecy. This holds true even if the investigator who obtained the statement also knew the witness testified before the grand jury and had access to the testimony.

Similarly, documents should be obtained outside grand jury proceedings, that is, without using a grand jury subpoena. The preferred method is through consent of whoever has possession of the document. Absent consent, the other two alternatives are either a search warrant or an administrative subpoena

issued by the DOD's Inspector General. The advantage of a search warrant is that the defendant is not alerted in advance of the Government's interest. Advance notice allows a defendant who is so inclined to destroy or conceal evidence. After all, a defendant willing to defraud the Government is ordinarily willing to conceal proof of that fraud.

The advantage of an Inspector General subpoena is that, unlike a search warrant, a showing of probable cause is unnecessary. The Inspector General Act of 1978 [128] assigns to agency Inspector Generals the duty, among other things, to investigate and audit programs and operations of their agencies. [129] They also are to carry out activities to detect fraud in agency programs and operations. [130] The Act gives Inspector Generals the authority to subpoena evidence necessary for them to perform their statutory functions. [131] An administrative subpoena may be issued if it furthers a purpose within the statutory authority of an agency's Inspector General. [132] The pendency of a parallel criminal proceeding is immaterial. [133] Moreover, materials obtained by an Inspector General subpoena may be provided to the Department of Justice to be used in pursuing criminal and civil remedies. [134]

The disadvantage of an administrative subpoena is the cumbersome process necessary to obtain one. In the DOD, the Inspector General or the deputy must personally approve the subpoena. [135] The Inspector General requires substantial documentation to accompany a request for a subpoena, especially if the subpoena is for financial records. [136] Consequently, if probable cause exists, a search warrant is more easily obtained.

Documents obtained through consent, search, or administrative subpoena are available to support civil, administrative, and criminal remedies. These documents include grand jury proceedings, although knowledge about which documents are provided to the grand jury must be limited to prosecutors and criminal investigators. In order that documents can be used in civil and administrative actions, copies, not the originals, should be provided to the grand jury.

The second part of pursuing the criminal case to avoid conflict with civil and administrative remedies focuses on the proper administration of criminal justice. Pursuing criminal, civil, and administrative remedies in parallel requires a cooperative effort. Among other advantages, this approach provides the Government greater leverage in bargaining with defendants over the terms of plea agreements and settlements in civil and administrative cases. Prosecutors, who have a great deal of discretion in deciding which crimes to charge, can offer reduced criminal charges to influence a defendant to settle civil and administrative cases on terms favorable to the Government. Similarly, attorneys handling civil and administrative cases can agree to take less than the full remedy to influence a defendant to accept a plea agreement and plead guilty.

Apart from leverage, prosecutors also can use their discretion to support the Government's position in civil and administrative cases. As discussed several times in this article, results in a criminal case may be used to support civil and administrative remedies. But usefulness for this purpose depends upon the crimes charged, language in the indictment, findings in the sentencing proceeding, and contents of any plea agreement. For example, for filing a $1 million false claim against the Government, the conviction

and sentence of an individual or corporation provides stronger support for civil and administrative remedies than a conviction and sentence for the same crime based on filing a false income tax return.

The Government's authority to use criminal, civil, and administrative remedies to affect overall outcome does have limits. Ethically, a prosecutor may pursue only those criminal charges supported by probable cause and sufficient evidence for a conviction. [137] Prosecutors also must bargain with similarly situated defendants on similar terms. [138] Finally, a defendant's plea of guilty must be voluntary. [139]

Within these limits, the concurrent pursuit of fraud remedies in a manner to influence the overall outcome of various remedies is legitimate. A plea agreement may properly provide for restitution as part of the sentence. [140] Restitution, moreover, when part of a plea agreement, is not limited to the specific crimes charged. [141] A prosecutor, in plea negotiations, may bargain for a defendant's agreement to pay restitution, not only for crimes charged, but also for crimes the prosecutor agrees to drop. [142] These rules apply when the victim is the Government. [143]

Global settlements between the Government and defendants that resolve criminal, civil, and administrative aspects of a fraud case are an accepted practice. Extending beyond restitution as part of the sentence, these settlements address a defendant's civil and administrative liability. In United States v. Carrigan, [144] for example, a proposed global settlement provided for the defendant corporation to plead guilty and settle civil and contract claims in exchange for the Government's agreement to dismiss criminal charges against individual defendants and take no action to bar the corporation from doing business with the Government. [145] A prosecutor also may agree to immunity from criminal prosecution in exchange for forfeitures and civil penalties. [146]

Global settlements have advantages for defendants who can reduce their civil/administrative liability. [147] Defendants often want and can use plea agreements to limit or even eliminate civil forfeitures in exchange for a guilty plea. [148] Consequently, voluntariness of a guilty plea should not be an issue. After all, if prosecutors can offer reduced charges or a reduced sentence in exchange for a guilty plea, [149] they should be able to make the same offer in exchange for a defendant's accepting certain civil and administrative liabilities. Just as criminal charges must be supported by probable cause and sufficient evidence for a conviction, threatened civil and administrative remedies must be supported in law and fact. [150]

This is not to suggest the Government should insist on global settlements. The Government and a defendant may be able to reach agreement on some, but not all, aspects of a fraud case. If that occurs, the parts where there is agreement are resolved, and the balance is litigated. A defendant, for example, may be willing to plead guilty to fraud, but unwilling to settle the civil case because agreement on the amount of the fraud cannot be reached. If the plea agreement is one the Government would ordinarily accept, the Government should accept the plea agreement without insisting on a global settlement. [151]

IV. CONCLUSION

Handling fraud cases can be a challenging, even a frustrating, experience for judge advocates. Lacking direct control of any fraud remedy, they must pursue remedies by influencing those who do have direct control. The judge advocate's influence is highest for administrative remedies that are handled within the military service concerned. Initiation is controlled by a staff office reporting to the same chain of command as the judge advocate. These staff offices are generally receptive to judge advocate recommendations to initiate an administrative remedy. Even here, however, pursuing an administrative remedy can be blocked by the DOJ. The judge advocate, therefore, must convince DOJ attorneys that administrative remedies can be pursued in a way that avoids interference with criminal and civil actions. A judge advocate's influence diminishes when the DOJ controls the remedy for civil and criminal actions. In this case, the judge advocate's role is to support DOJ. How vigorously these remedies are pursued depends upon the interest of DOJ attorneys in a case and the amount of influence the judge advocate has with DOJ. Moreover, lack of direct control is only part of the challenge. In many instances, a "field" judge advocate does not speak for the Air Force in dealing with DOJ attorneys. Instead, that role is usually reserved to the Secretariat's General Counsel office. Part of the solution to this situation is to enlarge a field judge advocate's authority. Service regulations should designate a field judge advocate as the staff officer principally responsible for handling fraud remedies. A field judge advocate should have authority, in the name of the commander, to direct initiation of demands for payment, administrative setoffs, and suspension and debarment actions. Moreover, he or she should be provided the authority to represent the Air Force to DOJ on all matters involving those fraud cases assigned to them. Higher headquarters, including the General Counsel's office, will continue to oversee actions taken in fraud cases based on field reports. The responsibility for execution, however, belongs in the field. Even if these changes are made, a field judge advocate must still work with others in and out of his or her command in order for fraud remedies to work. The seven principles discussed in this article are a starting point.

Footnotes

*Colonel Stubbs (A.B., University of Georgia; J.D., Harvard Law School) is the Deputy Staff Judge Advocate, Air Force Materiel Command, Wright-Patterson AFB, Ohio. He is a member of the State Bar of Georgia.

1. Federal Acquisition Regulations System (FARS), 48 C.F.R. Sec. 1.601 (1992).

2. Id. at Secs. 13.101, 13.106(a), and (b) (1992).

3. Air Force Regulation (AFR) 177-102, para. 12-2, Commercial Transactions at Base Level, (15 Nov. 1987 and 15 Apr. 1989).

4. 18 U.S.C. Secs. 287 (false, fictitious or fraudulent claims), 371 (conspiracy to defraud), 641 (theft), 1001 (fraud and false statements), 1951 (interference with commerce by threats or violence) (1988).

5. Implementing 5 U.S.C. Secs. 7511-14 (1988 & Supp. II 1990), Civil Service Regulations, 5 C.F.R.

Secs. 752.402(e), 752.404(b)(3)(iii) & (d)(1) (1992); AFR 40-750, para. 16e(1), and atch. 5, para. 10(b), Discipline and Adverse Actions (23 July 1982 and 22 Dec. 1989). See, e.g., Martin v. United States Customs Service, 12 M.S.P.R. 12, 10 M.S.P.B. 568 (1982).

6. 18 U.S.C. Sec. 1382 (1988) makes it a crime to reenter a military installation after having been removed or ordered not to enter.

7. 31 U.S.C. Secs. 3711, 3716 (1988 & Supp. II 1990); 4 C.F.R. Secs. 101.1-102.4 (1992); 32 C.F.R. Sec. 90.6, encl. 1, para. F.1.-3 (1992). See, e.g., 64 Comp. Gen. 907 *[cited at]* (1985).

8. 31 U.S.C. Secs. 3729-33 (1988 & Supp. II 1990).

9. 18 U.S.C. Secs. 371 and 641 (1988).

10. 5 U.S.C. Secs. 7512(1), 7513(a) (1988); 5 C.F.R. Sec. 752.402 (1992); AFR 40-750, supra note 5, at para. 16b and atch. 3, para. 15.

11. FARS, 48 C.F.R. Secs. 9.406-5(a), 9.407-2(a), & 9.407-5 (1992) (suspension of a company may be based on adequate evidence of fraud committed by an employee acting for the company).

12. See infra note 64 and accompanying text.

13. See infra note 65 and accompanying text.

14. FARS, 48 C.F.R. Sec. 9.407-2(a) (1992).

15. 18 U.S.C. Sec. 1382.

16. See infra note 70 and accompanying text.

17. 37 U.S.C. Sec. 1007(c) (1988); 32 C.F.R. Sec. 90.6, encl. 1, para. C. (1992).

18. 18 U.S.C. Secs. 371 (conspiracy), 641 (theft), 201 (bribery) and 1956 (money laundering) (1988).

19. Treasury Delegation Order 15-42, 56 Fed. Reg. 21400 (1991).

20. 31 U.S.C. Secs. 3711, 3716; 5 C.F.R. Secs. 752.402(e), 752.404(b)(3)(iii), & (d)(1); AFR 40-750, para. 16e(1) and atch. 5, para. 10(b).

21. FARS, Secs. 13.101, 13.106(a) & (b).

22. 48 C.F.R. Sec. 3.106(c) (1992).

23. 18 U.S.C. Sec. 371 (1988).

24. 31 U.S.C. Secs. 3711, 3716; 4 C.F.R. Secs. 101.1-102.4; 32 C.F.R. Sec. 90.6, encl. 1, para F.1.-3.

25. 18 U.S.C. Sec. 201(c)(1)(B) (1988).

26. 5 U.S.C. Secs. 7512(1), 7513(a); 5 C.F.R. Sec. 752.402; AFR 40-750, para. 16b and atch. 3, para. 15.

27. 31 U.S.C. Secs. 3711, 3716; 4 C.F.R. Secs. 101.1-102.4; 32 C.F.R. Sec. 90.6, encl. 1, para. F.1.-3.

28. 18 U.S.C. Sec. 201(c)(1)(A) (1988).

29. 18 U.S.C. Sec. 371 (1988).

30. 5 U.S.C. Secs. 7512(1), 7513(A); 5 C.F.R. Sec. 752.402; AFR 40-7750, para 16b and atch 3, para. 15.

31. 31 U.S.C. Secs. 3711, 3716; 4 C.F.R. Secs. 101.1-102.4; 32 C.F.R. Sec. 90.6, encl. 1, para. F.1.-3.

32. 18 U.S.C. Sec. 371 (1988) and 26 U.S.C. Sec. 7206(1) (1988).

33. 37 U.S.C. Sec. 1007(C); 32 C.F.R. Sec. 90.6, encl. 1, para. C.

34. 31 U.S.C. Secs. 3729-33 (1988 & Supp. II 1990).

35. See infra notes 70, 73.

36. See infra note 73.

37. See infra note 73.

38. See infra note 71.

39. See infra notes 128-134 and accompanying text.

40. 18 U.S.C. Sec. 981 (1988, Supp. I 1989, & Supp. II 1990).

41. Id. at Sec. 201(b)(1)(B) (1988).

42. 10 U.S.C. Sec. 934 (1988).

43. Id. at Sec. 921 (1988).

44. Id. at Sec. 907 (1988).

45. Id. at Sec. 892 (1988).

46. 18 U.S.C. Secs. 371 (1988); 26 U.S.C. Sec. 7206 (1988).

47. 18 U.S.C. Sec. 371 (1988).

48. Id. at Sec. 3624(b); 18 U.S.C. Secs. 3551, 3553; Sentencing Reform Act (part of the Comprehensive Crime Control Act) of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2027 Sec. 218(a)(b).

49. This principle and the following discussion are based on the thought and practice of Miriam Duke and Linda Phillips. Ms. Duke is the chief criminal prosecutor in the U.S. Attorney's Office for the Middle District of Georgia. Ms. Phillips, at the time, was an OSI special agent.

50. This principle is based on the thought and practice of Linda Phillips, then an OSI special agent, and Fred Stofer, an FBI special agent, assigned to the FBI office in Macon, Georgia.

51. 384 U.S. 436 *[cited at]* (1966).

52. California v. Beheler, 463 U.S. 1121 *[cited at]* (1983).

53. United States v. Henry, 447 U.S. 264 *[cited at]* (1980); Brewer v. Williams, 430 U.S. 387 *[cited at]* (1977); Massiah v. United States, 377 U.S. 201 *[cited at]* (1964).

54. 10 U.S.C. Sec. 831 (1988).

55. United States v. Penn, 39 C.M.R. 194 (C.M.A. 1969); United States v. Kellam, 2 M.J. 338 *[cited at]* , 341-42 (A.F.C.M.R. 1976). See also United States v. Baird, 851 F.2d 376, 383 (D.C.Cir. 1988).

56. United States v. Willard, 919 F.2d 606, 608 (9th Cir. 1990), cert. denied, 112 S.Ct. 208 *[cited at]* (1991) (defendants's cooperation would be made known to the government prosecutor); United States v. Nash, 910 F.2d 749, 752-53 (11th Cir. 1990) (defendant's cooperation would be made known to prosecutor; cooperating defendants generally fared better); United States v. Robinson, 698 F.2d 448, 455 (D.C. Cir. 1983) (defendant's cooperation would be made known to prosecutor); United States v. Ballard, 586 F.2d 1060, 1063 (5th Cir. 1978) (defendant told in uncoercive manner of realistically

expected penalties and encouraged to tell the truth); United States v. Pomares, 499 F.2d 1220, 1221-23 (en banc) (2d Cir. 1974), cert. denied, 419 U.S. 1032 *[cited at]* (1974) (defendant faced heavy penalties; cooperation wisest course rather than remaining silent).

57. Fred Lane, Lane's Goldstein Trial Technique, Secs. 19.12, 19.82, (3d ed. 1968).

58. The limitation period under the False Claims Act is six years from the fraud or three years from the date facts material to the right of action are known or reasonably should have been known by a federal official responsible to act, whichever is longer, but not to exceed ten years from the fraud. 31 U.S.C. Sec. 3731(b) (1988). For civil fines, penalties, or forfeitures, the period is five years. 28 U.S.C. Sec. 2462 (1988). For common law torts, such as fraud, bribery, and conflict of interest, the period is three years from the date the cause of action accrues. 28 U.S.C. Sec. 2415(b) (1988). For contract actions, the period is six years from the date the cause of action accrues. 28 U.S.C. Sec. 2415(a) (1988). The running of a limitation period under Sec. 2415 is suspended for any period facts material to the right of action are not known and reasonably could not have been known by a federal official responsible for acting. 28 U. S.C. Sec. 2416 (1988). The limitation period for Anti-Kickback claims is six years from when the Government knew or should have known of the prohibited conduct. 41 U.S.C. Sec. 55 (1988).

59. Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5-9 (Fed. Cir. 1985); World Wide Tankers, Inc., ASBCA No. 20903, 77-1 B.C.A. Para. 12,302 (1977), proceedings reinstituted, 79-1 B.C.A. Para. 13,619 (1978).

60. 31 U.S.C. Sec. 3716, by its own terms, "does not apply--(1) to a claim . . . that has been outstanding for more than 10 years." Id. at Sec. 3716(c)(1) (1988). Under the implementing federal rule, however, the limitation period is ten years from the date facts material to the right of action are known or reasonably should be known by a responsible official. 5 C.F.R. Sec. 102.3(b)(3) (1992). This apparent regulatory extension of the statutory limitation period is questionable.

61. Jobs for Progress, Inc., 759 F.2d at 5-9; Lane v. United States, 639 F.2d 758 (Ct. Cl. 1981); Roberts v. U.S. Great Am. Ins. Co., 357 F.2d 938, 946 (Ct. Cl. 1966).

62. 31 U.S.C. Sec. 3730(b),(d), and (e) (1988 & Supp. II 1990).

63. 31 U.S.C. Sec. 2729 (1988).

64. Grand Union Co. v. United States, 696 F.2d 888, 891 (11th Cir. 1983). Not all circuits require proof that the employee acted to benefit the corporation. United States v. O'Connell, 890 F.2d 563 (1st Cir. 1989). The general rule is that a corporation is liable for the wrongful acts of its employees acting within the scope of their employment. United States v. United States Cartridge Co., 198 F.2d 456, 464 (8th Cir. 1952) (stating the general rule in a False Claims Act case, but declining to follow it because of special facts), cert. denied, 345 U.S. 910 *[cited at]* (1953).

65. See, e.g., United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989), cert. denied, 493 U.S. 1021 *[cited at]* (1990) (anti-trust case); United States v. Automated Medical Lab., Inc., 770 F.2d 399, 406-08, n.5 (4th Cir. 1985).

66. United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977), cert. denied, 434 U. S. 1035 *[cited at]* (1978). (False Claims Act primarily directed against contractors who bill for nonexistent or worthless goods or who charge exorbitant prices for delivered goods).

67. United States v. Neifert-White Co., 390 U.S. 228 *[cited at]* (1968); United States v. Ueber, 303 F.2d 462 (6th Cir. 1962). Cf. Equifax, 557 F.2d 456 at 460.

68. United States v. Aerodex, 469 F.2d 1003, 1007-08 (5th Cir. 1973).

69. Brown v. United States, 524 F.2d 693, 704-05 (Ct. Cl. 1976); United States v. Cripps, 460 F. Supp. 969, 975 (E.D. Mich. 1978).

70. United States v. Mead, 426 F.2d 118 (9th Cir. 1970); United States v. Borin, 209 F.2d 145, 147-48, cert. denied, 348 U.S. 821 *[cited at]* (1954). See also United States v. Silliman, 167 F.2d 607, 611 (3d Cir.), cert. denied, 335 U.S. 825 *[cited at]* (1948) (False Claims Act is not the Government's exclusive remedy for fraud, and the Government may also pursue a claim under the common law for fraud); Continental Mgmt, Inc. v. United States, 527 F.2d 613, 620 (Ct. Cl. 1975) (statutory penalties for bribery and fraud do not preclude government civil remedies under the common law).

71. United States v. Carter, 217 U.S. 286 *[cited at]* (1910); Zions First National Bank v. United Health Club, Inc., 704 F.2d 120, 124 (3d Cir. 1983). See also United States v. Kearns, 595 F.2d 729 (D.C. Cir. 1978) (constructive trust imposed on proceeds held by person responsible for the fraud).

72. United States v. Aerodex, 469 F.2d 1003, 1011-12 (5th Cir. 1973).

73. United States v. Carter, 217 U.S. 286 *[cited at]* (1910); Continental Mgt, Inc. v. United States, 527 F.2d 613, 615-19 (Ct. Cl. 1975); United States v. Shaw, 725 F. Supp. 896, 898-900 (S.D. Miss. 1989).

74. United States v. Mississippi Valley Generating Co., 364 U.S. 520 *[cited at]* , 563-66 (1961); Joseph Morton Co., Inc. v. United States, 757 F.2d 1273, 1277-79 (Fed. Cir. 1985); K & R Eng'g Co., Inc. v. United States, 616 F.2d 469, 472-76 (1980); and United States v. Brown, 524 F.2d 693, 699-700 (Ct. Cl. 1976).

75. United States v. Mead, 426 F.2d 118, 124-25 (9th Cir. 1970); United States v. Syston-Donner Corp., 486 F.2d 259 (9th Cir. 1973); United States v. Rockwell Int'l Corp., 795 F. Supp. 1131 (N.D. Ga. 1992). See United States v. Wurts, 303 U.S. 414 *[cited at]* , 415 (1938) (the United States may recover funds that its agents have wrongfully, erroneously, or illegally paid independent of any statute).

76. FARS, 48 C.F.R. Secs. 9.406-1(a)(4) and (5), 9.407-1(b)(2) (1992).

77. The 1984 Memorandum of Understanding (MOU) between the Departments of Justice and Defense gives the FBI primary investigative jurisdiction in significant bribery and conflict of interest cases involving DOD personnel. This MOU also requires notice to the Department of Justice in fraud and theft cases when federal prosecution is warranted. DOJ decides, in consultation with DOD, which agency will handle the case. Department of Defense Directive 5525.7, encl. 1 (Jan. 22, 1985).

78. See, e.g., United States v. Killough, 848 F.2d 1523, 1528 (11th Cir. 1988).

79. See infra notes 101-103.

80. See, e.g., Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 *[cited at]* , 52 (1912); Securities & Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1374-76 (D.C. Cir. 1980) (en banc), cert. denied, 449 U.S. 993 *[cited at]* (1980). DOD policy is to take timely civil and administrative actions and, following required coordination, to take appropriate administrative actions before civil and criminal cases are reached. DOD Instruction 7050.5, para. D3 (June 7, 1985).

81. Dresser, 628 F.2d at 1375-76.

82. See infra notes 107-113 and accompanying text.

83. U.S. Const. amend. V.

84. Halper v. United States, 490 U.S. 435 *[cited at]* (1989).

85. Implementing 5 U.S.C. Secs. 7511-14 (1988 & Supp. II 1990), Civil Service Regulations, 5 C.F.R. Secs. 752.402(e), 752.404(b)(3)(iii) and (d) (1992); AFR 40-750, para. 16e(1) and atch. 5, para. 10(b), Discipline and Adverse Actions (23 July 1982 and 22 Dec. 1989). See, e.g., Martin v. United States Customs Service, 12 M.S.P.R. 12, 10 M.S.P.B. 568 (1982).

86. FARS, 48 C.F.R. Secs. 9.406-5(a) and 9.407-2(a), 9.407-5 (1992).

87. Id. at Sec. 9.407-2(a) (1992).

88. Id. at Sec. 9.407-3(c)6) and (d) (1992). See ATL, Inc. v. United States, 736 F.2d 677, 684-86 (Fed. Cir. 1984); Horne Bros., Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972).

89. Final and retired pay of civilian employees and final pay of military members, 31 U.S.C. Secs. 3711, 3716 (1988 & Supp. II 1990); 4 C.F.R. Secs. 101.1-102.4 (1992); 32 C.F.R. Sec. 90.6, Encl. 1, para. F.

1.-3. (1992); see, e.g., 64 Comp. Gen. 907 *[cited at]* (1985). Current and retired pay of military members, 37 U.S.C. Sec. 1007(c) (1988); 32 C.F.R. Sec. 90.6, encl. 1, para. C. (1992). Current pay of civilian employees, 5 U.S.C. Sec. 5514(a)(1) (1988); 32 C.F.R. Sec. 90.6, encl. 1, para. D. (1992).

90. Final and retired pay of civilian employees and final pay of military members, 31 U.S.C. Sec. 3716 (a) (1988); 4 C.F.R. Sec. 102.3(c) (1992); 32 C.F.R. Sec. 90.6, encl. 1, para. F.6. (1992). Current and retired pay of military members, 64 Comp. Gen. 142 *[cited at]* (1984); Air Force Reg. 170-30, para. 3-5 (change 2, 30 June 1990). Current pay of civilian employees, 5 U.S.C. Sec. 5514(a)(2) (1988); 32 C.F. R. Sec. 90.6, encl. 1, para. E.7.a(2) (1992); AFR 170-30, paras. 3-19, 3-20, Debt Collection, (30 Apr. 1987).

91. Final and retired pay of civilian employees and final pay of military members, 31 U.S.C. Sec. 3716 (a) (1992); 4 C.F.R. Sec. 102.3(c) (1992); 32 C.F.R. Sec. 90.6, encl. 1, para. F.6. (1992). Current and retired pay of military members, 64 Comp. Gen. 142 *[cited at]* (1984); 32 C.F.R. Sec. 90.6, encl. 1, para. C. 3. (1992). Current pay of civilian employees, 5 U.S.C. Sec. 5514(a)(2) (1988); 32 C.F.R. Sec. 90.6, encl. 1, para. E.7.a(2) (1992).

92. 491 F.2d 859 (10th Cir.), cert. denied, 417 U.S. 910 *[cited at]* (1974).

93. United States v. TDC Management Corp., 1992 WL 212418 (D.D.C. Aug. 17, 1992); Peterson v. Weinberger, 508 F.2d 45, 49-50 (5th Cir.), cert. denied, 423 U.S. 830 *[cited at]* (1975); Hillburn v. Butz, 463 F.2d 1207, 1209 (5th Cir. 1972), cert. denied, 410 U.S. 942 *[cited at]* (1973); United States v. Williams, 162 F. Supp. 903 (M.D. Ala. 1957).

94. 709 F.2d 968 (5th Cir. 1983).

95. Id. at 971.

96. Id. at 973.

97. United States v. Borstein, 423 U.S. 303 *[cited at]* (1976).

98. Lawlor v. National Screen Serv. Corp., 349 U.S. 322 *[cited at]* (1955); United States v. Thomas, 709 F.2d 968 at 971-72 (5th Cir. 1983).

99. Paramount Transp. Sys. v. Chauffeurs, Teamsters and Helpers, 436 F.2d 1064 (9th Cir. 1971).

100. United States v. TDC Management Corp., 1992 WL 212418 (D.D.C. Aug. 17, 1992); Ingalls Shipbuilding, Inc. v. United States, 21 Cl. Ct. 117, 122-25 (1990).

101. See, e.g., Otherson v. Dep't of Justice, I.N.S., 711 F.2d 267 (D.C. Cir. 1983).

102. FARS, 48 C.F.R. Sec. 9.406-3(d) (1992).

103. United States v. Scarano, 975 F.2d 580, 583 (9th Cir. 1992).

104. 41 U.S.C. Secs. 601-613 (1988 & Supp III 1991).

105. Id. at Sec. 606(a).

106. Id. at Secs. 607, 610(a).

107. Id. at Sec. 606(a).

108. United States v. Rockwell Int'l Corp., 795 F. Supp. 1131 (N.D. Ga. 1992); United States v. General Dynamics Land Sys., Inc., Civ. No. 90-70340, (E.D. Mich. Aug. 7, 1990); United States v. The Meredith Corp., Civ. , 1990 WL 375611 (S.D. Iowa, June 15, 1990); United States v. JT Construction Co., Inc., 668 F. Supp. 592, 593-94 (W.D. Tx. 1987); BMY Combat Sys. Div. of Harsco Corp. v. United States, 26 Cl. Ct. 846, 849 (1992). Contra United States v. Hughes Aircraft Co., 1991 WL 133569 (C.D. Cal. Apr. 5, 1991); United States ex rel. John P. Perron, Jr. v. Hughes Aircraft Co., 1991 WL 352416 (C.D. Cal. Apr. 29, 1991).

109. United States v. TDC Mgmt Corp., 1992 WL 212418 (D.D.C. Aug. 17, 1992); Rockwell Int'l, 795 F. Supp. at 1133-34.

110. See supra text accompanying notes 58-76.

111. 48 C.F.R. Sec. 32.606(a) and (b) (1992).

112. Id. at Sec. 32.609(c).

113. Id. at Secs. 32.611 and 32.612.

114. Id. at Sec. 32.610.

115. 31 U.S.C. Sec. 3711(a) (1988).

116. 31 U.S.C. Sec. 3711(c)(1) (1988, Supp. II 1990, & Supp. III 1991).

117. 4 C.F.R. Sec. 101.3(a) (1992).

118. See supra text accompanying notes 90-91.

119. Allied Signal, Inc. v. United States, 941 F.2d 1194, 1196-98 (Fed. Cir. 1991); Avco Corp. v. United States, 10 Cl. Ct. 665 (1986).

120. United States v. Sells Eng'g, Inc., 463 U.S. 418 *[cited at]* , 425-46 (1983); Matter of Federal Grand Jury Proceedings, 760 F.2d 436, 438-39 (2d Cir. 1985).

121. United States v. Baggott, 463 U.S. 476 *[cited at]* (1983); In Re Grand Jury 89-4-72, 932 F.2d 481 (6th Cir. 1991), cert. denied, 112 S.Ct. 418 *[cited at]* (1991).

122. In re Subpoena to Testify Before Grand Jury, 864 F.2d 1559, 1564 (11th Cir. 1989); In re Grand Jury Investigation, 610 F.2d 202, 216-217 (5th Cir. 1980); Matter of Grand Jury Investigation (90-3-2), 748 F. Supp. 1188, 1207 (E.D. Mich. 1990).

123. Anaya v. United States, 815 F.2d 1373, 1376, 1378-80 (10th Cir. 1987); Security & Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1382 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 *[cited at]* (1980); In Re Grand Jury Investigation, 610 F.2d at 217.

124. In re Subpoena to Testify Before Grand Jury, 864 F.2d 1559, 1564 (11th Cir. 1989).

125. Id. at 1564; Dresser, 628 F.2d at 1382-83; In re Grand Jury Investigation, 610 F.2d at 217; Matter of Grand Jury Investigation (90-3-2), 748 F. Supp. at 1208; United States v. Premises Known as 25 Coligni Ave., 120 F.R.D. 465 (S.D.N.Y. 1988); McArthur v. Robinson, 98 F.R.D. 672 (D.C. Ark. 1983).

126. Anaya, 815 F.2d at 1378-80; Matter of Grand Jury Investigation (90-3-2), 748 F. Supp. at 1207; In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299 (D.C. Fla. 1977).

127. Anaya, 815 F.2d at 1378-80; see supra note 125.

128. 5 U.S.C. app. 3 Secs. 1-12 (1988, Supp. II 1990, & Supp. III 1991).

129. Id. at Sec. 4(a)(1).

130. Id. at Sec. 4(a)(2).

131. Id. at Sec. 6(a)(4).

132. United States v. Aero Mayflower Transit Co., Inc., 831 F.2d 1142, 1144-46 (D.C. Cir. 1987); United States v. Westinghouse Corp., 788 F.2d 164 (3d Cir. 1986).

133. United States v. Art Metal-U.S.A., Inc., 484 F. Supp. 884, 886-87 (D.N.J. 1980).

134. United States v. Educational Dev. Network Corp., 884 F.2d 737, 738-40, 741-43 (3d Cir. 1989), cert. denied, 494 U.S. 1078 *[cited at]* (1990); Aero Mayflower, 831 F.2d at 1144-46.

135. United States v. Custodian of Records, Southwestern Fertility Center, 743 F. Supp. 783, 786-87 (W. D. Okla. 1990) (authority delegable to Deputy Inspector General).

136. 12 U.S.C. Sec. 3405 (1988) sets out statutory requirements for administrative subpoena of financial records. These statutory requirements are partly implemented in 32 C.F.R. Sec. 294.9(a)(1) (1992) (DOD Directive 5400.12) and Air Force Office Special Investigations Regulation 124-49, Chap. 3, Obtaining Financial Data Information (23 Feb. 1984).

137. Bordenkircher v. Hayes, 434 U.S. 357 *[cited at]* , 364 (1978); Office of The Judge Advocate General Letter No. 92-26, Air Force Standards for the Administration Criminal Justice 3-3.9(a) (22 Oct. 1992) [hereinafter AF Standards]. See also Commonwealth ex rel. Ward v. Harrington, 266 Ky. 41, 98 S. W. 2d 53 (1936).

138. AF Standards, supra note 137 at 14-3.1(c). See Borkenkircher, 434 U.S. at 364; In re Rook, 276 Or. 695, 556 P.2d 1351 (1976) (improper for a prosecutor to refuse to plea bargain because defendant was represented by a particular lawyer). Cf. United States v. Jones, 26 M.J. 650 *[cited at]* , 651 (A.C.M.R.), (in exercising its broad discretion to accept or reject a plea agreement, Government must be fair), pet. for review denied, 27 M.J. 650 *[cited at]* (C.M.R. 1988).

139. Brady v. United States, 397 U.S. 742 *[cited at]* (1970); Fed. R. Crim. P. 11.

140. 18 U.S.C. Sec. 3663(a)(1) (1988).

141. 18 U.S.C. Sec. 3663(a)(3) (Supp. II 1990); United States v. Olson, 25 M.J. 293 *[cited at]* , 295-96 (C.M.A. 1987).

142. United States v. Soderling, 970 F.2d 529, 532-34, n.9 (9th Cir. 1992), cert. denied, 113 S.Ct. 2446 *[cited at]* (1993).

143. United States v. Helmsley, 941 F.2d 71 (2d Cir. 1991), cert. denied, 112 S.Ct. 1162 *[cited at]* (1992); Olson, 25 M.J. at 294-96.

144. 778 F.2d 1454, 1456-57 (10th Cir. 1985).

145. Carrigan, 778 F. 2d at 1456-57. The agreement failed when the court refused to accept the plea agreement because it dismissed criminal charges against individual defendants. Id. at 1456-60. Cf. United States v. Mischler, 787 F. 2d 240, 244, n.5 (7th Cir. 1986) (court interpreted plea agreement as

not addressing restitution because, in part, parties negotiated, but failed to reach agreement on restitution).

146. United States v. Boltz, 663 F. Supp. 956, 960-61 (D. Ak. 1987).

147. In re Arnett, 804 F.2d 1200 (11th Cir. 1986) (Government agreed not to seek forfeitures beyond cash seized from defendant at time of arrest); United States v. Trott, 779 F.2d 912, 916 (3d Cir. 1985) (Government agreed not to seek forfeitures); United States v. Hall, 730 F. Supp. 646, 647, 650-53 (M.D. Pa.) (plea agreement barred civil penalty). Cf. Shades Ridge Holding Co., Inc. v. United States, 888 F.2d 725, 730 (11th Cir. 1989), cert. denied, 494 U.S. 1027 *[cited at]* (1990) (plea agreement interpreted as not releasing defendant from civil tax liability).

148. Arnett, 804 F.2d at 1202, 1204 (where plea agreement barred forfeitures beyond certain amount, Government must dismiss forfeiture action or court would vacate guilty plea); Trott, 779 F.2d at 916; United States v. Runck, 601 F.2d 968 (8th Cir. 1979) (plea agreement's failure to address restitution barred court from ordering restitution as part of the sentence); Hall, 730 F. Supp. at 646, 650-53.

149. Bordenkircher v. Hayes, 434 U.S. 357 *[cited at]* , 363-64 (1978); Ford v. United States, 418 F.2d 855, 858-59 (8th Cir. 1969) (promise not to prosecute under habitual offender state law).

150. Cf. Ford, 418 F.2d at 859 (to invalidate a guilty plea, defendant must show prosecutor threatened or promised illegitimate action).

151. Cf. United States v. Jones, 26 M.J. 650 *[cited at]* , 651 (A.C.M.R. 1988) (after Government involuntarily recouped its losses from defendant, improper for Government to reject a plea agreement because it did not provide for restitution).

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39 AFLR 143, Obtaining Expert Assistance

Title of Article

Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance

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Text of Article

I. INTRODUCTION

A defense attorney's foremost duty is to provide a client with competent representation. [1] However, there are practical limits on fulfilling this duty when counsel is faced with complex evidence that counsel may find difficult to fully comprehend, dissect, and attack. As technology has advanced, the level of complexity in criminal cases has steadily increased. Drug urinalysis interpretation, hair drug analysis, DNA analysis, blood spatter pattern analysis, and evidence of post traumatic stress syndrome are only a few of the issues that a military defense counsel may face. One powerful tool in a defense counsel's arsenal is the possibility of supplementing the defense team with expert assistance. While an accused has always been able to pay for experts and consultants, most often the military accused lacks the financial resources to engage the government in a battle of experts. Fortunately, as a matter of military due process, defense counsel can receive expert assistance at no cost when he or she can demonstrate such assistance is necessary. [2] At least three basic categories of expert assistance may be available to the defense - expert witnesses, expert consultants (including professional investigators), and additional scientific tests.

Several advantages are associated with supplementing the defense team. First, if defense counsel is successful in having an expert appointed to the defense team, the expert is considered the lawyer's representative and falls within the protection of the attorney client privilege. [3] This blanket of confidentiality gives the expert freedom to assist the defense in a variety of ways. The expert can assist defense counsel by interpreting data, suggesting fertile areas for attacking the government's case, preparing counsel to cross-examine witnesses effectively, testifying for the defense, investigating aspects of the case, serving as a sounding board to test defense theories, determining whether appropriate tests have been conducted and, if necessary, conducting additional tests. [4] In addition, with the approval of the military judge, a defense expert can sit at counsel table during trial to assist defense counsel while government experts testify. [5]

Counsel should be aware of some potential disadvantages to requesting expert assistance at government expense. In order to receive that assistance, the defense will have to make a showing as to why the assistance is necessary. This will sometimes mean removing the element of surprise from the defense case and revealing at least some of the defense's theory of the case prior to trial. In addition, defense counsel is not entitled to an expert of his or her own selection - just one who is qualified to perform the desired tasks. [6] As a result, while the defense may want the preeminent expert in a given field, the government is free to look to its own resources to determine whether it can provide an "adequate substitute." [7] The defense counsel must weigh these factors prior to pursuing expert assistance.

This article is intended to give defense counsel useful insight into requesting and receiving expert assistance at government expense. Section II looks briefly at the history and sources of the right to expert assistance. Section III lays out the process for requesting assistance, and section IV then looks at the necessity standards for receiving expert assistance. Section V considers the question of whether the courts have developed an alternative standard. Section VI then offers practical advice for maximizing the chances of receiving desired assistance.

II. HISTORY

Theoretically, the right to supplement the defense team with experts can be traced to the enactment of Article 46 of the Uniform Code of Military Justice (UCMJ), [8] which provides that "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." [9] By 1985 over 40 states and the Federal government through legislation or case law had determined that, under certain circumstances, indigent defendants were entitled to the services of a psychiatrist at government expense. [10] However, when the United States Supreme Court decided Ake v. Oklahoma [11] it established the principle that the Due Process Clause of the Constitution includes a right to supplement the defense team with expert assistance when such assistance is necessary to a fair trial.

Ake was a capital case in which an indigent accused was convicted of first degree murder. Following his arrest, the accused was found incompetent to stand trial. However, six weeks later, he was found competent provided he continued to receive an antipsychotic drug. At a pretrial hearing, Ake's defense counsel requested that his client receive a psychiatric evaluation at state expense to determine the accused's condition at the time of the offense. The judge refused the request. During the trial, the jury never heard any evidence of the accused's sanity at the time of the offense even though the defense case was based solely on a claim the accused was insane at the time of the offense. The Supreme Court held that when the defendant makes a showing that his sanity at the time of the offense will be a significant factor at trial, the Constitution requires that the defense be provided "a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." [12]

The principle that expert consultants, including investigators, are available in the military setting was

established in 1986 in United States v. Garries. [13] In Garries, the United States Court of Military Appeals (CMA) [14] held that as a matter of military due process, military members are entitled to investigative assistance when "necessary" for an adequate defense. [15] Since Garries, government-provided experts have assisted defense counsel in a wide range of areas, and the principle that investigators and consultants must be made available to assist the defense provided the defense can demonstrate necessity has gone unchallenged. However, the battle has waged over what the defense must show in order to meet its burden of demonstrating necessity.

Unfortunately, since the Garries decision, there has been little clarification or expansion on what the defense must show in order to justify having an expert assigned to its team. Commenting on this absence of clarification in 1989, the Air Force Court of Military Review [16] speculated that either defense counsel had generally not found it necessary to request expert assistance or "reasonable pretrial requests for appointment of expert witnesses have generally been granted." [17] At least two other possibilities exist for why the courts have done relatively little to expound on this issue. First, defense counsel may not have been well informed about the possibilities available to supplement the defense team. Second, due to the requirement to reveal much of the defense's theory in order to get expert assistance, defense counsel may be reluctant to seek assistance. [18]

III. The Procedure

Rule for Court Martial (R.C.M.) 703(d) [19] describes the process for requesting expert witnesses at government expense. However, the rule is silent on how to request other forms of assistance. The inference from the case law is that the process is the same regardless of whether defense counsel is requesting an expert witness or some other form of expert assistance.

Under R.C.M. 703(d), whenever a defense counsel desires expert assistance and wants the government to pay for it, counsel must notify the prosecution and submit a written request to the convening authority. The request should provide a detailed explanation of why the assistance is necessary and include an estimate of the costs of the assistance. If the convening authority denies the request, the defense can renew it before the military judge. [20] The military judge then evaluates the request in order to determine whether the assistance is relevant and necessary and, if so, whether the government has provided or will provide an adequate substitute. [21] If the judge determines that expert assistance is appropriate, he or she will direct the convening authority to provide the specified assistance. If the convening authority fails to honor a judge's order to provide expert assistance, the military judge can abate the proceedings. [22]

Air Force defense counsel interested in submitting requests for investigative assistance should consult The Judge Advocate General (TJAG) Policy Number 27. [23] This policy directs counsel to make requests in writing to the staff judge advocate (SJA) with immediate responsibility for the case. The SJA then forwards the request to the convening authority. The convening authority can appoint an investigator if he or she believes that investigative assistance is appropriate and decides not to make Air Force Office of Special Investigations (OSI) resources available. [24] On the other hand, if the defense

request requires the appointment of an OSI agent, the convening authority must inform the local OSI detachment commander, who will then send the request through OSI command channels for a determination of the appropriateness of appointing an OSI investigator. The ultimate decision to appoint an OSI agent belongs to Commander of Air Force OSI. However, the convening authority is responsible for providing funding if an OSI agent is appointed. [25]

The TJAG policy makes it clear that, like other defense representatives, if an OSI agent is appointed to the defense team, it will be under an order of confidentiality. As a result, the agent's work product will be protected and the agent's communications with counsel and the accused are privileged and cannot be disclosed to the prosecution. In an effort to prevent any apparent or real conflict of interest, the assigned agent will normally come from a base other than the one where the original investigation took place and will not be assigned normal OSI duties for the duration of the assignment. [26]

IV. THE NECESSITY STANDARD

The standard for requesting expert assistance and for requesting an expert witness is basically the same. In both cases, the defense must satisfy the military judge that the desired assistance is necessary. However the standards diverge in the area of reasonable substitutes.

A. Expert Witnesses

When defense counsel requests an expert witness, the request is governed explicitly by R.C.M. 703(d). Under the rule, the military judge must determine whether the witness is "relevant and necessary" and whether the government has provided or is willing to provide an adequate substitute. [27] CMA has held that in determining whether an offered witness is an adequate substitute, the witness must have similar qualifications as the desired witness and be prepared to testify to the same conclusions as the requested witness. [28] For example, in a drug urinalysis case, United States v. Van Horn, [29] the defense submitted a request for a specific expert witness who was prepared to testify that the Navy's drug laboratory had failed to follow standard operating procedures in testing the accused's urine sample and had made several errors that called into question the accuracy of the test results. The military judge denied the request for the witness on the grounds that the government's expert, who did not share the same views as those of the requested defense expert, was an adequate substitute and the testimony of the requested witness would be cumulative with that of the government's expert. Concentrating on the fact the opinions of the government's expert and the requested defense expert differed sharply, CMA reversed. The court stated: "To deny the defense a meaningful opportunity to present its evidence, which challenged the Government's scientific proof, its reliability, and its interpretation, denied appellant a fair trial." [30]

B. Expert Assistance

Even though R.C.M. 703(d) only expressly deals with requests for expert consultants and investigators, the Court of Appeals for the Armed Forces (CAAF) has looked to the rule to establish what the defense

must establish to merit non-witness expert assistance. In Garries, the court established the principle that when an accused requests expert assistance, he or she must "demonstrate the necessity for the services." [31] Unfortunately, CMA provided little, if any, assistance in explaining what the Garries necessity standard means. As a result, the test leaves defense counsel and military judges to fend for themselves in determining what is required to justify expert assistance.

In United States v. Gonzalez, [32] CMA made an apparent attempt to fill the void created by Garries, by favorably citing a three-part analysis laid out by the Navy Marine Court of Military Review in United States v. Allen. [33] In order to get expert assistance, the Allen court suggested the defense provide satisfactory answers to the following three questions: (1) Why is the expert assistance needed? (2) What would the expert assistance do for the accused? and (3) Why is the defense unable to provide the evidence the expert assistant would provide? [34] The court went on to provide a series of detailed requirements the defense should be able to satisfy to justify expert assistance. According to the court, in a request for expert assistance, defense counsel should be prepared to: (1) describe what the defense expects to find; (2) explain why the defense staff is unable to do the desired tasks; (3) explain how cross examination will be less effective without expert assistance; (4) explain how the desired information would negate the government's ability to prove its case; and (5) explain the nature of the prosecution's case, the evidence linking the accused to the crime, and how the requested information and assistance would otherwise be helpful to the defense. [35] After gathering the above information, the military judge must determine whether the defense has met its burden by determining "whether a reasonable probability exists that the expert services . . . would be of assistance and that denial of that assistance would result in a fundamentally unfair trial." [36]

The Allen factors are helpful because they provide a simple road map of the types of information military judges usually want to have when deciding on requests for expert assistance. In general, the more detail the defense is able to provide in a request for assistance the greater the chances that counsel will be successful in obtaining the desired assistance.

V. FUNDAMENTAL FAIRNESS: A NEW STANDARD?

A recent Court of Appeals for the Armed Forces opinion raises the question of whether a new "fairness" standard exists for justifying expert assistance. In United States v. Mosley, [37] the accused tested positive for cocaine in a random urinalysis and was charged with drug use. At trial, the military judge granted a defense motion to retest the accused's urine sample for the presence of ecgoninemethylester (EME) and benzoylecognine (BE). [38] The convening authority refused to order the retest and the military judge abated the proceedings. The government appealed the judge's abatement ruling, which was upheld by the Air Force Court of Military Review. The CAAF, without prejudice, refused to hear the appeal. The accused was subsequently tried and convicted. On appeal the CAAF held that the military judge did not abuse his discretion by ordering the retest. In doing so, the court recognized that a military judge has within his or her discretion the power to order the production of additional evidence. It stands to reason that this discretion would extend to providing experts to the defense team even when the defense has failed to, or is unable to, make a showing of necessity. In Mosley, the military judge cited R.C.M. 703(f)(1) [39] to support his ruling but granted the defense request on the basis of

"fundamental fairness, relevance, and the minimal burden on the Government." [40] In his conclusions of law the military judge stated:

Indeed, this may be the only way that an accused can effectively challenge the Government's evidence on chain of custody, since an accused is at somewhat of a disadvantage in demonstrating intentional contamination of his sample or unintentional contamination in the testing process. [41]

The impact, if any, of the Mosely decision remains to be seen. However, rather than signalling the emergence of a new standard for receiving expert assistance, the case should probably be seen as merely reaffirming the fact that the military judge has broad discretionary power to order additional evidence and to provide or deny expert assistance at government expense. This principle can be seen in another urinalysis case decided a year earlier. In United States v. Robinson, [42] CMA ruled that a military judge did not abuse his discretion in denying a requested secreter test. [43] The defense could point to no apparent discrepancies in the collection or handling of the sample. As a result, the court ruled that the defense failed to show that the secreter test was necessary. [44] If nothing else, these cases show that the military judge holds real power in granting or denying requests for expert assistance. The next section provides advice on how counsel can maximize the chances of receiving necessary assistance.

VI. MAXIMIZING CHANCES FOR SUCCESS

Defense counsel who provides the military judge with the Allen [45] information described earlier is well on the way to justifying expert assistance. However, there are a series of related things defense counsel can do to maximize the chances of successfully getting assistance. These include: self education; laying a factual predicate; showing one's cards; being flexible; stressing the seriousness of the case; stressing the uniqueness or novel nature of the evidence; and being diligent and timely in making the request for assistance. A brief explanation of these factors follows.

A. Educate Yourself

In order to justify expert assistance, counsel must first be prepared to show that they have made efforts to educate themselves regarding the relevant evidentiary issues and explain why the defense staff needs expert help to provide effective representation. In United States v. Kelly, [46] CMA identified a number of things counsel can do to improve their competence with respect to an area of evidence. These self-education options include: reading articles, books, journals, and periodicals; attending seminars; making laboratory visits; consulting with experts in the field; and gaining expertise through prior litigation experience. [47]

Military judges will often look to the experience of counsel as a factor in determining whether expert assistance is necessary. [48] If counsel have a great deal of experience with respect to a given type of evidence, they may not need a confidential expert to prepare for cross-examination or to develop strategies to negate the government's case. The reverse is also true. Defense counsel who are either inexperienced litigators or who have little or no experience attempting to defend against the type of

evidence in question should be given more leniency in requests for assistance. In order to receive special consideration, counsel should detail their experience level in the written request and indicate their efforts to gain competence with respect to the evidentiary issues.

B. Lay a Factual Predicate

The process of laying a factual predicate was described in Moore v. Kemp [49] as informing the court of the nature of the prosecution's case, explaining how the requested expert would be helpful, and - if the defense wants an expert to put on an affirmative defense - demonstrating a substantial basis for the defense. [50] Laying a factual predicate can also be seen as consuming four of the five issues the Allen [51] court stated a defense counsel should be prepared to address. [52] The degree to which a defense counsel will have to lay a factual predicate for assistance may vary from judge to judge. However, going through the process of identifying the available evidence in the case and how the government is likely to attempt to prove its case will undoubtedly help to crystallize the issues for defense counsel.

Laying a factual predicate requires the defense to show how the requested evidence relates to the prosecution's case and serves to negate or diminish that case. A military judge is likely to deny a defense request if the anticipated evidence - while logically connected to the government's case in the abstract - would not diminish the strength of the government's case. For example, in United States v. Mann, [53] defense counsel wanted expert assistance to show, in part, that injuries suffered by an apparent victim of child molestation could have been sustained over a prolonged period of time, rather than on one occasion as the prosecution alleged. The military judge used the fact that the accused had access to the victim on several occasions over a prolonged period of time as a basis for denying the request. Similarly, in United States v Reveles, [54] defense counsel requested a specific expert witness who would testify it was possible that a death in an involuntary homicide case was caused by the failure of emergency medical personnel to immobilize the victim's broken neck prior to moving her. The defense wished to pursue a theory that an intervening cause had led to the victim's death. The CAAF identified three reasons why the judge's denial of the defense request for the witness was proper. Significant among these reasons, in the court's view, was the fact that the evidence about a failure to immobilize the victim would not amount to a defense for involuntary manslaughter - the second act of negligence would have had to outweigh the first act to such an extent to render it as not playing a material role in the death of the victim. [55] The defense's theory failed to accomplish this.

C. Be Prepared to Show Your Cards

The element of surprise is often the only advantage the defense has over the prosecution. Unfortunately for defense counsel, courts have been consistent in the principle that if the defense wants expert assistance at government expense, the defense must provide the convening authority or military judge with sufficient information to make an informed decision as to whether the requested assistance is necessary. [56] In Garries, [57] the defense sought $1,500 to pay for a private investigator. The defense did not want to reveal its reasons for requesting the money in open court so it requested an ex parte hearing to explain the reasons for requesting the funds. In upholding the judge's denial of the request for

the hearing and the funds, CMA said that an ex parte hearing "would rarely be appropriate in the military context because funding must be provided by the convening authority and such a procedure would deprive the Government of the opportunity to consider and arrange alternatives for the requested expert services." [58]

In United States v. Tornowski, [59] the defense requested the services of a child psychologist, but counsel did not want to alert the prosecution to potential issues in the case. The Air Force Court of Military Review stated that "a trial defense counsel who seeks the services of an expert consultant cannot play coy. He must show whatever cards he either thinks he holds or may acquire with such expert assistance." [60] Accordingly, defense counsel may try to withhold exactly why they are seeking an expert, but will likely have to come forward with detailed reasons in order to obtain the desired assistance.

D. Be Flexible

Case law makes it clear that in order to maximize the chances for success at obtaining expert assistance, the defense must be prepared to be flexible regarding who the expert will be and where the expert will come from. This is because the defense is not entitled to an expert of his own choosing. [61] In addition, appellate courts have taken the position that in most situations, the government's in-house experts will be sufficient to allow the defense to prepare adequately for trial, providing those services are available under an order of confidentiality. [62] For example, the defense may want a private investigator, but the military judge may decide a military investigator is appropriate. [63] Similarly, the defense may want a preeminent expert in a given area. However, a miliary judge may properly decide that a military expert is an adequate substitute. [64]

In United States v. Burnette, [65] a civilian defense counsel requested that the convening authority appoint defense experts from a specific civilian laboratory. The accused's urine sample had been analyzed for the presence of drug metabolites at two different laboratories. The defense took the position that no one from either of these laboratories could serve as an adequate substitute and also argued that no government expert would be acceptable because of bias and an appearance of impropriety. The military judge directed the government to make their expert available to consult with the defense. CMA determined that the judge's decision to make the government's expert available was inadequate, but did not fault the military judge in his ruling. [66] The court reasoned that the defense had been unreasonable and overly narrow by refusing to consider any government expert and by requesting experts only from one specific laboratory. [67]

While the defense should be prepared to be flexible, there is no disadvantage associated with requesting a particular consultant who possesses unique expertise. However, if the government offers alternatives to the requested consultant, the defense must be prepared to explain why the alternatives are not acceptable. Of course, the more novel and unusual the evidence the consultant is being requested for, the greater the chances of getting the desired assistance. [68]

It is important to keep in mind that while flexibility is key when the defense is interested in an expert consultant or investigative assistance, the defense can be more demanding when it comes to requesting expert witnesses. The difference is that under R.C.M. 703(d) an "adequate substitute" must have similar qualifications as the defense requested witness and must be prepared to testify to the same opinions and conclusions as the defense requested witness. [69] For example, in United States v. Van Horn, [70] CMA ruled that a government expert whose views differed from those of a defense expert on proper testing procedures in a urinalysis case was not an adequate substitute under R.C.M. 703(d).

E. Stress the Seriousness of the Case

There is nothing in Article 46 of the UCMJ, R.C.M. 703(d) or M.R.E. 706 to suggest that the seriousness of a case should be considered in deciding whether experts should be appointed to the defense team. However, as a practical matter, military judges in serious cases may - out of an abundance of caution - appoint experts to the defense team even when the defense fails to make a strong showing of necessity. Death penalty cases are a special area in which defense counsel should emphasize the seriousness of the case when requesting assistance. In the past several years the lack of qualification standards for military defense counsel in death penalty cases has created a situation in which military judges are especially sensitive to ensuring that servicemembers facing charges in these cases receive fair trials. [71] As a result, there is a greater tendency on the part of military judges to supplement the defense team in these cases.

F. Stress the Uniqueness or Complexity of the Evidence

The defense should stress the unique nature of the evidence in question in order to justify expert assistance. Military courts have recognized that some types of evidence are so novel or complex that expert testimony is necessary to properly interpret it. For example, in United States v. Murphy, [72] the court held that in a drug urinalysis case, the government must present expert testimony or some lawful substitute, to justify an inference that an illegal drug was used. Similarly, because of the complex nature of the evidence in these cases, the defense can also justify having access to an expert consultant to explain and interpret drug test results. [73] The same principle should hold true for other types of complex and unique evidence. Examples of evidence of this sort might include DNA analysis, hair drug analysis, fiber analysis and various forms of evidence in so-called computer crimes.

G. Be Diligent and Timely in Making Requests

Defense counsel maximize the chances of getting expert assistance by demonstrating diligence and making requests for expert witnesses and consultants as early as possible. This accomplishes several things. First, it reduces the burden on the government associated with filling the request because it provides more time to find a suitable expert or an acceptable alternative to the desired services. Second, by making an early request for assistance, the defense will not have to defend against charges that the request was untimely. [74] In addition, if the request is denied, the defense has the luxury of renewing the request as additional information is collected or as the defense theory is more fully developed.

Military courts have been unsympathetic to defense claims for assistance when they determine that the defense has been untimely or less than diligent in using the resources at its disposal. For example, in United States v. Reveles, [75] the CAAF looked disapprovingly on the fact that the defense's first request for a specific expert witness was made five days prior to trial and that the defense had made no attempt to delay the transfer of the witness from Germany to Texas. [76] While the court also cited other reasons to support the denial of the witness, the court indicated that the military judge did not abuse his discretion by considering timeliness and the defense counsel's "apparent inattention" in pursuing the request. [77] Similarly, in United States v. Gonzalez, [78] CMA made the point that if a defense counsel fails to make use of resources or assistance already provided it will be in a poor position to demand greater resources. In Gonzalez, defense counsel requested the services of a spanish speaking investigator to explore defense theories surrounding the death of the accused's wife. The judge denied the motion, ruling that the request was too broad but did provide the defense with an interpreter under an order of confidentiality. This left the door open for the defense to develop leads that might justify the appointment of an investigator. The court criticized the fact there was no indication the defense had ever used the interpreter to gather potential evidence to lay a foundation to show why an investigator was necessary. [79]

VII. CONCLUSION

Supplementing the defense team with expert consultants can play a major role in fulfilling a defense counsel's obligation to provide a client with competent representation. Actually receiving the desired assistance often requires detailed thought and preparation by counsel that can be difficult and cumbersome. Justifying assistance also can mean having to reveal many of the details of counsel's case theory. However, as this article has stressed, there are several things counsel can do to enhance the chances of receiving desired assistance. First and foremost, counsel must be prepared to explain why expert assistance is necessary. Counsel can then significantly improve the prospects for receiving needed assistance by making requests in a timely manner explaining efforts made at self-education, laying a detailed factual predicate that explains how the requested assistance fits into the overall framework of the case, stressing the uniqueness or complexity of the evidence, and emphasizing the seriousness of the case. For the defense attorney who is willing to put forward the required effort, the rewards are potentially tremendous.

Footnotes

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1. Rule 1.1, Air Force Rules of Professional Conduct, The Judge Advocate General (TJAG) Policy No. 26 (6 Jan. 1995). The rule states: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation."

2. See United States v. Garries, 22 M.J. 288 *[cited at]* (C.M.A.), cert. denied, 479 U.S. 985 *[cited at]* (1986).

3. See Manual for Courts-Martial [hereinafter MCM] (1995), ch. III, Military Rule of Evidence [hereinafter M.R.E.] 502. Under M.R.E. 502 a client has a privilege to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.

4. See United States v. Turner, 28 M.J. 487 *[cited at]* , 488 (C.M.A. 1989); Moore v. Kemp, 809 F.2d 702, 709 (11th Cir. 1987).

5. MCM, supra note 3, ch. II, Rule for Courts-Martial [hereinafter R.C.M.] 502(e).

6. United States v. Garries, 22 M.J. 288 *[cited at]* (C.M.A.), cert. denied, 479 U.S. 985 *[cited at]* (1986).

7. MCM, supra note 3, ch. II, R.C.M. 703(d).

8. 10 U.S.C.A. Secs. 801-940 (West 1983 & Supp. 1995). See also MCM, supra note 3, app. 2. See also 64 Stat. 169 (1950).

9. The principle that all sides are entitled to expert witnesses is also spelled out in M.R.E. 706(a).

10. See Ake v.Oklahoma, 470 U.S. 68 *[cited at]* , 79 (1985).

11. 470 U.S. 68 *[cited at]* (1985).

12. Id. at 83.

13. 22 M.J. at 288.

14. Effective 5 Oct. 1994, pursuant to Pub. L. No. 103-337, Sec. 924, Stat. 2663, the United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces and each Court of Military Review was renamed Court of Criminal Appeals.

15. 22 M.J. at 290.

16. See supra note 14.

17. United States v. Tornowski, 29 M.J. 578 *[cited at]* , 580 (A.F.C.M.R. 1989).

18. See id. at 581.

19. MCM, supra note 3, ch. III.

20. R.C.M. 703(d). The rule does not expressly forbid the defense from making an initial request before the military judge. However, failing to make the initial request to the convening authority may pose a substantial risk and signal a lack of diligence on the part of the defense which may lessen the chances that a request will be granted. In United States v. Reveles, 41 M.J. 388 *[cited at]* , 394 (1995), the defense requested the convening authority provide the services of a particular expert witness who was out of the country. The first request was made five days prior to trial. In denying the request, the military judge and the Court of Appeals for the Armed Forces (CAAF) were critical of the timing and stated it showed a lack of diligence.

21. Id.

22. Id. See also United States v. Reinecke, 32 M.J. 63 *[cited at]* (C.M.A. 1990).

23. TJAG Policy No. 27, Defense Requests for Investigative Support (6 Jan. 1995).

24. For example, the convening authority has the power to appoint a security police investigator.

25. The Commander of Air Force OSI is the decision authority for appointing OSI agents even when a military judge orders an investigator be assigned to the defense team. However, even though the Commander of Air Force OSI is the decision authority, if that commander decides that OSI resources should not be provided, the military judge can still abate the proceedings if he decides otherwise. TJAG Policy No. 27, supra note 23.

26. Id.

27. R.C.M. 703(d)

28. United States v. Van Horn, 26 M.J. 434 *[cited at]* (C.M.A. 1988). See also United States v. Robinson, 24 M.J. 649 *[cited at]* , 652 (N.M.C.M.R. 1987).

29. 26 M.J. at 434.

30. Id. at 438.

31. 22 M.J. at 288.

32. 39 M.J. 459 *[cited at]* , 461 (C.M.A. 1994).

33. 31 M.J. 572 *[cited at]* (N.M.C.M.R. 1990), aff'd, 33 M.J. 209 *[cited at]* (C.M.A. 1991).

34. Id. at 623.

35. Id. at 623-24.

36. Id. at 624.

37. 42 M.J. 300 *[cited at]* (1995).

38. EME is a metabolite of cocaine that is only produced by ingesting cocaine in the body. It remains detectible for approximately 40-48 hours. BE remains detectible at the cutoff level for about 72 hours and can be produced by placing cocaine directly into a urine sample. A positive test for EME would rule out the possibility of test contamination. Id. at 301.

39. R.C.M. 703(f)(1) states: "Each party is entitled to the production of evidence which is relevant and necessary."

40. 42 M.J. at 301-02. Two experts testified during a hearing on the motion. They agreed that the cost of conducting the test probably would not exceed $250.

41. Id. at 302.

42. 39 M.J. 88 *[cited at]* (C.M.A. 1994).

43. Id. at 89. The secreter test could have possibly determined whether there was a mismatch between the accused's blood type and secreter status and the urine sample at issue in the case.

44. Id. at 90.

45. 31 M.J. 572 *[cited at]* , 623 (N.M.C.M.R. 1990), aff'd, 33 M.J. 209 *[cited at]* (C.M.A. 1991).

46. 39 M.J. 235 *[cited at]* (C.M.A. 1994).

47. Id. at 238. Defense counsel should exercise caution in consulting with experts who have not been assigned to the defense team. If counsel shares client confidences with the expert, the communication will not be protected by the attorney-client privilege because the expert is not the attorney's representative unless formally assigned to the defense team. See United States v. Toledo, 25 M.J. 270

[cited at] (C.M.A. 1987).

48. See, e.g., United States v. Kelly, 39 M.J. 235 *[cited at]* (C.M.A. 1994); United States v. Mann, 30 M.J. 639 *[cited at]* (N.M.C.M.R. 1990).

49. 809 F.2d 702, 712 (11th Cir. 1987).

50. Id.

51. 31 M.J. at 572.

52. Id. at 624. Within the context of laying the factual predicate, defense counsel should be prepared to describe what the defense expects to find, how cross-examination will be less effective without expert assistance, how the desired information would negate the government's ability to prove its case, the nature of the prosecution's case, the evidence linking the accused to the crime, and how the requested information and assistance would otherwise be helpful to the defense.

53. 30 M.J. 639 *[cited at]* (N.M.C.M.R. 1990).

54. 41 M.J. 388 *[cited at]* (1995).

55. Id. at 394.

56. See, e.g., Garries, 22 M.J. at 288; Tornowski, 29 M.J. at 578.

57. 22 M.J. at 288.

58. Id. at 291.

59. 29 M.J. at 578.

60. Id. at 581.

61. Ake, 470 U.S. at 68.

62. Garries, 22 M.J. at 290-91.

63. Id. at 291. Garries was offered, but refused, the services of a military investigator.

64. See United States v. True, 28 M.J. 1057 *[cited at]* (N.M.C.M.R. 1989).

65. 29 M.J. 473 *[cited at]* (C.M.A. 1990).

66. Id. at 476.

67. Id.

68. See, e.g., United States v. Mann, 30 M.J. 639 *[cited at]* (N.M.C.M.R. 1990)(defense was criticized for failing to present evidence that the requested expert consultant had specialized expertise in the field of forensic medicine).

69. See United States v. Guitard, 28 M.J. 952 *[cited at]* (N.M.C.M.R. 1989; United States v. Robinson, 24 M.J. 649 *[cited at]* , 652 (N.M.C.M.R. 1987).

70. 26 M.J. 434 *[cited at]* (C.M.A 1988).

71. See generally Dwight H. Sullivan, The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases, 144 Mil L. Rev. 1 (1994). See also United States v. Curtis, 31 M.J. 395 *[cited at]* (C.M.A. 1990) (in the appeal of a death penalty case, the court ordered that appellate counsel be provided with $15,000 to enable counsel to litigate the unique Constitutional issues involved in the case properly).

72. 23 M.J. 310 *[cited at]* (C.M.A. 1987).

73. United States v. Van Horn, 26 M.J. 434 *[cited at]* , 439 (C.M.A. 1989). Accord United States v. Burnette, 29 M.J. 473 *[cited at]* , 475 (C.M.A.), cert. denied, 111 S.Ct. 70 *[cited at]* (1990).

74. R.C.M. 703(c)(2)(D) provides that defense requests for witnesses can be denied for untimeliness.

75. 41 M.J. 388 *[cited at]* (1995).

76. Id. at 395. The witness's change of assignments apparently occurred after preferral of charges but prior to trial.

77. Id. at 393-95.

78. 39 M.J. 459 *[cited at]* , 461 (C.M.A. 1994).

79. Id. The court ignored the possibility that the defense used the interpreter but was unable to develop leads sufficient to make a showing of necessity.

39 AFLR 159, Multiplicity and Lesser Included Offenses

Title of Article

Multiplicity and Lesser-Included Offenses

Author

COLONEL JAMES A. YOUNG III, USAF*

Text of Article

I am overwhelmed with admiration for the zeal displayed in your sixty-four counts; but in accusing a heretic, as in other things, enough is enough. Also you must remember that all the members of the court are not so subtle and profound as you, and that some of your very great learning might appear to them to be very great nonsense. Therefore I have thought it well to have your sixty-four articles cut down to twelve.

- The Inquisitor, from Saint Joan [1]

I. INTRODUCTION

For the past 15 years, military multiplicity doctrine has been a vexatious problem for attorneys preparing charge sheets, counsel at trial, and military judges at all levels. The concept of multiplicity has been shrouded in a fog of judicial obfuscation. Unable to agree on a single multiplicity test, the judges of the United States Court of Military Appeals [2] promulgated several ambiguous tests. Thus, offenses could be multiplicious if one was "fairly embraced" in the other, [3] the offenses were committed as the result of a "single impulse" or intent, [4] or the offenses were part of an "insistent flow of events." [5] Although the different tests often seemed to "represent merely different ways of stating the same essential concept," [6] the results were so subjective and unpredictable, it appeared the desired results dictated the choice of the test applied. Military justice practitioners were often frustrated by their inability to predict which test the appellate courts would apply to a given case.

In United States v. Teters, [7] a unanimous Court of Military Appeals attempted to end the confusion by adopting the federal multiplicity rule for military practice. Offenses would be multiplicious only if - contrary to the intent of Congress - an accused was convicted and punished more than once for the same act or course of conduct. [8] The court concluded that when the statutes and legislative histories are

silent on the issue, the offenses are separate if each offense requires proof of an additional statutory element which the other does not. [9] In effect, the Court of Military Appeals "buried" the pleading and proof analysis of multiplicity formulated in United States v. Baker [10] and its progeny. [11]

Teters was a breath of fresh air, causing some military attorneys to forecast the end of extensive multiplicity litigation in the military. Prosecutors, however, fearing that the application of the Teters elements test would drastically affect the number of uncharged lesser-included offenses upon which the military judge could instruct, began to charge every permutation and combination of criminal activity that the evidence would support. Defense counsels appropriately challenged the resulting multi-page charge sheets as unreasonable. Military judges promptly dismissed specifications which were clearly lesser-included offenses, but were forced to continue courts-martial indefinitely while the prosecution appealed those decisions. [12]

In the decisions which followed, the Court of Military Appeals appeared to retreat from the elements test promulgated in Teters because the judges could not reach a consensus on how to express or apply the Teters standard. [13] Despite these missteps, the court has now settled on the pleadings-elements test Judge Cox expressed in United States v. Weymouth. [14] This approach has considerable merit and can bring clarity and consistency to the law of multiplicity and lesser-included offenses.

After briefly discussing the background of military multiplicity since the adoption of the Uniform Code of Military Justice (UCMJ or Code), [15] this article examines the Teters decision and the cases which followed and provides a framework for applying Judge Cox's pleadings-elements test. This article concludes with an appendix containing a guide for practitioners to use in analyzing multiplicity and lesser-included offense issues.

II. BACKGROUND

Military multiplicity doctrine is rooted in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." [16] That clause provides three protections for an accused: it protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. [17]

The doctrine of lesser-included offenses, on the other hand, was a common law rule meant to protect the prosecution from an outright acquittal when evidence failed to support a conviction on the offense charged, but supported conviction on a lesser, uncharged offense. [18] In modern times, the courts have applied the doctrine to the accused's benefit as well. Under the Due Process Clause of the Fifth Amendment, [19] an accused may have the right for the court to consider a lesser-included offense as an alternative to guilty of the charged offense. [20]

It is important to realize that "[w]hile the concepts of multiplicity and lesser-included offenses are different, they overlap - you can't get to multiplicity country without crossing lesser-included offense

territory." [21] This is necessarily so because convictions for both the greater and lesser-included offenses would violate the Double Jeopardy Clause. [22]

As originally promulgated by the President in the 1951 Manual for Courts-Martial (Manual), [23] the multiplicity rules appeared quite understandable and practical. These rules provided that "[o]ne transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person." [24] They also prohibited an accused being "found guilty of two or more offenses arising out of the same act or transaction, without regard to whether the offenses are separate." [25] The 1951 Manual went on to state:

The maximum authorized punishment may be imposed for each of two or more separate offenses arising out of the same act or transaction. The test to be applied in determining whether the offenses of which the accused has been convicted are separate is this: The offenses are separate if each offense requires proof of an element not required to prove the other. . . An accused may not be punished for both a principal offense and for an offense included therein because it would not be necessary in proving the included offense to prove any element not required to prove the principal offense. [26]

In these provisions of the 1951 Manual, the President focused on preventing an accused from being punished twice for what amounted to the same offense, rather than preventing multiple convictions. This was in accord with military legal precedent, dating from before the adoption of the UCMJ, which held that the improper multiplication of charges affected only the sentence, not the legality of the findings. [27] The President's rule for determining whether the offenses were separate for punishment purposes [28] incorporated the United States Supreme Court's holding in Blockburger v. United States. [29]

Even from its earliest days, the Court of Military Appeals had a different view than the President. The difference was first noted in the court's analysis of lesser-included offenses. The court acknowledged that it would go beyond the strict elements approach of Blockburger and the Manual, and "would look to the allegations of the specification, and proof in support thereof, in each case to determine whether a lesser included offense is placed in issue." [30] Thus, even if each offense had at least one element different from the other offense, one could still be a lesser-included offense of the other. Since lesser-included offenses were by definition multiplicious with the greater offense, the statutory elements test of Blockburger and the Manual was no longer controlling.

This did not cause great difficulties at the charging or trial level because, at the time, the court "viewed an unreasonable multiplication of charges as error without prejudice unless an accused was sentenced separately for both offenses." [31] But, the court's refusal to accept the President's rulemaking authority in this area foreshadowed more change. By 1958, the Court of Military Appeals began following the federal practice of dismissing charges that were found unduly multiplicious, [32] and in United States v. Sturdivant, [33] the court dismissed all of the charges and specifications on the grounds that such multiplication of charges violated the accused's due process rights. In an effort to keep the Manual a viable document for trial practitioners and commanders in the field, the President incorporated these decisions in the 1969 Manual. [34]

In United States v. Baker, [35] the Court of Military Appeals re-examined multiplicity - from charging, through findings, to sentencing. [36] Pursuant to a pretrial agreement and his guilty pleas, Baker was convicted, inter alia, of aggravated assault and communicating a threat to a female civilian outside the NCO Club at Fort Ord. Baker had choked the victim and hit her head against the car, while telling her that if she did not take him where he wanted to go, he would kill her. On appeal, the defense claimed the offenses Baker committed against the victim were not separate, and, therefore, the maximum punishment was three years and six months, rather than six years and six months as the military judge had advised the court members.

In an opinion by Chief Judge Fletcher, the Court of Military Appeals first noted that an unreasonable multiplication of charges might improperly "create the impression that the accused is a bad character and therefore lead the court-martial to resolve against him doubt created by the evidence," thereby warranting dismissal of all charges. [37] Chief Judge Fletcher indicated that although the charged offenses in the case were based on one transaction, the accused was not charged with the same offense in two different counts, neither offense was a lesser-included offense of the other, and "[n]either offense is generally considered, as a matter of legislative intent, to be indivisible or prohibitive of a course of conduct." [38] Therefore, he found no multiplication of charges.

The court next addressed the propriety of the military judge accepting the accused's guilty pleas. The court paid lip service to, but eviscerated, paragraph 74b(4) of the 1969 Manual, [39] which provided that an accused could be convicted of two offenses even if they were not separate. The court indicated that "where the pleadings and evidence adduced at trial show that one offense is a lesser included offense of another of which an accused has also been convicted, both convictions cannot stand." [40] The court then defined "lesser-included offense" in two ways:

First, where one offense contains only elements of, but not all the elements of the other offense; second, where one offense contains different elements as a matter of law from the other offense, but these different elements are fairly embraced in the factual allegations of the other offense and established by evidence introduced at trial. [41]

Despite this rather broad definition, the Baker court refused to find, as a matter of law, that the communication of a threat was a lesser-included offense of the aggravated assault. [42] Nevertheless, Chief Judge Fletcher determined that the offenses were not separate for sentencing. He agreed that the offenses were separate under the Blockburger test incorporated in paragraph 76b(8) of the 1969 Manual, but found they were not separate under paragraph 76a(5)(b). [43] That paragraph provided that "offenses may not be separate . . . [w]hen two offenses are committed as the result of a single impulse or intent," [44] and had been added to conform the Manual to decisions of the Court of Military Appeals. [45]

In a scathing dissent, Judge Cook demonstrated that multiplicity for sentencing in the military justice system was a "mess." [46]

Servicemembers are often forced to make the fundamental decision whether to contest a case or to plead guilty, possibly in conjunction with a pretrial agreement, without the slightest appreciation of the risks at stake. By the same token, cases are often overturned years after trial simply because some higher level of review selected a different test for multiplicity from that agreed upon by the trial participants. . . . This is not justice; this is chaos!

The problem is not that there are insufficient tests for multiplicity; the problem is that there are so many. Some of the tests seem to overlap and represent merely different ways of stating the same essential concept. Different tests, applied to the same facts, often produce opposite results. Some tests are so subjective that, applied to the same facts, they can produce different results for different people. The onus of responsibility for this state of confusion lies not with the Congress, not with the President, but with this Court. [47]

Judge Cook excoriated the court for exceeding its statutory charter under Article 67, UCMJ. [48] He pointed out that Congress delegated authority to the President to establish sentencing procedures and maximum punishments for courts-martial, [49] concluding that "absent some constitutional infirmity, the rules established by the President for determining multiplicity questions are the rules which this Court must apply and accept." [50] The President's adoption of the Supreme Court's own Blockburger rule could hardly be considered constitutionally infirm, he wrote, further alleging that basing the majority opinion on paragraph 76a(5)(b) of the Manual was disingenuous. He argued that paragraph 76a (5)(b) was not a rule laid down by the President, but represented merely the President's acquiescence to prior rulings of the Court of Military Appeals. [51]

Judge Everett agreed with Judge Cook that the Court of Military Appeals was responsible for the multiplicity mess. However, he declined "to repudiate almost three decades of precedent - now reflected in Manual provisions - in order to return to the simplicity of the Blockburger rule, which was the only test specifically authorized by the President in the 1951 Manual." [52]

III. TETERS AND FOSTER

In Teters, the accused was convicted of both forgery of certain checks and larceny of the money he obtained as a result of the forgeries. [53] On appeal, the defense objected, claiming that the accused could not be convicted of both the resulting crime of larceny and the means by which he accomplished the crime. The Court of Military Appeals took a fresh look at the multiplicity issue. The court cited Supreme Court cases interpreting the Double Jeopardy Clause of the Fifth Amendment [54] and concluded that "a constitutional violation under the Double Jeopardy Clause of the Constitution now occurs only if a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." [55] The court then set out a framework for determining whether Congress intended for an accused to be convicted and punished for two separate offenses for one act.

Chief Judge Sullivan wrote that the first step in determining Congressional intent is to examine the

statutes and their legislative histories for an indication of congressional intent. [56] He wrote that in those cases in which the statutes and histories are silent, the Supreme Court's rule of construction found in Blockburger v. United States [57] should be used to determine congressional intent. [58] The Blockburger rule provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." [59] Chief Judge Sullivan indicated that "[i]t is now unquestionably established that this test is to be applied to the elements of the statutes violated and not to the pleadings or proof of these offenses." [60] If the offenses satisfy the Blockburger rule, he wrote, it is presumed that Congress intended that the offenses be separate for both findings and sentencing. [61] However, even though offenses are separate under the Blockburger standard, it still may not be suitable to sentence an accused for both in the compound-and-predicate-offense situation (e.g., felony murder and the underlying felony rape. [62]

The final step in Sullivan's analysis "is to determine whether there are any other indications of contrary intent on Congress' part which can overcome the Blockburger presumption of separateness." [63] After applying the analysis to the facts, the court held that Teters had failed to show, by reference to either the statutes or legislative histories, that Congress expressly restricted multiple convictions in this case, that application of the Blockburger rule would preclude separate convictions, or that there was "any indication of congressional intent to overcome the Blockburger presumption." [64]

Judge Cox joined in "burying United States v. Baker and its progeny," [65] but, expressed concern over the effect Teters would have on the sentencing of servicemembers convicted of multiple offenses. He noted that "the all-or-nothing, sentence-multiplier consequence" of finding offenses not multiplicious was the primary cause of the multiplicity conflict, and he invited the President or Congress to establish a more rational sentencing scheme. [66]

Only a year later, in United States v. Foster, [67] the court held that the Blockburger/Teters test for multiplicity applied to determining lesser-included offenses. In doing so, however, Judge Cox, writing for the court, abandoned the clear language of Teters, and substituted vague new terms which indicated the Blockburger/Teters standard might be subject to varying interpretations.

Foster had been charged with forcible sodomy, [68] but convicted of indecent assault. [69] The Air Force Court of Military Review held that indecent assault was not a lesser-included offense of sodomy, but approved a conviction for committing an indecent act. [70] The Court of Military Appeals was "asked to review the Court of Military Review's findings to determine whether committing an indecent act is a lesser-included offense of forcible sodomy." [71]

First, the Court of Military Appeals adopted the Blockburger/Teters elements test for determining lesser-included offenses. [72] Under Article 79, UCMJ, [73] "[a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein." Because the language of Article 79 is virtually identical to its federal counterpart, Fed. R. Crim. P. 31(c), the court adopted the Supreme Court's interpretation of

"necessarily included" found in Schmuck v. United States: [74] "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." [75]

Next, the court examined the relationship between offenses under the enumerated articles [76] and those under Article 134, which proscribes unspecified disorders and neglects to the prejudice of good order and discipline in the armed forces and conduct of a nature to bring discredit upon the armed forces. Despite the need to prove an added element - that the conduct was prejudicial to good order or discipline or of a nature to bring discredit upon the armed forces - such Article 134 offenses:

may, depending upon the facts of the case, stand either as a greater or lesser offense of an offense arising under an enumerated article. Our rationale is simple. The enumerated articles are rooted in the principle that such conduct per se is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles. [77]

Despite this clear language, Judge Cox went on to suggest "that sound practice would dictate that prosecutors plead not only the principal offense, but also any analogous Article 134 offenses as alternatives." [78]

In analyzing Foster's offenses, the court noted the need to use a "qualitative, not quantitative approach. Particularly with regard to assaultive and sexual crimes, there is often a hierarchy or matrix of options available to the accuser to address the same criminal act." [79] For the one act, in addition to forcible sodomy, the accused could have been charged with attempted rape, assault consummated by a battery, assault with intent to commit rape, or indecent assault. While comparing the elements of these offenses would not necessarily lead one to conclude that they stood as greater and lesser-included offenses, Judge Cox asserted that Congress clearly could not have intended multiple punishments and convictions for this one act.

Thus, dismissal or resurrection of charges based upon "lesser-included" claims can only be resolved by lining up elements realistically and determining whether each element of the supposed "lesser" offense is rationally derivative of one or more elements of the other offense - and vice versa. At times, it may be necessary to plead offenses in the alternative. [80]

In his concurrence, Chief Judge Sullivan expressed his concern with the suggestion in the majority opinion that "the proof introduced at trial determines the relationship of the offenses for purposes of Article 79." [81]

IV. WEYMOUTH

The evolution of the military multiplicity and lesser-included offense rules did not end with Foster. Although some attorneys were able to reconcile Foster with Teters, it now appears that Judge Cox's opinion in Foster reflected his dissatisfaction with Teters. In United States v. Weymouth, [82] Judge

Cox announced a new standard for multiplicity and lesser-included offenses. Although not all of the other judges on the court were willing to use the Weymouth case as a vehicle for the new rules, their opinions made clear that a majority agreed with Judge Cox's position.

The prosecution charged Weymouth with four different offenses for one alleged act of seriously wounding a fellow airman by stabbing him in the abdomen with a knife. These included (1) attempted murder; [83] (2) assault with the intent to commit murder; [84] (3) assault with a dangerous weapon; [85] and (4) assault in which grievous bodily harm was intentionally inflicted. [86] At trial, the defense moved to dismiss the assault charges, claiming they were multiplicious with attempted murder because they were lesser-included offenses. The Government agreed that the accused could only be convicted of one of the four charged offenses, but asserted that, under the Teters elements test, the assaults were not lesser-included offenses of attempted murder. After getting the defense to agree that the assaults were lesser-included offenses of attempted murder and should be instructed upon if raised by the evidence, the military judge dismissed the three assault specifications without prejudice. The Government appealed the military judge's ruling. [87]

Applying the Teters and Foster rationales, the Air Force Court of Military Review held that the military judge was correct - the assault allegations were "necessarily included" in the attempted murder charge. [88] Instead of strictly analyzing the elements of each of the offenses, the Air Force Court instead focused on "over 40 years" of case law and listings of lesser-included offenses contained in the manuals for courts-martial. [89] Dissatisfied with that opinion, The Judge Advocate General of the Air Force certified the issue. [90] On May 12, 1995, the Court of Appeals for the Armed Forces concluded, in an order, that "the military judge did not abuse his discretion in provisionally dismissing the lesser specifications." [91] The court returned the case to The Judge Advocate General of the Air Force for submission to the military judge for trial, but did not issue an opinion until the end of the term.

At the end of the term, the Court of Appeals for the Armed Forces affirmed the decision of the Air Force Court of Military Review, but with insufficient agreement among the judges to produce an "opinion of the court." In the lead opinion, Judge Cox saw his task as broad in scope: "To resolve this case, it is necessary to clarify the very definition of an offense in the military; how the definition of military offenses compares and contrasts with the definition of offenses in the federal criminal justice system, and how those differences affect the treatment of lesser-included offenses." [92]

Judge Cox began his opinion in Weymouth by reviewing the federal law of lesser-included offenses as expressed by the Supreme Court in Schmuck v. United States, [93] and discussed in his earlier Foster opinion. In Schmuck, the Supreme Court adopted the elements approach it used earlier in Blockburger v. United States to determine multiplicity issues: "[O]ne offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." [94] The Supreme Court rejected the "inherent relationship" test because it placed the prosecution at a disadvantage. Moreover, by waiting until after the evidence is developed at trial to determine whether a lesser-included instruction would be appropriate, the accused may not have "constitutionally sufficient notice" of the lesser-included offense. [95] The Supreme Court cited with approval the following formulation of the test for lesser-included offenses: "To be necessarily included in the greater offense

the lesser must be such that it is impossible to commit the greater without first having committed the lesser." [96]

Although "the language of Article 79[, UCMJ [97]] is almost identical to the language of Fed. R. Crim. P. 31(c)," [98] Judge Cox found the appropriate application of Article 79 to be different from federal practice and the approach taken by a unanimous Court of Military Appeals in Teters. He concluded that "in the military, the specification, in combination with the statute, provides notice of the essential elements of the offense" [99] - a "pleadings-elements approach." [100] He based this conclusion on the definition of lesser-included offenses promulgated by the President, pursuant to Article 36(a), UCMJ, [101] in the 1969 and 1984 Manuals. [102]

Judge Cox provided an example of how this "pleadings-elements" test would differ from the federal elements test. In federal practice, assault with a dangerous weapon would never be a lesser-included offense of voluntary manslaughter, even if the indictment alleged use of a dangerous weapon, because use of a dangerous weapon is not a statutory element of voluntary manslaughter. [103] Judge Cox suggested that, in the military, it could be a lesser-included offense if the Government pled the use of a dangerous weapon in the specification - such a pleading would be sufficient to put the parties on notice of the lesser-included offense of assault with a dangerous weapon. [104] Judge Cox insisted that the military practice of considering the allegations in the specification as well as the statutory elements "does not, however, equate to the disfavored 'inherent relationship' test" [105] or the "fairly embraced" test of United States v. Baker. [106] According to Judge Cox, the disfavored "inherent relationship" test, overruled in Schmuck, involved two factors not present in military legal practice: (1) the proof "adduced at trial apparently could be used to evaluate relationships between offenses;" and (2) the relationship between the two offenses had to be found to be "inherent." [107] The "fairly embraced" test "gave the appearance of only working for the defense in having specifications dismissed," [108] while the pleadings-elements test rendered the same results for both the prosecution and the defense. [109]

Judge Cox gave several reasons why differences between the federal and military law of multiplicity and lesser-included offenses should not be surprising: (1) "unlike federal offenses," many military offenses are not derived exclusively from statutes, but from "regulations or orders, from customs of the service, or from traditional military crimes that have emerged from a military common law-like process," and a mere recitation of the statutory elements in a specification would not "provide an accused the requisite due process notice and protection against double jeopardy;" [110] (2) the military practice is to prefer all known offenses against an accused at the same time, [111] while federal practice limits the joinder of offenses to situations in which the offenses are of the same or similar character or based on the same act, transaction, or scheme; [112] (3) in the military, offenses which are not multiplicious for findings are separate for sentencing, while in federal practice sentences for closely related offenses usually run concurrently; [113] (4) "there may be no federal corollary for the military concept of 'legally less serious' elements;" [114] and (5) unlike federal practice, military policy prohibits charging both the offense and a lesser-included offense thereof. [115]

After analyzing the specifications contained in Weymouth's charge sheet using his pleadings-elements test, Judge Cox concluded that all of the assault offenses, except assault in which grievous bodily harm

was intentionally committed, were lesser-included offenses of attempted murder. Assault in which grievous bodily harm was intentionally inflicted was technically not a lesser-included offense of attempted murder, because it is not "necessary" to prove grievous bodily harm in order to prove attempted murder. [116] Thus, the military judge would not have abused his discretion had he allowed the specification alleging assault in which grievous bodily harm was intentionally committed to stand. [117] However, because the defense had agreed it was a lesser-included offense and that the military judge could properly instruct on it if raised by the evidence, there was no possibility that the prosecution was prejudiced by the military judge's ruling dismissing the assault specifications without prejudice. [118]

Judge Cox summarized the court's holdings on the law of multiplicity and lesser-included offenses as follows:

[I]n United States v. Teters, we adopted the elements test of Schmuck v. United States and Blockburger v. United States. In United States v. Foster, we clarified that elements in the lesser offense that are "legally less serious" than elements of the greater offense are included elements. Today we clarify that, in the military, those elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test. [119]

Judge Gierke concurred in Judge Cox's opinion. Chief Judge Sullivan and Judge Wiss did not believe there was an issue ripe for appeal in the case, although both commented upon the substance of Judge Cox's opinion. Chief Judge Sullivan disagreed with the pleadings-elements approach and reiterated his belief that the statutory elements test of Blockburger/Teters was the appropriate standard. [120] Judge Wiss, on the other hand, agreed with the "pleadings-elements" approach. [121] Judge Crawford concurred that the pleadings-elements approach was the appropriate test for determining lesser-included offenses, but disagreed with Judge Cox's conclusion that assault in which grievous bodily harm is intentionally inflicted is not a lesser-included offense of attempted murder. [122]

V. CONCLUSION

In the 1993 Teters decision, a unanimous Court of Military Appeals held that "the time has passed for a separate military-law doctrine to prevent multiplicious specifications. . . . [U]nder the Supreme Court decision in Schmuck, this rule of multiplicity, like the Blockburger rule used in Double Jeopardy cases, would be limited to consideration of the statutory elements of the involved crimes." [123] The following year, in Foster, the court held that the Blockburger/Schmuck/Teters elements test applied in determining lesser-included offenses. In 1995, in Weymouth, the court qualified those decisions by concluding that "those elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test." [124]

In his opinion, Judge Cox failed to explain the meaning of "those elements required to be alleged in the specification" and sent conflicting signals as to its application. At one point he suggested that assault with a dangerous weapon would be a lesser-included offense of voluntary manslaughter if use of the

dangerous weapon was pled, [125] yet in a footnote, he specifically declined to decide whether the Government could create a lesser-included offense "by merely alleging extra, non-essential elements." [126] If, by the pleadings-elements test, Judge Cox meant to incorporate consideration of all the facts pled in specifications in determining multiplicity and lesser-included offenses, then consistency of application will be lost, and we will have returned to the "fairly embraced" standard Judge Cox disavows. Nevertheless, for all the faults of Judge Cox's opinion, his pleadings-elements test may, if applied in a restrictive manner, be the clear, consistent, and relatively easy-to-apply standard for which military justice practitioners have been waiting.

Judge Crawford has suggested that practitioners follow the lesser-included offenses listed in Part IV of the Manual as a "right-line rule," although she concedes that it "will not work in every case." [127] Following Part IV of the Manual to determine lesser-included offenses, however, will give practitioners a false sense of security and risk reversal on appeal. After all, by using the Manual, Judge Crawford came to a different conclusion than Judge Cox on whether assault in which grievous bodily harm was intentionally inflicted was a lesser-included offense of attempted murder.

Until the court has an opportunity to clarify the rule, there is an approach military justice practitioners can follow which is fair to the accused and at the same time protects the prosecution's interests: In applying Judge Cox's pleadings-elements test, consider the statutory elements, those elements of a regulation which must be pled and proved beyond a reasonable doubt to subject an accused to conviction for violation of that regulation, and those aggravating facts which must be pled and proved beyond a reasonable doubt to subject an accused to an increased punishment.

In federal civilian criminal law, each offense carries with it a certain maximum penalty prescribed by statute. In defining military offenses under the UCMJ, Congress left it to the President to determine the maximum sentence in all but capital cases. [128] In exercising this duty, the President has elected to provide different maximum punishments for violations of the same statute, depending on the prosecution's ability to plead and prove - beyond a reasonable doubt - the existence of certain aggravating factors not mentioned in the statute. These aggravating factors are not "statutory elements" of the offense, and therefore, under the Teters elements test could not be considered in determining lesser-included offenses and multiplicity. Under Judge Cox's pleadings-elements test they would be considered. For example, the statutory element of sodomy [129] is that the accused engaged in unnatural carnal copulation with a certain other person or with an animal. [130] The maximum penalty for this offense includes confinement for five-years. [131] If, however, the prosecution alleged and proved beyond a reasonable doubt that the sodomy was committed by force and without consent, the maximum punishment includes confinement for life. [132] The use of force, however, is not a statutory element, and therefore, under a strict statutory elements test, could not be considered in determining what lesser-included offenses could be instructed upon or what other charged offenses might be multiplicious with the sodomy charge. Under the pleadings-elements test, other forms of assaultive conduct, such as indecent acts with another and assault consummated by a battery, would be lesser-included offenses, and, therefore, multiplicious.

If, after applying the pleadings-elements test as explained above, there is any question in the prosecutor's

mind that one offense is a lesser-included offense of the other, the prosecutor should charge both. After service of charges on the accused, the prosecution should file with the defense and the military judge notice that the specifications are charged in the alternative. At trial, the military judge can advise the court members that the specifications are charged in the alternative, that alternative charging is authorized in military law, and that the accused can be convicted of one of the specifications or neither but not both. By doing so, the military judge will avoid being second-guessed as to lesser-included offenses, yet protects the accused from the appearance that the allegations against him are more numerous.

Determining multiplicity when one offense is not a lesser-included offense of the other may be more problematic. An error in determining multiplicity will expose an accused to a higher maximum punishment because offenses which are separate for findings are separate for punishment. [133] If the military judge errs, a court of criminal appeals will either reassess the sentence or return the case for a rehearing on sentence. Obviously, the latter is to be avoided when possible. However, if the military judge applies the restrictive approach to the pleadings-elements test suggested above, the results will be predictable and consistent, and avoid drifting back to the fairly embraced doctrine of Baker. If, however, the court intends to consider other facts pled in the specifications, [134] it will result in another multiplicity "mess" similar to the one Judge Cook railed against in Baker. [135]

Weymouth is not the last word on multiplicity and lesser-included offenses. The Court of Appeals for the Armed Forces will have to clarify the pleadings-elements test before practitioners can be expected to apply it correctly. Regardless of whether the Weymouth test turns out to be "a new runway with lights to be installed later, or . . . the Baker runway reactivated," [136] for the foreseeable future, military justice practitioners will be asked often "to descend . . . into the inner circle of that Inferno where the damned endlessly debate multiplicity." [137]

APPENDIX

Guidelines for Determining Multiplicity and Lesser-Included Offense Issues

The following discussion provides guidance for trial practitioners and is intended as a starting point for further research and analysis. It offers a step-by-step approach for multiplicity and lesser included offense issues and suggests a framework for making arguments. Where appropriate, examples based on case law are included.

A few procedural issues bear initial comment. First, it is important to note that "multiplicity issues are forfeited unless raised at trial and do not rise to the level of plain error." [138] In addition, the accused has the burden of showing that offenses are multiplicious. [139] Ordinarily, lesser-included offenses should be determined before arraignment. When necessary, especially to determine whether the two acts are separate, the military judge may wait to determine multiplicity until after the presentation of the evidence.

1. Determine how many acts or transactions occurred - if the acts are separate, then an accused may be convicted and punished for each. To determine the number of acts or transactions, you must examine the specifications and perhaps the proof to be adduced at trial.

a. If the specifications allege different dates or places, then more than one act occurred, and the acts are separate, unless Congress, in enacting the statutes, intended to criminalize a course of conduct instead of individual acts.

(1) Conspiracy, under Article 80, UCMJ, is a course of conduct offense. In determining if two charged conspiracies are actually the same, courts should consider "(1) the time during which the activities occurred; (2) the persons involved in the conspiracies; (3) the places involved; (4) whether the same evidence was used to prove the two conspiracies; and (5) whether the same statutory provision was involved in both conspiracies." [140] But, conspiracy and the criminal act which is the object of the conspiracy may be charged separately. [141]

(2) The statute prohibiting men from cohabiting with more than one woman criminalizes a continuous course of conduct, not each act. [142]

(3) The offense of adultery, a violation of Article 134, UCMJ, does not criminalize a course of conduct; so each act of sexual intercourse constitutes a separate offense. [143]

(4) Fraternization is a course of conduct offense. An accused cannot be charged or convicted of each kiss, hug, or act of sexual intercourse in a long-term fraternization relationship. [144]

(5) Theft of Basic Allowance for Quarters and Variable Housing Allowances over a several month period by not reporting loss of entitlement was one continuing offense, not a theft for every month the accused received money to which he was not entitled. [145]

(6) Willful disobedience completed before an accused missed the movement are separate. [146]

b. If the specifications allege the same date, place, and victim, there still may be more than one act, if there was a break in time between the alleged acts, the accused was on notice that a repetition of the criminal conduct was unacceptable, or the accused had an opportunity to reflect on his conduct and choose not to commit additional offenses. [147]

(1) Murder and battery with baseball bat were separate where, after striking victim with bat, accused went to washroom with victim to help him clean up, then struck victim again with intent to kill him. [148]

(2) Battery and rape of victim were separate where the acts amounting to battery were not the acts that forced victim to engage in sexual intercourse [149]

(3) Consensual sodomy (fellatio) and attempted anal sodomy at same time, place, and with same individual, were separate acts [150]

(4) Unlawful entry and subsequent assault were separate; unlawful entry had been completed before the assault was begun. [151]

c. If specifications allege same date and place, but different victims, there may or may not be separate acts, depending upon the actions of the accused.

(1) Assault on several persons by one act constitutes only one criminal offense subject to one punishment. [152]

(2) Simultaneous solicitation of false testimony from two potential witnesses amounts to one act. [153]

(3) Distribution of drugs to two people at same time and place equals two separate acts. [154]

d. Beware of course of conduct pleading (alleging several similar acts, committed over the course of a period of time, in one specification). If the second specification alleges similar acts against the same victim, within the same period of time, and the defense objects, the prosecution must show why the specifications are separate and have not merged. [155] Since there is no requirement to allege several different acts in the same specification, the convening authority has wide discretion in formulating the specifications. Good reasons for charging separately might include alleging a different location.

2. If there is only one act or transaction, determine whether Congress intended to subject the military member to conviction and punishment for both.

a. First look at the wording of the statutes themselves for any indication of congressional intent. The statutes normally will be silent on this issue. [156]

Article 120(b), UCMJ, defines carnal knowledge as sexual intercourse under "circumstances not amounting to rape." Thus, even though carnal knowledge is not a lesser-included offense of rape, [157] an accused cannot be convicted of both for one act of sexual intercourse. [158]

b. Next, examine the legislative history. Legislative histories are normally silent on the issue. [159] Beware of the fragmentary legislative history of the UCMJ as indicating actual congressional intent, as opposed to the views of a witness who testified before a congressional committee. [160]

c. If the statutes and histories are silent, apply the Weymouth pleadings-elements test to determine congressional intent. Does each offense require proof of an additional element which the other does not? If so, it is presumed that Congress intended the offenses to be separate for both findings and sentencing. If one offense is a lesser-included offense of the other, then the offenses are necessarily multiplicious. [161]

d. Even if the offenses pass the pleadings-elements test and are presumed separate, if the offenses have a compound-and-predicate offense relationship, it still may be inappropriate to convict or punish for both. [162]

(1) Felony murder and the underlying rape were not the same offense under Blockburger, but the Supreme Court was unwilling to believe Congress could intend for the accused to be punished for both. [163]

(2) After trial for felony murder, accused can not be tried for the underlying offense of robbery with a firearm. [164]

(3) Robbery and assault with a dangerous weapon merged where the aggravated assault was the force and violence of the robbery charge. [165]

e. If the specifications allege violations of the same statute:

(1) One allegation may have merged into the other; old merger doctrine is now part of double jeopardy law. [166] Such offenses are likely to be multiplicious. [167]

(a) Entering a bank with intent to commit a robbery merges with crime of robbery. Both offenses are part of the same criminal statute and the entering provision was meant to cover those situations when an accused entered a bank with the intent to rob it, but the plan was frustrated before he could put his intent into effect. [168]

(2) The offenses may be separate if they are contained in "substantively distinct subsections of the same statute" and each subsection lists an alternative way in which the offense may be committed. [169]

f. Consider "whether there are any other indications of contrary intent on Congress' part which can overcome the Blockburger presumption of separateness." [170]

g. "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." [171] "Military judges must still exercise sound judgment to ensure imaginative prosecutors do not needlessly 'pile on' charges." [172]

Example

An accused writes and presents a check which bounces. How is the prosecutor to draft appropriate charges?

Step 1: Determine how many acts are involved. There appear to be two separate acts for which the

accused can be charged under Article 123a - one for making and another for uttering the bad check. [173] But, the drafter is concerned about convincing a court beyond a reasonable doubt that the accused made and uttered the check with intent to defraud and that the accused knew at the time he made the check that there were insufficient funds on account to pay the check upon presentment. Is the Article 134 offense of making and uttering a worthless check by dishonorably failing to maintain sufficient funds in the account a lesser-included offense such that the military judge will instruct on it if raised by the evidence? If it is not, then the prosecutor must draft an Article 134 specification to charge in the alternative.

Step 2: Determine whether one offense is a lesser-included offense of the other, by comparing the elements of the offenses to determine if one is necessarily included in the other. By elements, we mean pleadings and elements. [174]

Article 123a 1. Accused made check;

2. For a thing of value;

3. With intent to defraud;

4. At time, accused knew insufficient funds on account to pay check on presentment.

Article 134 1. Accused made and uttered check;

2. For a thing of value;

3. Accused subsequently failed to place or maintain sufficient funds on account;

4. This failure was dishonorable;

5. Conduct prejudicial to good order and discipline or discredit service.

Under Article 123a, the accused can be charged with making, uttering, or both. Under Article 134, the accused must have done both. Article 123a requires an intent to defraud and knowledge, at the time, that there were insufficient funds on account to pay the check upon presentment. Article 134 requires only a failure to place funds in the account before the check is presented for payment and that this failure was dishonorable. The fifth element of the Article 134 offense is per se included within the Article 123a offense. [175] In Foster, the Court of Military Appeals held that "elements in the lesser offense that are 'legally less serious' than elements of the greater offense are included elements." Therefore, and considering 44 years of legal precedent, I would expect the Court to find that the Article 134 offense is a lesser-included offense of the Article 123a offense. However, I would suggest that the drafter charge the offense in the alternative. Thus, the accused could be charged with 3 offenses: (1) making the check under Article 123a; (2) uttering the check under Article 123a; and (3) making and uttering the check and

subsequently not maintaining funds under Article 134. The accused could be convicted of one or both offenses under Article 123a, or only the Article 134 offense.

Footnotes

*Colonel Young (B.A., Lehigh University; J.D., University of Pennsylvania Law School) is the Chief Circuit Military Judge of the European Circuit, Sembach Air Base, Germany. He is a member of the bar of the Commonwealth of Pennsylvania.

1. George Bernard Shaw, Saint Joan 119 (Penguin Books 1946) (1924).

2. Effective Oct. 5, 1994, pursuant to Pub. L. No. 103-337, Sec. 924, 108 Stat. 2663, the United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces and each Court of Military Review was renamed the Court of Criminal Appeals.

3. United States v. Baker, 14 M.J. 361 *[cited at]* (C.M.A. 1983).

4. United States v. Kleinhans, 14 U.S.C.M.A. 496, 34 C.M.R. 276 (1964).

5. United States v. Burney, 21 U.S.C.M.A. 71, 44 C.M.R. 125 (1971). See United States v. Jobes, 20 M. J. 506 *[cited at]* (A.F.C.M.R. 1985) for an excellent discussion of these various rules for determining multiplicity.

6. United States v. Baker, 14 M.J. at 372 (Cook, J., dissenting).

7. 37 M.J. 370 *[cited at]* (C.M.A. 1993), cert. denied, __ U.S. __, 114 S. Ct. 919, 127 L. Ed. 2d 213 (1994).

8. United States v. Teters, 37 M.J. at 377.

9. Id.

10. 14 M.J. 361 *[cited at]* (C.M.A. 1983).

11. United States v. Teters, 37 M.J. at 378 (Cox, J., concurring).

12. See, e.g., United States v. Weymouth, 40 M.J. 798 *[cited at]* (A.F.C.M.R. 1994) (en banc), aff'd, No. 94-6004/AF (C.A.A.F. Sept. 29, 1995).

13. See United States v. Weymouth, No. 94-6004/AF (C.A.A.F. Sept. 29, 1995); United States v. Foster,

40 M.J. 140 *[cited at]* (C.M.A. 1994).

14. No. 94-6004/AF (C.A.A.F. Sept. 29, 1995).

15. 10 U.S.C. Secs. 801-940 (1950).

16. U.S. Const. amend. V.

17. James C. Cissel, Federal Criminal Trials Sec. 1001 (3d ed. Supp. 1995) (citing North Carolina v. Pearce, 395 U.S. 711 *[cited at]* , 717 (1969); United States v. Dinitz, 424 U.S. 600 *[cited at]* (1976); United States v. Ball, 163 U.S. 662 *[cited at]* (1896); Ex Parte Lange, 85 U.S. 163 *[cited at]* (1873)). See, UCMJ art 44(a), 10 U.S.C. Sec. 844(a) (1994).

18. United States v. Weymouth 40 M.J. at 801.

19. U.S. Const. amend. V.

20. United States v. Weymouth, 40 M.J. at 801 (citing Keeble v. United States, 412 U.S. 205 *[cited at]* , 208, 93 S. Ct. 1993, 1995, 36 L. Ed. 2d (1973)).

21. Id. at 802.

22. Id. (citing Brown v. Ohio, 432 U.S. 161 *[cited at]* , 165-69, 97 S. Ct. 2221, 2225-27, 53 L. Ed. 2d 187 (1987); Blockburger v. United States, 284 U.S. 299 *[cited at]* , 52 S. Ct. 180, 76 L.Ed. 306 (1932); and United States v. Teters, 37 M.J. at 370).

23. Manual for Courts-Martial (1951). Hereinafter, the manuals for courts-martial will be referred to in text by their date of publication and the word Manual; e.g. the 1951 Manual.

24. Id. at Para. 26b.

25. Id. at Para. 74b (4).

26. Id. at Para. 76a(8).

27. United States v. Sease, 2 C.M.R. 181, 185 (A.B.R. 1951).

28. Manual for Courts-Martial at Para. 76a(8) (1951).

29. 284 U.S. 299 *[cited at]* , 52 S. Ct. 180, 76 L. Ed. 306 (1932).

30. United States v. Duggan, 4 U.S.C.M.A. 396, 399-400, 15 C.M.R. 396, 399-400 (1954).

31. United States v. Baker, 14 M.J. at 365 n.2 (citing United States v. Posnick, 8 U.S.C.M.A. 201, 24 C. M.R. 11 (1957) and cases cited therein).

32. Id. (citing United States v. Drexler, 9 U.S.C.M.A. 405, 408, 26 C.M.R. 185, 188 (1958)).

33. 13 M.J. 323 *[cited at]* (C.M.A. 1982), cited in United States v. Baker, 14 M.J. at 365-66 n.2.

34. See Department of the Army Pamphlet 27-2, Analysis of Contents Manual for Courts-Martial, United States 1969, Revised Edition, 13-9 (1970).

35. 14 M.J. 361 *[cited at]* (C.M.A. 1983).

36. See United States v. Teters, 37 M.J. 370 *[cited at]* , 373 n.1. (C.M.A. 1993), cert. denied, __ U.S. __, 114 S. Ct. 919, 127 L. Ed. 2d 213 (1994) (recognizing the three-step analysis of multiplicity set forth in Baker).

37. United States v. Baker, 14 M.J. at 365.

38. Id. at 367.

39. Manual for Courts-Martial (1969).

40. United States v. Baker, 14 M.J. at 367 (citing United States v. Stegall, 6 M.J. 176 *[cited at]* , 178 (C. M.A. 1979)).

41. Id. at 368.

42. Id.

43. Manual for Courts-Martial (1969). Paragraph 76a(5), as herein cited, was not contained in the 1951 Manual.

44. Quoted in United States v. Baker, 14 M.J. at 370.

45. See Department of the Army Pamphlet 27-2, Analysis of Contents Manual for Courts-Martial, United States 1969, Revised Edition 13-9 (1970).

46. United States v. Baker, 14 M.J. at 372 (Cook, J., dissenting).

47. Id.

48. 10 U.S.C. Sec. 867.

49. United States v. Baker, 14 M.J. at 372-73 (Cook, J., dissenting) (citing UCMJ, arts. 36(a) and 56, 10 U.S.C. Secs. 836(a) and 856).

50. Id. at 373.

51. Id. at 371-72 (citing Department of the Army Pamphlet 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, 13-7 (1970)).

52. Id. at 370-71 (Everett, J., concurring) (citations and footnotes omitted).

53. UCMJ, articles 123 and 121, 10 U.S.C. Secs. 923 and 921, respectively.

54. U.S. Const. amend. V.

55. United States v. Teters, 37 M.J. at 373.

56. Id. at 377.

57. 284 U.S. 299 *[cited at]* , 52 S. Ct. 180, 76 L. Ed. 306 (1932).

58. United States v. Teters, 37 M.J. at 377.

59. Id. (quoting Blockburger v. United States, 284 U.S. at 304, 52 S. Ct. at 182).

60. Id. (citing United States v. Dixon, __ U.S. __, 113 S. Ct. 2849, 2851, 125 L. Ed. 2d 556 (1993)).

61. Id. at 377-78 (citing United States v. McMillian, 33 M.J. 257 *[cited at]* (C.M.A. 1991)).

62. Id. at 378 (citing Whalen v. United States, 445 U.S. 684 *[cited at]* , 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)).

63. Id. (citing Missouri v. Hunter, 459 U.S. 359 *[cited at]* , 366-67, 103 S. Ct. 673, 678-79, 74 L. Ed. 2d 535 (1983)).

64. Id. at 378.

65. Id. (Cox, J., concurring) (citation omitted).

66. Id. at 379 (Cox, J., concurring).

67. 40 M.J. 140 *[cited at]* (C.M.A. 1994).

68. UCMJ, art. 125, 10 U.S.C. Sec. 925.

69. UCMJ, art. 134, 10 U.S.C. Sec. 934.

70. UCMJ, art. 134, 10 U.S.C. Sec. 934.

71. United States v. Foster, 40 M.J. at 142.

72. Id.

73. 10 U.S.C. Sec. 879.

74. 489 U.S. 705 *[cited at]* , 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).

75. United States v. Foster, 40 M.J. at 142 (quoting Schmuck v. United States, 489 U.S. at 716, 109 S. Ct. at 1450 (emphasis added)).

76. UCMJ, art. 80-132, 10 U.S.C. Secs. 880-932.

77. United States v. Foster, 40 M.J. at 143.

78. Id. The reason for this suggestion is puzzling. If charging an offense under the enumerated articles provides adequate notice to an accused of the possibility of conviction of a lesser Article 134 offense, there should be no reason to charge in the alternative - if the evidence raised the issue at trial, the military judge would instruct on the lesser offense.

79. Id. at 146.

80. Id. Judge Cox's restatement of the Teters/Blockburger test is cause to reconsider Judge Cook's misgivings over the consequences of restating legal tests using different words which are subject to interpretations different from the original test. United States v. Baker, 14 M.J. at 372 (Cook, J., dissenting). Similarly, the meaning of "rationally derivative" caused concern at the Air Force Court of Military Review. See United States v. Weymouth, 40 M.J. at 805 (Snyder, S.J., concurring).

81. United States v. Foster, 40 M.J. at 148 (Sullivan, C.J., concurring in the result).

82. No. 94-6004/AF (C.A.A.F. Sept. 29, 1995).

83. UCMJ, art. 80, 10 U.S.C. Sec. 880.

84. UCMJ, art. 134, 10 U.S.C. Sec. 934.

85. UCMJ, art. 128, 10 U.S.C. Sec. 928.

86. UCMJ, art. 128, 10 U.S.C. Sec. 928.

87. UCMJ, art. 62, 10 U.S.C. Sec. 862.

88. United States v. Weymouth, 40 M.J. 798 *[cited at]* (A.F.C.M.R. 1994) (en banc), aff'd, No. 94-6004/AF (Sept. 29, 1995).

89. Id. at 803.

90. UCMJ, art. 67(a)(2), 10 U.S.C. Sec. 867(a)(2).

91. United States v. Weymouth, No. 94-6004/AF, Order (May 12, 1995).

92. United States v. Weymouth, No. 94-6004/AF at Para. 1 (Sept. 29, 1995).

93. 489 U.S. 705 *[cited at]* , 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).

94. United States v. Weymouth, No. 94-6004/AFat Para. 9 (quoting Schmuck v. United States, 489 U.S. at 716).

95. Id. at Para. 12 (quoting Schmuck v. United States, 489 U.S. at 718).

96. Schmuck v. United States, 489 U.S. at 718-20 (quoting Giles v. United States, 144 F.2d 860, 861 (1944)) quoted in United States v. Weymouth, No. 94-6004/AF at Para. 13.

97. 10 U.S.C. Sec. 879.

98. United States v. Teters, 37 M.J. at 375.

99. United States v. Weymouth, No. 95-6004/AF at Para. 19.

100. Id. at Para. 25.

101. 10 U.S.C. Sec. 836(a).

102. Manual for Courts-Martial, Para. 158 (1969 rev. ed.); Manual for Courts-Martial, pt. IV, Para. 3b (1) (1984). Those paragraphs read:

(1) In general. A lesser offense is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged. This requirement of notice may be met when:

(a) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, larceny as a lesser included offense of robbery);

(b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious (for example housebreaking as lesser included offense of burglary); or

(c) All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, wrongful appropriation as a lesser included offense of larceny).

The notice requirement may also be met, depending on the allegations in the specification, even though an included offense requires proof of an element not required in the offense charged. For example, assault with a dangerous weapon may be included in a robbery.

By basing his conclusion on the President's definition of lesser-included offenses contained in the Manual, Judge Cox is subject to the same criticism that Judge Cook leveled against the Court of Military Appeals in Baker. Judge Cox stated that the President's exercise of his rule-making authority under Article 36(a), UCMJ, is "merely . . . acquiescence to decisions of [the Court of Military Appeals]." United States v. Baker, 14 M.J. at 372 (Cook, J., dissenting) (referring to changes in the 1969 Manual concerning multiplicity). The drafters of the 1969 Manual specifically noted that the definition of lesser-included offenses was "rewritten in accordance" with opinions of the Court of Military Appeals. Department of the Army Pamphlet 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, 28-1 (1970). The 1984 Manual definition was based on the 1969 Manual and the same cases. Manual for Courts-Martial, app. 21, p. 82 (1984). As stated earlier, in preparing the manuals for courts-martial, the President must compromise his rule-making authority and adopt Court of Military Appeals decisions or the manuals would be useless to military justice practitioners. Furthermore, if the basis for Judge Cox's opinion is a presidential rule, then the President should be able to change it if he so desires.

103. United States v. Browner, 937 F.2d 165 (5th Cir. 1991).

104. United States v. Weymouth, No. 94-6004/AF at Para. 23. Judge Cox confused the definition of a lesser-included offense with the determination of the sufficiency of a specification. The two are different. See infra note 111. Later in his opinion, Judge Cox expressly declined to decide whether the inclusion in the specification of notice that grievous bodily harm was intentionally inflicted would have been sufficient to raise that as a lesser-included offense. See United States v. Weymouth, No. 94-6004/ AF at n.5.

105. Id. at Para. 21.

106. Id. at Para. 24.

107. Id. at Para. 21. Judge Cox is correct in asserting that his "pleadings-elements" test does not involve evaluation of the proof adduced at trial which Schmuck condemned. However, he fails to mention that the Supreme Court has also condemned the practice of considering the pleadings. See United States v. Teters, 37 M.J. at 377 (citing United States v. Dixon, __ U.S. __, __, 113 S. Ct. 2849, 2851, 125 L. Ed. 2d 556 (1993) and Grady v. Corbin, 495 U.S. 508 *[cited at]* , 521 n.12, 110 S. Ct. 2084, 2093 n.12, 109 L. Ed. 2d 548 (1990)).

108. United States v. Weymouth, No. 94-6002/AF at Para. 24.

109. Id. at Para. 25.

110. Id. at Para. 29. Judge Cox's first proposition is inaccurate while the second is misleading. Certain federal statutes, especially in the drug and environmental areas, make criminal the failure to abide by Government regulations and executive orders. See, e.g., 21 U.S.C. Sec. 960, which provides criminal penalties for the manufacture of controlled substances listed in 21 U.S.C. Sec. 802, to which the Attorney General may add substances by regulation. The so-called offenses derived from custom or military common law are fully described in the Manual, which is an executive order and available to all military personnel. Furthermore, the elements test is used to determine lesser-included offenses, and to determine congressional intent for multiplicity, not to determine the sufficiency of a specification. The sufficiency of military and federal specifications are measured in the same manner and are required to meet the same standard. Every specification, whether military or federal, and whether for a purely statutory crime or one that involves violation of a regulation, requires a statement of the law and facts which comprise the allegation, not just a recitation of the statutory elements of the offense, despite language in R.C.M. 307(c)(3) to the contrary. A military specification "is," and a federal information or grand jury indictment "shall be," "a plain, concise, and definite statement of the essential facts constituting the offense charged." R.C.M. 307(c)(3); Fed. R. Crim. P. 7(c)(1) (emphasis added). The elements test is used to determine lesser-included offenses and to determine congressional intent for multiplicity, not to determine the sufficiency of a specification. Judge Cox's suggestion that reference to the pleadings is necessary to develop the elements of an offense which allege violation of a regulation is correct. The terms of the regulation alleged to have been violated are necessary elements of the offense.

111. R.C.M. 307(c)(4).

112. Fed. R. Crim. P. 8(a).

113. 113. United States v. Weymouth, No. 94-6002/AF at Paras. 31-32.

114. Id. at Para. 33. Judge Cox does not cite, nor could I find any cases to suggest this proposition is correct.

115. Id. at Para. 35-36 (citing R.C.M. 307(c)(4) (discussion)). A rational reading of the "policy" would suggest that this limitation was not meant to apply to cases in which the lesser-included offense was pled in the alternative. Judge Cox failed to note how any or all of these differences in procedure justify his conclusion that the military need not follow the Supreme Court's determination of the meaning of "an offense necessarily included in the offense charged."

116. Id. at Paras. 37-40. Judge Cox seems to have abandoned the "hierarchy or matrix of options" approach of Foster, in which he at least implied that the elements test did not apply to assault and sex cases. In Weymouth, he fails to mention the "hierarchy or matrix of options" approach and concludes that assault in which grievous bodily harm is intentionally inflicted is not a lesser-included offense of attempted murder using the "elements-pleadings" test. It is still unlikely, however, that he would have permitted convictions to stand for both attempted murder and assault in which grievous bodily harm was intentionally inflicted.

117. Using Judge Cox's pleadings-elements test, one would expect that had the prosecution alleged grievous bodily harm in the attempted murder specification, assault in which grievous bodily harm was intentionally inflicted would be a lesser-included offense. See id. at Para. 70 (Crawford, J., concurring in the result). However, Judge Cox declined to decide that issue. Id. at n.5.

118. Judge Cox found assault with intent to commit murder to be a lesser-included offense of attempted murder. Therefore, the military judge was correct in dismissing that specification as multiplicious. However, in a lengthy, separate section of his opinion, Judge Cox questioned whether assault with intent to commit murder was a separate offense under the UCMJ, or "was preempted by Congress through the enactment of Articles 80 and 118." Id. at Para. 57. While reserving that question for an appropriate case, Judge Cox found, "based on the plain meaning of the statutes and the legislative history, Congress authorized an offense of attempted murder and, at a minimum, did not expect servicemembers to be charged with both attempted murder and assault with intent to murder, arising out of the same act." Id.

119. Id. at Para. 59 (citations omitted).

120. Id. at Paras. 65-66.

121. Id. at Para. 62.

122. Id. at Paras. 68, 70 (Crawford, J., concurring in the result). Judge Crawford suggested that the lesser-included offenses listed in Part IV of the Manual serve as a bright-line rule, although she conceded such an approach would not work in every case.

123. United States v. Teters, 37 M.J. at 376.

124. United States v. Weymouth, 94-6002/AF at Para. 59.

125. Id. at Para. 23.

126. Id. at n.5.

127. Id. at Para. 69.

128. UCMJ, art. 56, 10 U.S.C. Sec. 856.

129. UCMJ, art. 125, 10 U.S.C. Sec. 925.

130. Manual for Courts-Martial, pt. IV, Para. 51(b)(1) (1995).

131. Id. at Para. 51(e)(4).

132. Id. at Para. 51(e)(1).

133. United States v. Morrison, 41 M.J. 482 *[cited at]* (1995).

134. Judge Cox declined to "decide whether the Government could create a lesser offense merely by alleging extra, non-essential elements." United States v. Weymouth, No. 94-6004 at n.5. But, Judge Cox suggested earlier in his opinion that assault with a dangerous weapon would be a lesser-included offense in the military if use of the dangerous weapon had been pled. Id. at Para. 23.

135. United States v. Baker, 14 M.J. at 371 (Cook, J., dissenting).

136. United States v. Weymouth, 40 M.J. 798 *[cited at]* , 805 (A.F.C.M.R. 1994) (Snyder, S.J., concurring in the result).

137. United States v. Barnard, 32 M.J. 530 *[cited at]* , 537 (A.F.C.M.R. 1990) (referring to multiplicity for sentencing).

138. United States v. Lloyd, No. 30846 (A.F.Ct.Crim.App. 24 Aug. 1995).

139. United States v. Teters, 37 M.J. at 378.

140. United States v. Booth, 673 F.2d 27, 29 (1st Cir.), cert. denied, 456 U.S. 978 *[cited at]* , 102 S. Ct. 2245, 72 L. Ed. 2d 853 (1982).

141. United States v. Felix, 503 U.S. 378 *[cited at]* , 112 S. Ct. 1377, 118 L. Ed. 2d 25 (1992).

142. Ex Parte Snow, 120 U.S. 274 *[cited at]* , 7 S. Ct. 556, 30 L. Ed. 658 (1887).

143. United States v. Johnson, 38 M.J. 88 *[cited at]* , 89 (C.M.A. 1993), cert. denied, __ U.S. __, 114 S. Ct. 1056, 127 L. Ed. 2d 377 (1994).

144. United States v. Appel, 31 M.J. 314 *[cited at]* , 321 (C.M.A. 1990). This is a pre-Teters case, but one would not expect the results to differ under Teters/Weymouth.

145. United States v. Johnson, 39 M.J. 707 *[cited at]* (N.M.C.M.R. 1993).

146. United States v. Morrison, 41 M.J. 482 *[cited at]* (1995).

147. United States v. Sepulveda, 40 M.J. 856 *[cited at]* (A.F.C.M.R. 1994).

148. United States v. Burks, 36 M.J. 447 *[cited at]* (C.M.A. 1993), cert. denied, 114 S. Ct. 187, 126 L. Ed. 2d 146 (1993).

149. United States v. Watkins, 21 M.J. 224 *[cited at]* (C.M.A.), cert. denied, 476 U.S. 1108 *[cited at]* , 106 S. Ct. 1956, 90 L. Ed. 2d 364 (1986).

150. United States v. Johnson, 27 M.J. 798 *[cited at]* (A.F.C.M.R. 1988), aff'd, 30 M.J. 53 *[cited at]* (C.M.A.), cert. denied, 498 U.S. 919 *[cited at]* , 111 S. Ct. 294, 112 L. Ed. 2d 248 (1990).

151. United States v. Lenoir, 39 M.J. 751 *[cited at]* (A.F.C.M.R.), pet. denied, 40 M.J. 276 *[cited at]* (C.M.A. 1994).

152. See Ladner v. United States, 358 U.S. 169 *[cited at]* , 79 S. Ct. 209, 3 L. Ed. 2d 199 (1958).

153. United States v. Guerrero, 28 M.J. 223 *[cited at]* (C.M.A. 1989).

154. United States v. Staples, 19 M.J. 741 *[cited at]* (A.F.C.M.R. 1984).

155. See United States v. Neblock, 40 M.J. 747 *[cited at]* (A.F.C.M.R. 1994); United States v. Gill, 37 M.J. 501 *[cited at]* (A.F.C.M.R. 1993); see also United States v. Hennis, 40 M.J. 865 *[cited at]* (A.F. C.M.R. 1994).

156. United States v. Teters, 37 M.J. at 377.

157. Under Judge Cox's elements-pleadings test, some may be tempted to tinker with the model rape specification to make carnal knowledge a lesser-included offense of a properly drafted rape specification. Avoid the temptation, until the breadth of Weymouth is fully resolved. Instead, charge rape and carnal knowledge in separate specifications, in the alternative.

158. United States v. Morris, 40 M.J. 792 *[cited at]* (A.F.C.M.R. 1994).

159. United States v. Teters, 37 M.J. at 377.

160. See United States v. Antonelli, 35 M.J. 122 *[cited at]* , 130-31 (Crawford, J., concurring in the result).

161. United States v. Dixon, __ U.S. __, __, 113 S. Ct. 2849, 2851, 125 L. Ed. 2d 556 (1993); Grady v. Corbin, 495 U.S. 508 *[cited at]* , 521 n.12, 110 S. Ct. 2084, 2093 n.12, 109 L. Ed. 2d 548 (1990).

162. United States v. Teters, 37 M.J. at 378 (citing Whalen v. United States, 445 U.S. 684 *[cited at]* , 695 n.10, 100 S.Ct. 1432 *[cited at]* , 1439 n.10, 63 L. Ed. 2d 715 (1980)).

163. Whalen v. United States, 445 U.S. at 684.

164. Harris v. Oklahoma, 433 U.S. 682 *[cited at]* , 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977).

165. United States v. McMillian, 33 M.J. 257 *[cited at]* (C.M.A. 1991) (harmless error because the trial court sentenced the accused for only the robbery); United States v. McVey, 4 U.S.C.M.A. 167, 15 C.M. R. 167 (1954).

166. United States v. Teters, 37 M.J. at 376.

167. United States v. Prince, 352 U.S. 322 *[cited at]* , 77 S. Ct. 403, 1 L. Ed. 2d 370 (1957).

168. United States v. Cedar, 437 F. 2d 1033 (9th Cir. 1971).

169. United States v. Albrecht, 43 M.J. 65 *[cited at]* , 68 (1995) (charge of making a bad check is separate from uttering the same check, even though both were alleged to have occurred at approximately the same time and place, and alleged to have violated Art. 123a, UCMJ, 10 U.S.C. Sec. 923a).

170. United States v. Teters, 37 M.J. at 377.

171. R.C.M. 307(c)(4) (discussion). However, such language is merely "precatory." United States v. Wheeler, 40 M.J. 242 *[cited at]* , 244 (C.M.A. 1994). The actual rule is found in R.C.M. 907(b)(3) and its discussion:

A specification may be dismissed upon timely motion by accused if: (B) The specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review and appellate action, and should be dismissed in the interest of justice.

Discussion: Ordinarily a specification should not be dismissed for multiplicity before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification. It may be appropriate to dismiss the less serious of any multiplicious specifications after findings have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification.

172. United States v. Foster, 40 M.J. 140 *[cited at]* , 144 n.4 (C.M.A. 1994).

173. United States v. Albrecht, 43 M.J. 65 *[cited at]* (1995).

174. United States v. Weymouth, No. 94-6004/AF at Para. 59.

175. See United States v. Foster, 40 M.J. at 143.

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39 AFLR 185, Prosecution Sentencing Evidence

Title of Article

Looking Beyond the Verdict: An Examination of Prosecution Sentencing Evidence

Author

Major Lauren K. Hemperley, USAF* Until the sentence proceedings are complete, the trial is not ended. [1]

Text of Article

I. INTRODUCTION

The vast majority of Air Force courts-martial reach the sentencing phase of the trial. [2] Sentencing proceeding are adversarial, albeit neither side has a burden of proof. Presentencing proceedings-where evidence is presented by both sides prior to arguments and deliberations on sentence- are governed by Rule for Court-Martial (R.C.M.) 1001. [3] This rule dictates those matters which the prosecution must present and explains the types of evidence trial or defense counsel may present.

All too often, trial counsel have a tendency to relax once the conviction is in and turn over the sentencing part of the trial to their opponents. More than one trial counsel has been heard to say "sentencing belongs to the defense." While the reality may seem that way at times, R.C.M. 1001 clearly gives trial counsel the first chance to present a variety of evidence for consideration in determining an appropriate sentence, and Air Force prosecutors should take advantage of this opportunity.

This article is intended to provide prosecutors some insight into the effective use of R.C.M. 1001, including evidence to "enhance" the accused's sentence. [4] It begins with a discussion of that most basic of sentencing evidence-the personal and service data of the accused. This is followed by a short discussion on the use of prior criminal convictions. A lengthier section covers evidence in aggravation, to include the use of expert testimony to show victim impact. The last and longest portion of this article covers the somewhat confusing area of rehabilitation evidence.

II. PERSONAL AND SERVICE DATE OF THE ACCUSED

A. Personal Data and Pretrial Restraint

Pursuant to R.C.M.1001(b)(1), the trial counsel is required to present evidence of the accused's service and pay data from the charge sheet, as well as the type and duration of any pretrial restraint. [5] Although the rule allows this information to be read orally to the court, the practice in the Air Force is for trial counsel to present a "personal data sheet" which combines the requirements of R.C.M. 1001(b)(1) and (2) as they pertain to personal and service data of the accused. The personal data sheet should contain: the accused's name, rank and other identifying information; base pay amount; awards and decorations; marital status and number of dependents; military aptitude test scores; date and term of current service and characterization of any prior service; prior courts- martial or nonjudicial punishment actions, if any; and the nature and duration of any pretrial restraint. The personal data sheet is prepared as a prosecution exhibit and offered to the military judge or court members for consideration.

B. Performance Reports

In addition to the accused's personal and service data taken from personnel records, the prosecution may present other information and documents from the personnel records. [6] "Personnel records" are defined as "any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused." [7]

One type of personnel record presented in nearly every trial is the accused's performance reports. In the past, the prosecution could elect whether or not to offer the accused's performance reports into evidence. Past practice is illustrated in United States v. Wingart, [8] a 1988 case decided by the United States Court of Military Appeals. [9] The trial counsel did not present the accused's Airman Performance Reports (APRs) as prosecution evidence because he hoped the defense would offer them, and he, in turn, would then offer some damaging rebuttal evidence. The defense did not offer the APRs even though they reflected a history of outstanding performance by the accused because they did not want to open the door to the prosecution's anticipated rebuttal evidence. Ultimately, the military judge ordered the APRs presented as a court exhibit, and the trial counsel was allowed to present rebuttal evidence. On appeal, the court ruled that the prosecution was not entitled to rebut the APRs because they were presented as a court exhibit. However, the court did not specifically preclude the prosecution from rebutting entries contained in the performance reports when those reports are offered as defense evidence. [10]

In order to avoid the "tactical tap-dancing" and "gamesmanship" described in Wingart, [11] Air Force regulations now require the prosecution to offer all of the accused's performance reports during presentencing. [12] This evidence is subject to proper objection by the defense; usually such an objection arises when the document involved is a referral report. [13]

Inexperienced trial counsel often neglect to read the accused's performance reports, perhaps assuming there is no point in reading them because they are required to be presented. On the contrary, performance reports may contain evidence of prior misconduct or attitude problems. They also will indicate whether the accused has displayed poor, average, or above average duty performance-a factor trial counsel should consider when fashioning the sentencing argument and cross-examination questions for defense character witnesses. The key then, is for trial counsel to closely examine an accused's

performance reports for they may prove quite useful.

C. Other Personnel Records

Other information contained in the accused's service records may also be admissible as prosecution evidence. Each service establishes requirements for maintaining records on their personnel. [14] Within the Air Force, records from the accused's personnel information file (PIF) must comply with the requirements of Air Force Instruction (AFI) 51-201 to be admissible. This instruction states that information from a PIF may be admitted in presentencing if: opposing counsel receives a copy of the document before trial; [15] there is evidence on the document or attached to it that reflects the accused received a copy of the document and had an opportunity to respond; [16] and the document is not more than five years old at the time of trial. [17]

Letters of reprimand (LOR) and records of counseling are typical documents maintained in a PIF. An issue frequently litigated in this area is whether the accused had an opportunity to respond to the document. Records of counseling which are maintained on an Air Force Form 174 (or a similar local form) have been deemed to meet the requirements of receipt and opportunity to respond. [18] Similarly, LORs which on their face annotate an accused's notice and opportunity to respond are clearly admissible. [19]

When may the prosecution use an attachment to show notice and the opportunity to respond? A good illustration exists in United States v. Dudley, [20] a 1992 case in which the prosecution offered an LOR which did not reflect on its face that the accused had notice or an opportunity to respond. The prosecution did provide an attachment to the LOR, an AF Form 1058. This form is used by commanders to place derogatory data-including LORs-into an unfavorable information file (UIF), a centralized dossier maintained in the individual's orderly room and within computer databases at the Military Personnel Flight. Prior to placing derogatory information into a UIF, the AF Form 1058 serves as notice and gives the individual three duty days to provide a response. The Air Force Court of Military Review held that the LOR in this case was admissible because the AF Form 1058 constituted an opportunity to respond to the creation of a UIF, which necessarily indicated an opportunity to respond to the underlying LOR.

Another useful case for Air Force practitioners is United States v. Donohue, [21] in which the Air Force Court of Military Review considered the issue of whether it was proper for the prosecution to use live testimony from a supervisor indicating that the accused had been offered the right to reply to a document. The court held that live testimony was improper, strictly applying the regulatory requirement that there be "evidence on the document or attached thereto." [22] The court was less strict in its interpretation of what evidence could be offered to show that the accused received a copy of the document. The court stated " [i]f an individual refuses to acknowledge he was afforded the opportunity to respond, we believe the counselor may make an appropriate entry on the document or an attachment which will [make] the document admissible." [23]

Other documents admissible as "personnel records" include: pretrial confinement records; [24] pay records; [25] and an order revoking the accused's status as a recruiter. [26] Beyond LORs, a UIF is often a good source of other prosecution presentencing evidence. [27]

A final issue to consider is whether documents inadmissible in the Government's case-in-chief can be offered in rebuttal. Pursuant to AFI 51-201, "relevant material contained in an accused's PIF may be admitted under R.C.M. 1001(d) for rebuttal purposes, even if it does not comply with [AFI 51-201, paragraphs] 8.5.2.2.1 and 8.5.2.2.2, if, in the military judge's discretion, other competent means of authenticating the materials have been presented to the court." [28] The military judge, of course, may still rule the document inadmissible under Military Rule of Evidence (M.R.E.) 403 [29] when its probative value is substantially outweighed by unfair prejudice, confusion, misleading the members, or by considerations of "undue delay, waste of time, or needless presentation of cumulative evidence."

D. Nonjudicial Punishment Records

Another extensively litigated area under R.C.M. 1001(b)(2) concerns the admissibility of prior nonjudicial punishment actions under Article 15 of the Uniform Code of Military Justice (Article 15 or nonjudicial punishment). [30] Generally, an Article 15 is admissible in the prosecution's case-in-chief if it is maintained properly and is no more than five years old. [31] The five-year period runs from the date the individual's commander notifies the accused of the intent to impose Article 15 punishment until the date of referral of charges. [32]

An Article 15 may be retrieved "from any file in which the record is properly maintained by regulation." [33] Ordinarily, this will be either the locally maintained UIF or the central repository for personnel records at the Air Force Personnel Center at Randolph AFB, Texas. [34] Copies of Article 15 documents maintained by a base legal office are not admissible. [35]

III. EVIDENCE OF PRIOR CONVICTIONS OF THE ACCUSED

Prior convictions of an accused-military or civilian-may be introduced by the prosecution in presentencing. [36] A conviction exists in a court- martial case when a sentence has been adjudged. [37] Thus, the prosecution may offer evidence of any prior court-martial case in which the accused received an adjudged sentence, even when an accused is sentenced to "no punishment." [38]

The fact that a conviction is pending appeal does not preclude its admissibility into evidence. [39] In consideration of the desire to provide a sentencing authority with complete information, however, R.C. M. 1001(b)(3)(B) authorizes defense counsel to present evidence that an accused's prior conviction has not been finally resolved on appeal.

Proof of civilian convictions is typically made by presenting an authenticated copy of the civilian court judgment. Proof of a prior court-martial conviction is made by either an authenticated copy of a court-martial order indicating the offenses for which the accused was convicted and the approved sentence, or

a DD Form 493, Extract of Military Records of Conviction.

IV. EVIDENCE IN AGGRAVATION

A. Overview

Rule for Court-Martial 1001(b)(4) allows the prosecution to present evidence reflecting "any aggravating circumstances directly relating to or resulting from the offense." Before 1984, evidence in aggravation was limited to evidence about the accused's past, his or her conduct during the commission of the offense, and evidence of harm to the victim. [40] Now, evidence in aggravation includes evidence of financial, social, psychological, or medical impact on the victim, in addition to evidence of a significant adverse impact on the unit mission or on discipline within the command. [41]

The terms "victim impact" and "mission impact" may appropriately be used as shorthand phrases to describe the types of aggravation evidence outlined in R.C.M. 1001(b)(4). The key to determining whether something is proper aggravation evidence is whether the information is directly related to or the result of the accused's crimes. Victim impact occurs in a variety of ways, and victim impact evidence may take a number of different forms. It is not limited to evidence concerning the victim only, but may also include evidence showing the impact the accused's conduct had on the victim's family. Mission impact evidence typically reflects a change in schedules, workloads, or morale within the accused's unit. In order for trial counsel to properly argue aggravation evidence in an effort to enhance the accused's punishment, [42] it is essential for prosecutors to understand the nature of aggravation evidence and the limits courts have placed upon its use.

B. Victim Impact

1. The General Rule

The seminal military case on the use of victim impact evidence is United States v. Pearson, [43] decided by the Court of Military Appeals in 1984. The accused had been charged with murder of a fellow Marine in an enlisted club. What made this a case of first impression was the Government's introduction of "independent evidence that the victim was an outstanding person and Marine, and that his family and community were devastated by his loss." [44] The court held that, as a general principle, this type of evidence was admissible, writing:

[W]e agree that courts-martial, like their civilian-judges counterparts, can only make intelligent decisions about sentences when they are aware of the full measure of loss suffered by all of the victims, including the family and the close community. This, in turn, cannot be fully assessed unless the court-martial knows what has been taken. [45]

The court believed that the military judge did not abuse his discretion by permitting evidence about the victim's character "and the magnitude of loss felt by his family and community," [46] but found fault

with the extent to which the testimony "blatantly invaded the province of the court members." [47] Specifically, the court found error when the victim's father testified, "I've been trying to think . . . how I can call my wife tonight, and how I can go back to Reeseville, and tell them that the verdict was negligent homicide." [48] Judge Cook, writing for the court, concluded that curative instructions were required even if the defense counsel failed to object to the testimony. [49]

The Pearson case, then, is important for trial counsel in two respects: first, it establishes the appropriateness of testimony regarding the impact of an accused's crime on the victim's family and the community where the victim lived or grew up; second, it delineates the boundary for such testimony by making it clear that a witness cannot violate the "fundamental sanctity" of the court-martial. [50]

2. Using Expert Testimony

Many victims experience changes in lifestyle, habits, relationships, or physical or emotional behavior. A very persuasive way to present this evidence is through the testimony of an expert witness trained and experienced in treating victims of the particular type of crime alleged. For example, in United States v. Hancock, [51] the Air Force Court of Military Review found a prosecution witness' testimony on "battered wife syndrome" to be proper aggravation evidence in a spousal assault case.

Similarly, prosecutors quite often use rape trauma syndrome (RTS) [52] evidence to explain a delayed report of rape or behavior by the victim which may seem to be inconsistent with a claim of rape. [53] As in the case of rape trauma syndrome, experts often discuss post-traumatic stress disorder in its other forms for the prosecution in findings [54] to explain that a child victim of sexual abuse displays characteristics consistent with this psychological disorder. However, trial counsel should not ignore the potential of such evidence in sentencing. Expert testimony explaining the nature of the trauma and the difficulties the victim may encounter in recovery can be very persuasive. The fact that a sexual assault victim suffers such symptoms as nightmares, flashbacks, sleeplessness, and decreased interest in normal activities-all as a direct result of the accused's crime-may very well persuade the fact-finder to impose a more severe sentence than if only the cold facts of the case were offered for consideration.

In many cases involving victim impact evidence, the prosecution's expert will speak with the victim and the victim's family before trial to acquire information on which to base an opinion. In other cases, the prosecution may offer expert testimony through a therapist who has treated the victim in the aftermath of the crime. The expert will ordinarily determine what kind and how much information he or she needs to render an opinion in the case. The basic requirement is, of course, that the expert base his or her opinion on information "reasonably relied upon by experts in the particular field." [55] The case of United States v. Hammond [56] indicates this is a relatively low threshold.

In Hammond, a family counselor testifying for the prosecution was recognized as an expert in the treatment of rape victims. The expert had no direct interaction with the victim. Her testimony consisted of a general discussion of the impact of rape on victims and a description of RTS. She also opined that the victim displayed some of the same effects and symptoms. The witness based her opinions on her

observations of the victim while testifying and reading the stipulation of fact in this guilty plea case. The Court of Military Appeals found this to be proper aggravation evidence in the prosecution's sentencing case. [57]

3. The Personal Side of Victim Impact Testimony

The testimony of family members or the victims themselves may be used to support expert testimony or, in some cases, to stand alone. In United States v. Bostick, [58] an indecent assault victim related to the court that after the incident she "had trouble sleeping and eating, experienced nightmares and episodes of crying, no longer socialized as much as before the incident, and was afraid to be alone." [59] This testimony, along with testimony from the victim's platoon supervisors regarding changes in her behavior, supported the expert psychologist's diagnosis of post- traumatic stress disorder. Other examples of victim impact evidence include the case of United States v. Tomlinson, [60] a 1985 Army case in which the victim testified that she "felt nauseous, could not eat or sleep, and felt extreme changes of mood," and United States v. Wilson, [61] in which the father of one of the victims in a carnal knowledge case was permitted to testify about his "family's frantic search for his daughter on the night of the incident and of their distress."

4. Trial Tip

In cases where evidence of post-traumatic stress disorder or a similar syndrome is presented in the prosecution's findings case (e.g., to explain delayed reporting), trial counsel should pay close attention to how the evidence might be useful in sentencing argument. In guilty plea cases, the prosecution's evidence on the facts of the offense is generally presented through a written stipulation of fact devoid of emotion. Careful attention should be paid to whether evidence of victim impact does exist, whether it may be persuasive to the factfinder, and, if so, in what form it should be presented (e.g., through expert witnesses or family members).

C. Mission Impact

Another form of aggravation evidence available to trial counsel is "mission impact" evidence. This may include evidence of such things as the effect of an accused's crimes on morale in his or her unit or changes in duty schedules resulting from an accused's absence from the work center. The key to admissibility of this type of evidence is to show a nexus between the offense and the impact on the unit or mission. [62]

In some cases, mission impact evidence has been presented in the form of testimony regarding the accused's loss of a security clearance. In United States v. Fitzhugh, [63] the accused, a deputy missile crew commander, was convicted of drug offenses. During the prosecution's sentencing case the accused's commander testified that the accused was required to be removed from the Personnel Reliability Program (PRP), which directly affected crew integrity. On appeal, the Air Force Court of Military Review held that " [c]learly, the consequences of the accused's removal from a missile crew and

its effect on the military mission are circumstances that the court may consider." [64] In contrast, the Court of Military Appeals in United States v. Antonitis [65] found evidence regarding the accused's loss of a security clearance to be improper, ruling that the prosecution did not attempt to show any connection between the revoked security clearance and the intelligence mission of the unit but, rather, that the prosecution intended to show the inability to obtain a clearance meant the accused had no place in the Army. The difference in these two cases is found in R.C.M. 1001(b)(4), which requires that aggravation evidence directly relate to or result from the offense.

The importance of this rule is plainly seen in United States v. Spears, [66] a case involving the theft of military property. The Air Force Court of Military Review held that it was improper for the trial counsel to present evidence and subsequently argue that the discovery of a stolen meal card during an inspector general visit was an aggravating factor. Citing Gordon, the court reiterated the rule that trial counsel must show a direct connection between the accused's offenses and the impact on the mission.

Trial counsel should include in his or her pretrial preparation an interview with the accused's commander, first sergeant, and supervisors to discover any mission impact evidence. Mission impact evidence can be as simple as demonstrating that the accused's co-workers had to perform extra duties because of the accused's absence or that work must be redelegated to avoid contact between offenders and victims.

V. EVIDENCE OF REHABILITATION POTENTIAL

A. Overview

A discussion of rehabilitation evidence begins with a look at the cases of United States v. Horner [67] and United States v. Ohrt. [68] These cases clearly laid out the fundamental requirements for the proper use of rehabilitation potential testimony, yet they were followed by a series of cases in which trial counsel made innovative and sometimes blatant attempts to do an end-run around the rule and replace proper rehabilitation potential testimony with a commander's recommendation for a punitive discharge. What at first appeared to be a simple test for use of rehabilitation potential evidence (or, more accurately, the lack of it) soon become a quagmire. The evolution of rehabilitation potential evidence can best be described by returning to the language in Ohrt: "We acknowledge that an elusive concept such as rehabilitative potential has the inherent quality of fostering confusion in the minds of members imposing sentence." [69] It can safely be said that this elusive concept had the misfortune of confusing trial practitioners as well.

While Horner and Ohrt dealt with the issue of a commander's testimony on rehabilitation potential and drew a clear picture of permissible and impermissible testimony, the later case of United States v. Aurich [70] muddied the waters as to what was proper rehabilitation potential evidence for the Government. As a result, trial counsel often shied away from presenting proper opinion testimony in cases where an accused's commander possessed a rational basis for his or her opinion. Some trial counsel were reluctant to offer expert testimony in the presentencing case-in- chief, and in cases where

the prosecution did attempt to offer such evidence, the attempts were sometimes thwarted by the military judge. Despite the plain language of R.C.M. 1001(b)(5), it sometimes seemed as though any evidence the prosecution had of an accused's lack of potential for rehabilitation was limited to those cases where the accused raised the issue first. Obviously, it was the rare case where an accused would offer evidence of good rehabilitation potential when the prosecution was ready and waiting with evidence in rebuttal. An overview of the key cases in this area is necessary to acquire an understanding of how and when to use rehabilitation potential evidence.

B. United States v. Horner

In United States v. Horner, [71] the Government called the accused's commander to testify as to the accused's lack of rehabilitation potential. In response to trial counsel's questions, the commander testified, "I don't think he [Horner] should be allowed to stay in the Army." [72] On appeal, the Court of Military Appeals discussed whether the commander's testimony was proper rehabilitation potential evidence. In discussing the definition of "rehabilitation," the court held that it denotes an individual's return to a specific status (e.g., retention in the armed forces) and return to society in general. [73]

Recognizing that the question of rehabilitation potential in a military court setting necessarily includes the question of retention in the armed forces, the court nevertheless found the commander's testimony erroneous because it was based not on an evaluation of the accused's character and potential but rather solely on the severity of the offense the accused committed. [74] The court went on to say that the function of a sentencing witness who testifies on rehabilitation potential should be to provide the sentencing authority with insight into the accused's character, rather than offering the witness' view of what an appropriate sentence should include, which is a question for the sentencing authority's determination. [75]

C. United States v. Ohrt

The Court of Military Appeals discussed this issue further in Ohrt. [76] In a prosecution for wrongful use of marijuana, trial counsel elicited opinion testimony from the accused's squadron commander that Ohrt had no potential "for continued service in the United States Air Force." [77] The court again discussed the interplay between "rehabilitation potential" and "retention in the armed forces" and rejected the lower court's opinion that it is nearly impossible to differentiate between the two concepts because they are so inextricably related to the question of punitive discharge. [78] Writing the majority opinion, Judge Cox said that there is clearly no place in a court-martial for a witness to give his or her opinion as to a punitive discharge. [79] He went on to say that the punitive discharge can be adjudged without regard to whether an accused has rehabilitative potential, stating "the punitive discharge was never intended to be a rehabilitative punishment." [80]

Thus, Judge Cox made it clear in Ohrt that the Court of Military Appeals considered issues of rehabilitation potential and punitive discharge to be separate and that an opinion as to an accused's rehabilitation potential must be based on the accused's character and potential; it cannot be a euphemism

for "the accused should be punitively discharged." [81]

Both Horner and Ohrt dealt with the admissibility of a commander's testimony about an accused's rehabilitation potential. In 1989, the same year Ohrt was decided, the Court of Military Appeals also addressed the question of whether expert testimony regarding rehabilitation potential in a cocaine use case was proper.

D. The Court Looks at Expert Testimony

The Court of Military Appeals in United States v. Gunter [82] clarified the state of the law concerning expert rehabilitation testimony offered under R.C.M. 1001(b)(5). The accused pled guilty to wrongful use of cocaine and unauthorized absence and offered evidence during the presentencing portion of the trial that he "was a likely candidate for rehabilitation and retention in the Air Force." [83] In rebuttal, the trial counsel introduced testimony from the head of the base drug and alcohol abuse control program, who stated his belief that the accused had a "poor" potential for rehabilitation. [84] After determining that the witness had a "rational basis" for his opinion based on his review of the accused's records from the drug rehabilitation program, the Court of Military Appeals held that "expert testimony about appellant's chances of successfully overcoming his drug addiction, in light of his case history, is exactly the sort of statement envisioned in Ohrt and R.C.M. 1001(b)(5)." [85] The witness's knowledge of the accused's case file was "sufficient information and knowledge" about the accused. [86]

E. The Aurich Footnote

The Court of Military Appeals again confronted the rehabilitation potential issue in United States v. Aurich. [87] Private Aurich was convicted of using and distributing marijuana. The accused's commander testified that he did not want the accused back in his company. [88] On appeal, the court asked, "should an accused receive greater punishment merely because his commander does not want him?" [89] The answer was "no." The court held that the commander's testimony was inadmissible and had no place in a court-martial until it became relevant. [90] In footnote 3 of the opinion, the court wrote that it is a "rare case" where the Government should be allowed to introduce rehabilitation potential evidence other than in rebuttal, after the accused has placed his or her potential for rehabilitation into issue. Well-known language from the opinion reads:

Having rehabilitation potential is a mitigating factor. Lacking rehabilitative potential is not an aggravating factor. . . . In other words, if an offense does not ordinarily warrant a punitive discharge, then it would be inappropriate to award such a discharge to an accused because he "lacked rehabilitative potential. [91]

This time the court went further than it had in Ohrt and provided a clear indication that attempts by the Government to offer rehabilitation potential evidence in its case-in-chief were to be viewed unfavorably. The court nevertheless affirmed the conviction and sentence in Aurich, finding no prejudice in the judge-alone trial.

Although the court in Aurich tried to make clear that it viewed rehabilitation potential and retention in the armed forces as two distinct concepts, the language in footnote 3 clearly ties the two together. Recognizing this, Judge Sullivan wrote in a separate opinion, "I agree that this [testimony that the commander did not want the accused back in his unit] is a valid sentencing consideration at a court-martial as a component of the accused's 'character and potential' in general." [92] He went on to explain his view that the commander's testimony in Aurich was more specific than the statements in Horner and Ohrt regarding the accused's potential for continued military service. In Aurich, the commander limited his opinion to whether or not the accused should return to the same unit, and Judge Sullivan found this permissible under R.C.M. 1001(b)(5). [93]

F. The Waters are Further Muddied

Further confusing the issue, on the same day Aurich was decided, the Court of Military Appeals issued what appear to be contradictory rulings regarding seemingly identical testimony in two other cases. In United States v. Kirk, [94] the accused's squadron commander testified, "I think it would be, you know, a waste of Air Force resources to retain her," testimony which the court found to be plain error. [95] Curiously, however, in United States v. Wilson, [96] the court found the opinion of the accused's first sergeant that "I don't believe [the accused] would be able to function as a senior NCO in the United States Army" to be proper. The court determined the first sergeant had a rational basis for his opinion, specifically, that he had personal knowledge of the accused's duty performance and character during a period of more than two years. The court then went on to address the substance of the first sergeant's testimony. [97] Finding this testimony violated Horner, Ohrt, and Aurich, the court nevertheless found the error was waived because trial defense counsel's objections did not address the issue of whether the testimony was an improper comment on discharge from the service, but whether the witness had a basis for his opinion. [98]

The Wilson opinion is difficult to reconcile with Horner/Ohrt. Not only does it appear to contradict other case law, but it also has internal contradictions. The witness' opinion had a sufficient basis (Ohrt) and was not based solely on the accused's offenses (Horner); therefore, the court concluded, the witness could properly render an opinion on rehabilitation potential. However, the substance of the testimony-that the accused could no longer function in the Army-clearly violated the Horner/Ohrt holdings that rehabilitation potential is not a question of retention or separation. Interestingly, Wilson continues to be followed and is cited in several cases since the opinion was issued. [99]

The Court of Military Appeals tried to clarify its position on rehabilitation potential evidence in United States v. Claxton, [100] a Coast Guard case decided in 1991. The accused, an electrician's mate, pled guilty to destruction of military property, use of marijuana, larceny, and housebreaking. The property offenses were committed while the accused was on duty as officer-of-the-day in an attempt to cover up what he knew would be a positive urinalysis. The accused's commander testified he did not believe Claxton had any rehabilitation potential because he betrayed the trust and confidence he held as an officer-of-the- day. Consistent with Horner/Ohrt and their progeny, the court equated this testimony to an opinion based on the severity of the offenses alone and found its admission at trial improper. [101]

However, in responding to the lower court's opinion on the issue of whether prosecution rehabilitation potential evidence was limited to rebuttal, the court said:

We disagree, however, with the Court of Military Review that the Government can only introduce rehabilitative-potential evidence in rebuttal. We are not aware of having made such an assertion; if we have, we hereby disown it. Nonetheless, as our cases demonstrate . . . the scope of such preemptive testimony is quite limited, and those limits were exceeded in this case. [102]

By the early 1990s then, it simply was not clear to Air Force prosecutors what type of opinion evidence would be appropriate-if any opinion was allowed at all. Despite the plain language of R.C.M. 1001(b)(5), the Court of Military Appeals decision in Aurich effectively limited prosecution evidence of an accused's lack of rehabilitation potential to the Government's rebuttal case. Claxton should have clarified this issue, but some Air Force trial judges continued to rely on the Aurich footnote as authority for limiting the prosecution's use of rehabilitation potential evidence to its rebuttal case. Additionally, Aurich-a case involving the testimony of a commander-became a guide for determining the relevance of expert testimony on an accused's rehabilitation potential. [103] Although the Court of Military Appeals had found expert testimony on this issue to be proper in Gunter and United States v. Stinson, [104] some trial judges still precluded the prosecution from presenting this type of evidence.

G. United States v. Williams

The use of expert testimony seems finally to have been resolved in United States v. Williams, [105] decided in late 1994 by the Court of Appeals for the Armed Forces. In that case, an Air Force sergeant was convicted of multiple violent offenses involving four different women over a period of more than one year. In sentencing, the Government called as its only witness an Air Force forensic psychiatrist who testified, among other things, that the accused was a "dangerous man." [106] The defense objected on the basis of speculation, and the objection was overruled.

The Air Force Court of Military Review addressed the appropriateness of "future dangerousness" testimony in its review of Williams in 1992. [107] Returning to the Horner/Ohrt line of cases, the Air Force court held this type of testimony was not proper as either rehabilitation or aggravation evidence. Borrowing from the Aurich footnote, the court said that "a low likelihood of future dangerousness is mitigating, but a high likelihood is not an aggravating factor." [108] Nevertheless, the court found harmless error.

Upon further appeal, the Court of Appeals affirmed the lower court's decision, but disagreed with its conclusion that expert testimony as to future dangerousness was improper. The Court of Appeals determined that Horner/Ohrt and their progeny limited a commander's testimony on rehabilitation potential, requiring that this type of opinion testimony must be based on an evaluation of the accused's character and not just his crimes. In Williams, however, the court held that "expert testimony on future dangerousness may be relevant rehabilitation potential evidence." [109] The court reiterated its holding in Stinson that, " [i]n a sentencing rehearing, an accused's potential for rehabilitation is a proper subject

of testimony by qualified experts." [110] The Supreme Court of the United States has also found this type of evidence proper. [111]

Of course, expert testimony in this area must have a proper basis. [112] Ideally, this will include detailed research in the area (e.g., statistics on recidivism rates), access to investigative reports, access to the accused's statements, a chance to interview the victims and their families, and an opportunity to hear or review the testimony of the victims and other witnesses.

H. Another Change?

Nothing has changed the law concerning the testimony of commanders with regard to rehabilitation evidence under R.C.M. 1001(b)(5), at least for Air Force practitioners. In a recent case, however, the Army Court of Review found a commander's opinion on the accused's lack of rehabilitation potential to be proper, even though cross-examination showed that the commander's assessment was of the accused's potential for future military service and not his potential to be a good citizen. [113] The Army Court of Military Review in United States v. Sylvester [114] found "opinions of rehabilitation potential limited to return to military status are within the scope of opinions contemplated by RCM 1001(b)(5)," and then continued, "whether an RCM 1001(b)(5) opinion applies to military service goes to the weight to be given the evidence not to its admissibility." [115] Finally, consistent with Judge Sullivan's opinions in previous rehabilitation potential cases decided by the Court of Military Appeals, the Army court stated, "We hold RCM 1001(b)(5) opinion evidence is not per se inadmissible merely because it is shown to be based solely on the witness's view of the appellant's potential for military service." [116]

I. Trial Tip

Unless the Court of Appeals for the Armed Forces adopts Sylvester, Air Force prosecutors are advised to abide strictly by Horner/Ohrt. After determining that a commander's or supervisor's opinion on the accused's potential for rehabilitation is helpful (in many cases it is not), the trial counsel should carefully lay out the foundation for the opinion. A few examples of foundation questions are: How long has the accused worked for you? What kind of interaction have you had with the accused at work? Have you talked with the accused in any social circumstances? Have you ever counseled the accused regarding any personal problems he or she had? Trial counsel must also ensure the witness is able to separate the question of an accused's rehabilitation potential from the witness's belief as to whether or not the accused should remain in the Air Force. The following question is helpful in focusing a witness on the correct issue: "Sergeant Smith, if I define rehabilitation potential as the ability to learn from one's mistakes and correct one's behavior, do you have an opinion as to this accused's potential for rehabilitation?" Following the witness's affirmative answer to the preliminary question, he or she is asked to give the actual opinion.

In addition to the proper use of a commander's or supervisor's testimony, there is a definite opportunity for the prosecution to present evidence of an accused's poor rehabilitation potential through an expert witness, based on R.C.M. 1001(b)(5) and Williams. Trial counsel are able to elicit an expert opinion as

to an accused's potential for rehabilitation and predictions of future dangerousness. Thus, in any case involving crimes of substance abuse or violence (e.g., rape, indecent acts with a child), the prosecution should explore the potential use of Stinson- or Williams- type testimony.

III. CONCLUSION

As the Air Force Court of Military Review has stated, "The trial counsel bears the same sort of adversary duty in prosecuting cases as does the defense counsel in defending an accused." [117] Prosecutors in the military have a significant opportunity to influence an accused's sentence. Rule for Court-Martial 1001 provides the framework, but it is the responsibility of every trial counsel to build the Government's case. This is not the time for the prosecution to relax; rather, it is the time for trial counsel to display the strongest advocacy skills on behalf of their client. Preparation for the prosecution case requires more than good courtroom advocacy, however. It requires a strong knowledge of the rules, dedication to investigating, developing, and preparing sentencing evidence-as well as plenty of creativity. Hundreds of military cases discuss sentencing evidence. Through the sample of cases discussed here, it is easy to see how the prosecution can use R.C.M. 1001 to convince the factfinder to adjudge a sentence not only appropriate to the accused and the crime, but one which will best serve the interests of the Air Force.

Footnotes

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1. United States v. Strand, 6 U.S.C.M.A. 297, 20 C.M.R. 13 (1955).

2. Between 1982 and 1992, more than 6800 general courts-martial were tried in the Air Force, with a conviction rate of more than 93%. During the same period, more than 9300 special courts-martial were held with 92% resulting in a conviction. Department of Justice, Sourcebook of Criminal Justice Statistics (1993). For 1993 and 1994, the Air Force tried 1819 general and special courts-martial; convictions resulted in 1670 cases, for a conviction rate of nearly 92%. Memorandum from AFLSA/ JAJT (15 Feb. 1995).

3. Manual for Courts-Martial, ch. II, Rules for Courts-Martial (1995) [hereinafter R.C.M.].

4. Although many judge advocates believe a prosecutor cannot seek a more severe punishment simply because an accused has a record of prior nonjudicial punishment or a criminal conviction, the military appellate courts have stated just the opposite. The Navy-Marine Court of Criminal Appeals recently defined the term "enhance" to mean "either to increase or 'escalate' the maximum authorized punishment, or to increase the sentence awarded within the maximum authorized punishment, in other words to 'aggravate.'" United States v. Kelly, 41 M.J. 833 *[cited at]* , 834 (N.M.Ct.Crim.App. 1995). See also United States v. Sauer, 15 M.J. 113 *[cited at]* , 114 (C.M.A. 1983) (nonjudicial punishment

"tends to increase the accused's sentence by demonstrating that earlier efforts to rehabilitate him have been unsuccessful"); United States v. Mack, 9 M.J. 300 *[cited at]* (C.M.A. 1980) (court recognized validity of prior nonjudicial punishment to "increase the maximum punishment to which appellant would be subject); United States v. Booker, 5 M.J. 238 *[cited at]* (C.M.A. 1977) (prior court-martial conviction or Article 15 punishment "may be used for the purpose of enhancement of the punishment"); United States v. Nagel, 46 C.M.R. 397 (N.M.C.M.R. 1972) (error for judge to admit prior special court-martial conviction "as evidence of a prior conviction for the purpose of enhancing the punishment;" error related to date of prior conviction, not improper use).

5. R.C.M. 1001(b)(1). Section I of the Charge Sheet, DD Form 458, contains the accused's name, Social Security number, rank, pay grade, unit, initial date and term of current service, monthly pay, and the nature and beginning date of any pretrial restraint.

6. R.C.M. 1001(b)(2).

7. Id. See also Air Force Instruction (AFI) 51-201, para 8.5.1, Administration of Military Justice (28 July 1994) [hereinafter AFI 51-201].

8. 27 M.J. 128 *[cited at]* (C.M.A. 1988).

9. Effective Oct. 5, 1994, pursuant to Pub. L. No. 103-337, Sec. 924, 108 Stat. 2663, the United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces and each Court of Military Review was renamed the Court of Criminal Appeals.

10. Id. at 133.

11. Id. at 131, 133.

12. See AFI 51-201, para 8.5.4.

13. See AFI 36-2403, The Enlisted Evaluation System, para. 3.7 and fig. 3.1 (20 July 1994).

14. R.C.M. 1001(b)(2).

15. AFI 51-201, para 8.5.2.1.

16. Id. at para 8.5.2.2.1. The Air Force Court of Military Review has required the prosecution to abide strictly by this rule. See United States v. King, 29 M.J. 535 *[cited at]* (A.F.C.M.R. 1989) (error for the trial judge to admit two letters of reprimand which reflected the accused's receipt but did not show an opportunity to respond).

17. Id. at para 8.2.2.2.

18. United States v. Shepherd, 30 M.J. 652 *[cited at]* (A.F.C.M.R. 1990).

19. AFI 36-2907, para. 3.2, Unfavorable Information File (UIF) Program (22 July 1994), requires a written reprimand or admonition to state that the individual has three duty days to submit a response.

20. 34 M.J. 603 *[cited at]* (A.F.C.M.R. 1992).

21. 30 M.J. 734 *[cited at]* (A.F.C.M.R. 1990).

22. Id. at 735.

23. Id. at 736.

24. See United States v. Perry, 20 M.J. 1026 *[cited at]* (A.C.M.R. 1985). But cf. United States v. Fontenot, 29 M.J. 244 *[cited at]* (C.M.A. 1989) (official confinement forms were admissible but not handwritten notes documenting the accused's misconduct while in pretrial confinement).

25. See United States v. Green, 21 M.J. 633 *[cited at]* (A.C.M.R. 1985).

26. United States v. Stone, 37 M.J. 558 *[cited at]* (A.C.M.R. 1993).

27. R.C.M. 1001(b)(2). The UIF forms themselves-AF Form 1058, Unfavorable Information File Actions, and AF Form 1137, UIF Summary-are generally admissible if they are properly maintained. A properly maintained UIF will not, however, render otherwise inadmissible evidence admissible. See United States v. Cruzado-Rodriguez, 9 M.J. 908 *[cited at]* (A.F.C.M.R. 1980) (a notification revealing the accused's entry into a drug abuse prevention program was held inadmissible on grounds of confidentiality).

28. AFI 51-201, para 8.5.2.3, citing United States v. Strong, 17 M.J. 263 *[cited at]* (C.M.A. 1984) (an Article 15 which was erroneously maintained in the accused's personnel file beyond its expiration date was admitted as rebuttal by the prosecution). This is a change from the previous directives, which did not differentiate between the prosecution's case-in- chief and rebuttal. As a result, the Air Force Court of Military Review held that the regulatory provisions pertaining to documents from an accused's PIF applied equally to the prosecution's rebuttal evidence. See United States v. Smith, 29 M.J. 736 *[cited at]* (A.F.C.M.R. 1989).

29. Manual for Courts-Martial, pt. III, Military Rules of Evidence 403 (1995) [hereinafter M.R.E.]. See also United States v. Martin, 20 M.J. 227 *[cited at]* (C.M.A. 1985), cert. denied, 107 S.Ct. 323 *[cited*

at] , 479 U.S. 917 *[cited at]* , 93 L.Ed.2d 295) (1985) ("The same balancing test required under Mil.R. Evid. 403 applies equally to evidence received during findings and sentencing.").

30. 10 U.S.C. Sec. 815. See, e.g., United States v. Yarbough, 33 M.J. 122 *[cited at]* (C.M.A. 1991) (failure of Article 15 form to indicate whether appeal process was final was not error); United States v. Dyke, 16 M.J. 426 *[cited at]* (C.M.A. 1983) (admission of Article 15 record without signatures on form was plain error); United States v. Mack, 9 M.J. 300 *[cited at]* (C.M.A. 1980) (records of prior Article 15 punishment reflect prior performance of accused and prior rehabilitative measures taken); United States v. Booker, 5 M.J. 238 *[cited at]* (C.M.A. 1977) (unless Article 15 record shows accused's right to counsel was explained to him, the record is inadmissible at a later trial); United States v. Kelly, 41 M. J. 833 *[cited at]* (N.M.Ct.Crim.App. 1995) (court overruled Booker and held trial judge properly admitted Article 15 record which did not reflect whether accused was advised of right to counsel).

31. Article 15 records more than five years old may be used in rebuttal. AFI 51-201, para. 8.5.3.

32. AFI 51-201, para 8.5.3.

33. Id. There has been some litigation concerning the scope of official files with respect to Article 15 documents. The "official file" consists of the AF Form 3070, and, if applicable, the decision letter regarding filing of the Article 15 action in the officer selection folder. Evidence supporting the Article 15 action and written materials submitted by the offender are not part of the official record. AFI 51-202, para 14.2, Nonjudicial Punishment Guide (14 Apr. 1994).

34. It is standard practice for the NCOIC of the Military Justice section of the base legal office to request derogatory data from the Air Force Personnel Center well in advance of trial.

35. United States v. Elrod, 18 M.J. 693 *[cited at]* (A.F.C.M.R. 1984).

36. R.C.M. 1001(b)(3).

37. Id.

38. Rule for Courts-Martial 1002 authorizes a court to impose a sentence of no punishment, but no punishment cases are not specifically addressed in the discussion of prior convictions. Nonetheless, because a court is authorized to impose no punishment and the convening authority may take action approving such a sentence, the case would be final and there would be a "sentence" for purposes of R.C. M. 1001(b)(2). Whether trial counsel would actually offer a prior conviction with a sentence of no punishment would be a tactical decision based on the circumstances of the individual case.

39. The Article 64, UCMJ, or Article 66, UCMJ, appeal must be complete before a conviction from a summary court-martial or a special court- martial without a military judge may be admitted. R.C.M. 1001

(b)(2)(B).

40. United States v. Pearson, 17 M.J. 149 *[cited at]* (C.M.A. 1984).

41. R.C.M. 1001(b)(4) (discussion). R.C.M. 1004 governs aggravating factors in capital cases.

42. See discussion accompanying note 5, supra. See also Major Larry Gaydos & Major Paul Capofari, A Methodology for Analyzing Aggravation Evidence, The Army Lawyer, 6-17 (July 1986).

43. 17 M.J. 149 *[cited at]* (C.M.A. 1984).

44. Id. at 152.

45. Id. at 153. See also United States v. Fontenot, 26 M.J. 559 *[cited at]* , 563 (A.C.M.R. 1988), rev'd as to sentence, 29 M.J. 244 *[cited at]* (C.M.A. 1989).

46. Id. at 152.

47. Id. at 153.

48. Id. at 151.

49. Id. at 153.

50. Id.

51. 38 M.J. 672 *[cited at]* (A.F.C.M.R. 1993).

52. Rape trauma syndrome is a subtype of post-traumatic stress disorder (PTSD), which involves the development of certain symptoms subsequent to an extremely traumatic event. The victim often reexperiences the event, particularly at certain times of the year (e.g., the anniversary of the event) or in certain circumstances (e.g., riding in an elevator if the rape occurred in an elevator). American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994).

53. United States v. Houser, 36 M.J. 392 *[cited at]* (C.M.A. 1993). See also United States v. Carter, 26 M.J. 428 *[cited at]* (C.M.A. 1988); United States v. Carter, 22 M.J. 771 *[cited at]* (A.C.M.R. 1986).

54. United States v. Johnson, 35 M.J. 17 *[cited at]* (C.M.A. 1992). This case also provides a good discussion of the dangers of using this type of testimony because it sometimes becomes an assessment by the expert of the victim's credibility. See generally Captain Saritha R. Angilvel, Expert Testimony in

Child Sexual Abuse Cases: Avoiding the "Profile" Trap, 39 A.F. Law Rev. (this issue) (1996).

55. M.R.E. 703. See generally S. Saltzburg et al., Military Rules of Evidence Manual (3d ed. 1991).

56. 17 M.J. 218 *[cited at]* (C.M.A. 1984).

57. Id. at 221.

58. 33 M.J. at 849.

59. Id. at 851.

60. 20 M.J. 897 *[cited at]* , 899 (A.C.M.R. 1985).

61. 35 M.J. 473 *[cited at]* (C.M.A. 1992). For a different look at victim impact evidence, see United States v. Schwarz, 32 M.J. 823 *[cited at]* (A.C.M.R. 1987) (prosecution presented a copy of the Army regulation which limited a soldier's pecuniary liability to the Government in cases of damage or destruction of government property, arguing the difference between the value of the ambulance and the amount which could be recovered from the accused was a matter in aggravation); United States v. Sargent, 18 M.J. 331 *[cited at]* (C.M.A. 1984) (court reversed accused's conviction on involuntary manslaughter because the unforeseen heroin overdose death of a buyer was insufficient to sustain a conviction, but also held that death from an overdose after obtaining drugs from an accused was proper evidence in aggravation).

62. See United States v. Gordon, 31 M.J. 30 *[cited at]* (C.M.A. 1990) where the Court of Military Appeals set forth a clear mandate regarding aggravation evidence: "The standard for admission of evidence under this rule is not the mere relevance of the purported aggravating circumstance to the offense. See Mil.R.Evid. 401 and 402. Instead, a higher standard is required, namely, the aggravating circumstance proffered must directly relate to or result from the accused's offense."

63. 14 M.J. 595 *[cited at]* (A.F.C.M.R. 1982), pet. denied, 15 M.J. 165 *[cited at]* (1983).

64. Id. at 598. See also United States v. Thornton, 32 M.J. 112 *[cited at]* (C.M.A. 1991)(company commander's testimony about accused's loss of access to classified information, plus his explanation of the time and effort spent by the Army on training the accused, "gave the members some insight into the impact of the offenses on the unit's mission.")

65. 29 M.J. 217 *[cited at]* (C.M.A. 1989).

66. 32 M.J. 934 *[cited at]* (A.F.C.M.R. 1991).

67. 22 M.J. 294 *[cited at]* (C.M.A. 1986).

68. 28 M.J. 301 *[cited at]* (C.M.A. 1989).

69. Id. at 583.

70. 31 M.J. 95 *[cited at]* (C.M.A. 1990).

71. 22 M.J. at 294.

72. Id. at 295.

73. Id. at 296.

74. Id. at 294.

75. Id. at 296.

76. 28 M.J. at 301.

77. Id. at 307.

78. Id. at 304. The Air Force Court of Military Review affirmed the conviction and sentence by operation of law because the court was evenly divided; four judges voted to affirm the trial court decision and four voted to reverse it.

79. Id. at 305.

80. Id. at 306, quoting Lance, A Criminal Punitive Discharge-An Effective Punishment? 79 Mil.L.Rev. 1, 17 (1978).

81. 28 M.J. at 307.

82. 29 M.J. 140 *[cited at]* (C.M.A. 1989).

83. Id. at 141.

84. Id.

85. Id. at 142.

86. Id. at 141, citing United States v. Ohrt, 28 M.J. at 304.

87. 31 M.J. 95 *[cited at]* (C.M.A. 1990).

88. Id. at 96.

89. Id. at 97.

90. Id.

91. Id.

92. Id. at 100 (Sullivan, J., concurring).

93. Id. at 101 (Sullivan, J., concurring).

94. 31 M.J. 84 *[cited at]* (C.M.A. 1990).

95. Id. at 89 (C.M.A. 1990). In addition to addressing the substance of the commander's testimony in this case, the court also found-and the Government conceded-that there was no rational basis for the opinion. An excerpt of the testimony reveals why:

Q: Do you know the accused in this case? A: Yes, I do. Q: If she's present, would you point to her and state her name. A: (Pointing at the accused) It's, uh, uh, Airman uh-I've got so many. Uh, what's her name?

96. 31 M.J. 91 *[cited at]* (C.M.A. 1990).

97. The applicable portion of the testimony is as follows:

Q: And what is that opinion? A: I don't believe that he got-that he would be able to function as a senior NCO in the United States Army. Q: Would you want him back in your unit? A: No, sir. Q: Do you believe he can fulfill a role anywhere in the Army? A: Not really, sir. Id. at 92.

98. Id. at 94.

99. See, e.g., United States v. Goodman, 33 M.J. 84 *[cited at]* (C.M.A. 1991); United States v. Pompey, 33 M.J. 266 *[cited at]* (C.M.A. 1991)

100. 32 M.J. 159 *[cited at]* (C.M.A. 1991).

101. Id. at 161-62.

102. Id. (emphasis added). See also United States v. Pompey, 33 M.J. at 266, where the court held that the rational basis test applies to opinion testimony offered either in the case-in-chief or in rebuttal. Presenting rehabilitation evidence in rebuttal does not relieve the prosecution's burden of presenting a sufficient foundation for the opinion.

103. See United States v. Williams, 35 M.J. 812 *[cited at]* (A.F.C.M.R. 1992) (court held that evidence of the accused's poor prognosis for rehabilitation was not relevant under R.C.M. 1001(B)(5)).

104. 34 M.J. 233 *[cited at]* (C.M.A. 1992) (social worker allowed to testify in child sexual abuse case about victim impact and accused's poor prognosis for rehabilitation).

105. 41 M.J. 134 *[cited at]* (C.M.A. 1994).

106. Id. at 135.

107. 35 M.J. 812 *[cited at]* (A.F.C.M.R. 1992). For an earlier case discussing future dangerousness in the context of prosecution sentencing argument, see United States v. Williams, 23 M.J. 776 *[cited at]* (A.C.M.R. 1987).

108. 35 M.J. at 817.

109. 41 M.J. at 138.

110. 34 M.J. at 233.

111. See United States v. Williams, 41 M.J. at 139, quoting Barefoot v. Estelle, 463 U.S. 880 *[cited at]* , 103 S.Ct. 3383 *[cited at]* (1983) ("Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.").

112. M.R.E. 703. See also United States v. Stark, 30 M.J. 328 *[cited at]* (C.M.A. 1990) (forensic psychiatrist's personal interviews with child victims and their father, observations of victims in court, and viewing of videotaped interviews provided sufficient basis for opinion on effects of child sexual abuse). Cf. United States v. Hammond, 17 M.J. 218 *[cited at]* (C.M.A. 1984) (director of rape crisis center allowed to testify about rape trauma even though her only connection to the case was reading the stipulation of fact and observing the victim in court).

113. 38 M.J. 720 *[cited at]* (A.C.M.R. 1994).

114. Id. at 723.

115. Id.

116. Id.

117. United States v. Roman, 45 C.M.R. 492, 494 (A.F.C.M.R. 1972).

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39 AFLR 207, Prior Inconsistent Statements

Title of Article

Prior Inconsistent Statements and the Military Rules of Evidence

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Text of Article

When you have no basis for argument, abuse the plaintiff. [1] -Cicero

I. INTRODUCTION

Whether you are a prosecutor or a defense counsel, your goal in cross- examination is always the same- defuse or destroy the effectiveness of the opposing witness's testimony and impeach the witness either in substance or credibility. This challenging task may be accomplished in numerous ways. Counsel may show the witness's testimony is influenced by bias, prejudice, or a motive to misrepresent, and thus should not be believed. [2] In addition, counsel may gain the desired result through the use of a prior conviction. [3] Either of these methods, or others for that matter, [4] can achieve the goal of calling into question the believability of the witness. For purposes of this article, however, the discussion focuses on a very specific form of impeachment -the use of a prior inconsistent statement. This powerful technique is perhaps one of the most frequently used in courts-martial, but is nevertheless widely misunderstood. [5]

Consider the following exchange between a military judge and the trial and defense counsel concerning the defense counsel's attempt to impeach a witness with her prior inconsistent statement. The military judge already had ruled he would not allow the defense to introduce the written statement which contained the actual inconsistencies.

DC. Okay, sir. He [an investigative agent] did the interview. I could elicit from him what he heard her say without the use of the statement.

TC. I would object to that also.

MJ. The rule for your objection?

TC. As to hearsay. He had her here, let her say what she wanted to tell him.

MJ. [To defense counsel] Why is this not classic hearsay?

DC. I am not offering it as to the proof of the prior statement being true, I am offering it to show that she has made prior inconsistent statements. I understand there to be a hearsay exception under [Military Rule of Evidence] 801.

MJ. Counsel, you have not shown me an exception to hearsay.

DC. Okay, sir, I will-

MJ. I don't see that it comes under [Military Rule of Evidence] 608. This witness talking about what that witness said to me or said to her-

DC. All right, sir. I will withdraw that and only question him regarding the method of interrogation to show that her story changed. And that is not inconsistent with what I asked her. [6]

Confusing? In the course of a very short exchange, the participants in this conversation went through a number of issues: Is it a prior inconsistent statement solely for purposes of impeachment? Is it hearsay? Is it an exception to the hearsay rule? Does the evidence address character, conduct, or bias of the witness? Ultimately, the defense counsel was allowed to elicit the prior inconsistent verbal statements, but the trial judge continued to block the defense counsel's effort to introduce the written text of such, [7] which ultimately led to a reversal on appeal.

The judge and counsel in this case are not alone in their struggle to understand the proper use of prior inconsistent statements. It is probably safe to say that counsel throughout the military continue to struggle with these very same issues. Instead of focusing on the legal arguments, advocates often resort to Cicero's tactic of simply abusing the opposing side.

The purpose of this article is to provide an overview of the law in the hope that base-level judge advocates will have a better understanding of how to use prior inconsistent statements. In particular, this article first discusses Military Rules of Evidence (M.R.E.) 613 and 801(d)(1)(A), [8] starting with a look at their foundational requirements. It then addresses tactical considerations, the substantive use of prior inconsistent statements, and the interaction between these two rules.

II. EXAMINING A WITNESS CONCERNING A PRIOR STATEMENT

The starting point for any discussion of prior inconsistent statements is M.R.E. 613(a), which states: "In examining a witness concerning a prior statement made by the witness, whether written or not, the

statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel." [9] This rule creates some confusion in light of the fact it speaks to prior statements and not prior inconsistent statements. Not to worry. As a practical matter, this portion of M.R.E. 613 is limited to prior inconsistent statements, [10] and for purposes of this article, the focus is on prior inconsistent statements. [11]

Perhaps the best way to understand how M.R.E. 613(a) works is to look at the foundation requirements under the 1969 version and see how it has changed. In the 1969 Manual for Courts-Martial, witnesses had far more "rights" than under present practice. [12] In the past counsel first had to direct the witness's attention to the time and place of the statement and the person or persons to whom it was made, and then ask the witness if he or she made the statement. [13] This is far more constraining for the examining counsel than today's requirements. [14] All counsel now has to do is disclose the contents of the statement to the opposing counsel, and then only if asked. [15] The statement need not be shown to the witness, nor must its contents be disclosed to the witness during cross- examination. [16]

The 1969 military rule was in place to protect the witness from what some perceived to be unfair surprise by requiring that the witness be informed of a prior statement. [17] Supporters of this practice believed a witness was more likely to be truthful about earlier declarations when faced with them on the stand. [18] Critics of this practice, however, believed the requirements had the opposite effect of allowing dishonest witnesses to reshape their testimony, anticipate questions, and thus frustrate counsel by preventing effective cross-examination. [19] Present day requirements do not even require that the prior statement be offered or mentioned during cross-examination, thereby eliminating the potential for any reshaping of testimony or anticipation of questions. Now counsel can withhold the prior statement until other witnesses are called. This increases counsel's ability to demonstrate collusion among witnesses by springing a trap after all the witnesses have committed themselves to a certain course of conduct.

III. EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENTS

A. Foundation Requirements and Related Issues

Turning to M.R.E. 613(b), the focus now is on the admissibility of extrinsic evidence of the prior inconsistent statement. This provision states,

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Mil. R. Evid. 801(d)(2). [20]

Although this portion of M.R.E. 613 appears straightforward, one must look more closely to develop a thorough understanding of the rule.

In our earlier discussion of M.R.E. 613(a), we noted that a witness does not have to be told during cross-examination about the existence of the prior inconsistent statement. On the other hand, M.R.E. 613(b) clearly states a witness is "afforded an opportunity to explain or deny the [prior inconsistent statement] and the opposite party is afforded an opportunity to interrogate the witness thereon." While this appears to be an irreconcilable difference between the two subdivisions of M.R.E. 613, it really boils down to a matter of timing.

Military Rule of Evidence 613(b) does not specify any particular time for the witness's opportunity to explain or deny the prior inconsistent statement nor does it specify any particular method. [21] Therefore, this opportunity may come after the alleged inconsistency has been revealed through a third party because the maker of the statement is not entitled to be immediately confronted with the same. As long as the witness has the opportunity to explain or deny the statement at some point in time, the requirement of this paragraph is satisfied. [22]

The same can be said for the opposing party's right to interrogate the witness on the prior inconsistent statement. Obviously, this questioning cannot occur until the prior inconsistent statement has been exposed. The counsel who initially called the witness may very well have to recall the now-impeached witness, not only to interrogate him or her, but also to give the witness a chance to explain or deny the inconsistency, if either is counsel's desire. [23] This assumes, given the rule's silence on the matter, that the counsel who originally called the witness bears the burden of providing that witness with the chance to be heard on the statement, and this is not necessarily the case. There is a line of thought which places this burden on the party who actually introduces the prior inconsistent statement, the rationale being this was the party who traditionally bore the burden under common law. Furthermore, the argument goes, since the impeaching party is actually offering the inconsistent statement, that party should bear the burden of ensuring the foundation is adequately laid. [24]

From this discussion, at least one thing about M.R.E. 613(b) appears to be absolute-the inconsistency does not have to be brought to the attention of a witness when initially testifying. However, as with most things in life, appearances can be deceiving. A military judge has the discretion to exclude extrinsic evidence of a prior inconsistent statement if the offering party did not confront the witness with it when the witness was first on the stand.

In United States v. King, [25] the United States Court of Appeals for the Second Circuit held that Federal Rule of Evidence (F.R.E.) 613(b) does not exist in a vacuum, and thus, the court still maintains the power to control the presentation of evidence under F.R.E. 403, [26] which allows exclusion of evidence on grounds of prejudice, confusion, or waste of time. King said the judge may call upon the offering party to explore the matter of a prior inconsistent statement with a witness or face exclusion of extrinsic evidence if its probative value would be substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. [27] By holding in this manner, King recognized that F.R.E. 403 and F.R.E. 613(b) fulfill separate functions. [28] Because M.R.E. 613 is the same as F.R. E. 613, [29] a similar result should apply to military practice.

The application of M.R.E. 611(a) also provides the military with discretion in handling prior inconsistent statements. This rule allows the military judge to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." [30] The United States Court of Military Appeals has recognized that this provision can override the procedures laid out in M.R.E. 613(b). [31] In fact, as dicta, the court has said,

If a judge learns in advance of the intent of a party to offer extrinsic evidence of a statement subject to Mil.R.Evid. 613(b), he has authority under Mil.R.Evid. 611(a) to require the party to prove the statement immediately after the witness has testified. A judge might well impose such a requirement in order to minimize inconvenience to the witness. [32]

Another issue found in M.R.E. 613(b) is the use of a prior inconsistent statement when the witness admits making the statement. Are you still allowed to introduce extrinsic evidence of such? In United States v. Button, [33] the Air Force Court of Military Review dealt with this very issue. At trial the stepdaughter of the accused recanted her allegations of sexual abuse. When she was confronted with prior inconsistent statements she made to an investigative agent and a social worker, she admitted making the statements, but said she had lied. The court, over defense objection, still allowed the prosecution to introduce extrinsic evidence of the prior inconsistent statements in the form of testimony from the investigative agent and the social worker. The court held that "where it is sought to impeach a witness by showing a prior inconsistent statement and the witness admits the prior inconsistent statement, the witness is thereby impeached and further testimony is not necessary." [34] The court, in following federal precedent, [35] recognized in this situation "the witness is fully impeached with regard to the prior statement and further extrinsic evidence as to it is nothing but cumulative and may well be misleading to court members even in the face of a limiting instruction." [36] The issue of the limiting instruction refers to the limited use which can be made of prior inconsistent statements when admitted only for impeachment. [37]

Finally, before closing our discussion of the foundation requirements of M.R.E. 613(b), we need to address the language, "or the interests of justice otherwise require." [38] Clearly, this language contemplates the possibility a witness will not be afforded an opportunity to explain or deny the prior inconsistent statement, but the opposing party will still be allowed to produce extrinsic evidence of such. Unfortunately, neither the rule nor the drafters' analysis illustrate when this exception to the foundation requirements is likely to be invoked. [39] In the military, this clause might be relied upon if a party discovered the existence of an inconsistent statement after a witness is excused and the witness is then outside the trial court's jurisdiction or has been discharged from the service and cannot be located. [40]

B. Impeachment v. Substantive Use

Confusion always exists concerning the use which can be made of prior inconsistent statements once they have been established through extrinsic evidence. One must always draw a distinction between the

use of the evidence for impeachment and use of the evidence substantively, or in other words, for the truth of the matter contained therein. [41] An example appears in the case of United States v. Dodson. [42] In Dodson, the Government was allowed to impeach an accomplice of an accused on trial for murder by establishing the accomplice had made prior inconsistent statements which went to the issue of whether or not the accomplice had a knife in his possession on the night of the murder. [43] In upholding the decision of the trial judge, the appellate court called this a "proper use of impeachment and a proper attack upon a witness's credibility so long as the military judge instructs the members to view the impeachment evidence, not as substantive evidence, but rather, as being determinative of the credibility of the witness." [44] Since the trial judge had done this not only in his closing instructions, but also after the trial counsel had referred to the evidence in a substantive vein in his closing argument, the proper limitation had been put on the use of the evidence. [45]

C. Tactical Issues Under M.R.E. 613(b)

After determining whether a statement is admissible and the purposes for which it is offered, counsel still must assess tactics and the overall appropriateness of using the prior inconsistent statement. Counsel must be aware of how the form of the statement will impact its usefulness. A statement may be oral, written, or conduct-based. [46] Obviously, written sources are the best because what was actually said is generally not subject to dispute. Somewhat less desirable are oral statements which others have witnessed. In these situations the maker of the alleged prior inconsistent statement is given some wiggle room in that they can argue the other party is incorrect, lying, or misunderstanding what they said. A third source of prior inconsistent statements is a pretrial interview. In this case, a witness may say something on the stand different than what was said in the interview. Counsel then attempts to attack the witness with the inconsistency. The problem with this approach is it inevitably degenerates into the counsel and the witness arguing over what was in fact previously said, and a definitive answer is never achieved. It was just this kind of a result which led the Navy Court of Military Review to note, "It is, as stated by the trial judge, bad practice for counsel to rely solely on a pretrial oral conversation with a witness as basis for impeachment." [47]

Counsel must also be aware of the reason why the inconsistency occurred in the first place. Remember, the witness will get a chance to explain any apparent inconsistency and, in the end, this explanation could do more harm than good for your cause. For a prime example of this, consider the case of United States v. Armstrong. [48] There, the accused's wife was free to explain herself after being impeached by the defense counsel with a prior inconsistent statement. Her explanation included references to the accused beating her and threatening her whenever she confronted him over abusing his stepdaughter. [49]

Another pitfall in this area is the interplay between M.R.E. 613 and M. R.E. 801(d)(1)(B), the rule which allows for the use of prior consistent statements to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive. Once counsel has impeached a witness through the use of a prior inconsistent statement, the door has been opened to an effort to buttress the witness, if possible, through the use of a prior consistent statement. [50] The effectiveness of this tactic is limited by the fact that the prior consistent statement must have been made before the motive to fabricate arose,

and often the prior inconsistent statement will have come after this motive already existed. [51]

Flowing from the limited use which can be made of prior inconsistent statements is another tactical concern which addresses the ability of a party to impeach his or her own witness. As a general rule a party is not allowed to call a witness to the stand for the primary purpose of impeaching the witness's testimony with a prior inconsistent statement. [52] Otherwise, it would result in a subterfuge of the hearsay rule, in that the impeachment evidence which has a very limited, albeit legitimate, purpose, is ultimately used by the court substantively, despite limiting instructions. [53]

One further potential scenario which all counsel need to be aware of is the use of an accused's prior inconsistent statement for impeachment-even when it is involuntary. Under M.R.E. 304(b)(1), some involuntary statements which are not admissible in the Government's case-in-chief could nevertheless be used to impeach the accused if he or she testified contrary to those earlier statements. [54] While a discussion of the full effect and history of this provision is beyond the scope of this article, counsel must still be aware of the dangers or opportunities-depending upon which side of the case counsel represents - presented by this rule.

A final tactical concern deals with the scope or extent to which a trial court will allow impeachment. In other words, when is the prior inconsistency "collateral" or "inconsequential"? This question was examined in United States v. Tyler, [55] a case in which the accused was convicted of various drug offenses. One of the Government's main witnesses was an informant who implicated the accused in drug use and controlled buys. On cross-examination, the informant denied he had submitted a false claim for the theft of a VCR from his car. After this denial, the defense counsel attempted to call another airman who would testify the informant had told him of the false claim. The defense counsel told the court he was proceeding under M.R.E. 613, but the military judge disallowed the testimony saying the evidence had only a collateral connection with the case and was minimally probative of the informant's truthfulness. [56]

The exclusion of this testimony was an appellate issue. The Air Force Court of Military Review began by saying, "The normal rule of impeachment is that a witness may not be contradicted by extrinsic evidence on a collateral matter" because of the potential for the evidence to "cause confusion and . . . distract the court-members." [57] With regard to the specifics of this case, the court noted, "The subject that trial defense counsel wished to pursue did not have a direct bearing upon the guilt or innocence of the appellant, i.e, the possession, use and distribution of drugs, but was a collateral matter having only peripheral application." [58] In affirming the decision of the trial judge the court said, "The extent of impeachment of a witness is within the trial judge's discretion and his ruling in this regard will be reversed only when he abuses that discretion." [59]

IV. OTHER PRIOR INCONSISTENT STATEMENTS

A. Not a Hearsay Exception

Military Rule of Evidence 801 is the rule which defines hearsay. Military Rule of Evidence 801(d)(1)(A) states a prior inconsistent statement is not considered hearsay as long as the witness is present and subject to cross- examination, and the prior inconsistent statement was under oath "at a trial, hearing, or other proceeding, or in a deposition." In United States v. Powell, [60] the Army Court of Military Review refused to interpret the terms "or other proceeding" broadly. The court had to consider whether a government witness's prior inconsistent statements to investigative agents were admissible under M.R.E. 801(d)(1)(A). In holding they were not, the court said,

We simply are unwilling to hold that M.R.E. 801(d)(1)(A) extends to a statement made in a policeman's office during a non-advocatory, inquisitorial police investigation merely because an oath was administered. There is nothing in the legislative history of Federal Rule of Evidence 801(d)(1)(A), upon which MRE 801(d)(1)(A) was modeled, that warrants the conclusion that a routine police investigation was intended to be encompassed within the words "other proceedings." [61]

Later, in response to a government argument, this court refused to analogize police investigations to Article 32 hearings saying this "requires a stretch of the imagination beyond what is reasonable." [62]

Just as Powell shows us what is not an example of "other proceedings" under M.R.E. 801(d)(1)(A), [63] the case of United States v. Rudolph [64] can serve as an example of what does. Rudolph was a child sexual abuse case where the victim had made numerous pretrial statements which she refuted at trial while recanting her allegations. In the course of the investigation of the case, the victim's unsworn interview with the police had been recorded and a verbatim transcript had been made of such. Furthermore, the victim had testified briefly about the abuse under oath in a civilian court, and a record was made of that testimony. At the Article 32 hearing, the victim refused to discuss the specifics of her allegations, but on two occasions she read the transcript of her police interview and indicated it was true and stated she didn't want to change anything. At this same hearing the victim did say the accused had done things to her which he shouldn't do to a daughter. [65]

In considering the admission of all of these statements under M.R.E. 801(d)(1)(A), the Army Court of Military Review first held the victim's Article 32 testimony clearly fit the requirements of the rule, in that it was taken under oath and recorded verbatim at the formal pretrial investigation. [66] As for the transcript of the police interview, the court said this was admissible because it had been adopted by the victim as part of her testimony at the Article 32 hearing. [67] The court also noted the defense counsel had actually cross-examined the victim on this statement at the Article 32 hearing. Finally, as for the transcript of the victim's testimony from the civilian court, this was also allowed in, but without any real discussion. [68]

While Rudolph provides examples of statements fitting M.R.E. 801(d)(1)(A), it also illustrates a few other issues as well. Although the court might have felt better about admitting the transcript of the police interview since the defense counsel had cross-examined the victim on it at the Article 32 hearing, this is of no real importance on the issue of admissibility. Military Rule of Evidence 801(d)(1)(A) does not require as a condition of admission that the accused or his or her counsel cross- examine the witness on

the prior inconsistent statement or even to have had an opportunity to do so. [69] This fact also explains, at least in part, why the appellate court upheld the admissibility of the civilian court testimony without any explanation. Again, whether the accused participated in that hearing in any fashion is not a prerequisite to admissibility. On its face, this testimony clearly fit the requirements of the rule because it was under oath and made at a court hearing, [70] and that is all that is required.

B. Relationship to MRE 613(b)

1. Shared Qualities

In comparing M.R.E. 613(b) with M.R.E. 801(d)(1)(A) it is helpful to start with those areas where they share common traits. Recall that M.R.E. 613(a) applies to all prior statements of a witness. [71] Under this guidance, whether examining a witness on a prior inconsistent statement under M.R.E. 613(b) or M. R.E. 801(d)(1)(A), counsel do not have to show or disclose to the witness the contents of the statement they are concerned with, but they must show or disclose the contents to opposing counsel if so requested. [72]

Another area of similarity has to do with the presence of the declarant at trial. Both rules require the declarant of the prior inconsistent statement to be present at trial before it can be established through extrinsic evidence. M.R.E. 613(b) does this by requiring the witness be given an opportunity to explain or deny the inconsistency before extrinsic evidence is to be admitted. M.R.E. 801(d)(1)(A) does this by requiring the declarant be available for cross-examination before the statement can be put before the court.

Closely related to the present-at-trial requirement is the shared tactical concern of the declarant's explanation. When given the opportunity to explain or deny under M.R.E. 613(b), a declarant may very effectively turn the tables on the attacking party in such a way the prior inconsistency would have been better left unsaid. The same concern should exist under M.R.E. 801(d)(1)(A). The witness must be available for cross-examination, and thus it is likely the witness will be given an opportunity to comment on the perceived inconsistency. Counsel must be aware of the possible explanation and the impact it could have on the case.

A final shared tactical concern is the ability of the attacked witness to be rehabilitated with a prior consistent statement under M.R.E. 801(d)(1)(B). In either situation, this remains a possibility and so gives rise to another pitfall which counsel should avoid.

2. Differences

The real area of difference between M.R.E. 613(b) and M.R.E. 801(d)(1)(A) grows out of the nature of the prior inconsistent statements-written, oral, or conduct-based. Earlier, we addressed the benefits and disadvantages of each. For inconsistencies under M.R.E. 801(d)(1)(A), these concerns do not exist. This is because under M.R.E. 801(d)(1)(A) the inconsistencies were made under oath in some kind of formal

proceeding. Therefore, for all practical purposes (although this is not absolutely required), you will have a written text of the inconsistencies. A statement made under oath and in a formal proceeding arguably carries with it a strong guarantee of trustworthiness.

As previously discussed, statements admitted under M.R.E. 613(b) are admitted solely to cast doubt on the testimony of the witness. They cannot be used as proof of the matter contained in the statement. Under M.R.E. 801(d)(1)(A), prior inconsistent statements do come in for the truth of the matter being asserted in the statement. [73] Therefore, in M.R.E. 801(d)(1)(A), counsel gets two for the price of one. Not only can you argue the impeachment value of the prior inconsistent statement, but you also can argue what was previously said was the truth and the court should treat it as such. Unlike M.R.E. 613(b), evidence admitted under M.R.E. 801(d)(1)(A) will not be subject to any limiting instructions. [74]

The final difference between these two rules deals with the ability to impeach one's own witness. As already noted, calling a witness for the sole purpose of impeachment with an inconsistency under M.R. E. 613(b) creates concern about the court misusing the prior statement by considering it on the merits instead of just for its impeachment value. This problem does not exist with statements under M.R.E. 801 (d)(1)(A) because of the distinction just discussed between the two rules. Under M.R.E. 801(d)(1)(A), the court can use the prior inconsistent statement for the truth of the matter contained therein, and thus, the danger of misuse does not exist. The practical effect of this is that a party is free to call a witness for the sole purpose of eliciting a M.R.E. 801(d)(1)(A) prior inconsistent statement since it is admissible as substantive evidence. [75]

V. CONCLUSION

Cicero's quote about abusing the plaintiff may be an early version of the present day saying, "The best defense is a good offense." As Cicero recognized, you must take the fight to the opposing witnesses, impeaching them if you can. The weapon of choice may well be a prior inconsistent statement. According to one commentator,

Prior inconsistencies are the single-most frequent and fertile ground upon which a cross-examiner shall or can walk. There is nothing which can be utilized so effectively, or is so debilitating to a witness presented by your adversary, than for the cross-examiner to be armed with a statement the witness previously made, which contradicts the present trial testimony. [76]

From this quote we hear from a source who obviously believes prior inconsistent statements are the master's tools for achieving the nirvana of impeachment. One catch remains. Before you can effectively impeach a witness with such statements under either M.R.E. 613 or M.R.E. 801(d)(1)(A), you have to know the ground rules. If you don't, you are likely to end up as confused as the military judge and opposing counsel from our introduction. It is hoped this article has contributed, at least in some small fashion, to your understanding of the intricacies of these rules, and thus, will improve your ability to effectively represent your clients in the future.

Footnotes

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1. Cicero, The Quotable Lawyer 74 (1986).

2. Manual for Courts-Martial [hereinafter MCM] (1995), ch. III, Military Rule of Evidence [hereinafter M.R.E.] 608(c).

3. M.R.E. 609.

4. In United States v. Banker, 15 M.J. 207 *[cited at]* , 210 (C.M.A. 1983), the United States Court of Military Appeals wrote:

The process of impeachment can embrace several different methods or lines of attack. . . . One method is to show that the witness has a bad character for truthfulness. . . . A second method of impeachment is to show that a witness has made a prior statement inconsistent with his trial testimony. . . . A third method of impeachment is to show a bias, prejudice, or any other motive on the part of the witness to misrepresent. . . . A fourth method of impeachment is contradiction.

See generally John W. Strong, McCormick on Evidence 111-12 (4th ed. 1992) [hereinafter McCormick] (listing "five main modes of attack upon the credibility of a witness").

5. See generally John N. Iannuzzi, Cross-Examination: The Mosaic Art 142 (1982) [hereinafter Iannuzzi] ("Many a seasoned adversary, and even a seasoned judge, has no idea how these prior inconsistent statements are properly used"); McCormick, supra note 4, at 114.

6. United States v. Rodko, 34 M.J. 980 *[cited at]* , 981-82 (A.C.M.R. 1992).

7. Id. at 983-84.

8. MCM, supra note 2.

9. M.R.E. 613(a) (emphasis added).

10. S. Saltzburg et al., Military Rules of Evidence Manual 702 (3d ed. 1991 & Supp. 1995) [hereinafter Saltzburg]. But cf. MCM, supra note 2, app. 22, at A22-46 [hereinafter MCM analysis] (the drafters of the MCM suggest the word "inconsistent" was inadvertently omitted and concludes the effect of this omission is unclear).

11. On the question of just what is a prior inconsistent statement, see United States v. Damatta-Olivera, 37 M.J. 474 *[cited at]* , 478 (C.M.A. 1993) ("W]hether testimony is inconsistent with a prior statement is not limited to diametrically opposed answers but may be found as well in evasive answers, inability to recall, silence, or changes of position."). See also McCormick, supra note 4, at 114 ("The language of some of the cases seems overstrict in suggesting that a contradiction must be found, and under the more widely accepted view any material variance between the testimony and the previous statement will suffice."). But cf. Iannuzzi, supra note 5, at 142-43:

In order for a statement, or a part thereof, to fall within the category of "inconsistent," there must be a specific area where the testimony at trial conflicts with the prior statement. It is not enough that the prior statement is in different language from the trial testimony, or that it is not given in the same order, or with the same detail, that not everything in the prior statement is testified to from the stand. In order for a prior statement to be usable as a prior inconsistent statement, the contents of that statement must actually contradict or conflict with the witness's trial testimony; it must disagree, it must mean something completely different.

12. Manual for Courts-Martial, para. 153b(2)(c) (1969) stated:

A witness may be impeached by showing by any competent evidence that he made a statement, or engaged in other conduct, inconsistent with his testimony or any part thereof, but a foundation must first be laid before introducing evidence of an inconsistent statement if that evidence is admissible only for the purpose of impeachment. The foundation for the introduction of evidence of the making of an inconsistent oral statement is laid by directing the attention of the witness to the time and place of the statement and the person or persons to whom it was made and then asking the witness if he made it. This procedure may also be used as constituting a sufficient foundation in the case of an inconsistent written statement, and, if it is used, the writing need not be show to the witness. If the witness denies making the inconsistent statement, or testifies that he does not remember whether he made it, or refuses to testify as to whether he made it, competent evidence that he did make it, including competent evidence of the text or substance of the statement, may be introduced in addition to the admission. When the inconsistent statement is contained in a writing apparently signed or written by the witness, a sufficient foundation may be laid by showing the writing to the witness and asking him whether the signature is his or whether he was the author of the written statement. If he admits that the signature is his or that he was the author, the writing then becomes admissible in evidence. If he does not make any such admission but either of these facts is otherwise proved, the writing will then become admissible in evidence.

* * * *

Proof that a witness made an inconsistent statement generally is admissible only for the purpose of impeaching him. Proof of an inconsistent statement of a witness is admissible to establish the truth of the matters asserted in the statement only if that proof may properly be received as evidence of a voluntary confession or admission of the witness, when he is the accused, or of some statement of the witness which is otherwise admissible as an exception to the hearsay rule, or if the witness testifies that his

inconsistent statement is true, not merely that he made it, and thus adopts the statement as part of his testimony. If proof of an inconsistent statement of a witness is admissible merely for the purpose of impeachment, the military judge, or the president of a special court-martial without a military judge, should, when evidence of the inconsistent statement is introduced, instruct the members of the court in open session that the evidence is to be considered only for the purpose of determining the credibility of the witness and not for the purpose of establishing the truth of the matters asserted in the statement.

* * * *

A witness has a right to explain any apparently inconsistent statement made by him and may, if excused from the stand, be recalled for that purpose.

13. MCM analysis, supra note 10, at A22-46 to 47; United States v. Veilleux, 1 M.J. 811 *[cited at]* , 813 (A.F.C.M.R. 1976); Saltzburg, supra note 10, at 703.

14. See supra text accompanying note 9.

15. M.R.E. 613(a). See also United States v. Callara, 21 M.J. 259 *[cited at]* , 264-65 (C.M.A. 1986); Saltzburg, supra note 10, at 703.

16. See Callara, 21 M.J. at 264-65; Saltzburg, supra note 10, at 703.

17. Callara, 21 M.J. at 264. Cf. McCormick, supra note 4, at 120 ("The purposes of this traditional requirement are (1) to avoid unfair surprise to the adversary, (2) to save time, as an admission by the witness may make extrinsic proof unnecessary, and (3) to give the witness in fairness a chance to explain the discrepancy.").

18. Callara, 21 M.J. at 265.

19. Id.

20. M.R.E. 613(b).

21. See MCM analysis, supra note 10, at A22-46 to 47; Callara, 21 M.J. at 265.

22. Id. See also United States v. Rodko, 34 M.J. 980 *[cited at]* , 983. The last sentence of M.R.E. 613 provides one caveat to the requirement that a witness be allowed to explain or deny. It states that statements which fall under M.R.E. 802(d)(2) (admissions by party-opponent) are exempt, and thus are admissible without giving the declarant a chance to explain or deny such or to be interrogated on such by the opposing party. See Callara, 21 M.J. at 264-65.

23. See generally Saltzburg, supra note 10, at 704.

24. Id. at 705.

25. 560 F.2d 122 (2d Cir. 1977).

26. Id. M.R.E. 403 is taken without change from Federal Rule of Evidence [hereinafter F.R.E.] 403. See MCM analysis, supra note 10, at A22-33.

27. 560 F.2d at 122.

28. Id. F.R.E. 613 is the same as M.R.E. 613.

29. MCM analysis, supra note 10, at A22-47.

30. M.R.E. 611(a).

31. Callara, 21 M.J. at 265 n.5.

32. Id. See also McCormick, supra note 4, at 123 n.13 (cases of courts opting for the traditional practice cited); Saltzburg, supra note 10, at 704 (the trial court retains its discretion to control presentation of witnesses and evidence).

33. 31 M.J. 897 *[cited at]* (A.F.C.M.R. 1990), aff'd, 34 M.J. 139 *[cited at]* (C.M.A. 1992).

34. Id. at 902-03. See also Rodko, 34 M.J. at 983.

35. See United States v. Soundingsides, 820 F.2d 1232 (10th Cir. 1987). In Button, the Government argued that other federal cases seemed to hold the admission of extrinsic evidence in such a situation was within the sound discretion of the military judge and that the plain language of the rule provides no such limitation. The court nonetheless said the other federal cases were distinguishable and since M.R.E. 613 is a carbon copy of F.R.E. 613, they would follow the federal precedent which they considered directly on point. Button, 31 M.J. at 902-03.

36. 31 M.J. 902 *[cited at]* -03. The court did find the admission of the extrinsic evidence was error, but they said it was harmless error because the stepdaughter's verbatim testimony from the pre-trial hearing was properly admitted without defense objection and it contained the girl's incriminating statements against the accused. See also United States v. Gibson, 39 M.J. 319 *[cited at]* , 324 (C.M.A.) (reaffirming guidance found in Button). But see McCormick, supra note 4, at 120 (Professor Wigmore suggests the cross-examiner may go on to prove the inconsistency with extrinsic evidence notwithstanding any admission by the witness.).

37. See infra notes 46-47 and accompanying text.

38. See supra text accompanying note 21.

39. MCM analysis, supra note 10, at A22-46 to A-22-47.

40. Saltzburg, supra note 10, at 704. Cf. United States v. Fairman, 862 F.2d 630, 637-39 (7th Cir. 1988) (since the declarant was deceased and the defendant never had the opportunity to cross-examine the declarant regarding his earlier statements, the defense was not required to show the hearsay declarant was given an opportunity to explain his prior inconsistent statements before introducing testimony regarding such into evidence.).

41. See generally Iannuzzi, supra note 5. Iannuzzi writes:

Testimony elicited concerning a prior inconsistent statement is not evidence in chief, is not evidence in and of itself. Such testimony is elicited merely to attack the credibility of the witness under cross-examination, to cast new light, new coloration, on the witness's present trial testimony. The only purpose of eliciting such testimony is to aid the jury's acceptance or rejection of the witness's truthfulness and reliability. Thus the prior inconsistent statement, and what is brought out during an examination based on that prior statement, is not evidence in chief. . . . It is merely utilized to affect credibility, and remains such.

Id. at 143-44.

42. 16 M.J. 921 *[cited at]* (N.M.C.M.R. 1983), aff'd, 21 M.J. 237 *[cited at]* (C.M.A. 1986), aff'd on rehearing, 22 M.J. 257 *[cited at]* (C.M.A. 1986).

43. Id. at 927-28.

44. Id. at 928. See also Gibson, 39 M.J. at 325 (United States Court of Military Appeals offers some criticism of the military judge's instruction on this very issue); United States v. Jackson, 12 M.J. 163 *[cited at]* (C.M.A. 1981); United States v. Pollard, 34 M.J. 1008 *[cited at]* (A.C.M.R. 1992); United States v. Mendoza, 18 M.J. 576 *[cited at]* (A.F.C.M.R. 1984).

45. 16 M.J. at 928. An instruction on prior inconsistent statements is found in Department of the Army, The Military Judges' Benchbook (1982 & Supp.) which provides:

You have heard evidence that (state the name of the witness) made a statement prior to trial that (may be) (is) inconsistent with his/her testimony at this trial. Specifically, that (highlight any materially significant inconsistencies). If you believe that an inconsistent statement was made, you may consider

the inconsistency in evaluating the believability of the testimony of (state the name of the witness). You may not, however, consider the prior statement as evidence of the truth of the matters contained in that prior statement.

Id. at para. 7-11.

46. See generally McCormick, supra note 4, at 113 n.5 ("Any form of statement is acceptable.").

47. United States v. Maxwell, 2 M.J. 1155 *[cited at]* , 1159 (N.C.M.R. 1975). If counsel anticipates a witness may change his or her story between the pretrial interview and the time he or she testifies at trial, then it is advisable to have a third party sit in on the interview and take notes. If necessary, the third party can testify as to what was said.

48. 33 M.J. 1011 *[cited at]* (A.C.M.R. 1991).

49. Id. at 1016. See also Saltzburg, supra note 9, at 704 ("when the previous statement was made, the witness may have been acting in response to threats, fear, or unlawful command control.").

50. United States v. Martin, 9 M.J. 731 *[cited at]* (N.C.M.R. 1979), aff'd, 13 M.J. 66 *[cited at]* (C.M.A. 1982).

51. See United States v. Toro, 37 M.J. 313 *[cited at]* , 315 (C.M.A. 1993); United States v. McCaskey, 30 M.J. 188 *[cited at]* (C.M.A. 1990).

52. United States v. Hogan, 763 F.2 697, 702 (5th Cir. 1985). See also, United States v. Dodson, 22 M.J. 257 *[cited at]* , 259 (C.M.A. 1986). Instead of speaking in terms of "primary purpose," the Dodson court cast the issue in terms of whether the calling party acted in "bad faith" when they impeached their own witness with a prior inconsistent statement. In United States v. Crouch, 731 F.2d 621, 623 (9th Cir. 1984), the court wrote,

A party is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of a witness, by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines.

But cf. United States v. Nixon, 30 M.J. 501 *[cited at]* , 504 (A.F.C.M.R. 1989). In Nixon, in ruling on the appropriateness of trial counsel's question to a witness who had made a prior inconsistent statement, this court acknowledged the guidance of M.R.E. 607 which allows either party to attack the credibility of a witness, even the party who called that witness. This court did not, however, go on to address the issue of calling a witness solely for the purpose of impeaching his or her testimony.

53. See Hogan, 763 F.2d at 702, where the court wrote,

The danger in this procedure is obvious. The jury will hear the impeachment evidence which is not otherwise admissible and is not substantive proof of guilt, but is likely to be received as substantive proof. The defendant thus risks being convicted on the basis of hearsay evidence that should bear only on a witness's credibility.

See also Crouch, 731 F.2d at 624; Gibson, 39 M.J. at 326-27 (this very issue resulted in the Court of Military Appeals setting aside an accused's findings and sentence); McCormick, supra note 4, at 129; Saltzburg, supra note 9, at 640.

54. See United States v. Ravenel, 26 M.J. 344 *[cited at]* , 350 (C.M.A. 1988); United States v. Sykes, 38 M.J. 669 *[cited at]* , 670-71 (A.C.M.R. 1993); United States v. Lucas, 19 M.J. 773 *[cited at]* , 778 (A.F.C.M.R. 1984).

55. 26 M.J. 680 *[cited at]* (A.F.C.M.R. 1988), aff'd, 28 M.J. 253 *[cited at]* (C.M.A. 1989).

56. 26 M.J. at 681.

57. Id. See also Iannuzzi, supra note 5, at 143 ("While a statement might properly fall within the area of a prior inconsistent statement, it must also be relevant and material to the issue of the witness's credibility"); McCormick, supra note 4, at 118 ("You cannot contradict as to collateral matters").

58. Id.

59. Id.

60. 17 M.J. 975 *[cited at]* (A.C.M.R. 1984), aff'd, 22 M.J. 141 *[cited at]* (C.M.A. 1986).

61. Id. at 976.

62. Id. See also United States v. Luke, 13 M.J. 958 *[cited at]* (A.F.C.M.R. 1982). In Luke, the court refused to allow prior inconsistent statements which had been made to security police to come in under M.R.E. 801(d)(1)(A). In doing this, Luke expressly decided not to follow the holding of United States v. Castro-Avon, 537 F.2d 1055 (9th Cir. 1976), which had allowed the admission, under the Federal rule, of a statement given to a Federal agent during an interrogation at a border patrol station.

63. See also United States v. LeMere, 22 M.J. 61 *[cited at]* (C.M.A. 1986), where the court held a daughter's statement to her mother the morning after she was allegedly sodomized by the appellant did not fit the parameters of M.R.E. 801(d)(1)(A) since the statement was not under oath or made in some form of proceeding or deposition. Of course, whether or not your facts fit the requirements of one rule of admissibility does not always end the inquiry. For example, in Powell, although the evidence was found

not to fit the foundation requirements of M.R.E. 801(d)(1)(A), the court did ultimately allow the same evidence in under M.R.E. 803(24) and this was affirmed on appeal. 17 M.J. at 977.

64. 35 M.J. 622 *[cited at]* (A.C.M.R. 1992).

65. Id. at 623-24.

66. Id. at 624. See also MCM analysis, supra note 10, at A22-49 ("It should clearly apply to Article 32 hearings"); United States v. Austin, 32 M.J. 757 *[cited at]* (A.C.M.R. 1991).

67. 35 M.J. at 624. The court said it follows that the tape of the police interview also was admissible and it was not error for the military judge to allow the panel to hear it.

68. Id.

69. See MCM analysis, supra note 10, at A22-49.

70. 35 M.J. at 624.

71. See supra text accompanying note 9.

72. Id.

73. See Button, 34 M.J. at 140; Austin, 32 M.J. at 759.

74. See Saltzburg, supra note 10, at 761.

75. Id. at 640.

76. Iannuzzi, supra note 5, at 142.

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39 AFLR 225, Computer Crimes

Title of Article

Computer Crime: Substantive Statutes & Technical & Legal Search Considerations

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Text of Article

I. INTRODUCTION

This article is designed to assist Air Force Judge Advocates and Office of Special Investigations (OSI) Special Agents conducting computer crime investigations and prosecutions. The legal and technical issues involved in computer crime investigation and prosecution are complex and constantly changing. Given this complexity and state of flux, this article is only intended as an introduction to the subject area and not as a definitive analysis. Many times there are no solutions, only educated guesses as to what statutes and regulations apply and what procedures should be followed. Given these uncertainties, the philosophical perspective of the authors is, when in doubt, to lean toward obtaining appropriate search authority. The authors, however, strongly believe that the procedures and level of search authority should be as simple and low as possible, given the speed necessary for successful computer crime investigations.

This article is divided into five sections. The first section is a short listing and description of various computer crime statutes, as well as related federal crime statutes, which may apply in a computer crime prosecution. The second section is a brief list of possible Uniform Code of Military Justice (UCMJ) articles, [1] which may apply to a subsequent court-martial proceeding. Awareness of these statutes and articles will be helpful in focusing a criminal investigation. The third section is an outline of four typical situations an OSI agent may encounter when investigating computer crimes and a discussion of the possible investigative actions which may be available to an agent. The situations overlap, but have been chosen as starting points to focus the OSI agent and the judge advocate on the types of actions to take. The resulting legal issues involved in each of these actions is discussed in the fourth section. The fifth section concludes this article.

II. SUBSTANTIVE COMPUTER CRIME STATUTES

This brief overview is designed to acquaint the agent and judge advocate with the various substantive federal computer crime statutes, as well as related federal crime statutes. While there are very few actual computer laws, computer-related crimes have been found to fit into statutes which were not originally designed with computers in mind. This overview, therefore, should be used as a starting point to the substantive law to ensure that all critical evidence is obtained during an investigation.

A. Hacker Statute

The Computer Fraud and Abuse Act of 1986 [2] and its amendments [3] make up the primary federal legislation dealing directly with computer crime. The statute's [4] various provisions apply specifically to "computer(s) in interstate commerce or communications," "federal interest computers," and government computers. [5] Under the revised statute, "knowingly causing the transmission of a program, information, code, or command" in interstate commerce is a criminal offense where there is an intent to cause damage or where there is a reckless disregard of a substantial or unjustifiable risk that damage would be caused. [6] The specific types of information protected under the statute include information relating to national defense or foreign relations, records held by financial institutions, and computer passwords. [7] Unfortunately, the reckless disregard offense was reduced to a misdemeanor, [8] and thus prosecutive interest of agents and prosecutors using this offense may remain relatively low. However, violations of other subsections of 18 U.S.C. Sec. 1030 do carry stiffer penalties. [9]

B. Passwords

Computer passwords are also protected under the Access Device Fraud Act. [10] The statute [11] makes it a crime to knowingly and with intent to defraud, produce, use, traffic in, or in some cases simply possess counterfeit and/or unauthorized access devices or device-making equipment. [12] Access devices are broadly defined to include "any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number . . . or other means of account access." [13] In United States v. Fernandez, [14] the court held that "the plain meaning of the statute certainly covers stolen and fraudulently obtained passwords which may be used to access computers to wrongfully obtain things of value, such as telephone and credit services." [15]

C. Interception and Disclosure of Communications

Title 18 of the United States Code, section 2511 creates criminal liability for illegally intercepting wire, oral, or electronic communications. The statute creates a blanket prohibition on wiretapping with a list of specific exceptions. Exemptions include those situations where there is one-party consent, the communication is designed to be readily accessible to the general public, the acts of a provider of communications services are "necessarily incident to the rendition of his service," or the interception is the subject of a court order. [16] Intentional disclosure of the contents of communications intercepted illegally, i.e., outside one of the exemptions, is also covered by the statute. [17] Agents and judge advocates should also be aware that 18 U.S.C. Sec. 2520 creates civil liability for improper interception

of communications.

D. Unlawful Access to Stored Communications

Under 18 U.S.C. Sec. 2701, it is a criminal offense to intentionally access (without authorization or in excess of authorization) a facility through which an electronic communication service is provided and thereby to obtain, alter, or prevent authorized access to an electronic or wire communication while in storage. Exemptions from this provision include providers of the electronic or wire service, parties to the communication, and law enforcement officers who have obtained authorization. Agents and judge advocates should be aware that 18 U.S.C. Sec. 2707 creates civil liability for improper access to stored communications.

E. Theft and Vandalism

Title 18, United States Code, Section 2314 is violated when goods known to be stolen or fraudulently obtained and worth more than $5000 are transported in interstate commerce. The statute, however, only applies when "goods, wares, merchandise, securities or money" are transported. [18] If software is stored on tape or disk it probably falls into these categories. [19] In addition, 18 U.S.C. Sec. 659 makes theft of goods or chattels which are part of interstate commerce illegal, and 18 U.S.C. Sec. 1361-62 punish malicious injury to government property.

F. Public Money, Property, or Records

Embezzlement or theft of federal records, property or public money is proscribed by 18 U.S.C. Sec. 641, whereas 18 U.S.C. Sec. 2071 prohibits concealment, removal, or mutilation of public records. Bank and credit institution records are protected under 18 U.S.C. Secs. 1005-06. The statutes are applicable when a false entry is made with the intent to injure or defraud. Any false entry, obliteration, or alteration of computerized bank records would seem to be a violation. The Electronic Fund Transfer Act [20] creates criminal liability for violations of the act affecting interstate or foreign commerce. Violations of the act include using, transporting, selling, or concealing counterfeit, stolen, altered, or fraudulently obtained debit instruments. [21]

G. Disclosure of Confidential Information

Disclosure by a government employee of confidential information that is in government custody, owned by either the Government or a private party, is a crime under 18 U.S.C. Sec. 1905. Transmitting or delivering national defense information to a foreign government or agent is proscribed by 18 U.S.C. Sec. 794. Although the statute prohibiting the sketching or photographing of defense installations, 18 U.S.C. Sec. 795, has to date not been used in this manner, it may apply to the copying of certain types of classified computer software. National defense information receives additional protection from 18 U.S. C. Sec. 793, which makes it unlawful to gather, transmit, or lose defense information. It may be applicable when the abuse involves classified, restricted, or national defense computer software.

H. Mail Fraud

The use of the mail in attempting a fraud to obtain money or property is a crime under 18 U.S.C. Sec. 1341. Intangible property is covered by the federal mail and fraud statutes. [22] However, a scheme to copy computer software will be prosecuted more successfully under the copyright statute. [23] In addition, 18 U.S.C. Sec. 1343 contains provisions basically identical to those in the mail fraud statute at 18 U.S.C. Sec. 1341, and applies when one uses a remote terminal or microcomputer to perpetrate a computer fraud, or when one telephones an accomplice in furtherance of a fraud scheme, so long as messages cross state lines. [24]

I. False Statements

A more generally applicable fraud statute is 18 U.S.C. Sec. 1001, which prohibits making a false, fictitious, or fraudulent statement to a department or agency concerning a "matter within the jurisdiction" of that department or agency. This statute does not require that a thing of value be involved, only that the statement was knowingly and willfully made. [25] If a thing of value is involved, however, 18 U.S.C. Sec. 912 may be applicable. It is triggered when one gains access to a program by falsely representing himself or herself as an officer or employee of the United States. [26]

J. Counterfeit Trademarks

If the computer crime statutes are not effective in a software piracy case, then the counterfeit trademark laws [27] may be helpful. There is ample case precedent for cases involving the trafficking in counterfeit trademarked goods. [28] The U.S. Customs Service has used these laws with excellent results. [29]

K. Copyright Infringement

Under 17 U.S.C. Sec. 506, the elements of criminal copyright infringement are intent, infringement, and a purpose of financial gain or commercial advantage. Infringement is defined as any violation of the exclusive rights of the copyright owner, [30] including: reproduction; preparation of derivative works; distribution (including any type of sale, lease, or transfer) to the public; public performance or performance- oriented works; and any other type of public display. [31]

L. Miscellaneous

The following federal statutes, among others, may also apply: 18 U.S.C. Sec. 2251- Sexual Exploitation of Children; 18 U.S.C. Secs. 1961- 68-RICO; 18 U.S.C. Sec. 371- Conspiracy to Defraud the Government; 18 U.S.C. 471 Sec. 509- Forgery and Counterfeiting; 18 U.S.C. Sec. 1951- Extortion; 18 U. S.C. Sec. 875 - Threats; Hobbs Act.

III. RELEVANT UCMJ ARTICLES

The following brief summary of UCMJ articles is intended to assist the judge advocate and agent in focusing on specific violations of the UCMJ at an early point in the investigation. By focusing early on specific offenses, it is more likely that all elements of each chosen article will be appropriately investigated and documented for use at a subsequent court-martial. [32]

A. Article 92: Failure to Obey Order or Regulation

This article makes it unlawful to violate or fail to obey any lawful general order or regulation or to disobey any other lawful order known to the accused. Further research will be needed to see what relevant punitive instructions or orders were in effect at the time of the alleged criminal act.

B. Article 106(a): Espionage

Any military member who transmits a document or other information with the intent or reason to believe that the document or other information will be used to injure the United States (or used to the advantage of a foreign nation) is subject to court-martial for espionage.

C. Article 107: False Official Statements

Arguably, using another's password could constitute a false official statement. No distinction should be made whether the entity receiving the statement was a person or a machine, rather the agent and judge advocate should look at whether the statement or password was required for gaining illegal access to the computer system. The focus must be on "an official statement" and whether logging onto a computer is an official statement.

D. Article 121: Larceny and Wrongful Appropriation

This article defines larceny and wrongful appropriation as the wrongful taking, obtaining, or withholding "by any means, from the possession of the owner or any other person any money, personal property, or article of value of any kind." [33]

E. Article 123: Forgery

This article has been used to prosecute a subject for altering keypunch cards before the cards were used to process payroll checks by the computer. [34] The subject's action allowed him to increase his payroll check. Even though the accused did not actually make false writings, his actions in altering the computer input to increase the face amount of the check constituted a forgery. This analogy should hold true in all instances where a person has altered the computer's operation, at either the input or programming states, to effect the creation of a false writing.

F. Article 132: Frauds Against the United States

This article makes punishable frauds against the United States. It may provide a better remedy than forgery in those instances where the individual submits paperwork to set the computer crime in motion instead of altering the computer program. Submitting false documents to receive a payroll check or travel allowance would be some examples.

G. Article 134: General Article

This article criminalizes any disorder or neglect which may prejudice good order and discipline, any conduct of a nature which may bring discredit on the armed forces, and any non-capital crimes and offenses, even though not specifically mentioned in the UCMJ. This general article has been used for theft of intangible items such as time or services. [35] It may also be used against anyone who willfully and unlawfully alters, conceals, removes, mutilates, or destroys a public record. [36] The removal of a computer record will usually entail making a copy of the record, thereby leaving the original unaltered so as to minimize detection. Copying a computer record may be punishable under Article 134 by incorporating the same theory used in United States v. DiGilio. [37] In DiGilio, the defendant made unauthorized photocopies of Federal Bureau of Investigation (FBI) files using government equipment. The unauthorized copies were considered government records and the removal of the copies constituted theft under 18 U.S.C. Sec. 641. Recently, an Air Force colonel was convicted by a general court martial of four specifications of service-discrediting misconduct under Article 134. [38] The charges stemmed from the colonel's use of an online computer service to transmit and download child pornography, and the use of e-mail to communicate indecent language to another servicemember.

IV. TYPICAL SITUATIONS AND PROPOSED OSI ACTIONS

Agents and judge advocates must be aware of the various contexts in which investigative situations arise, and the investigative actions that are both necessary and available. This section describes four typical scenarios an OSI agent may face-and proposed investigative actions-to serve as a starting point for focusing the investigation.

A. Typical Scenarios

1. Air Force Computer

This is the basic fact pattern where a stand-alone personal computer (probably with modem) owned by the Air Force is used, and Air Force military and civilians are involved in the alleged computer crime.

2. Air Force Networked Computer

This situation, involving an Air Force networked computer, is more common than the first situation, given the present trend toward electronically linked computers. The focus of the situation, however, is on the Air Force-owned computer systems as they relate to the alleged computer crime. Some Air Force

computer systems (whether leased or owned by the Air Force), may be operated and/or maintained by civilian contractors.

3. Civilian Owned

This scenario focuses on civilian-owned computer systems, including commercial and private electronic bulletin board systems (BBSs), as they relate to the alleged computer crime. Naturally, this situation is mutually exclusive from the second scenario set out above, and so will be the focus of the investigation for each type of computer system. A large quantity of resources, both within OSI and outside OSI, will be needed to coordinate a search in this situation. The coordination may need to include Federal Bureau of Investigation (FBI), Secret Service, and state and local officials. In addition, if a business is searched, all data and materials not relevant to the investigation must be returned to the business as quickly as possible. The time to return data and materials for a computer system privately owned (i.e., not used for business purposes) is generally longer. [39]

4. Intrusions

This last situation deals more specifically with the hacker, cracker, and phreaker situations. The intrusion may come from within the Air Force/ Department of Defense (DoD) or from civilian computer systems. A major difficulty with intrusions, however, is that the identity of the intruder may not be known at the beginning of the investigation. The reason this situation is different from the situations presented earlier is due to a combination of facts: (1) the identity of the intruder(s) is generally not known; (2) no definite jurisdiction exists; (3) extensive coordination is needed with Headquarters OSI and civilian investigators; and (4) although many of the intruders are probably voyeurs, the remainder may pose a substantial threat to national security as well as economic competitiveness (and the groups cannot be separated until the investigation is virtually completed, or perhaps never). The OSI Computer Crime Investigations (CCI) has exclusive OSI jurisdiction for intrusion investigations (case category 96), and coordinates all OSI 96 cases with the appropriate law enforcement agencies. [40]

B. Proposed OSI Actions

Computer Crime Investigations was established in 1978 and performs computer forensic analysis and supervises computer intrusions investigations (case category 96). [41] They are mandated to perform computer media analysis for the Air Force, as well as provide expert testimony at trial. [42] In the course of dealing with a computer crime investigation or prosecution, one should not hesitate to draw on the knowledge and experience of CCI. The following three categories are the major types of investigative techniques an OSI agent will consider when planning a computer search.

1. Basic Investigative Techniques

Under basic investigative techniques, the OSI will not only seize hardware and software, but also read the seized data. In the first scenario discussed above, the hardware will generally be in the form of a

stand alone computer. If the alleged computer crime involves one of the other scenarios, the seized hardware/software will undoubtedly include network file servers and data stored within the computer network.

Seizure of Hardware and Software. When a computer is the instrumentality of the crime and is in the possession of the perpetrator, it may be appropriate to seize the equipment to prevent further harm to victims. For example, where the computer is used to distribute contraband, the investigator may elect to seize the hardware and/or software to prevent further crimes. [43] If the evidence is in the form of data or files, the investigator may, depending on the specific fact situation, need to seize the peripherals that enable an operator to view the subject material (i.e., cpu, monitors, mouse, keyboards, but usually not printers or modems). If a publishing entity is involved, all data should generally be copied rather than seized. [44] After prompt review, all non-relevant data should be returned. [45] Under many circumstances, the hardware must be seized to ensure the preservation and prompt examination of the data. When software is to be seized, the storage medium (magnetic discs, tape, rom discs, flopticals, etc.) will need to be seized. Where the investigator wants to gain information or criminal intelligence without the subject's knowledge in order to develop a case or identify co-conspirators, the investigator may elect to obtain a "surreptitious entry" or "sneak and peek" warrant. [46] The "sneak and peek" warrant permits the investigator to enter the computer system to make duplicate copies to be viewed at a later time without alerting the subject(s). The investigator should be aware, however, that such action, without reasonable subsequent notice to the subject(s) that the search has occurred, could violate federal search and seizure requirements. [47]

Read Seized Data. Where the subject is known, the investigator may need to read the contents of the subject's files in a multi-user system. In conducting this type of search, the investigator should be aware that several types of information may reside in those files, and special legal issues may be applicable based on the specific contents. First, in the case of an e-mail file, the Electronic Communications Privacy Act (ECPA) Title II will apply to unread e-mail. [48] If the e-mail has been read and saved, the Fourth Amendment alone protects it in the same manner as most other saved files. In either case, a properly issued warrant should allow the investigator access to the e-mail. [49] Second, if the content of any file appears to be publishable, Privacy Protection Act [50] concerns arise. These concerns dictate that files not subject to the search warrant cannot be examined. Finally, the investigator may use a version of a "sneak and peak" warrant in a situation where a hacker has compromised a system and created files under pseudonyms. This will allow the investigator to cull through the files and read only those that were created by the subject. The investigator must be aware of the repercussions of using a sneak and peek warrant without subsequent notice. [51]

2. Basic Surveillance Techniques

Closed Circuit Television (CCTV). At times, a terminal will be accessible by several employees with either shared passwords or with individual passwords for each user. If the alleged computer crime can only be traced to the specific terminal, it may be necessary to monitor the terminal to determine who is using the terminal at the time of each alleged crime. Closed circuit television monitoring is one way, albeit a very resource- intense method, to solve a classic computer crime problem-putting the criminal's

fingers on the keyboard.

Caller ID. If caller ID is already installed and the phone call recipient consents to the reading of the device, no warrant or search authority is necessary. [52] On the other hand, if caller ID is installed during the course of an investigation, the safer approach is to obtain proper search authority or a warrant. [53]

Trap and Trace. Trap and trace devices, much like caller ID, are used to identify the originating number from which wire or electronic communications were transmitted. Trap and trace devices do not access content and thus may be installed after obtaining a court order. [54]

Pen Register. Pen registers are used to identify outgoing numbers called from a subject's phone line. If a central station speed dialer is used, only the numbers used to activate the speed dialer will be recorded. When the speed dialing numbers are contained in the phone, the phone must be seized in order to determine what phone numbers actually were dialed. Unless the investigator knows that the speed dialing numbers are non- volatile (i.e., if there is no independent power or backup batteries), the numbers should be read by the investigator as soon as possible under the exigent circumstances doctrine. [55] In some cases involving speed dialers, the pen register may record a number which only accesses the telephone company speed dialer. The actual number is never recorded by the pen register. A subpoena for the telephone company records will then be required. Pen registers are installed by OSI technical agents or the telephone company based on court orders. [56] A second application for a court order is necessary to install a portable pen register or dialed number recorder (DNR) for use on speed dialers or redial functions on phones. [57] Trap and trace procedures, as opposed to pen registers, are used to determine the phone number of the calling activity (caller ID).

Subpoena Call Detail Reports (CDR). The phone company needs a subpoena to release records if requested for law enforcement purposes. [58] No subpoena is necessary if the CDRs are used for the maintenance of the communications system. The detailed nature of CDRs is usually indicative of law enforcement interest, and thus a subpoena will generally be needed. If the base commander or communication squadron commander requests the CDRs from the telephone company without the instigation of law enforcement, the telephone company will provide the CDR.

Context Monitoring. It is permissible for the system operator to create an audit trail of systems the subject has entered or attempted to enter. This use is specifically permitted under the ECPA if no content is ascertained. [59]

Content Monitoring. Keystrokes also may be monitored to determine what actions the subject is taking from a particular terminal and verify the computer's subsequent responses. An agent should be aware that such action, if deemed to derive content (and not falling within one of the exceptions to the statute) will violate the ECPA, which deals with the interception of wire, oral, and electronic communications. The Department of Justice (DoJ) believes these actions to be defensible, but advises the use of appropriate banners to alert users of the system that they are subject to monitoring. The authors advise

adherence to ECPA Title I in the absence of appropriate banners.

3. Enhanced Investigative Techniques

The following three sub-parts deal with enhanced investigative techniques.

Authorized Entry. If the investigator is an authorized user of the system, operating system commands/ techniques available to any user may be employed. An example would be a terminal with access to pay records that has been the instrument of a fraud by one authorized user. Another authorized user may extract data useful to an investigator. In a commercial system, "finger" and other techniques that reveal information on system users may be employed. It should be noted, however that finger can be manipulated by users to hide their identity. The perpetrator conceals his or her true identity by pretending to be another user of the system. A suspect may even install a program on the host to send a message whenever fingered, and then to reverse finger.

One Step Beyond Air Force Perimeter of Networked Computers. This is limited on-line pursuit. The investigator determines only the last system the intruder came through before entering the Air Force system. It is of limited value given that hackers generally take circuitous routes and mask their location by invading through several innocent host systems and numerous private phone systems.

Real Time Pursuit. A reverse hack may be necessary when system security measures mask a hacker's location. Specialized programs and techniques are used to track the intruder back through innocent host systems. Resources required for reverse hacking outside of the Air Force (let alone outside DoD) are enormous. Given the multiple jurisdictions, coordination will be needed at the domestic level (FBI, Secret Service, state and local investigators) and international level (country by country-civilian and possibly military). Real time pursuit, therefore, should be reserved for those cases where a large loss has occurred, national security is at stake, or lives are in danger. The authors recommend that real time pursuit only be requested when less intrusive options have been exhausted. The issues of consent and the need for warrants remain unresolved in real time pursuit, and it will be years before these complex technical and legal issues are resolved. Judge advocates at HQ OSI should be consulted when real time pursuit/reverse hack is considered.

V. BASIC COMPUTER SEARCH CONSIDERATIONS

The following is a brief summary from the Department of Justice's 1994 Federal Guidelines on Searching & Seizing Computers (DoJ Guidelines) coupled with insights from OSI agents which may assist judge advocates when reviewing proposed OSI actions. This section is written from the perspective of the Air Force. Given that many computer crime cases will involve military members and civilians or just civilians, the DoJ Guidelines are critical. Appropriate references to the DoJ Guidelines are noted. This section subsequently discusses the statutes and regulations that will need to be adhered to in any investigation. Adherence will help ensure that all evidence obtained will be admissible during prosecution. Adherence to these statutes and regulations will also help limit any possible investigator

liability.

A. Technical

1. Location of Data

The seriousness of the case will naturally dictate the intensity of the search. A case involving national security will obviously entail more detailed searches than a case involving improper use of an internal Air Force e-mail system to communicate Super Bowl football pool results. In most modern computer crime investigations, it is impractical and sometimes impossible to search all storage. If a small hard drive (under 100 megabytes) and less than 100 disks are seized, everything can be searched thoroughly. Computer Crime Investigations (CCI) performs all computer media analysis and will generally use a method analogous to medical "triage." This triage involves working from the most obvious to the least, and seldom does the investigator have either the time or resources to check everything.

All storage devices should be considered for evidence when searching any computer. This includes hard drives, floppy disks, back-up tapes, CD- ROMs, and worm drives. Input/output devices may also provide useful information. Laser printers can be searched for evidence of the last image printed. Hard disk print buffers-hard disks in the printer to store the data to be printed-and print spooler devices retain data until it is written over, and should be checked for evidence. A ribbon printer contains impressions from material printed. The burning of the screen phosphorous on the monitor may reveal an image. Keyboards with internal diskette drives, hard cards, and scanners may be additional sources of evidence. Some computer users make routine back-ups of the data on their computers and store these back-ups off-site.

Networked personal computers require careful planning and consideration of the possibility of off-site storage locations because of the use of file servers, e-mail, electronic bulletin boards (BBS), and voice-mail systems. It is routine on multi-user systems for the system operator (sysop) to make routine back-ups on a regular basis and to make disaster back-ups for storage off-site. [60]

2. Drafting a Warrant to Seize Hardware

Where the computer is simply a storage device, the search can be viewed as "conceptually similar to searching a file cabinet for papers." [61] Care must be taken in drafting the warrant. Like any document search, the breadth of the warrant's authority depends on the breadth of the crime being investigated. If the criminal activity is extensive, the warrant will need to be broadly worded. [62] Where the activity is more limited, the warrant must specifically describe each item to be seized. [63] In child pornography cases, the monitor and printer may need to be seized in order for the investigator to review the evidence in the same manner as the targeted defendant viewed the evidence. [64]

Describing the place to be searched may be problematic when dealing with a networked computer. The location of the stored information may in fact be unknown. If the information is stored off-site but

within the same district, agents should get a second warrant if the location is known. [65] If there are multiple sites within one district, remote access may be authorized under one warrant, but separate warrants are preferable. [66] Agents should notify the magistrate judge issuing the warrant when they know that there are multiple sites in different districts. [67] If the information is being stored at an unknown site, the magistrate should be apprised of this as well. [68] Off-site storage should be included in the warrant. [69] The description must be "such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." [70] The DoJ Guidelines recommend always getting a warrant for each geographic "place" if possible. [71] Given the DoJ recommendation, a warrant for each location is the preferable approach.

When dealing with information or devices that have been moved, the warrant will not be invalidated by the "within district" requirement so long as the items were within the district when the warrant was issued. [72] In all situations, the magistrate judge should be asked for explicit permission to remove the hardware and conduct the search off- site.

An exception to the knock-and-announce requirement for execution of a search warrant may be appropriate in exigent circumstances. [73] If "knocking" may cause an officer or other individual to be hurt, the suspect to flee, or the evidence to be destroyed, a no-knock warrant is permitted. [74] The knock-and-announce requirement also is waived if no one is home or the door is open. [75] No computer cases have litigated the no-knock concepts, and so only analogies can be drawn. Special circumstances justifying a no-knock warrant should, however, be put in the warrant. [76] There must be some reasonable, articulable basis to dispense with the knock-and-announce requirement. [77] Factors to consider include what offense is being investigated (violent or non-violent), if there is information indicating evidence will be destroyed, the age and technical sophistication of the target, and whether the target knows he/she is under investigation. [78] Judge advocates at HQ AFOSI should be consulted in all no-knock warrant cases.

3. Electronic Bulletin Boards

The Privacy Protection Act of 1980 (PPA) [79] provides protection for publishers, authors, editors, newspapers-really anyone else who possesses materials with an intent to distribute to the general public-from search and seizure when they are not suspected of a crime. Given the scope of the PPA, it is generally advisable to assume that the PPA applies if any type of publishing activity is involved. For example, a BBS may include fantasy stories, personal memoirs, and even "letters to the editor." When searching this sort of service, copies of all data should be made, and promptly after review, all non-relevant data should be immediately returned. [80] The Privacy Protection Act covers work product materials and documentary materials. [81] Work product materials contain mental impressions, opinions, and theories and are produced with the intent to disseminate to the public. [82] Work product materials are afforded extra protection under the PPA, and they cannot be seized unless there is probable cause to believe that the person possessing them has committed or is committing a criminal offense to which the materials relate, or there is reason to believe that the materials must be seized in order to prevent death or serious bodily injury to a human being. [83] Contraband, fruits of crime, and items otherwise criminally possessed are excluded from the work-product protection. [84] Documentary

materials contain recorded information and their protection under the act does not extend to contraband, fruits of crime, or items that are criminally possessed. [85] The exceptions pertaining to documentary materials are those which apply to work-product materials for law enforcement search and seizure, [86] plus additional exceptions. Agents may search and seize documentary material if there is reason to believe that giving notice pursuant to a subpoena duces tecum would result in destruction, alteration, or concealment of such materials. [87] Search and seizure is also permitted if the documents have not been produced as required by a court order directing compliance with a subpoena. [88]

Application for a warrant pursuant to 42 U.S.C. Sec. 2000aa(a) must be authorized by the Assistant Attorney General for the Criminal Division on the recommendation of the U.S. Attorney or supervising Department of Justice attorney. [89] If time does not permit use of this procedure, a supervisory law enforcement officer in the applicant's agency may authorize the search and seizure, but the authorization must be reported to the Assistant Attorney General for the Criminal Division within 24 hours. [90]

The documentary and work-product materials must be possessed by someone reasonably believed to have the purpose to distribute "a newspaper, book, broadcast, or similar form" to the public in order to be protected. [92] Not every BBS will meet this threshold for protection under the Privacy Protection Act. This requirement is still being interpreted by the courts. In many BBSs, the investigator will encounter "anarchy texts" which are detailed technical descriptions of how to make a bomb or how to hack or phreak phone and computer systems. These descriptions are almost always protected by the First Amendment. [93] If the items used-or information to facilitate the hacking and phreaking (i.e., passwords, credit card PINs, etc.)-are found in the computer system, then the anarchy texts and the facilitating devices should all be seized and can be used as evidence. [94]

4. E-Mail

The issues involved in legally obtaining the content of e-mail are complex and revolve around the distinction between intercepting and accessing stored communications. [95] Interception and storage can occur at various times during e-mail transmission. From a practical viewpoint, the most viable interceptions occur at the sender's microcomputer and the file server/recipient's microcomputer. The seizure of stored communications is most easily conducted at the recipient's file server/microcomputer. The appropriate approval authority, as well as procedures to obtain the approval, must be carefully analyzed. Careful review of the relevant statutes as well as the sparse case law is mandatory for a legally sufficient interception or search. [96]

5. Searching for Information

The destructibility of computer records creates special problems when searching for information. [97] It is crucial that agents control remote access to the computer while searching it so that they may prevent the target from destroying the data from another location. If the data is created or maintained by targets, or the target owns or operates a system, a warrant should be used for safety's sake. Cooperation by the systems operator (sysop) should be strictly within his or her authority (as limited by the Electronic

Communications Privacy Act of 1986). When dealing with a large amount of data, key word searches and utility packages can be used to do limited data searches.

If, while searching for information, agents find items different from those described in the warrant, they must be careful not to violate the Fourth Amendment. The particularity of descriptions required by the Fourth Amendment for a warrant may prohibit law enforcement from seizing items outside the warrant. [98] The warrant should be looked at carefully, however, to determine its breadth. Encrypted information may be translated if the warrant gives authority to search for it. [99] If the search is based on consent, however, the encryption may act as an implicit limitation on the scope of the search. [100] If the data cannot be de- encrypted, it may be possible to use a subpoena to compel the targeted defendant to turn over the key or face contempt proceedings. [101] In attempting to obtain a contempt of court/ refusal to obey a legal order charge, the judge advocate should analogize the situation to one where a targeted defendant refuses to turn over a traditional key to a safe containing materials specified in the warrant. [102]

6. Searching On-site or Removing Hardware to Another Location

Off-site searches are permitted when they are reasonable under the circumstances. [103] Consider how extensive the warrant is and at what type of premises the computer is located. If the warrant is broad, then voluminous seizure of documents is permitted. A narrow warrant requires that the agents distinguish between documents to be seized and those not covered by the warrant. Generally, courts may be more lenient about the "seize now, sort later" approach when the search is in a home, as compared to a search and seizure of a business where the business could be crippled until the data and materials are returned to the business. [104] The investigator must keep in mind the popularity of home offices and new trends in telecommuting-working via modem at home. [105]

7. Finding Experts

Planning is very important in computer searches. It should be determined, to the extent possible, what type of computer is involved, what operating system is used, and whether the information sought can be accessed by, or is controlled by, a computer literate target. Once these questions are answered, determine the type of expert needed. Air Force OSI policy is that Computer Crime Investigators (CCIs) are the only AFOSI personnel allowed to process (i.e., analyze) computer evidence. [106] If the AFOSI involvement is minor (i.e. monitoring a case, such as when the Secret Service is primarily responsible), AFOSI CCIs should still be consulted first. They are the primary Air Force source of qualified expertise. The CCI, depending on the technology involved, will determine what private sources, including computer organizations, universities, members of the industry, and the victim organization itself, should be called upon to assist in the investigation. Experts can perform forensic exams to retrieve information, make the equipment operate properly, unblock deleted or erased data storage devices, bypass or defeat passwords, decipher encrypted data, and detect the presence of viruses. [107] Again, this investigative process will be supervised by CCI. [108]

B. Fourth Amendment, Statutes, and Regulations

The following is a brief summary of the statutes and regulations that may be needed to ensure the proper collection of evidence during any investigation. From a legal perspective, it is most convenient to approach these complex issues by first examining the Constitution and federal statutes, followed by an analysis of appropriate agency regulations. In addition, given that a large percentage of computer crimes will involve civilians, the DoJ Guidelines are critical for the OSI agent and judge advocate to follow.

1. Warrant Requirement - General Principles

The Fourth Amendment provides that

the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [109]

Constitutional requirements for search and seizure are, of course, relevant to the investigation of computer crime despite the sometimes intangible nature of the searched for items. [110] A search warrant is thus generally required to search or seize computer hardware or software.

2. Requirements to Obtain a Search Warrant

Search and seizure, as limited by the Fourth Amendment, requires a showing of probable cause under the "totality of the circumstances" to obtain a warrant. [111] For there to be probable cause, a reasonable person has to conclude that it is probably true that (1) a crime has been committed; (2) evidence of that crime exists; and (3) evidence presently exists at the place to be searched. [112] A neutral magistrate must make the probable cause determination as to whether a "fair probability" exists that the contraband will be discovered in the place to be searched. [113] In addition, law enforcement agents must describe with "particularity" the place to be searched and the things to be seized. [114] This rule is strictly enforced in order to prevent the officer conducting the search from exercising personal discretion as to what is included in the search. [115]

3. The Exclusionary Rule and Defective Warrants

If a search warrant is found to be defective after the search is over, the evidence obtained may be excluded from any judicial process. The United States Supreme Court in United States v. Leon, [116] however, limited use of the exclusionary rule to those cases which further its exclusionary purpose, which is identified as deterrence rather than a personal constitutional interest. Use of trustworthy evidence, obtained through reasonable good-faith reliance on a defective warrant, may be appropriate, after weighing the costs and benefits of preventing its use in the prosecution's case in chief. [117]

4. Exceptions to the Warrant Requirement

No Reasonable Expectation of Privacy. A warrant is not required in situations where an individual does not have an actual expectation of privacy and where society would generally refuse to recognize the expectation as reasonable. [118] As the "first response" to the privacy/consent issue, proper computer banners should be included on all Air Force systems. [119]

A military member's expectation of privacy in his or her workplace is determined on a case-by-case basis using criteria similar to that used in O'Connor v. Ortega. [120] The military courts have recognized that a limited expectation of privacy may exist, but in United States v. Muniz, [121] Judge Cox, writing for the court, indicated that the expectation of privacy in the military context is, by necessity, minimal. He said,

In this regard, we note that the credenza, like any other item of government property within the command, was subject at a moment's notice to a thorough inspection. That omnipresent fact of military life, coupled with the indisputable government ownership and ordinarily nonpersonal nature of military offices, could have left appellant with only the most minimal expectation-or hope-of privacy in the drawer vis-a-vis his commander. This minimal expectation must be distinguished from an unquestionably greater expectation of privacy and security vis-a-vis the rest of the world. [122]

However, the opinion further notes that the entry into the desk was justified because there was an emergency. [123] Similar searches have been upheld where there were no exigent circumstances. In both United States v. Craig [124] and United States v. Battles [125] the searches were justified on the grounds that the area searched was easily accessible to other people besides the accused and the accused was aware of the access. [126] The use of this case law may be persuasive in computer searches.

Consent. When a party with authority over the computer, account, or data in question consents to the search, a warrant is not necessary. [127] In the Air Force, commander will usually be able to give consent to search. Consent must be voluntary, [128] and the Government bears the burden of proof if a factual dispute arises over whether consent was voluntary. [129] Parents, spouses, and private employers may be among those third parties authorized to consent to the search. [130] When dealing with computer networks, consent issues are complicated. While there may be some shared access to files for which the sysop may give the consent to search, there will be other files over which the sysop lacks the authority to give consent to search.

There may be explicit or implicit limits to the scope of the consent a third party may give. [131] The consenting individuals may choose to delineate specific boundaries or may lack authority to give consent to a search in areas of the jointly held computer exclusive to another user. [132] Generally, for a court to find that an area is under the exclusive control of the non-consenting party, the party will have taken some special steps to protect his or her personal property. [133]

The Government, even as an employer, is limited by the Fourth Amendment. [134] Therefore,

warrantless searches by government employees must be limited to work-related or administrative matters. [135] To determine if employer consent is adequate to search without a warrant, one should assess the expectation of privacy in the context of the employment relationship. [136] Factors that may be relevant include (1) whether the area or item to be searched has been set aside for the employee's exclusive or personal use; (2) whether the employee has been given permission to store personal information on the system or in the area to be searched; (3) whether the employee has been advised that the system may be accessed or looked at by others; (4) whether there have been past inspections of the area or item and this fact is known to the employee; (5) whether there is an employment policy that searches of the work area may be conducted at any time for any reason; and (6) whether the employee/ military member has signed a security agreement. [137]

Incident to a Lawful Arrest. A warrantless search of a person who has been arrested is permissible because of the danger of concealed weapons. [138] The scope of a search incident to a lawful arrest is limited to the arrestee and the area under the arrestee's control and possession at the time of the arrest. [139] This includes the area from which the arrestee might obtain a weapon or destroy evidence. [140] An investigator may be able to seize items based on arrest, but may not be allowed to search the items. If a beeper or alphanumeric pager is found, for example, it may be seized but could be protected from search by the Electronic Communications Privacy Act of 1986 until a warrant is obtained. Further examples of items that may require a warrant to search after being lawfully seized include pocket organizers and palmtop computers.

To Protect and Preserve Life. "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."[141] The Fourth Amendment does not bar law enforcement agents from making warrantless entries when they reasonably believe a person is in need of immediate aid. [142] Once the law enforcement officers have entered the premises, they may seize evidence that is in plain view.

Plain View. Evidence may be seized without a warrant when the officer is in a lawful position to observe the evidence and its incriminating character is immediately apparent. [143]

Exigent Circumstances. The perishable nature of electronic data makes the doctrine of exigent circumstances particularly relevant to computer crime. The doctrine provides that "when destruction of evidence is imminent, a warrantless seizure of that evidence is justified if there is probable cause to believe that the item seized constitutes evidence of criminal activity."[144] The doctrine of exigent circumstances applies to situations where an officer reasonably believes that someone inside needs "immediate aid," to prevent the destruction of relevant evidence, the escape of a suspect, or the frustration of some other legitimate law enforcement objective. [145] To determine whether the doctrine of exigent circumstances applies, consider (1) the degree of urgency involved, (2) the amount of time necessary to obtain a warrant, including by phone, [146] (3) whether the evidence is about to be removed or destroyed, (4) the possibility of danger at the site, (5) information indicating the possessors of the contraband know the police are on their trail, and (6) the ready destructibility of the contraband. [147] A warrantless search is only justified if a reasonable person would think it necessary. [148] So long as an officer's fears are reasonable, the warrantless search will be upheld even if the suspicions

prove to be incorrect. [149]

It is important to note that while exigent circumstances may justify seizing hardware (i.e., the storage device), a warrant may be still be necessary to conduct an actual search. In United States v. David, [150] a federal district court held that although the agent was correct to seize the defendant's computer memo book without a warrant because the agent saw him deleting files, the agent should have gotten a search warrant before re-accessing and searching the book. The court held the exigencies allowed the agent to take the computer memo book, but once taken, there was time to obtain a warrant to examine the computer files. The seized evidence was suppressed. [151] This case analogizes the computer hardware to a container; authority to seize a container does not necessarily authorize a warrantless search of the container's contents. [152] If a reasonable expectation of privacy exists for the contents of the container, a warrant will be required. In the case of a beeper or pager, the officer may make the argument that if the numbers from a beeper are not searched and recorded, incoming pages may wipe out old information. On the other hand, on an alphanumeric pager, this argument may not work due to the fact that many providers will keep back-ups of text messages in their own computers that could be obtained via subpoena. [153]

Hot Pursuit. In Warden v. Hayden, [154] the United States Supreme Court held that police entering a home of a third party in pursuit of a robbery suspect could search the home for the suspect and for weapons. Other evidence discovered in the course of the search is also admissible. [155] Warden may be relevant to on-line hot pursuit. The relationship between pre-computer hot pursuit and on-line hot pursuit is not clear. The analogy between these two concepts is far from perfect and there are no regulations or case law on the rules and procedures for a legally sufficient on-line pursuit. Given this legal uncertainty as well as the need for inter-governmental coordination, on-line pursuit should only be considered in the most serious of circumstances. Consent and warrant issues must be carefully considered and coordinated among the various involved governmental agencies. (i.e., federal, state, local, and international).

Border Searches. A warrant is not required to conduct a search at the border. [156] A border search is also permissible at the functional equivalent of a border, such as a checkpoint located several miles from the actual border. [157] Incoming international mail [158] and incoming international baggage [159] are also subject to warrantless searches.

Disclosure. "If an individual voluntarily discloses information to another, who then passes it on to the government, either unsolicited or in accordance with a pre-existing agreement, the government needs no warrant to receive that information. The presumption is that the individual assumed the risk of the other's revealing the information to the government." [160] Disclosure may also be a factor in considering the reasonableness of an individual's expectation of privacy. [161]

C. Federal Privacy Act Legislation

1. Wiretap Act [162]

Predecessor to the Electronic Communications Privacy Act of 1986, the Wiretap Act protected face-to-face conversations and telephone conversations from electronic eavesdropping. The act barred the interception of wire communications over a common carrier unless an appropriate court order had been obtained. Interception applied only to "aural acquisition," interpreted as meaning to acquire through the sense of hearing the contents of the communication. [163] United States v. Seidlitz [164] held that the Wiretap Act does not apply to computer transmissions because they are not aural.

2. The Electronic Communications Privacy Act of 1986

Generally. The Electronic Communications Privacy Act of 1986 (ECPA) consists of three separate titles. Title I updated Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act) to include electronic communications transmitted on electronic communication systems affecting interstate and foreign commerce. [165] Title II provides protection for stored electronic communications, again limited to systems affecting interstate or foreign commerce. [166] Title III governs the use of pen registers and trap and trace devices. [167] Electronic mail receives the majority of its protection from the ECPA generally and particularly from Title II. The ECPA applies, in most cases, only to e- mail that has not been read. Once the message has been fully transmitted, i.e., read, the Fourth Amendment alone protects it, unless the communication is stored in a remote computing service. Part V of the DoJ Guidelines has further information and details on this subject. Given the potential civil and criminal personal liability for agents, thorough legal research in this area is essential. Furthermore, when military members are involved, Air Force and OSI regulations must be followed.

Interception. The general rule of ECPA Title I is that it is unlawful to intentionally intercept the contents of an electronic communication while it is being transmitted, or to use or disclose the contents of communications that were unlawfully intercepted. Electronic mail "cannot legally be read except by the sender or the receiver even if someone else actually intercepted the message." [168] As with any general rule, however, ECPA Title I provides for exceptions. One major exception is that the communication must not be readily accessible to the general public. [169] Another exception is made for the system operator (sysop) to the extent necessary to manage the system used to send an electronic communication. [170] This exception does not allow for the sysop/systems administrator to read text of e-mail without the express permission of either the sender or the receiver. [171] The issue of whether use of appropriately worded banners giving the sysop implied permission to read based on the banner has not been decided. Additional exceptions for the sysop include (1) the originator or addressee gives consent; [172] (2) the message is inadvertently obtained by the sysop and appears to pertain to a crime and disclosure is made to a law enforcement agency; [173] and (3) the message is configured to be readily accessible to the general public. [174] Pen registers and trap and trace devices are excluded from coverage under Title I because they do not access content. [175]

If a law enforcement investigator cannot obtain the contents of the electronic communication by means of one of the exceptions and wishes to intercept an electronic communication, the agent must have proper authorization under 18 U.S.C. Sec. 2516 and must obtain a court order under the provisions of 18 U.S.C. Sec. 2518.

Keystroke Monitoring. Keystroke monitoring for content is covered by 18 U.S.C. Sec. 2518, which provides for intercepting wire, oral, or electronic communications and sets out the requirements for law enforcement to obtain the requisite permission from a court of competent jurisdiction. The warrant application must be made in writing and include (1) the identity of the law enforcement agency and personnel conducting the investigation; (2) a statement of the facts, to include (a) details of the offense committed or about to be committed, (b) a particular description of the nature and location of the facilities from which the communication to be intercepted originates, (c) a particular description of the type of communications to be intercepted, (d) the identity of the person, if known, committing the offense and whose communications are to be intercepted; (3) a statement of other investigative techniques that were attempted and why they failed or could not be used at all; (4) a statement of the intended duration of the interception; (5) a statement of the facts concerning any other applications made concerning the same individuals, facilities or places; and (6) if for an extension of an order, an account of the results received to date. [176] The procedure for obtaining authorization for keystroke monitoring must be carefully followed. If not followed, the investigator may be subject to personal civil and criminal liability. [177]

Pen Registers and Trap and Trace Devices. Pen registers and trap and trace devices are not included in the surveillance techniques covered by Titles I and II of the Electronic Communications Privacy Act of 1986 because they do not access content. [178] The requirements for installation of a pen register are set forth in Title III of the ECPA, codified at 18 U.S.C. 3121-3127. Service providers are authorized to install and use pen registers in the normal course of business. [179] Law enforcement, however, is required to obtain a court order. [180] A court order must show that the "information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." [181] Service providers must assist law enforcement in the installation and operation of such devices and are to be reasonably compensated for their expenses. [182] In an emergency involving immediate danger of death or serious bodily injury, or conspiratorial activities characteristic of organized crime, and if there is not adequate time to obtain a court order, a pen register or trap and trace device may be installed without a court order. [183] However, the order still must be obtained within 48 hours after the device is installed. [184]

Access to Stored Communications. There are two general rules within ECPA Title II (18 U.S.C. Sec. 2701 et seq). The first rule is that one may not access, or exceed access of, a facility through which an electronic communication service is provided and thereby obtain, alter, or prevent authorized access to an electronic communication in electronic storage. [185] This rule is inapplicable if the conduct has been authorized by the service provider, the service user with respect to a communication from or for that user, or under 18 U.S.C. Secs. 2703, 2704, or 2518. [186] The second rule prohibits (1) a provider of electronic communication services to the public from divulging the contents of a communication in electronic storage [187] and (2) a provider of remote computing services to the public from divulging the contents of a communication carried or maintained on the service. [188] There are two major exceptions to this statutory provision. A sysop may disclose the contents when he or she receives lawful consent from the originator, addressee, intended recipient, or the subscriber. [189] Furthermore, if a sysop inadvertently obtains the contents of a communication and it appears to pertain to the commission of a crime, the sysop may disclose the contents to a law enforcement agency. [190] In addition, the

definition of "electronic storage" for purposes of Title II is quite limited. Electronic storage refers to electronic communications which are held as an interim stop in the transmission between the originator and the receiver. [191] The Department of Justice has interpreted the statutory language to mean that once an e-mail message has been retrieved by the intended recipient it is no longer protected by Title II because it is no longer "stored incident to transmission," unless the communication is in a remote computing service. [192]

If a law enforcement agent wishes to have the contents of an electronic communication disclosed, and disclosure is not available under the applicable exceptions, disclosure can be required by use of a warrant, administrative subpoena, grand jury or trial subpoena, or court order. The means used will depend upon the type of service the communication is stored in, and if in electronic storage in an electronic communication service, the length of time the communication has been in storage. [193]

Preservation of Electronic Communications. The ECPA allows for backup preservation of electronic files [194] when notice to the subscriber [195] would cause destruction. The act requires a subpoena or court order to compel the sysop to make the copies. [196] Notice must be given within three days or when the copies are made to the subscriber/customer to whom the files belong, unless notice is delayed pursuant to 18 U.S.C. Sec. 2705. The subscriber then has 14 days to file a motion to quash the subpoena or to vacate the court order before the Government can access the copied files. [197] Given the newness of this provision, careful coordination is needed between agent, judge advocates, and the local U.S. Attorney.

3. Privacy Protection Act of 1980

The Privacy Protection Act of 1980 (Privacy Protection Act) immunizes from law enforcement search and seizure any "work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce." [198] Exceptions to the law occur when the "person possessing such materials has committed or is committing the criminal offense to which the materials relate," [199] or the immediate seizure is necessary to prevent death or serious injury to a human being. [200]

The Privacy Protection Act also protects "documentary materials," which are defined to include, but not limited to, "mechanically, magnetically, or electronically recorded cards, tapes, or disks." [201] This "seems to include all computer media including floppy and hard disks." [202] In addition to the exceptions for work product materials, these "documentary materials" may be seized if it can be shown that the issuance of a subpoena would result in the destruction, alteration, or concealment of the materials, or if the materials were not produced by the possessor in response to a court order. [203]

The Privacy Protection Act may be applicable to electronic publishers by means of the "or other similar form of public communication" phrase, as long as an intent to disseminate can be shown. [204] This issue, however, has not been litigated. Though the act has already been applied to cases where the

publishable information has been placed in computer storage or on an electronic bulletin board, the issue of whether BBS storage implies an intent to disseminate remains open to further fact- specific litigation. [205]

D. Department of Defense Directive 5200.24

Department of Defense Directive 5200.24, Interception of Wire, Electronic, and Oral Communications for Law Enforcement (DoDD 5200.24), when issued, will replace the 1978 edition. The new directive is designed to keep Department of Defense regulations in compliance with recent changes in the law of computer communications and the search and seizure of stored computer data. The key parts of the proposed directive provide that the commander of AFOSI is the lowest level of approval for consensual intercepts. [206] The AFOSI is the only Air Force component authorized to intercept wire, electronic, and oral communications or to use pen registers and trap and trace devices for law enforcement purposes. [207] The directive requires AFOSI to control its inventory of technical apparatus used in intercepts and to maintain an accounting system to track and report the details of all intercept requests (whether approved or disapproved, acted upon or not). [208] Finally, the directive mandates that the DoD Inspector General monitor its implementation. [209]

There are several enclosures to DoDD 5200.24 which may be of interest to judge advocates working on computer crime matters:

--Enclosure two is a list of definitions of terms. --Enclosure three outlines the procedures to follow before conducting consensual and non-consensual interceptions and for seizing communications stored in on-site and off-site storage units. --Enclosure four contains the records administration and reporting requirements and enclosure five dictates the information to be included in the reports. --Enclosure seven is a memorandum by the Attorney General entitled, Procedures for Lawful, Warrantless Interceptions of Verbal Communications.

E. Air Force Directives and Instructions

Several Air Force documents may be of use to the reader, including Air Force Policy Directive (AFPD) 71-1, paragraph 4 (1995) and Air Force Instruction (AFI) 71-101, Volume 1, (July 22, 1994).

Under authority granted the Secretary of the Air Force under DoDD 5200.24 (1978 and 1994 (in draft)), AFPD 71-1, paragraph 4, authorizes AFOSI to conduct law enforcement related technical surveillance for the Air Force. Air Force Instruction (AFI) 71-101, Volume 1 establishes the approval requirements and procedures for AFOSI technical surveillance activities. It regulates the use of pen registers, trap and trace techniques, and other devices that are capable of intercepting wire, oral, or electronic communications.

Chapter 4.3 of AFI 71-101, Volume 1, deals specifically with requests for technical surveillance. It

outlines the approval procedure for a request for non-consensual interceptions of wire, oral, or electronic communications off-site. Air Force OSI sends the technical request to the Secretary of the Air Force General Counsel's Office (SAF/GC), [210] who then forwards the request to DoD for approval to seek a court order. [211] The request is then coordinated with the DoJ. [212] If approval has been granted by each reviewing authority, an attorney from DoJ and a military lawyer apply for the court order. [213] If the interception is to occur on a military installation, the process is simplified. Agents request authority to search from the installation commander, who grants approval on the advice of the local staff judge advocate. [214]

The general counsel's office is the final approval authority for consensual interceptions. [215] However, in situations where there is not adequate time to send the request to SAF/GC, the commander of AFOSI may give approval; emergency approval must be followed by written notification to SAF/GC within 72 hours. [216]

Pen registers and trap and trace devices are dealt with separately. In order to request approval to install one of these devices, AFOSI sends a technical request to SAF/GC. Once SAF/GC has approved the request, the AFOSI agent contacts the local Assistant U.S. Attorney and requests that he or she apply for a court order. [217] The commander of AFOSI may also give emergency approval for requests for pen registers and trap and trace devices; the same notification procedures pertain as for other technical surveillance devices. [218]

Volume 1 of AFI 71-101 also contains further information on the approval necessary for technical surveillance requests where the surveillance takes place abroad or on a military installation.

F. Air Force Office of Special Investigations Rules

Air Force Office of Special Investigations Instruction 71-103 (October 28, 1994) (AFOSII 71-103), governs the procedures for using technical surveillance equipment for the interception of wire, oral, or electronic communications. The instruction deals specifically with the duties of Computer Crimes Investigations in providing support to the field and in dealing with computer intrusion cases. The CCI manages all computer intrusion cases [219] and provides assistance to other Air Force organizations involved in security, law enforcement, or criminal justice. [220] The CCIs, who have received special training, perform all computer forensic media analysis and are generally available to provide expert testimony in cases involving an Air Force interest. [221]

With regard to technical surveillance, AFOSII 71-103 requires that OSI agents follow the procedures outlined in DoD Directive 5200.24 and AFI 71-101. The instruction further requires that technical requests be submitted in writing to the appropriate approval authority. [222] The appropriate level of approval may be ascertained by referring to the Technical Support Approval Matrix. [223] When approval authority is at the HQ AFOSI level or higher, requests for technical surveillance should be sent to IOC/MCI, who will process the request. [224] The instruction provides further guidance with regard to emergency approvals, monitoring and recording of intercepts, and other issues involved in technical

surveillance.

VI. CONCLUSION

In order to investigate and prosecute computer crime properly, the OSI agent and judge advocate must be aware of three distinct areas that will affect the outcome of the investigation and prosecution. First, an understanding of the crime being investigated is needed. This will help to focus the investigation and ensure that evidence necessary to prove the elements of the offense will be obtained. Second, proposed actions must be evaluated to optimize the investigator's ability to obtain the evidence necessary for a subsequent prosecution. Finally, before implementation of any course of action, the OSI agent, preferably with consultation with the judge advocate, must ensure that the proposed course of action is legally implemented. Recognition and adherence to the applicable statutes and regulations discussed above is mandated in most situations. This will ensure that evidence obtained during the investigation will be admissible in the subsequent prosecution, and-in some cases-will shelter the OSI agent from possible civil liability.

Footnotes

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1. Manual for Courts-Martial, Uniform Code of Military Justice, app. 2 (1995).

2. Pub. L. No. 99-474, Sec. 2, 100 Stat. 1213 (1986).

3. Computer Abuse Amendments Act of 1994, Pub. L. No. 103-322, Title XXIX, Sec. 29001(b)-(f), 108 Stat. 2097 (1994).

4. 18 U.S.C.A. Sec. 1030 (West Supp. 1995).

5. Id. at Secs. 1030(a)(5), (a)(4), and (a)(3).

6. Id. at Sec. 1030(a)(5).

7. Id. at Secs.1030(a)(1), (a)(2), and (a)(6).

8. Id. at Secs. 1030(a)(5)(B), (c)(4).

9. Id. at Sec. 1030(c).

10. Pub. L. No. 98-473, Title II, Sec. 1602(a), 98 Stat. 2183 (1984).

11. 18 U.S.C.A. Sec. 1029 (West Supp. 1995).

12. Id. at Sec. 1029(a)(1)-(4).

13. Id. at Sec. 1029(e)(1).

14. No. 92 CR. 563 (R0), 1993 WL 88197 (S.D.N.Y. Mar. 25, 1993).

15. Id. at *2.

16. 18 U.S.C.A. Secs. 2511(2)(a)(i), (c), (d), & (g)(i) (West 1970 & Supp. 1995).

17. Id. at Sec. 2511(1)(c).

18. 18 U.S.C.A. Sec. 2314 (West Supp. 1995).

19. Ciongoli, DeMarrais, Wehner, Computer-Related Crimes, 31 AM.CRIM.L.REV. 425, 431 (1994). See also United States v. Greenwald, 479 F. 2d 320, 322 (6th Cir. 1973); United States v. Bottone, 365 F.2d 389 (2d Cir.), cert. denied, 385 U.S. 974 *[cited at]* (1966).

20. Pub. L. No. 90-321, Title IX Sec. 902, as amended, Pub. L. No. 95- 630, Title XX, Sec. 2001, 92 Stat. 3741 (1978).

21. 15 U.S.C.A. Sec. 1693n (West 1982).

22. See Carpenter v. United States, 484 U.S. 19 *[cited at]* , 27-28 (1987).

23. 17 U.S.C.A. Sec. 506 (West 1977 & Supp. 1995).

24. See United States v. De Biasi, 712 F.2d 785 (2d Cir.), cert denied, 464 U.S. 962 *[cited at]* (1983).

25. 18 U.S.C.A. Sec. 1001 (West Supp. 1995).

26. Id. at Sec. 912.

27. 15 U.S.C.A. Sec. 1114 (West Supp. 1995).

28. See, e.g., United States v. Bohai Trading Co., 45 F.3d 577 (1st Cir. 1995).

29. See, e.g., United States v. Song, 934 F.2d 105 (7th Cir. 1991).

30. 17 U.S.C.A. Sec. 501(a) (West 1977 & Supp. 1995).

31. Id. at Sec. 106.

32. The first draft of this summary was taken from Computer Evidence Collection and Preservation, United States Air Force Special Investigators Course, USAF Special Investigations Academy, Oct. 1988, and enhancements came from suggestions from HQ ARPC/JA personnel.

33. Manual for Courts-Martial, pt. IV, p. 66, para. 46.a.(a) (1995).

34. United States v. Langston, 41 C.M.R. 1013 (1970).

35. United States v. Holley, 42 M.J. 779 *[cited at]* (1995).

36. See, e.g., United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976).

37. 538 F.2d 972 (3d Cir. 1976).

38. United States v. Maxwell, 42 M.J. 568 *[cited at]* (1995).

39. See discussion of the Privacy Protection Act of 1980 in text accompanying notes 200-06 infra.

40. See generally AFOSII 71-103 discussed in text accompanying notes 220- 25 infra.

41. Id.

42. Id.

43. See Warden v. Hayden, 387 U.S. 294 *[cited at]* , 306 n. 11 (1967). See also Wayne R. LaFave, 2 Search and Seizure Sec. 6.5(d) (2d ed. 1987 & Supp. 1995) [hereinafter LaFave].

44. See discussion of the Privacy Protection Act of 1980 in text accompanying notes 200-06 infra.

45. Id.

46. LaFave, supra note 43, at Sec. 4.12.

47. See Fed. R. Crim. P. 41(d). But see United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993), where the court stated the subsequent notice requirement is grounded in Fed. R. Crim. P. 41 and is not compelled by the Constitution and therefore suppression depends on the specific circumstance, and United States v. Sitton, 968 F.2d 947 (9th Cir. 1992), where violation of the notice requirement was overcome when the evidence was later seized pursuant to a conventional warrant. See also United States v. Johns, 948 F.2d 599 (9th Cir. 1991).

48. 18 U.S.C. Sec. 2701 et seq. See Steve Jackson Games v. United States, 816 F. Supp. 432 (W.D. Tex. 1993, appeal filed on other grounds, 1994 WL 561233 (5th Cir. Sept. 17, 1993).

49. 18 U.S.C.A. Sec. 2703(a) requires a warrant for electronic communications in storage 180 days or less. Where agents intend to read electronic communications, the warrant should identify whose mail is to be read and establish that those electronic communications are subject to search under Fed. R. Crim. P. 41(b).

50. 42 U.S.C.A. Sec. 2000aa (West 1980 & Supp. 1995).

51. United States. v. Johns, 948 F.2d 599 (1991). See discussion of sneak and peek warrants, text accompanying note 51 supra.

52. See United States v. Milan-Rodriguez, 759 F.2d 1558, 1563-64 (11th Cir.), cert. denied, 474 U.S. 485 *[cited at]* (1985); Schneckloth v. Bustamonte, 412 U.S. 218 *[cited at]* , 219 (1973) (consent may be explicit or implicit).

53. While the ECPA allows access with a court order, its predecessor, the Wiretap Act, 18 U.S.C.A. 2511, 2516, & 2517 (1982) prohibited "aural acquisition" of oral communications. Smith v. Wunker, 356 F. Supp. 44, 46 (D. Ohio 1972). Since investigator control negates consent to listen in on the communications, a warrant should be obtained.

54. 18 U.S.C.A. Sec. 2522 (West Supp. 1995). Unlike caller ID, which uses a telephone line carrying protected oral communications, trap and trace devices do not allow one to listen in on the conversation. Thus, only a court order is required.

55. See generally LaFave, supra note 43, at 656. See also United States v. Talkington, 875 F.2d 591 (7th Cir. 1989); United States v. David, 757 F. Supp. 1385 (D. Nev. 1991).

56. The Department of Justice maintains the signals intercepted by pen registers, which are not electronic communications within the meaning of the ECPA and therefore require no warrant. CCU NewsBits: The Computer Crime Unit Newsletter, no. 7, p. 10 (Oct. 1994). The requirements for installation of a pen register are set forth in Title III of the ECPA, 18 U.S.C.A. Sec. 3121-27 (West Supp. 1995). Emergency installation absent a court order is provided for in 18 U.S.C.A. Sec. 3125.

57. 18 U.S.C.A. Sec. 3122 (West Supp. 1995).

58. Id. at Sec. 2703.

59. Id. Sec. 2511(2)(h)(ii).

60. DoJ Guidelines, pt. IV, Sec. F.

61. Id. at 97.

62. United States v. Bentley, 825 F.2d 1104, 1110 (7th Cir.), cert. denied, 484 U.S. 901 *[cited at]* (1987).

63. Id. at 1110.

64. See, e.g., United States v. Maxwell, 42 M.J. 568 *[cited at]* (1995), where the monitor and printer were needed to view and print the downloaded child pornography.

65. See United States v. Rodriguez, 968 F.2d 130 (2d Cir.), cert. denied, 113 S.Ct. 140 *[cited at]* (1992).

66. Id.

67. See DoJ Guidelines at 94-95.

68. Id.

69. Id.at 96.

70. Steele v. United States, 267 U.S. 498 *[cited at]* , 503 (1925).

71. See DoJ Guidelines at 24.

72. See Fed. R. Crim. P. 41(a)(2).

73. The purpose of the knock and announce statute, 18 U.S.C.A. Sec. 3109, is to restrict the authority of the Government to intrude upon the privacy of its citizens and to protect law enforcement officers who might be mistaken as unlawful intruders. United States v. Remigio, 767 F.2d 730 (C.D. Kan.), cert. denied, 106 S.Ct. 535 *[cited at]* .

74. See generally LaFave, supra note 43, at 656.

75. United States v. Remigio, 767 F.2d at 730; United States v. Brown, 556 F.2d 304 (5th Cir. 1977).

76. See DoJ Guidelines at 100-02.

77. Id.

78. Id.

79. 42 U.S.C.A. Sec. 2000aa (a)(b).

80. For an example of the potential liability involved in failing to immediately return all non-relevant data, see Steve Jackson Game v. United States, 816 F. Supp. 432 (W.D. Tex. 1993).

81. 42 U.S.C.A. Sec. 2000aa (a)(b).

82. Id. at Sec. 2000aa - 7(b)(3).

83. Id. at Sec. 2000aa (a)(1)(2).

84. Id. at Sec. 2000aa - 7(b).

85. Id. at Sec. 2000aa - 7(a).

86. Id. at Sec. 2000aa (b)(1)(2).

87. Id. at Sec. 2000aa (b)(3).

88. Id. at Sec. 2000aa (b)(4).

89. See DoJ Guidelines at 84.

90. Id.

92. 42 U.S.C.A. Sec. 2000aa (a).

93. As the legislative history to the PPA indicates "[t]he purpose of this statute is to limit searches for materials held by persons involved in First Amendment activities who are themselves not suspected of participation in the criminal activity for which the materials are sought." S. Rep. No. 874, 96th Cong., 2d Sess. 4 (1980).

94. See DoJ Guidelines at 38.

95. 18 U.S.C.A. Secs. 2510 et seq., Secs, 2701 et seq. (West Supp. 1995).

96. See DoJ Guidelines at 38. See also Soma et al, Legal Guide to Computer Crime (A Primer for Investigators and Lawyers), OFFICE OF THE STAFF JUDGE ADVOCATE, AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS (1995) [hereinafter Primer].

97. See discussion of the unique case of Commonwealth v. Copenhefer, 526 Pa. 555, 587 A.2d 1353 (1991) in LaFave, supra note 43, at 115. In Copenhefer, the defendant attempted to destroy evidence on his computer by using the "delete" function. This action did not actually destroy the information on his hard drive. The defendant argued his attempt to delete the information created "a new and different legally and constitutionally protected right of privacy" requiring additional warrants. The court disagreed.

98. See DoJ Guidelines at 53.

99. Id. at 54.

100. Id.

101. Id.

102. Id. at 49-55.

103. Id. at 55-56.

104. Id. at 56-60.

105. Id. at 60-61.

106. Primer, supra note 93, at 13 n. 94.

107. Id.

108. See DoJ Guidelines at 63-70.

109. U.S. Const., amend. IV.

110. See Katz v. United States, 389 U.S. 347 *[cited at]* (1968).

111. Illinois v. Gates, 462 U.S. 213 *[cited at]* (1983).

112. Sauls, Raiding the Computer Room, FBI LAW ENF. BULL. 25 (May 1986).

113. Illinois v. Gates, 462 U.S. 213 *[cited at]* , 238 (1983).

114. The standard to use in evaluating a description in a warrant is whether "[t]he description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended." Steele v. United States, 267 U.S. 498 *[cited at]* , 503 (1925).

115. Gates, 462 U.S. at 213.

116. 468 U.S. 897 *[cited at]* (1984).

117. Id.

118. United States v. Knotts, 460 U.S. 276 *[cited at]* (1983).

119. For examples of banners which would be appropriate when appearing at every log in, see Primer, supra note 93.

120. 480 U.S. 709 *[cited at]* (1987).

121. 23 M.J. 201 *[cited at]* (C.M.A. 1987).

122. Id. at 206 (citations omitted).

123. Id. at 207.

124. 32 M.J. 614 *[cited at]* (A.C.M.R. 1991).

125. 25 M.J. 58 *[cited at]* (C.M.A. 1987).

126. United States v. Craig, 32 M.J. at 614 (no reasonable expectation of privacy in a desk shared with other employees, in an area accessible to many other employees and where accused was told not to store personal items in desk); United States v. Battles, 25 M.J. at 58 (no reasonable expectation of privacy in a common area on a ship).

127. Schneckloth v. Bustamonte, 412 U.S. 218 *[cited at]* , 219 (1973).

128. United States v. Scott, 578 F.2d 1186, 1189 (6th Cir.), cert. denied, 439 U.S. 870 *[cited at]* (1978).

129. United States v. Price, 599 F.2d 494, 503 (2d Cir. 1979).

130. United States v. Matlock, 415 U.S. 164 *[cited at]* (1974).

131. United States v. Griffin, 530 F.2d 739, 744 (7th Cir. 1976); United States v. David, 756 F. Supp. 1385 (D. Nev. 1991).

132. Frazier v. Cupp, 394 U.S. 731 *[cited at]* , 740 (1969).

133. United States v. Block, 590 F.2d 535 (4th Cir. 1978).

134. O'Connor v. Ortega, 480 U.S. 709 *[cited at]* (1987).

135. Id. at 725-26.

136. Id. at 717.

137. See DoJ Guidelines at 13-23 for a further discussion of consent.

138. United States v. Robinson, 414 U.S. 218 *[cited at]* , 234-36 (1973).

139. Chimel v. California, 395 U.S. 752 *[cited at]* , 762-63, 768 (1969).

140. Id.

141. Mincey v. Arizona, 437 U.S. 385 *[cited at]* , 392-93 (1978).

142. Satchell v. Cardwell, 653 F.2d 408, 412 (9th Cir. 1981).

143. Horton v. California, 496 U.S. 128 *[cited at]* , 136 (1990).

144. United States v. David, 756 F. Supp. 1385, 1392 (D. Nev. 1991); see also United States v. Talkington, 875 F.2d 591 (7th Cir. 1989).

145. United States v. Arias, 923 F.2d 1387 (9th Cir.), cert. denied, 112 S. Ct. 130 (1991).

146. United States v. Patino, 830 F.2d 1413, 1416 (7th Cir. 1987), cert. denied, 490 U.S. 1069 *[cited at]* (1989) (warrantless search not justified when officer had adequate opportunity to obtain a telephone warrant during 30-minute wait for back up assistance; not permissible for agents to wait for exigency and then exploit it).

147. United States v. Reed, 935 F. 2d 641, 642 (4th Cir. 1991), cert. denied, 112 S. Ct. 423 (1991).

148. Reed, 935 F.2d at 641; Arias, 923 F.2d at 1387.

149. Id.

150. 756 F. Supp. 1385 (D. Nev. 1991).

151. Id. at 1392.

152. See Texas v. Brown, 460 U.S. 730 *[cited at]* , 750 (1983) (Stevens, J., concurring).

153. See DoJ Guidelines at 9-12.

154. 387 U.S. 294 *[cited at]* , 298-99 (1967).

155. Id.

156. United States v. Ramsey, 431 U.S. 606 *[cited at]* (1977).

157. Almeida-Sanchez v. United States, 413 U.S. 266 *[cited at]* (1973).

158. United States v. Ramsey, 431 U.S. at 623.

159. United States v. Scheer, 600 F.2d 5 (3rd. Cir. 1979).

160. Note, Warrant Requirement For Searches of Computerized Information, 67 B.U.L.REV. 179, 185 (1987). See also United States v. Miller, 425 U.S. 435 *[cited at]* , 442-43 (1976).

161. Smith v. Maryland, 442 U.S. 735 *[cited at]* (1979).

162. Title II of the Omnibus Crime Control and Safe Streets Act of 968, 18 U.S.C.A. 511, 2516, 2517 (1982).

163. Smith v. Wunker, 356 F. Supp. 44, 46 (D. Ohio 1972).

164. 589 F.2d 152 (4th Cir.), cert. denied, 441 U.S. 922 *[cited at]* (1978).

165. 18 U.S.C.A. 2510 et seq (West Supp. 1995).

166. Id. at 2701 et seq (West Supp. 1995).

167. Id. at 3121-27 (West Supp. 1995).

168. 3 ALB. L.J. SCI. & TECH. 79.

169. 18 U.S.C.A. Sec. 2511(2)(g) (West Supp. 1995). .

170. 10 U.S.C.A. Sec. 2511(2)(a)(i) (West Supp. 1995).

171. 18 U.S.C.A. Sec. 2511(3)(a) (West Supp. 1995).

172. 10 U.S.C.A. Sec. 2511(3)(b)(ii) (West Supp. 1995).

173. Id. at Sec. 2511(3)(b)(iv).

174. Id. at Sec. 2511(2)(g)(i).

175. Id. at Sec. 2511 (2)(h). See also United States v. Seidlitz, 589 F.2d Sec. 152 (4th Cir.), cert. denied, 441 U.S. 922 *[cited at]* (1978).

176. 18 U.S.C.A. Sec. 2518(1)(a-f) (West Supp. 1995).

177. Id. at Sec. 2511(5)(a)(ii) & (b) (West Supp. 1995).

178. See note 176 supra.

179. 18 U.S.C.A. Sec. 3121(b) (West Supp. 1995).

180. Id. at Sec. 3121(a).

181. Id. at Sec. 3123.

182. Id. at Sec. 3124(a), (b), (c).

183. Id. at Sec. 3125.

184. Id.

185. Id. at Sec. 3125.

186. Id. at Sec. 2701(c).

187. Id. at Sec. 2702(a)(1).

188. Id. at Sec. 2702(a)(2).

189. Id. at Sec. 2702(b)(3).

190. Id. at Sec. 2702(b)(6).

191. Id. at Sec. 2510(17).

192. DoJ Guidelines at 86-87.

193. 18 U.S.C.A. Sec. 2703 (West Supp. 1995).

194. Id. at Sec. 2704.

195. Id. at Sec. 2703.

196. Id. at Sec. 2704(a).

197. Id. at Sec. 2704(4).

198. 3 ALB. L.J. SCI. & TECH. at 119; 42 U.S.C. Sec. 2000aa(a) (West 1980 & Supp. 1995).

199. 42 U.S.C.A. Sec. 2000(a)(1).

200. Id. at Sec. 2000aa(a)(2); 3 ALB. L.J. SCI. & TECH. at 119.

201. 42 U.S.C.A. Sec. 2000aa(7)(a).

202. Perry and Ballard, A Chip By Any Other Name Would Still Be a Potato: The Failure of Law and Its Definitions to Keep Pace with Computer Technology, 24 TX. T. L. REV. 797, 810 (1993).

203. 42 U.S.C.A. Sec. 2000aa (b)(4) (West 1980 & Supp. 1995).

204. DoJ Guidelines at 82-83.

205. Steve Jackson Games v. United States, 816 F.Supp. 432 (W.D. Tex. 1993). See generally DoJ Guidelines at pt. V.

206. DoDD 5200.24 at para. D.3.

207. Id. at para. D.4.

208. Id.

209. Id.

210. Air Force Instruction (AFI) 71-101, vol. 1, para. 4.3.1.

211. Id. at para. 4.3.1.1.

212. Id. at para. 4.3.1.2.

213. Id. at para. 4.3.1.3.

214. Id. at para. 4.3.1.4.

215. Id. at para. 4.3.3.

216. Id. at para. 4.3.3.1.

217. Id. at para. 4.3.4.

218. Id. at para. 4.3.4.1.

219. Air Force Instruction (AFI) 71-103, para. 3.1.

220. Id. at para. 3.2.

221. Id. at para. 3.3 and 3.4.

222. Id. at para. 4.14.

223. Air Force Office of Special Investigations Instruction 71-103, atch. 2.

224. Air Force Instruction (AFI) 71-103, para. 4.1.4.

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39 AFLR 261, Unlawful Command Influence

Title of Article

Unlawful Command Influence

Author

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Text of Article

History repeats itself. That's one of the things wrong with history. -- Clarence Darrow

I. INTRODUCTION

Even though it has been repudiated by appellate authorities since as early as 1953, [1] unlawful command influence continues to affect the military justice system. Often cloaked in ignorance and the good intentions of commanders and members of their command, this issue is a significant obstacle to those who would champion the military justice system as one of the best criminal justice systems in the world. This article defines unlawful command influence, discusses procedural issues as addressed through case law, and adds itself to a large stack of literature which aspires to educate those who are in the best position to prevent this issue from existing at all.

II. BACKGROUND

Unlawful command influence is prohibited by Article 37 of the Uniform Code of Military Justice (UCMJ). [2] The word "unlawful" quickly becomes the definitional focus because "command influence" in the sense of lawful participation in the process is a necessary and predominant feature of the military justice system. [3] After all, military commanders have the lawful responsibility and authority to ensure the timely and fair disposition of charges. [4] However, sometimes that same power and authority is used to influence decisions that should be independent of command prerogatives and policy. Despite continuous efforts to educate commanders, judge advocates must be constantly vigilant because unlawful command influence, even in its most virulent forms, still occurs. [5]

Just as the definition of "unlawful" will certainly illuminate what action is impermissible, the definition of "command" is equally important to identifying who is capable of engaging in this unlawful conduct.

Case law is clear that unlawful command influence [6] is not limited in scope to the actions of commanders. [7] For example, Article 37 has been held to apply specifically to staff officers, [8] noncommissioned officers, [9] and military judges. [10]

More generally, the Court of Military Appeals [11] has indicated that the broad wording of the article clearly applies to command subordinates. [12] Historically, one common scenario where unlawful command influence is exercised by command subordinates is when they make comments or take action to prevent witnesses from testifying on behalf of the accused. [13] In one instance, while several drug cases were under investigation, an Air Force first sergeant told the noncommissioned officers in his hospital unit that anyone who testified that a drug offender was amenable to rehabilitation might anticipate adverse career impact. [14] At a post- trial commander's call of the same unit, the hospital administrator criticized those testifying on behalf of accused drug offenders. [15] Although witnesses are not specifically mentioned in Article 37, appellate courts have consistently held that it prohibits coercion or unauthorized influence of actual or prospective witnesses with respect to the content of their testimony. [16]

Regardless of the identity of the perpetrator or of the specific factual manifestation, appellate courts take a very dim view of unlawful command influence and have vowed to address the issue thoroughly when it is raised and to correct any resulting prejudice to the accused. [17] The measure of judicial disdain for this issue is evident in the characterization of unlawful command influence as "the mortal enemy of military justice" [18] and as "a malignancy that eats away at the fairness of our military justice system." [19] The Army Court of Military Review described the role performed by military appellate courts as a check on the power granted to commanders under the UCMJ, because the courts can grant relief in cases where an abuse of command authority has occurred. [20] Discussing its role in particular, the Court of Military Appeals pointed out that one of the main reasons for its civilian composition was to "erect a further bulwark against impermissible command influence." [21] As the discussion in this section illustrates, in their commitment to eliminate the problem, appellate courts have broadly construed the definition of who may be found to have exercised unlawful command influence as well as what types of actions are impermissible.

III. ADDRESSING THE PROBLEM

A. Actual and Apparent Influence

When the UCMJ was first enacted, Congress acknowledged the need to address both actual and apparent unlawful command influence. [22] The former deals with whether an accused receives a fair trial; the latter examines whether service members and the public at large believe the accused received a fair trial. [23] Recognizing the need for not only justice, but also the perception of justice, appellate courts have discussed these two concepts at length. [24]

To determine whether or not actual unlawful command influence occurred, the reviewing court looks "inside" the military justice system. [25] That is, the court considers evidence offered in the form of

exhibits or testimony and analyzes it to determine in detail what actually happened. [26] Figuratively speaking, the test for actual unlawful command influence is "whether the convening authority has been brought into the deliberation room." [27]

Even if a case was not actually affected by unlawful command influence, it may appear to have been. Therefore, the analysis of apparent unlawful command influence does not focus on the actual effect on the accused's case, but instead asks "whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair." [28] The Court of Military Appeals has recognized that "[a] judicial system operates effectively only with public confidence." [29] As a result, courts are concerned about the appearance of unlawful command influence "because of its deleterious effect on public confidence in the military justice system, not because an accused has any legitimate claim to relief." [30] This illustrates that, unlike actual unlawful command influence, external considerations (factors outside of the military justice system) are the key to identifying apparent unlawful command influence. [31]

There is a dearth of cases decided solely on the issue of apparent unlawful command influence. [32] However, in United States v. Cruz, [33] the court intimated an appropriate remedy for such a case. In Cruz, the appellant and several others who were suspected of wrongful distribution and use of hashish were apprehended during a unit formation in full view of the other members of the unit while the brigade commander addressed the formation. As the so-called "Peyote Platoon" was handcuffed and searched, the commander announced that these members had not met standards and were to be removed from their units. [34] The appellant argued that the commander's action had a "chilling effect" on allowing the appellant to obtain favorable testimony and denied him a fair forum for the disposition of his case. [35] However, the appellant provided no specific evidence of how his case was influenced, and the court found no actual unlawful command influence. [36]

Subsequently, the court addressed the issue of apparent unlawful command influence. In discussing the appropriate remedy for a case involving the appearance of unlawful command influence, the court stated each case required a carefully tailored response. [37] The court acknowledged that reversal of findings or sentence may be required as a last resort when no other feasible course of action will restore public confidence. However, the court went on to say that such extreme measures are clearly not required in all "appearance" cases and would be an inappropriate windfall to an appellant who had not suffered actual prejudice. [38] In terms of what reasonable members of the public might believe, given the facts in Cruz, the court opined that the appellate review process, in and of itself, should restore public confidence. The court stated that by publishing the truth about the case [39] it had dispelled any appearance of unlawful command influence that may have existed. [40]

As in Cruz, courts usually only consider the issue of apparent unlawful command influence where there is no actual unlawful command influence. [41] The reasoning is that if actual unlawful command influence has prejudiced the accused, then providing appropriate relief to the accused will remove the appearance of unlawful command influence as well. [42]

B. Application of the Waiver Doctrine

Before discussing the concept of prejudice or what might constitute appropriate relief in a case of actual unlawful command influence, it is important to first examine when and how the issue of unlawful command influence is raised. In United States v. Blaylock, [43] the Court of Military Appeals held that although many errors are waived if they are not raised at trial, unlawful command influence is not one of them. [44] Blaylock dealt with a challenge, made for the first time on appeal, as to how the charges were referred. The court rejected the doctrine of waiver stating,

In view of the policy clearly stated in Article 37 we have never allowed doctrines of waiver to prevent our considering claims of improper command control. Indeed, to invoke waiver would be especially dangerous, since a commander willing to violate statutory prohibitions against command influence might not hesitate to use his powers to dissuade trial defense counsel from even raising the issue. [45]

In a 1994 case, however, the Court of Military Appeals qualified the waiver doctrine. In United States v. Hamilton, [46] the appellant raised the issue of unlawful command influence for the first time on appeal, alleging that the staff judge advocate (SJA) had coerced the commander into referring charges. The court held that the applicable rules of law regarding waiver depend on what stage of the case unlawful command influence is alleged to have affected: preferral, forwarding of charges, referral, trial, or post-trial review. [47]

The court pointed out that the referral, trial, and review processes are protected from unlawful command influence by the language of the statute. [48] Therefore, unlawful command influence at these stages is not waived by failure to raise the issue at trial. However, the Hamilton court concluded that errors in the preferral and forwarding stages are subject to waiver, even if caused by unlawful command influence. [49] This could include, for example, situations where a commander is coerced through unlawful command influence into preferring charges that he or she otherwise would not [50] or incidents where a superior commander or a representative interferes with a commander's personal recommendation as to the disposition of charges. [51]

Carving out an important exception, however, the Hamilton court went on to say that if a party is deterred by unlawful command influence from challenging at trial any defects in the preferral or forwarding of charges, then the provisions of Article 37 are triggered and the issues are not waived because the trial itself has been subjected to unlawful command influence. [52] This seems to adequately address the concern raised in Blaylock that unlawful command influence could prevent defense counsel from raising the issue at trial.

In United States v. Griffin, [53] the Army appellate court went one step further, holding that a military judge had no duty to inquire into an issue of unlawful command influence when the defense had affirmatively waived the issue at trial. On appeal the appellant argued that the judge had a sua sponte duty, despite the affirmative waiver, to ensure that no unlawful command influence affected the referral process. [54] The court refused to adopt a rule that would "require a military judge to undo the benefit to

the accused of an excellent bargain exacted from the government by a highly competent trial defense counsel." [55] This is not to say that appellate courts are retreating on their strong stance against unlawful command influence. A careful reading of the opinion reveals the court came to its conclusion only after it found no evidence that unlawful command influence adversely affected the appellant. In fact, the court noted that after negotiating with the defense, the Government withdrew the charge that might have been tainted and amended the stipulation of fact to exclude such matters. In addition, the defense counsel affirmatively asserted he found no unlawful impact as to the remaining charges. [56]

C. Burden of Proof

Given the inapplicability of the waiver doctrine to referral, trial, and post-trial review, the issue of unlawful command influence is often raised for the first time on appeal. The Air Force Court of Criminal Appeals uses a three-prong test to analyze whether or not the accused has adequately raised the issue of unlawful command influence. [57] First, the appellant must carry the burden of production in showing evidence of unlawful command influence. The second prong requires the accused to show the proceedings were unfair. Third, the accused must show that the unlawful command influence was the proximate cause of the unfairness. [58]

Once the issue of unlawful command influence has been raised successfully by the accused, the burden shifts to the prosecution to show the accused nonetheless received a fair trial beyond a reasonable doubt. [59] The Court of Military Appeals wrote in United States v. Thomas, [60] the seminal case in this area, that "in cases where unlawful command influence has been exercised, no reviewing court may properly affirm findings and sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence." [61]

Distinguishing between the type of witness allegedly affected by unlawful command influence, the Thomas court offered guidance as to what the Government would have to show. Concerning findings, the Thomas court drew a distinction between character witnesses and those witnesses who would testify as to some other issue. [62] For the Government to show the accused has not been deprived of favorable character evidence, it could show: (1) that extensive character evidence was offered by the defense at trial; (2) there was no evidence of good character; or (3) the prosecution's evidence was so conclusive as to outweigh any character evidence the accused could have produced. [63] As for other witnesses, the prosecution must show that witnesses with relevant information testified and that none of the witnesses felt pressured to testify in a certain way. [64] Similarly, for sentencing witnesses, the burden is on the prosecution to show that favorable evidence in extenuation and mitigation was not curtailed by unlawful command activities. The Government may do so by showing a lack of favorable evidence or by showing the defense made an informed decision not to present evidence in order to avoid damaging rebuttal evidence. [65]

Unfortunately, the Thomas analysis is not always easy to apply and may not work in all situations. For example, in his concurrence in United States v. Levite, [66] Judge Cox expressed the view that it was not necessary to assign burdens of proof. [67] He foresaw cases in which the issue would be raised by

trial counsel [68] or someone else [69] with an ethical duty to come forward and reveal the existence of actual or apparent unlawful command influence. Dispensing with the technicalities of burden of persuasion and burden of proof, Judge Cox simply stated that, in his view, unless he is satisfied beyond a reasonable doubt that the accused has received a fair trial, he will vote for relief. [70]

This is what Judge Cox appeared to do in United States v. Singleton. [71] Upon reviewing the record, the Court of Military Appeals determined that several facts which had become known to counsel post-trial should have been presented to and evaluated by the fact finder. [72] Among several reasons for the poor development of the facts at trial was an allegation that a sergeant major had urged a character witness to alter his testimony. However, that witness testified at trial he was not intimidated by the sergeant major and that he was prepared to testify truthfully and completely. [73] Additionally, the court found no evidence in the record to indicate unlawful command influence caused any of the other problems with the full development of the facts. [74] Judge Cox stated he was not sure if the record was incomplete because of "the fog of command influence, the inability of counsel to ascertain the facts, misguided friends, pusillanimous witnesses, outright perjury, or just plain bad luck." [75] Nonetheless, writing for the majority in reversing several of the findings and the sentence, Judge Cox stated, "On this record . . . we cannot conclude, in a due process sense, that appellant has yet enjoyed a full and complete trial." [76] Although the court mentioned unlawful command influence as if it were at least part of the reason for the reversal, the court did not analyze the case in terms of whether the Government had met its burden of proof on that issue. Instead, the overarching reason for the relief granted to the appellant appeared to be that, even though the court could not specifically identify the cause, it was nonetheless sure the appellant's case had been improperly affected and the appellant prejudiced.

D. Prejudice

The concept of prejudice is critical to the analysis of unlawful command influence and is usually the decisive factor upon which appellate courts decide whether or not to award the appellant any relief. [77] To properly raise the issue of unlawful command influence, the accused must show some causal connection between the unlawful command influence and the prejudice or unfairness in the proceedings. [78] Granted, this showing is made easier because both the appearance and the existence of unlawful command influence have been held to create a rebuttable presumption of prejudice. [79] However, the courts have made it clear that "generalized, unsupported claims of 'command control' will not suffice to create a justiciable issue." [80] For example, in Cruz, the appellant argued it was possible his chain of command was influenced concerning the disposition of his case and that it was possible he was deprived of favorable testimony. However, the appellant presented no evidence on either of these points. The Army Court of Military Review concluded that not only were these allegations insufficient to show prejudice, but they were also insufficient to shift the burden of persuasion to the Government. [81]

E. Remedies and Relief

After identifying some prejudice to the accused's or appellant's case due to unlawful command influence, the next issue is to determine an appropriate remedy. In cases where the issue was raised at

trial, military judges tailored relief for the defense. [82] For example, faced with evidence that unlawful command influence may have "chilled" defense witnesses from wanting to testify in sentencing, one trial judge did not allow the Government to present character evidence unfavorable to the accused. [83]

Other examples of specially tailored relief appear in United States v. Sullivan. [84] Sullivan was the last of four drug related courts-martial where the first sergeant and hospital administrator had discouraged defense sentencing witnesses from testifying. [85] The military judges, with the cooperation of command, tailored extensive remedies for all four cases:

(1) additional commander's calls were held to inform hospital personnel that, if requested by defense, testifying was their duty; (2) the government was issued a blanket order to produce all witnesses requested by the defense and these witnesses were advised of their duty to testify truthfully and assured no adverse consequences would ensue; (3) the hospital first sergeant was transferred to another unit to eliminate his access to the rating process (the administrator had already been reassigned); and (4) the judges approved liberal continuances to ensure the cleansing process worked. [86]

These steps were applauded by the appellate court. [87] However, providing relief at trial or during the initial post-trial review will not suffice if it is only done begrudgingly with the intent of covering up instead of exposing and correcting unlawful command influence. [88] For example, in Levite a post-trial investigation of unlawful command influence was conducted. The defense counsel had to make three requests before receiving a complete copy of the report. [89] Only after the defense counsel requested the investigation be included with the record of trial did the SJA even address the issue in an addendum to his recommendation to the convening authority. Whereas the initial SJA recommendation called for approving the findings and sentence, in the addendum the SJA opined the accused had suffered no prejudice but recommended, "out of an abundance of caution," that the convening authority reduce the confinement from ten to five years. [90] In a scathing opinion, the Levite court made it clear that its goal was to ensure fair courts-martial and not to effectuate "a gratuitous grant of clemency which tends to obfuscate the problem of command influence." [91]

Obviously, appellate courts may grant different forms of relief to an appellant than what is available at the trial stage. Frequently, upon appellate review, the court is convinced the findings portion of a given case was not tainted but is not sure about sentencing. Therefore, one common remedy used by the appellate courts for these cases is to order a rehearing on sentence and action by a different convening authority. [92] In some cases, the appellate court may itself reassess the sentence. [93] Appellate remedies do not always leave the findings intact, however. In Levite, for example, the court reversed the accused's general court- martial conviction for various drug offenses. [94] This strong signal from the appellate court makes it clear that the Government must not be content with addressing unlawful command influence after the fact, but must take a proactive stance to preclude such situations from existing.

IV. AN OUNCE OF PREVENTION . . .

As this long line of cases illustrates, the problem of unlawful command influence is unfortunately persistent. However, unlawful influence is seldom purposely done to thwart unbiased and independent proceedings. [95] Perhaps this is best illustrated by the fact that there have been no prosecutions under Article 98, UCMJ, which makes punishable the failure to comply with any other provision of the UCMJ. [96] In most cases, the facts portray a well-meaning commander or other person within the command structure who is merely trying to promote good order and discipline. [97] Recognizing the devastating effects of unlawful influence on the military justice system, however, one court explained that the intent of the perpetrator is not dispositive and that unlawful command influence can be committed unwittingly. [98]

The commander's interest in good order and discipline, juxtaposed with the commander's obligation not to interfere with the impartiality of the military justice system, understandably leads to tension. On one hand, the commander has a responsibility to administer the military justice system. In fact, the Court of Military Appeals has gone so far as to say that the fair administration of the military justice system is "one of the most sacred duties of a commander." [99] On the other hand, a commander may have a strong desire for a certain type or level of disciplinary action in a given case. Nonetheless, the commander must not allow his or her actions to create even the appearance of unlawful influence.

The drafters of Article 37, UCMJ, recognized the commander's role in the administration of the military justice system and provided some guidance on what is and is not permissible activity on the part of a commander or his or her representatives. The article specifically authorizes "[g]eneral instructions or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial." [100] In many cases, unfortunately, the commander or a representative has been found to run afoul of this provision. [101] For example, in United States v. Treakle, [102] an Army commander's message quickly went astray because of how subordinates perceived his guidance. In that case, Major General Anderson, commander of the 3d Armored Division, spoke to a great many of his subordinates in various commander's calls with a message of "consistency." [103] According to him, he was trying to get across the messages that (1) a commander should recommend a lower level court- martial if he does not believe the accused should be discharged; and (2) commanders and non-commissioned officers should not testify that the accused is a "good soldier" or recommend retention if they believe the accused should be discharged. [104] Unfortunately, many soldiers who heard his comments thought General Anderson was discouraging favorable character testimony in courts-martial. [105]

The general's comments caused widespread litigation that went on in the appellate system for years. [106] Of particular note is the Court of Military Appeals' assertion that the general's legal advisor was partially responsible because he failed to perceive the problem developing from the commander's comments. [107] The Army Court of Military Review said that General Anderson and his SJA neglected two important principles: (1) announce policies and directives clearly and (2) follow up to see that directives are correctly understood and properly executed. [108] The Army court observed, "Correction of procedural deficiencies in the military justice system is within the scope of a convening authority's supervisory responsibility." [109] Not surprisingly, however, in the same opinion, the court went on to say that "the band of permissible activity by the commander is narrow, and the risks of overstepping its

boundaries are great." [110]

Recently, Air Force Chief of Staff General Robert R. Fogleman communicated a message of "accountability" in a videotaped speech which he required all Air Force officers, the top three enlisted ranks, and all senior executive service civilians to view. After emphasizing that military standards are the foundation of good order and discipline, General Fogleman stated, "When standards are not met, it is our responsibility and duty to hold those involved accountable for their actions." [111] However, he also recognized that an appropriate response to violations of military standards may be anything from administrative action to prosecution under the UCMJ. General Fogleman's overall message was that all actions taken regarding an individual, to include administrative personnel actions, [112] must be consistent and must accurately reflect the failure to meet standards. Nonetheless, he was careful to add that commanders have wide latitude to take the appropriate action. Instead of suggesting specific responses, he urged commanders to do what is right. [113]

Judge advocates played a key role in ensuring General Fogleman's message complied with Article 37. Several reviews of the message and its wording were conducted to make sure it avoided giving the impression that General Fogleman was attempting to influence the discretionary functions of subordinate commanders unlawfully. The Office of The Judge Advocate General has repeatedly emphasized the importance of the judge advocate's role in precluding unlawful command influence. A 1994 memorandum for all general court-martial convening authority SJAs, briefly outlined the case law in this area and stressed that the issue "must be every SJA's top priority in ensuring the proper and just administration of military justice." [114] Four months later, another memorandum was distributed to all SJAs and accompanied by a point paper briefly summarizing the "Do's and Don'ts" for commanders relative to unlawful command influence. [115] In October 1995, another memorandum was sent to all SJAs "revisiting" the issue of unlawful command influence. [116] The memorandum reemphasized that military justice is "job 1" and that it is impossible for judge advocates to do that job when unlawful command influence plays any part in military justice actions. [117]

V. CONCLUSION

It is not sufficient for the military justice system to merely find and fix unlawful command influence unlawful command influence must be prevented. [118] Because the area is treacherous, judge advocates must take a proactive role in educating each new crop of commanders and command subordinates. We must make sure each person understands, as General William Westmoreland did, that "[a] military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and fulfilling this function, it will promote discipline." [119] Judge advocates, not commanders, are in the best position to determine whether or not a communication or action will constitute unlawful command influence. However, to fulfill this function, we must first earn the trust and confidence of the commanders we serve and convince them to let their lawyers review proposed communications to the troops before they are given. Otherwise, history will continue to repeat itself and occurrences of actual or perceived unlawful command influence will result in reduced confidence in the military justice system by both service members and the public.

Footnotes

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1. United States v. Burke, 7 C.M.R. 745 (A.F.B.R. 1953).

2. 10 U.S.C.A. sec. 837 (West 1983 & Supp. 1995). Article 37 provides in pertinent part:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

3. See David A. Schlueter, Military Criminal Justice: Practice and Procedure 255 (1992); Major Deana M. C. Willis, The Road to Hell is Paved With Good Intentions: Finding and Fixing Unlawful Command Influence, THE ARMY LAWYER 3 (Aug. 1992).

4. The convening authority and commander are involved in virtually every stage of the judicial process. See generally Manual for Courts-Martial, ch. II, Rules for Courts-Martial [hereinafter R.C.M.] (1995) (preliminary inquiry into reported offenses, R.C.M. 303; initial disposition, R.C.M. 306; preferral, R.C.M. 307; referral, R.C.M. 601; pretrial agreements, R.C.M. 705; action, R.C.M. 1107; promulgation of orders, R.C.M. 1114).

5. In a 1994 case, for example, a commander told several court members the morning of trial that he was dissatisfied with the results of courts that had occurred over the past couple of years. United States v. Reynolds, 40 M.J. 198 *[cited at]* (C.M.A. 1994). The Court of Military Appeals found that the commander's remarks were inappropriate, but concluded the remarks did not prejudice the appellant because they did not cause the members in this guilty plea case to award a more severe sentence.

6. Appellate courts use the terms "unlawful command control," "unlawful command influence," and "command influence" interchangeably.

7. Willis, supra note 3, at 4.

8. United States v. Hilow, 32 M.J. 439 *[cited at]* (C.M.A. 1991) (deliberate stacking of pool of potential court-martial members by a subordinate of convening authority); United States v. Kitts, 23 M.

J. 105 *[cited at]* (C.M.A. 1986) (staff judge advocate acted with the mantle of command authority).

9. United States v. Carlson, 21 M.J. 847 *[cited at]* (A.C.M.R. 1986) (citing United States v. Olson, 29 C.M.R. 102, 104 (C.M.A. 1960)).

10. United States v. Mabe, 33 M.J. 200 *[cited at]* (C.M.A. 1991) (letter from Chief Judge of Navy Trial Judiciary to circuit chief judge voicing concern over lenient sentences held unlawful command influence).

11. Effective Oct. 5, 1994, pursuant to Pub. L. No. 103-337, sec. 924, 108 Stat. 2663, the United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces and each Court of Military Review was renamed the Court of Criminal Appeals.

12. Hilow, 32 M.J. at 441; United States v. Levite, 25 M.J. 334 *[cited at]* (C.M.A. 1987)(Cox, J., concurring).

13. See, e.g., Carlson, 21 M.J. at 847 (platoon sergeant told defense sentencing witnesses that testifying on behalf of accused could have adverse career consequences).

14. United States v. Sullivan, 26 M.J. 442 *[cited at]* (C.M.A. 1988).

15. Id. at 443.

16. United States v. Thomas, 22 M.J. 388 *[cited at]* , 394 (C.M.A. 1986), cert. denied, 479 U.S. 1085 *[cited at]* , 107 S.Ct. 1289 *[cited at]* , 94 L.Ed.2d 146 (1987). See also United States v. Gleason, 39 M. J. 776 *[cited at]* , 782 (A.C.M.R. 1994) (command climate, atmosphere, attitude, and actions had such a chilling effect on members of the command that there was a feeling that if you testified for the accused your career was in jeopardy); United States v. Jameson 33 M. J. 669 (N.M.C.M.R. 1991) (witnesses who testified on behalf of accused in sentencing were removed from their positions and received poor evaluations); United States v. Tucker, 20 M.J. 863 *[cited at]* (A.F.C.M.R. 1985) (squadron commander admonished a chief master sergeant who testified in an earlier court-martial in sentencing for retention of convicted drug abuser, thereby chilling defense's ability to obtain sentencing witnesses); United States v. Treakle, 18 M.J. 646 *[cited at]* (A.C.M.R. 1984) (general's comments to command subordinates were perceived to mean that he was discouraging them from providing favorable character testimony).

17. See, e.g., Thomas, 22 M.J. at 394.

18. Id. at 393.

19. Gleason, 39 M.J. at 782.

20. Treakle, 18 M.J. at 654.

21. Thomas, 22 M.J. at 393.

22. United States v. Cruz, 20 M.J. 873 *[cited at]* , 880 (A.C.M.R. 1985)(en banc), rev'd on other grounds, 25 M.J. 326 *[cited at]* (C.M.A. 1987).

23. Id.

24. See, e.g., United States v. Grady, 15 M.J. 275 *[cited at]* (C.M.A. 1983); United States v. Rosser, 6 M.J. 267 *[cited at]* (C.M.A. 1979); United States v. Allen, 31 M. J. 572 (N.M.C.M.R. 1990), affirmed, 33 M.J. 209 *[cited at]* (C.M.A. 1991); Cruz, 20 M. J. at 873. See generally, H. Moyer, Justice and the Military Sec. 3-400 (1972), cited in Rosser, 6 M.J. at 273 n. 19; SCHLUETER, supra note 3, at 257; Willis, supra note 3, at 5.

25. Cruz, 20 M.J. at 882.

26. Id. See United States v. Johnson, 34 C.M.R. 328 (C.M.A. 1964)(court examined the effect of a pamphlet entitled "Additional Instructions for Court Members" distributed prior to trial had on panel members); United States v. Olson, 29 C.M.R. 102, (C.M.A. 1960)(court found actual unlawful command influence in bad check case where court president had previously drafted policy letter signed by acting commander regarding importance of addressing dishonored check offenses and had also spoke at commander's call regarding the necessity for taking action in such cases); United States v. Ferguson, 17 C.M.R. 68, (C.M.A. 1954). Do not, however, confuse "actual" with "intentional." Actual unlawful command influence could be either intentional or unintentional. It could occur unintentionally if, for example, a participant in the military justice system misperceives the commander's desires. See note 102 and accompanying text infra.

27. Allen, 31 M.J. at 590, (citing Grady, 15 M.J. at 275).

28. Id.

29. Grady, 15 M.J. at 276 (citing United States v. Stringer, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954)).

30. Cruz, 20 M.J. at 884.

31. See Schlueter, supra note 3, at 258.

32. Cruz, 20 M.J. at 882 (citing Rosser, 6 M.J. at 267, as the only case in which the Court of Military Appeals has based its remedy on a finding of the appearance of unlawful command influence without finding actual command influence).

33. 20 M.J. 873 *[cited at]* .

34. Id. at 876.

35. Id. at 875.

36. Id. at 889.

37. Id. at 890.

38. Id.

39. Id. at 891. The court explained that all the cases resulting from the mass apprehension had been disposed of a variety of ways, ranging from nonjudicial punishment to general court-martial, indicating that commanders exercised their own discretion. Additionally, the court pointed out that witnesses were available to testify on behalf of appellant but that appellant may have failed to offer that testimony because of available rebuttal evidence regarding the appellant's marginal performance and lack of motivation and leadership ability.

40. Id.

41. Id. at 883-84.

42. Id. at 884.

43. 15 M.J. 190 *[cited at]* (C.M.A. 1983).

44. Id. at 193. On the same page, however, the court stated that even in egregious cases of command influence, it had refused to hold the error was "jurisdictional." (citing Ferguson, 17 C.M.R. at 68).

45. Id.

46. 41 M.J. 32 *[cited at]* (C.M.A. 1994).

47. Id. at 36. See also United States v. Drayton, 39 M.J. 871 *[cited at]* (A.C.M.R. 1994); United States v. Bramel, 29 M.J. 958 *[cited at]* (A.C.M.R.), aff'd, 32 M.J. 3 *[cited at]* (C.M.A. 1990).

48. Hamilton, 41 M.J. at 36.

49. Id. The court asserted it is well settled that failure to object to a defective preferral waives the error and cited R.C.M. 905(b)(1) for the proposition that defects in the forwarding process are waived if not challenged prior to entry of pleas.

50. Id. But cf. United States v. Wallace, 39 M.J. 284 *[cited at]* (C.M.A. 1994) (finding no unlawful command influence where superior commander told company commander to reconsider Article 15 punishment the company commander had already imposed).

51. Hamilton, 41 M.J. at 36.

52. Id. at 37.

53. 41 M.J. 607 *[cited at]* (Army Ct.Crim.App. 1994)(general court-martial convening authority sent memorandum to all subordinate commanders saying there was no place in the Army for those who use illegal drugs).

54. Id. at 608.

55. Id. at 610.

56. Id. at 609. Additionally, to protect the sentencing portion of this guilty plea case, the judge allowed full and open voir dire of the members regarding the memorandum, relaxed the rules for challenging members, and disqualified the convening authority from taking any post-trial action in the case.

57. United States v. Washington, 42 M.J. 547 *[cited at]* , 556 (A.F.Ct.Crim.App. 1995) (the court combined the analyses contained in Levite, 25 M.J. at 334, and United States v. Stombaugh, 40 M.J. 208 *[cited at]* (C.M.A. 1994)).

58. Id.

59. United States v. Dykes, 38 M.J. 270 *[cited at]* , 272 (C.M.A. 1993) (citing Mabe, 33 M.J. at 203). Appellate courts frequently send the parties to a hearing authorized under United States v. DuBay, 37 C. M.R. 411 (1967). However, in some cases courts rely on Dykes for the proposition that a DuBay hearing is not required where post-trial affidavits contain sufficient information upon which to decide the issue. See Captain David D. Jividen, Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c), UCMJ, 38 A.F. LAW REV. 63 (1994).

60. 22 M.J. 388 *[cited at]* (C.M.A. 1986).

61. Id. at 394.

62. Id. at 396.

63. Id. at 396-97. The court, however, discouraged the use of the third alternative, stating that character evidence can be very effective in creating a reasonable doubt at trial and that it did not wish to create even an appearance of condoning command influence on findings.

64. Id. at 397.

65. Id.

66. 25 M.J. 334 *[cited at]* .

67. Id. at 341.

68. Reynolds, 40 M.J. at 198 (trial counsel called the court's attention to comments made at a morning briefing by the special court-martial convening authority).

69. United States v. Campos, 37 M.J. 894 *[cited at]* (A.C.M.R. 1993) (military judge raised issue of unlawful command influence because he had recently been replaced as the senior military judge at Ft. Hood, possibly because his sentences were too lenient).

70. Levite, 25 M.J. at 341.

71. 41 M.J. 200 *[cited at]* (C.M.A. 1994).

72. Id. at 207.

73. Id. at 203.

74. Id. at 206.

75. Id. at 206-07.

76. Id. at 207.

77. Reynolds, 40 M.J. at 203 (command influence, however condemnable, does not prompt judicial action in response, where an appellate court is convinced beyond a reasonable doubt that the proceedings are free from prejudicial influence); United States v. Allen, 33 M.J. 209 *[cited at]* , 212 (C. M.A. 1991), cert. denied, 112 S.Ct. 1473 *[cited at]* , 117 L.Ed.2d 617 (1992) (there must be more than an appearance of evil to justify action by an appellate court in a particular case). But cf. Hilow, 32 M.J.

at 439 (Cox, J., dissenting) (questioning whether the court was departing from the standard that prejudice must be shown in order to grant relief or if "some evils are so enormous that they must be punished, notwithstanding that they do not affect the accused").

78. Levite, 25 M.J. at 341.

79. Wallace, 39 M.J. at 286 (citing Johnson, 34 C.M.R. at 331); Allen, 31 M.J. at 590 (citing United States v. Crawley, 6 M.J. 811 *[cited at]* (A.F.C.M.R. 1978)).

80. United States v. Serino, 24 M.J. 848 *[cited at]* , 852 (A.F.C.M.R. 1987) (citing Green v. Widdecke, 42 C.M.R. 178, 181 (C.M.A. 1970)). See also Stombaugh, 40 M.J. at 213; United States v. Johnston, 39 M.J. 242 *[cited at]* , 244 (C.M.A. 1994) (the threshold triggering further inquiry, although low, must be more than a bare allegation or mere speculation).

81. Cruz, 20 M.J. at 886 (it was not unreasonable or unfair to require the defense to produce some evidence showing which witnesses were persuaded not to testify or to alter their testimony as a result of unlawful command influence, since this information is readily available to the defense).

82. See, e.g., Sullivan, 26 M.J. at 442.

83. Thomas, 22 M.J. at 399.

84. 26 M.J. 442 *[cited at]* (C.M.A. 1988).

85. See notes 14 and 15 and accompanying text supra.

86. Id. at 443.

87. Id.

88. Levite, 25 M.J. at 340.

89. Id. at 337.

90. Id. at 338.

91. Id. at 340.

92. Thomas, 22 M.J. at 388.

93. Id. at 398.

94. 25 M.J. at 338-39.

95. Thomas, 22 M.J. at 400 (recognizing that military commanders and judge advocates usually exert themselves in every way to comply with both the spirit and the letter of the law). But cf. Levite, 25 M.J. at 338 (actions of officers and enlisted in accused's chain of command constituted a serious breach of good order and discipline).

96. Schlueter, supra note 3, at 256.

97. Id. See also Thomas, 22 M.J. at 400 (stating it understands the desire of military commanders to ensure members of their commands adhere to high standards of discipline); United States v Pierce, 29 C. M.R. 849 (A.B.R. 1960) (commander joked to officer members of the court that he didn't care how long the case lasted so long as they found the accused guilty and hanged him); United States v. Littrice, 13 C. M.R. 43 (1953) (meeting with panel immediately prior to trial to give general instructions and policy guidance was improper, although the attempt to enlighten the court members may have been prompted by the highest ideals). United States v. Stephens, 21 M.J. 784 *[cited at]* (A.C.M.R. 1986) (at NCO call, sergeant major indicated any NCO found guilty of appellant's offenses should be given at least 30 years confinement).

98. Jameson, 33 M.J. at 673 (court noted the word "attempt" in Article 37 and stated that while specific intent and scienter may be required for a successful prosecution under Article 98 of one who violates Article 37(a), an accused whose case is adversely affected by unlawful command influence and the integrity of the military justice system in general are just as victimized whether the source of the influence intended the adverse effects or not).

99. Thomas, 22 M.J. at 400.

100. Art. 37, UCMJ; 10 U.S.C.A. Sec. 837.

101. United States v. Brice, 19 M.J. 170 *[cited at]* (C.M.A. 1986) (court members' attendance at lecture on drug abuse given by convening authority during court-martial involving drugs constituted improper influence upon court); United States v. Kitchens, 12 C.M.A. 589, 31 C.M.R. 175 (1961) (assistant SJA sent letter to all officers stationed where court-martial was pending and asked them to note the "considerable difference" in sentences imposed during two different periods); Littrice, 13 C.M.R. at 43 (commander's executive officer meeting with panel immediately prior to trial to give general instructions and policy guidance improper).

102. 18 M.J. 646 *[cited at]* (A.C.M.R. 1984).

103. Id. at 650.

104. Id.

105. Id. at 651.

106. See, e.g., Thomas, 22 M.J. at 400 (a companion case to Treakle).

107. Id.

108. Treakle, 18 M.J. at 653-54.

109. Id. at 653.

110. Id. (court noted that while a commander is not absolutely prohibited from publishing general policies and guidance which may relate to the discretionary military justice functions of his subordinates, several decades of practical experience under the UCMJ have demonstrated that the risks often outweigh the benefits).

111. General Ronald R. Fogleman, Air Force Chief of Staff, videotape entitled Air Force Standards and Accountability (1995).

112. Administrative personnel actions in the military include, inter alia, periodic performance reports used for promotion consideration.

113. Fogleman, supra note 111.

114. Memorandum from HQ USAF/JA for GCMCA Staff Judge Advocates, Unlawful Command Influence and its Derivations (1 July 1994).

115. Memorandum from HQ USAF/JA for All Staff Judge Advocates, Command Influence (23 Nov. 1994).

116. Memorandum from HQ USAF/JA for All Staff Judge Advocates, Unlawful Command Influence Revisited (19 Oct. 1995).

117. Id.

118. Thomas, 22 M.J. at 400.

119. Willis, supra note 3, at 4, quoting from William C. Westmoreland, Military Justice -- A

Commander's Viewpoint, 10 Am. Crim. L. Rev. 18, 22 (1971).

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39 AFLR 277, Orchestrating Child Abuse Cases

Title of Article

Orchestrating the Successful Prosecution of Child Sexual Abuse Cases

Author

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Text of Article

I. INTRODUCTION

Some of the most challenging cases confronting judge advocates involve child abuse, both physical and sexual. The unique case facts and their collateral implications, the child's cognitive powers and communicative capabilities, the victim's family dynamics, and the ongoing requirements of the Victim and Witness Assistance Program (VWAP) [1] exponentially compound the formidable responsibilities of case preparation and management. Most cases destined for resolution by court-martial present ample opportunities for mistakes which can undermine or preclude a successful prosecution. Moreover, child abuse cases carry the added burden and risk that a mistake can have long-lasting repercussions for a young child. Motivated by this daunting reality, this article provides judge advocates with general advice on prosecuting child abuse cases, focusing almost exclusively on child sex abuse cases because they present arguably the widest and most sobering range of challenges to prosecutors.

II. THE EXPANDING RESPONSIBILITIES OF JUDGE ADVOCATES

A. Societal Trends

Before judge advocates can truly fathom the issues and collateral considerations involved in prosecuting child abuse cases, they must first appreciate the full scope of the problem. According to David Finkelhor, a renowned authority on child sexual abuse, considerable evidence indicates that at least 20% of American women and 5% to 10% of American men experienced some form of sexual abuse as children. [2] Ninety percent of child sexual abuse is perpetrated by men, with family members constituting 33% to 50% of the perpetrators against girls and 10% to 20% of the perpetrators against boys. [3] Children between 7 and 13 years of age are most likely to fall victim to a pedophile's criminal act. [4]

To put these percentages in more meaningful perspective, it is helpful to consider some of the raw numbers involved. Again according to Finkelhor, during 1993 alone there were 150,000 confirmed cases of child sexual abuse reported to child welfare authorities in the United States. [5] For a variety of reasons (e.g., the private nature of these offenses, feelings of shame and/or fear, familial considerations, etc.), these confirmed reported cases likely do not constitute the totality of annual child sexual abuse incidents. Indeed, based upon a comparison of confirmed child abuse cases to child sex abuse incidents reported by adults in retrospective surveys, Finkelhor believes that "less than one-third of all occurring [child sex abuse] cases are currently being identified and substantiated by child protection authorities, in spite of ongoing efforts." [6]

While no military data base yet exists which can provide statistics on the full scope of child sexual abuse, certain figures are available from the Automated Military Justice And Management System (AMJAMS) and AMJAMS II files. AMJAMS and AMJAMS II are incapable of identifying child-specific offenses. However, the system can track such offenses as carnal knowledge, sodomy involving a victim under age 16, indecent acts/liberties with a child, communicating indecent language to a child, and assault consummated by a battery on a child under age 16. Although these specific crimes and their corresponding AMJAMS codes do not account for all charged offenses involving child victims, the following data provides at least a partial snapshot of child abuse allegations in the Air Force over the past 12 years. [7]

Indecent Carnal Indecent Year #Cases Sodomy Acts/Liberties Know Language Assault 1984 1117 19 37 48 41 22 1985 1140 34 74 84 80 38 1986 1271 32 74 93 90 42 1987 1386 23 60 74 65 29 1988 1637 42 100 128 108 57 1989 1536 44 99 115 105 58 1990 1286 40 96 123 104 59 1991 1100 30 77 96 83 43 1992 1079 50 125 154 137 65 1993 940 47 108 140 125 64 1994 870 27 93 114 99 40 1995 982 24 79 95 85 46

The raw numbers under the specific offenses depict the number of charged specifications, not necessarily the number of cases, for a given offense category. Apart from this statistical limitation and the previously referenced inability to track (by victim's age) certain offenses perpetrated against children, other factors combine to preclude a completely accurate portrayal of the extent to which the Air Force prosecutes child abusers or otherwise holds them accountable for their offenses. These additional factors include the manner of charging a given suspect (i.e., charging separate specifications for each incident vs. grouping multiple instances of the same type of offense against the same victim into one "divers occasions" specification); a commander's decision to prefer charges concerning only what he or she deems the most egregious misconduct while intentionally not charging "lesser" offenses; and, final disposition by adverse action other than trial by court-martial.

Notwithstanding the inherent limitations of the AMJAMS and AMJAMS II statistics, the available data appears to support a general proposition that, since 1984, there has been an overall increase in Air Force prosecutions for offenses against children. This development is particularly noteworthy since 1988 because the increased focus on child victims has continued while the total number of Air Force cases for all crimes has (except for 1995) steadily declined.

B. The Victim and Witness Assistance Program

Judge advocates need to be aware of the victim-witness measures our Department has embraced in order to provide comprehensive and relatively uniform assistance to victims and witnesses of criminal offenses. Although the VWAP is not limited to any particular criminal offense, in all practicality it is of greatest benefit in high trauma situations, such as child sex abuse cases, violent assaults, and rape. Obviously, it is critical to comply with the VWAP mandates--not only to assist the victims as much as possible and reduce the trauma they experience from their involvement in the military criminal justice system, but also to enhance the Government's ability to prosecute the offender.

Chapter 7 of Air Force Instruction (AFI) 51-201 [8] sets forth the Air Force VWAP. It provides considerably expanded guidance over the provisions of its precursor, Air Force Regulation (AFR) 111-1. [9] The VWAP implements both federal legislation [10] and Department of Defense requirements. [11] Judge advocates are well advised, therefore, to have a working knowledge of their responsibilities under the program, and to consult AFI 51-201, Chapter 7, frequently when they are assigned child abuse cases.

The VWAP procedures should not require any dramatic shift in judge advocates' philosophy in preparing to prosecute child sex abuse offenses. The provisions for interface between judge advocates and crime victims/witnesses are common-sense courtesies that successful and thoughtful counsel have historically employed. This is likewise true for the concepts involving crime victims' rights and the services provided victims and witnesses.

There are, however, several significant VWAP developments which expand judge advocates' past responsibilities and which merit careful attention. [12] They include the mandates to educate commanders and first sergeants and to spearhead a multidisciplinary victim/witness support apparatus involving key functional agents from the Air Force Office of Special Investigations (OSI), Security Police, medical treatment facilities, and the Family Support Center, among others. [13] Judge advocates must also ensure these team members are properly trained for their specialized responsibilities in the overall VWAP process, including the need to coordinate with comparable civilian authorities. [14]

Additionally, counsel must overcome a widely-held predisposition to sever all ties with victims/ witnesses upon trial completion. Trial counsel now have clearly defined guidance to assist these individuals in the post- trial setting. As a corollary to this latter development, judge advocates must be schooled in the evolving array of available benefits and forms of transitional assistance to which victims and witnesses may be entitled - even following the approved separation of the offending servicemember. [15]

III. DEVELOPING YOUR CAPABILITIES AND EXPERTISE

A. Education

Child sexual abuse allegations are some of the most difficult cases to assume without any specialized knowledge. As the years have passed and our society has learned more about this problem, professionals from assorted disciplines have become more aware of how to handle victims of these crimes.

Because child sex abuse cases involve issues and sub-issues associated with a specialized body of knowledge, it behooves judge advocates to educate themselves in this area--before, not after, they inherit such a case. This notion assumes even greater importance when the abuse victim is a very young and impressionable child. If you make a mistake (e.g., alienating or frightening the child, displaying insensitivity, confusing the victim, implanting ideas in the child that the defense later uses to assert false memory, making promises to the victim or his/her family which you can't guarantee), there may be no second chance from a prosecutorial standpoint to undo the damage.

There are many sources of information judge advocates can access to get up to speed on these issues. From books in the local public library to specialized academic articles in professional publications, each passing year brings more expansive treatment of the subject and more intensive scrutiny into its subtleties. Additionally, circuit counsel should be a good source of specialized information in this regard, as well as numerous private organizations and governmental agencies dedicate their efforts to child welfare issues. [16]

B. Training

Acquiring proficiency in prosecuting child sex abuse cases is twofold: training yourself and training the other members of the interdisciplinary team. Training yourself is largely a measure of the self-education process described above and doing the casework. It should come as no surprise that the best and longest lasting training lessons are those learned through actual case experience. One can also supplement this training process by attending professional courses, conferences, and symposia.

Training the other members of the interdisciplinary team, though, is an entirely different matter--but an extremely important and, by virtue of the VWAP, mandatory one. Certainly the requirement to train others on the interdisciplinary team does not mean that judge advocates should, for example, tell pediatricians how to conduct and interpret a gynecological examination on a suspected child victim. Nor should judge advocates tell chaplains, OSI agents, mental health providers, commanders, or any other professionals how to do their jobs. We do, however, have the responsibility to assume a leadership role for the overall training and operational effectiveness of the interdisciplinary team.

C. Organization

Organization is merely a logical extension of the education and training aspects of developing individual and collective office capabilities to prosecute child sex offenses most successfully. By analogy, the legal office orchestrates the VWAP and associated prosecutions in much the same manner as a symphony conductor obtains a masterful performance from the musicians: talented individuals play distinctive instruments, but the conductor trains them to function together and blends them in different

combinations with varying timing and tempo to achieve the desired effect.

Depending on the size of the legal office, base population, average incident rate, and the staff judge advocate's preferences, the VWAP leadership can assume alternative organizational formats. In some cases, the Chief of Military Justice may be best suited to spearhead the program. In other situations, it may be better to have a completely independent attorney (such as the Chief of Civil Law or Preventive Law) run the VWAP, while in still other instances, depending on the case and/or family dynamics, the SJA may deem it most advisable to designate the projected trial counsel on an ad hoc basis to shepherd the interdisciplinary group. Each of these alternative approaches has its particular advantages and disadvantages, and there is no one right way to administer the program. The critical considerations are that the legal office oversee the VWAP (assuming the installation commander has delegated this responsibility) and monitor its effectiveness, that the VWAP has a structured organizational approach, and that committed people are involved in all disciplinary roles.

IV. THE CRITICAL FIRST INTERVIEW

A. Preparation

The specific preparation for the initial victim interview in a given case will largely depend on how the allegation surfaced and how many facts are already known (and by whom). The standard practices adopted at a given base for handling these cases, the unique situational factors present, and the professional preference and recommendation of the primary military evidence gatherers--typically the OSI in child sex abuse cases--may also affect the interview preparation.

Often, there will be at least two "first" interviews with which prosecutors need to be concerned--the first official investigative meeting the OSI case agent has with the victim, and the first meeting the victim has with the judge advocate who will likely handle the case. A model situation perfectly designed to minimize the danger of so-called memory contamination would have all necessary parties present at the child victim's first interview. But such a gathering, given the busy schedules and varied responsibilities of different functional experts, is almost impossible to arrange on short notice. By the time a meeting for all parties could convene, it might entail an unacceptably lengthy delay in ascertaining the full facts, following fresh evidentiary leads, and embarking upon the path to hold a molester accountable for his crimes. Moreover, in the larger scheme of considerations (and depending on the particular case), a meeting of this type may not even be the most effective or appropriate way to proceed.

Typically, an OSI case agent will conduct the first military interview of the child victim. It is unlikely that the agent will allow an outsider (even a judge advocate) to be present during the initial interview to interject his or her thoughts into the evidence-gathering process. Yet, while such early judge advocate involvement is not the norm in most cases, child sex abuse cases might call for an exception. If there is an excellent working relationship between the two, and the prosecutor has established a leadership role in the VWAP, the OSI case agent might be willing to have the prosecutor participate in the first victim interview in these cases.

Whether or not an attorney attends the first OSI interview with the victim, however, there are certain measures the prosecutor can take to ensure the OSI agent is fully prepared for the interview. Prior to the victim interview the judge advocate and OSI agent should meet for a strategy session and discuss the elements of various possible offenses. The agent will thereby be prepared during the first meeting to nail down complete information about the full extent of the suspected abuse. Similarly, it would be helpful to review together the types of child behaviors and conditions which, if present, might provide collateral evidence consistent with sexual abuse. [17] It would also be useful to review which abuse indicia tend to be present depending upon the suspected victim's age/developmental level. [18] An awareness and reminder of these considerations prior to conducting the interview will help the case agent tremendously in building the case.

Assuming the judge advocate was not present at the OSI agent's interview, he or she should meet the victim as soon after the first investigative interview as possible. At that meeting, which should include the OSI case agent (and possibly other members of the interdisciplinary team with whom the victim has already had contact and feels comfortable), the judge advocate must begin building a close rapport with the child, and should participate in non-leading questioning to refine factual details possibly missing in the first OSI interview.

B. Location and Circumstances

The particular case facts will again have a considerable impact on the timing and location of the first interview. If the child is in a highly agitated state and it is critical to get the information immediately, it may be appropriate for the OSI agent to conduct the interview in a hospital setting, such as a private area of the pediatrics ward. In most situations, though, there will not be an immediate crisis, and the agent can conduct a calm, carefully planned interview in a controlled OSI setting.

A key decision the prosecutor and case agent should discuss and resolve prior to the interview is the question of videotaping it. There are many potential benefits of videotaping this first interview; there are considerable risks as well. [19] One cannot typically find at an average Air Force base the necessary level of experience and proficiency in conducting videotaped child victim interviews. Until that expertise develops and remains stable at base level through training and practice, there are simply too many things having nothing to do with the truth of the allegation which can go wrong in the videotape process to justify the gamble. A shoddy, incomplete, or error-plagued video interview with a child victim will not only provide the prosecution poor evidence on which to proceed against a suspected child abuser, it may actually provide the defense ammunition to confuse the child at trial, to inject collateral issues which sidetrack the jury's consideration of relevant facts, or to otherwise undermine a legitimate prosecution.

C. Rapport

The child must trust the prosecutor implicitly regarding everything the prosecutor says, does, and asks. Without acquiring that level of trust, the prosecutor will not succeed in unlocking the full truth from

within the victim, the child won't be able to confront fears about testifying, and the prosecution may fail at trial to extract the information and performance necessary to convince the trier of fact of the accused's guilt.

The first necessary component in building rapport is that the judge advocate must like children. Assigning a judge advocate who has no fondness for children to a child sex abuse case is a recipe for disaster. Everyone has their own particular talents, strengths, and capabilities; some attorneys are particularly gifted in this area while others who are otherwise outstanding practitioners may possess neither the capacity nor inclination to deal with children. Those individuals should not get involved in these cases.

The second necessary quality in building rapport with a child is patience. Don't expect the child to embrace the prosecutor, a total stranger, at the first meeting and reveal all intimate details of the abuse. Even adult crime victims cannot be open and forthcoming in a first meeting without considerable difficulty, and the realities of child development are such that many children are simply not ready to discuss their most troubling experiences during a first interview without some level of trust and rapport already in place. [20] Building rapport and trust will likely be a gradual process. Don't push the child, always listen, and pay attention to what he or she says and does. After time and familiarization, the rapport will develop.

D. Eliciting Thorough Information and Interview Techniques

Good prosecutors are always attentive to everything a witness tells them during an interview. Sometimes a seemingly unrelated offhand remark will generate additional questions which yield useful information. This is especially true when the victim witness is a child. Paying close attention to what victims say (and, implicitly, what they fail to say), how they say it, the body language they display may yield considerable corroboration of the alleged crime. Naturally, the interviewer must be careful to avoid asking leading questions or suggesting an answer to a child victim. The interviewer will usually be safe in this regard by using questions which begin with "who, what, when, where, why, or how." When the additional information comes forward in that manner, the impact on the case can be powerful.

V. SITUATIONAL AWARENESS AND FLEXIBLE RESPONSE

A. Assessing the Non-Suspect Parent

An early and ongoing assessment a prosecutor will have to make in a situation of alleged intrafamilial sexual abuse concerns the non-suspect parent. This person's reaction to the allegations can range from adamant denial to a bloodlust for vengeance. If the prosecutor perceives the non- suspect parent's reaction as being irregular in either extreme, it should trigger a critical assessment of the reasons or motives for the non- suspect parent's reaction.

If the non-suspect parent adamantly supports the accused at the expense of believing the child, for

example, it might signal an economic motivation. The new transitional assistance initiatives and VWAP procedures should greatly reduce the non-suspect parent's anxiety and denial which usually accompany a lack of cooperation with, and sometimes an outright undermining of, prosecutorial efforts. [21]

Alternatively, a prolonged reaction in the other extreme might signal a hidden agenda by the non-suspect parent. In such a situation, it might be helpful to ascertain whether the parents had been experiencing marital difficulties, infidelities, and/or whether they had been contemplating divorce prior to the allegations. If so, the prosecutor should consider the possibility that the allegations might be associated with an anticipated child custody battle.

B. Using Experts

Don't be too proud to request and accept help. Within the base legal office alone, chances are excellent that a new judge advocate can receive substantial assistance from his or her colleagues. Many times, the staff judge advocate has had significant litigation and/or military justice experience. This fact also holds true for many deputy staff judge advocates, who can serve as excellent mentors for new attorneys. Outside the immediate circle of the base legal office, a young prosecutor can access enormous legal expertise through circuit counsel, chiefs of military justice at the numbered air force and MAJCOM, and the attorneys assigned to Appellate Government. In soliciting others' assistance, of course, one should ask early.

Finally, expertise in these cases is certainly not limited to attorneys. For example, the treating pediatrician can give a crash course on child anatomy and development. Ask to borrow the doctor's learned treatises and latest medical journals. Repeat this process with all functional experts. Prosecutors need to immerse themselves in the expertise necessary for the case.

VI. CASE PREPARATION

Virtually every experienced litigator or published trial tactician will counsel a young attorney that thorough preparation is the sine qua non of a winning case. It's true: there is no substitute for hard work and thorough preparation. In preparing any case, the best guidance is to prepare early and often. Where a child victim is concerned, early preparation is especially important. It is difficult enough to make any witness who is unfamiliar with a trial setting feel comfortable with the process; that difficulty grows larger when the witness is a victim of sexual abuse, and larger still when the victim is also a child.

Prepare for the investigation pursuant to Article 32 of the Uniform Code of Military Justice [22] as though it is an actual trial. This is a departure from the more relaxed standards of most Article 32 investigations, but there are sound reasons for it. The most basic reason to present the full panoply of physical evidence and witness testimony at the Article 32 is to send the accused a powerful and pointed message. By showing the accused the strength of the Government's case, he may recognize the likelihood of his conviction. An impressive Government performance at the Article 32 hearing will also give the accused's counsel some leverage in persuading a client that a guilty plea and pretrial agreement

are in the client's best interests. If that comes to fruition, the prosecutor will have succeeded in vindicating the interests of justice while sparing the child the additional ordeal of a public trial.

If that strategy does not succeed, the Government has lost nothing in trying. It's not as though the Government has given the defense any discovery or strategy advantage. Even prior to the Article 32 proceeding, the defense will have had a fairly thorough knowledge of the evidence. Additionally, by having the child victim thoroughly prepared, the prosecutor has afforded the child a dress rehearsal before trial.

Following the Article 32 investigation and referral of charges, it is essential to continue preparing the case. Stating the obvious, the prime focus of all witness preparation has to be the victim. Spend as much time as it takes for him or her to feel comfortable with the prosecutor, the courtroom, the testimony, and the prospect of facing strangers as well as the accused. The prosecutor needs to be certain the victim will perform well at trial; until the prosecutor has this certainty, the child is not yet adequately prepared. It is a weighty responsibility to shoulder, because the prospect of failure could carry heavier consequences than losing the trial: the child could be victimized again by the experience.

VII. THE TRIAL

In large measure, the circuit counsel as lead attorney will orchestrate the prosecution's actual trial presentation. However, the thoroughness of the base prosecutor's preparations will leave a profound imprint on the case. Chances are excellent that the base judge advocate will conduct a substantial portion of the trial--including the direct examination of the child victim. The child will be most comfortable testifying in response to the questions posed by the attorney with whom he or she has had the most contact and with whom he or she has an established rapport. The following discussion offers some general observations which prosecutors should carefully consider to help the trial go well.

Communicate well. The prosecution has the burden of proof beyond a reasonable doubt. Knowing the case and fervently believing in the accused's guilt are not particularly helpful if the prosecutor is incapable of helping the child understand what information he or she needs to tell the court, or if the prosecutor can't effectively communicate the message to the fact finder. One should not be a pompous orator-- merely a sincere, credible, and effective communicator who can persuade the trier of fact.

Respect your opponent's capabilities and his or her case. In preparing the case and, more so, during the heat of battle, advocates are naturally biased in favor of their cause. Sometimes this bias eclipses their ability to consider alternative case theories and evidence characterizations advanced by the other side. Overconfidence and underestimation of opposing counsel breeds carelessness, and carelessness causes mistakes.

Sense the sensitive. Be perceptive to the victim's needs. Small children lack the stamina and attention span of adults. Take special precautions to make the victim as comfortable as possible while he or she waits to testify. An isolated room or office occupied by a trusted chaperone should suffice. Consult the

child's therapist/counselor and ascertain if there are any special considerations of which to be aware. Reassure the victim--regardless of the trial's outcome; the child does not need further pressure or trauma.

Be vigilant of security risks and take reasonable security precautions for the courtroom and the legal office complex. Trials of this nature where emotions run high, especially if they also involve messy domestic issues between the victim's parents, can involve an increased risk of violence by the accused and/or non-suspect parent. Assess in particular the accused's likely behavior by asking his friends, co-workers, supervisors, and mental health professionals who may have counseled him in the past. Implement whatever additional security measures may be warranted under the circumstances (e.g., metal detectors, bag searches, reduced courtroom access).

VIII. POST-TRIAL

Common sense dictates that the base prosecutor should be available to assist the victim and his or her family with certain additional measures after the trial is over. It is unreasonable to expect that either an individual prosecutor or the collective base legal office personnel would spend such an extensive amount of time with the child, use him or her to help secure the conviction, and then discard the victim after he or she had served the Government's purpose. Fortunately, the VWAP has assumed great importance lately, and base counsel are not only morally and pragmatically bound--but are now also duty-bound--to help victims transition back to some semblance of a normal life. Be conscientious and timely, follow the guidance, and give these people the best service and effort possible--they entrusted themselves to the military legal system, often at their economic disadvantage, and it is the least they deserve.

IX. CONCLUSION

Many of the concepts discussed above have broad application to all trial work a base judge advocate will experience. Because of societal trends involving child abuse and the expanded mandates of the VWAP, judge advocates in their first assignment will also likely grapple with these issues. The unique aspects of cases involving child victims (particularly of sexual abuse) requires prosecutors to develop a certain level of expertise across a fairly broad range of considerations. Accordingly, it is imperative for counsel planning to work these cases to begin the processes of self education, training, and organization early. It is also vital to begin preparing a particular known case and establishing rapport with the victim as soon as possible. Through the process, counsel must be situationally aware and flexible, resourceful in accessing experts' help, and tenacious in their resolve. Prosecutors who vindicate the interests of justice, maintain their professional decorum, and leave the victim in better condition than at the start of the ordeal score a tremendous victory for the Air Force and American society.

Footnotes

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1. See Air Force Instruction (AFI) 51-502, ch. 7, Administration of Military Justice (July 1994) [hereinafter AFI 51-502].

2. David Finkelhor, Current Information on the Scope and Nature of Child Sexual Abuse, The Future of Children 31 (Summer/Fall 1994).

3. Id.

4. Id.

5. Id.

6. Id. at 34.

7. Statistical data from AMJAMS and AMJAMS II provided by AFLSA/JAJM (27 June 1995; updated 25 Jan. 1996).

8. AFI 51-201, ch. 7, Administration of Military Justice, supra note 1.

9. Air Force Regulation 111-1, ch. 11, Military Justice Guide (Sept. 1988).

10. The Victim and Witness Protection Act of 1982, 18 U.S.C.A. Secs. 1501 note, 1503, 1505, 1510, 1512 note, 1512-15, 3146, 3579, 3580 (West 1984 & Supp. 1994); The Victims' Rights and Restitution Act of 1990, 42 U.S.C.A. Secs. 10601-03 (West 1995); and the Victim's Rights and Restitution Act of 1990, 42 U.S.C. Secs. 10606, 10607 (West 1995).

11. Dept. of Defense Dir. 1030.1, Victim and Witness Assistance (Nov. 1994); Dept. of Defense Inst. 1030.2, Victim and Witness Assistance Procedures (Dec. 1994).

12. See Major William Pischnotte & Major Regina Quinn, The Victim and Witness Assistance Program, 39 A.F. LAW REV 57 (1996) (this issue) for an examination of recent legislation and guidance affecting the way the VWAP is conducted in the military justice system [hereinafter Pischnotte & Quinn.].

13. AFI 51-201, sec. H, Administration of Military Justice, supra note 1.

14. Id.

15. See Pischnotte & Quinn, supra note 12, at 63-69.

16. A small sampling follows: National Center on Child Abuse and Neglect (Washington, DC, 202/205-

8586), U.S. Advisory Board on Child Abuse and Neglect (Washington DC, 202/690-8137); American Professional Society on the Abuse of Children (Chicago, IL, 312/554-0166); David and Lucile Packard Foundation, Center for the Future of Children (Los Altos, CA, 415/948-3696); and C. Henry Kempe Center for Prevention and Treatment of Child Abuse and Neglect (Denver, CO, 303/321-3963). In addition, several legal centers can provide specialized assistance: American Prosecutors Research Institute/National Center for Prosecution of Child Abuse (Alexandria, VA, 703/549-4253); American Bar Association Center on Children and the Law (Washington DC, 202/331-2250); National Institute of Justice Clearinghouse (Rockville, MD, 800/851-3420).

17. See Kathryn B. Hagans & Joyce Case, When Your Child Has Been Molested: A Parent's Guide to Healing and Recovery 37-40 (1988).

18. See Sandy K. Wurtele & Cindy L. Miller-Perrin, Preventing Child Sexual Abuse: Sharing the Responsibility 104-19 (1992).

19. See John E.B. Myers, Investigative Interviews of Children: Should They Be Videotaped? 7 Notre Dame J.L. Ethics & Pub. Pol'y 387 (1993).

20. See Donna M. Pence & Charles A. Wilson, Reporting and Investigating Child Sexual Abuse, THE FUTURE OF CHILDREN 78 (Summer/Fall 1994).

21. See Pischnotte & Quinn, supra note 12, at 63-69, for a discussion on the new transitional assistance initiatives.

22. See Manual for Courts-Martial, app. 2 (1995).
