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FROM THE EDITOR

This issue of *The Reporter* comes to you full of motivating information from a broad cross-section of sources. We are pleased to bring you an article on the Aerospace Expeditionary Force. The article contains a very good breakdown of the AEF, including a discussion of the predeployment phase through the post-deployment phase. This is a must read for all JAGs. In addition, we have an article which discusses the history surrounding Bosnia and the significance of the Dayton Peace Accords. As always, we extend our sincerest appreciation to the outstanding authors that submitted the pieces that appear in the following pages. R

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Contributions from all readers are invited. Items are welcome on any area of the law, legal practice, or procedure that would be of interest to members of The Air Force Judge Advocate General's Department. Items or inquiries should be directed to The Air Force Judge Advocate General School, CPD/JAR (150 Chennault Circle, Maxwell AFB, AL 36112-6418)(Comm (334) 953-2802/DSN 493-2802).

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Aerospace Expeditionary Force Opportunities For The JAG Team

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Most of the latter half of the 20th century was marked by the Cold War struggle between two rival military superpowers, the United States and the Soviet Union. That struggle helped define the United States Air Force from its founding in September 1947 through the fall of the Berlin Wall more than 42 years later. Today, the United States is the world's only military superpower. The branches of America's military have struggled to devise appropriate roles in the post-Cold War period. For the Air Force, the new era has seen a move back to its roots as an expeditionary force. This article highlights the role of the judge advocate team in the 21st century's Expeditionary Aerospace Force (EAF), especially as applied to Aerospace Expeditionary Force (AEF) packages.

The end of the Cold War ushered in an era of strategic uncertainty. Today's threats are more ambiguous and regionally focused. They span the spectrum from regional conflicts to insurgencies, from civil wars to drug trafficking. Rogue states and terrorist groups seek weapons of mass destruction and enhanced military capabilities. Yesterday's superpower adversary was replaced by the likes of Manuel Noriega, Saddam Hussein, Usama Bin Laden, and Slobodan Milosevic.

During the Cold War, our forces were based around the globe in the tense standoff of containment. Today's national security strategy of engagement is much less clear. The post-Cold War "peace dividend" has meant fewer troops forward deployed. But as the Air Force was reduced in size by 40% over the past decade, its deployment commitments increased four-fold. Nevertheless, the same questions must be asked: What are the national security interests that will cause a military response? When will we deploy and employ military force?

The strategic uncertainty of today's threats has rendered Cold War basing policies obsolete. Now the emphasis is on rapidly responsive forces that are tailored for the threats each warfighting CINC confronts. By virtue of its speed and range, aerospace power is fundamentally different from other forms of military power. Today's Air Force is light, lean, and lethal. It is postured to take advantage of the unique characteristics of aerospace power. This is the very essence of the EAF.

The EAF can be viewed as "*what*" we are as the United States Air Force, and AEF as "*how*" we are to perform the mission. The EAF represents our leadership's vision to organize, train, and equip the Air Force so as to create a mindset and culture that embraces the unique characteristics of aerospace power. To implement that vision, the AEF is comprised of force packages tailored to the nation's security needs in a particular location at a particular time.

What is the role of the JAG team in this EAF/AEF era? Much of the work consists of deployment law. Colonel Charles Dunlap, currently assigned as staff judge advocate of Air Education and Training Command, defines "deployment law" as simply the practice of law in a deployed setting where JAGs and paralegals practice their conventional skills in a less than conventional setting. (*See* Colonel Charles J. Dunlap, Jr., and Captain Jeanne M. Myer, *Deployments Today: The Practical Issues, The Reporter,* September 1999, at 5. In the article, Colonel Dunlap distinguishes "deployment law" from "operational law." The latter requires specialized knowledge and experience to perform duties on a Joint Task Force or in an Air Operations Center.)

This article seeks to better prepare deploying JAGs and paralegals by reviewing the predeployment, deployment, and post-deployment phases. By building on common, generalist skills, JAGs and paralegals can readily succeed in a deployed environment. Note that additional information on this topic (including the internet links that are referenced in this article) is available on the HQ ACC/JA website at http://wwwmil.acc.af.mil/ja/FILES/EAF0004.doc.

Predeployment Phase:

Deployed locations should never be viewed as training opportunities. All training and preparation must be completed well before arriving at a deployed location. Deployment threats are real, as demonstrated by the June 1996 terrorist attack on

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Khobar Towers. JAGs and paralegals cannot afford to be less than fully prepared for all facets of these assignments.

The Air Force JAG School offers the annual Operations Law/JAG Flag Course. It provides superb overall preparation and training. However, this training is not an end in itself. Deployees should also take advantage of opportunities to participate in exercises such as Blue Flag, Bright Star, Roving Sands, and base exercises. Exercises not only allow JAGs and paralegals to sharpen their legal skills, they also provide an opportunity to better understand the operational setting for these issues.

Consideration should be given to attending such other Air Force JAG School courses as the Deployment Fiscal Law and Contingency Contracting Workshop. Similar courses are offered at the Army and Navy JAG Schools, including the Law of War Workshop and the Operational Law Seminar. After Action Reports on the HQ USAF/JAI homepage provide good sources of information. Individuals should consult the deployed location links on the AEF Center and HQ ACC/JA homepages for location-specific information. The AEF Center recently published comprehensive training templates for the various deployed locations; these are also available on the AEF Center website. Consult the State Department website to obtain country specific information — historical, political, cultural, economic, and more.

Paralegals should ascertain in advance of deploying whether court-reporting skills will be required. The AEF Center training templates provide much useful information. Courts are a reality at some deployed locations. PSAB had four courts in February 2000, each of which was transcribed by paralegals.

Take advantage of enroute spin-up training: ask questions, preview current issues, understand AOR policies and philosophies, and put faces to names. Become familiar with how to use a STU III, a classified FAX, and SIPRNET. Know how to open a classified safe. Understand the proper procedures for handling classified materials and develop good OPSEC and COMSEC habits.

If you're not in good physical shape, get in shape. Physical fitness is a great edge for long hours and the many physical and mental challenges that are inherent to deployed locations. Know how to use your chemical warfare gear and don't underestimate the value of Self-Aid and Buddy Care training.

Become a student and learn more about the Air Force, the joint environment, and the military in general. Stay on top of current events, and talk to those who have recently returned from similar deployments (and don't limit such discussions to JAGs and paralegals).

Know the rules pertaining to gift acceptance from prohibited sources and be prepared to take affirmative steps to ensure these rules are consistently enforced. Likewise, ensure gifts from foreign governments are handled in accordance with laws and regulations. Contractors can be a special source of concern. Recognize that some individuals have a tendency to rationalize away ethical rules (and core values) in the name of being deployed.

Fiscal law is a potentially contentious issue in the deployed environment. Before coordinating on proposed actions, make sure that funds are available and are proposed to be spent in an authorized manner. Many locations are witnessing a flurry of contracting activity as they seek to expand or enhance their infrastructure and capabilities. Take a proactive approach — work closely with the contracting officer, civil engineer, comptroller, and others. The same basic contracting and fiscal rules (such as the Anti-Deficiency Act) apply in the deployed environment. Do not hesitate to say "no" when that's the right answer.

Predeployment preparation should also include time for realistic mental preparation. Deploy with the right attitude and expectations. Do not have a "short timer's" perspective. Be honest with yourself and accept the fact that some aspects of deploying are anything but fun. Long hours are a given. Some deployees will live in tents while others may be in some form of lock-down for force protection reasons. Understand and accept that a deployed location may require the performance of non-legal duties: filling sandbags, throwing A-bags, or helping out with any one of a number of non-traditional legal duties. While these duties may not be glamorous, they certainly generate team credibility and cohesiveness. Be prepared to confront jet lag, dietary changes, cultural differences, organizational and procedural challenges, and occasional loneliness.

Realize that a deployed setting requires quick spin-up and mental stamina. Follow local "Right Start" guidance on sleeping, eating, and hygiene. Get involved in sports and community activities.

Make the days count, don't count the days. When you look back over your Air Force career, you will undoubtedly describe your deployed days as some of your best because you'll realize that you overcame significant personal and professional challenges.

Make the most of predeployment training and preparation opportunities. Without question, today's expeditionary environment requires deployees to be ready from Day One.

Deployment Phase

Hit the ground running by quickly becoming a member of the deployed team. Whether the deployment lasts 90 days or more or less, realize that you are a part of a new organization. You're not simply TDY, you're deployed. If you're deployed to Prince Sultan Air Base, Saudi Arabia, for example, you (along with your deployed comrades) belong to the 363rd Air Expeditionary Wing at Prince Sultan. Your permanent unit of assignment is the place where you'll return, but you're now a member of the deployed team.

AEFs are a mix of lead wings, sister wings, and the Air Reserve Component. It is essential to get up to speed quickly on how things are done at a deployed location because homestation procedures are irrelevant. Actively learn about the mission — how it is done, and who does what. Early in the assignment, become familiar with the commanders and first

sergeants, learn the weapons systems (an absolute must for proper ROE and targeting guidance), and take advantage of overlap to learn the real issues and pitfalls at your location. JAGs are more than mere lawyers, they're a commander's trusted advisor and honest broker. As such, you need to understand the intricacies of the deployed mission. The PERSTEMPO at deployed locations places an exacting premium on the ability to quickly transition into and identify with the deployed team.

JAGs are trained to help commanders achieve their objectives, often providing options that ensure mission accomplishment. But don't fall into the trap that the rules are somehow "different" in the deployed environment. When the law or policy contradicts a commander's goals — tell the commander. Try to find a way to help your commander achieve the objective, but don't hesitate to say "no" when that's the right answer. Unless the law clearly permits exceptions in the deployed environment, commanders need to know that some things simply cannot be done.

Understand the new chain-of-command, to include where to obtain higher headquarters legal support. Steady state AEFs plug into an existing command structure, and it is important to understand the deployed "wiring diagram" and the organizational structure of any coalition partners as well. Keep the deployed JA chain informed of current issues and do not hesitate to seek out their good counsel. For example, 9 AF/JA functions as CENTAF/JA and provides invaluable continuity and issue-familiarity to anyone deploying to Southwest Asia. Avoid any temptation to email or otherwise seek homestation guidance on deployed issues. The deployed chain-of-command should be used for all purposes, and the deployed JA chain must be kept in the information loop.

The importance of JAGs and paralegals working together as a team cannot be over-emphasized. There are presently four deployed steady state locations in Southwest Asia (SWA) and five in the EUCOM (United States European Command) theater. Two of the SWA locations feature JAG-paralegal teams and there are three such teams in EUCOM. Most deployed locations are austere in terms of resources and manning.

Teamwork provides the edge to make the difference. JAGs and paralegals need to know what the other is working on and how to get the job done. When one or the other becomes unavailable, the remaining member of the JAG team may well be required to step in and fill the breech. Teamwork requires an unselfish attitude, shared respect, and candid and frequent dialogue. Professional attitudes and mutual respect can sustain successful team building.

Whether we deploy in battle dress or desert camouflage uniform, we remain ambassadors in blue. We represent our nation and the United States Air Force in the deployed environment. Coalition partners and host country officials and citizens will judge our mission and our government by their interaction with our forces. We must always be mindful of cultural and political sensitivities.

Many of the deployed locations have a joint mission, and it is important to understand this mission and each component's role and organization. JAGs and paralegals must get away from the office; this communicates mission interest, and it provides an opportunity to understand the issues that confront commanders and operators. Visibility is particularly important in a deployed environment because these locations tend to suffer from a lack of corporate memory — JAGs and paralegals must make their presence known.

Military justice is Job #1. Our Expeditionary Aerospace Force relies on good order and discipline to function effectively. JAGs have a duty to ensure military justice is meted out in a fair, consistent, and uniform manner. It is important to ensure the system is fair both in fact and in perception. Consider whether there are unjustified differences in punishments based on the status of deployed offenders (e.g., permanent party, 90-day active duty deployees, 15-day Guardsmen). Especially when dealing with the Guard and Reserves, it is important to understand the difference between administrative control (ADCON) and the statutory authority to exercise disciplinary jurisdiction. Predeployment preparation should include understanding how military justice functions in a joint environment.

Procuring defense counsel services can be problematic in the deployed environment. Ensure deployed members have ready access to needed defense services. Take advantage of opportunities to publicize this information, such as at Right Start briefings. Call the servicing ADC office and introduce yourself (e.g., the Ramstein ADC office provides defense services for all Air Force members in Southwest Asia). Good working relations with the defense community benefit everyone.

Know the AOR rules on what constitutes a serious incident and when and how it should be reported. The enroute spin-up training is an ideal time to obtain any such AOR-specific rules. Most deployed locations have fewer military justice cases than equivalent stateside bases, but deployed JAGs and paralegals often have to work these cases smarter, harder, and faster because of their atypical setting. In Southwest Asia alone, 12 courts were tried in the first half of CY 2000.

A deployed location can be a very isolating and frustrating experience. These experiences can be magnified for younger troops who have little or no overseas experience, let alone deployed experience. The legal team's greatest contribution to the overall quality of life can come in the areas of legal assistance and claims. Responsive, timely, and professional legal assistance is a must for our Expeditionary Aerospace Force. In the lean circumstances of today's EAF, more is often being done with less, and it is extremely important that our people remain focused at all times.

World class legal assistance must be the standard. Considering the frequent turnover of personnel, it is especially important to publicize legal assistance hours at Right Start briefings, various wing meetings, in base newspapers, and via television and radio spots. Consider providing some form of legal

assistance to shift workers; most flight line squadrons welcome the opportunity to have a JAG or paralegal for an hour or two on mids. Take advantage of the information age: WebFLITE, the internet, and email can facilitate rapid and professional legal assistance.

Paralegals must have a broad base of skills; they must be knowledgeable in both claims and military justice. Special awareness of civil law and other areas is a definite plus. The ability to troubleshoot computer problems is a great asset.

Special touches are always appreciated. For example, a responsive tax program can be a great morale boost for deployed troops. The deployed claims program should be administered in a like fashion. Most individuals only deploy with what they can stuff in an A-bag, and nothing is more frustrating than having those precious few items damaged or lost. We can make a world of difference by providing hassle-free and timely claims services. JAGs and paralegals can positively impact the deployed quality of life by giving the proper priority to legal assistance and claims.

It is not unusual for foreign claims to arise in a deployed setting. These can be high-visibility events, and how they are handled can have an impact on our nation's subsequent engagement with the host nation. It is important to get the facts, adjudicate the claim quickly and fairly, and keep the local chain-of-command and relevant JA chain informed.

Deploying JAGs and paralegals can also make an invaluable contribution to the future legal mission by considering the needs of those to come. Does the office need new furniture or carpeting? Are computer upgrades desirable? Are electronic files and documents properly maintained for future access? Is SIPRNET access or a STU III needed? Could the legal mission be made more effective by an office closer to the commander? As you plan for your successors, consider how the ancient Greeks planted olive trees not for themselves, but for the benefit of following generations. AEF tour lengths are not long enough to see the results of many initiatives; however, a "make-it-better" approach will ensure the legal mission stays on the path of continuous improvement.

Post-Deployment Phase

Every JAG and paralegal should become an ambassador for the EAF. There was a time when JAGs and paralegals manned a mobility line but rarely processed through one. Not so long ago, many young judge advocates and paralegals were stationed overseas but only "deployed" in support of local base exercises. The times have definitely changed as we support the current National Security Strategy. Deployments have become the norm. The emphasis is now on being lean and lethal. Returning JAGs and paralegals should translate their deployment experiences into something positive by mentoring others. Consider writing an article for the Air Force Law Review, Reporter, base newspaper, or a law school or bar association periodical. Share deployment experiences and lessons learned by volunteering to help the JAG School with next year's JAG Flag. EAF presents JAGs and paralegals a golden opportunity to explain our new role for the nation's security.

Also, remember the importance of offering to help with the needs of those who are deployed and their families. Periodic phone calls, emails, and packages are always appreciated by deployed members, and checking in with their families is a responsibility we all share.

The EAF concept provides maximum agility to effectively respond to today's diverse and ambiguous threats. While EAF represents a profound change for today's generation of airmen, it's really simply a return to our service's expeditionary roots. The demise of the bi-polar world has rendered Cold War basing concepts a thing of the past. Now the emphasis is on an expeditionary culture grounded in the proper mindset. The practice of deployment law is neither new nor esoteric, but rather, it is predicated upon the generalist skills all JAGs and paralegals possess. Through timely, thorough, and practical preparation, every judge advocate and paralegal can successfully contribute to the emerging EAF culture.

Warrior Diplomats

AF JAGs
Force Multipliers For the 21st Century

MAJOR DEREK K. HIROHATA

"This is it, the last one. Don't think it won't matter. This is history that we are about to make...don't just go through the motions, make a difference!"[1]

Introduction

It seems like only yesterday I heard those words. At the time, I was a GLCM Ranger.[2] Years have gone by, and I have often thought back to the encouraging words spoken by my old Flight Commander (call sign "FOX ONE"), to GLCM Rangers in the UK about to deploy for the last time, bringing to a historic conclusion one of the most unique missions in Air Force history. I was busy running weapons checks and coordinating communication frequencies with the wing command post. Still, I felt what I heard would stay with me a long time. I remember his words, and as the years pass, I often reflect on their timeless significance.

Now, many years later, I am an AF JAG and find myself on another AF deployment, another unique AF mission. This time I am deploying as part of an AF legal team in support of a Civil Military Operations support mission, and my old Flight Commander's words are again timely.

The first question many of us ask when arriving in country is "*will this make a difference?*" An unusual question, but one that needs to be asked. It has been said that "[i]n the Balkans, past history is closely linked with perceptions of the present and future."[3] Because Bosnia is part of the Balkans[4] a partial answer can be found in history.

Historically, the Balkans is a region that has been the focus of prophetic quotes. Even before the assassination of Archduke Franz Ferdinand in Bosnia triggered WWI, the Balkans had long been recognized as a volatile area. The best example of that historic recognition is the comment by Otto von Bismark when asked what he thought would start a general war in Europe (WWI), "*Some damn foolish thing in the Balkans.*"[5] He was not the only one to make a comment that proved prophetic.

Benjamin Disreali described *"the Balkan peninsula- Serbia – Bosnia – Herzegovina- political intrigues, constant rivalries, a total absence of public spirit. . .hatred of all races, animosities of rival religions, and absence of any controlling power. .* And predicted *"nothing short of 50,000 of the best troops would produce anything like order in these parts."*[6] When Mr. Disreali said those words 120 years ago he was dealing with that era's Balkan crisis. Yet his predictions hold true today as well.

Four years of the bloodiest fighting Europe has seen since the ending of WWII marked the war in Bosnia and prove the animosity and hatred mentioned by Mr. Disreali are still present. To end the fighting, the United States and NATO deployed 60,000 troops to enforce a peace brought by the Dayton Peace Accord.[7] This NATO led Implementation Force (IFOR) brought the "order" to Bosnia that Mr. Disreali predicted. By doing so, they have now established an "environment for hope" into which a nation might be reborn.[8]

While it is true that the Balkans has a history of bloodshed, this is an oversimplification. No one denies that hatred and animosity exist, and have done so throughout history. As the author Robert D. Kaplan observed "Neither Martians nor President Clinton killed Bosnian Moslems. Other Bosnians did."[9] He goes on, however, to make a salient point about the particular significance of that fact: "So what if the Balkans are a confused, often violent ethnic cauldron? Welcome to much of the world."[10] Mr. Kaplan also points out that if one is to note the incidents of violent bloodshed in Bosnian history, one must also note "the peaceful intercommunal tradition present through much of Bosnian history . . .."[11] And there lies the basis for hope. There has been more peace, than bloodshed in Bosnian history.

The Dayton Peace Accords
"The mere absence of war is not peace."[12]

The Dayton Peace Accords, commonly called the GFAP (General Framework Agreement for Peace (GFAP) in Bosnia and Herzegovina), recognized that to establish a durable peace and cessation of hostilities, more intervention would be required than the mere presence of an occupation army. The signatories and mediators also realized that the cessation of

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hostilities was more of a cease-fire, than a mediated lasting peace. They would have been hopelessly naïve to believe otherwise in a place where the SFOR handbook states "[r]eligious and cultural animosities have developed over centuries and are deeply ingrained among the various warring fractions. . .violence has been, and will likely continue to be, prevalent."[13]

Second Generation Peacekeeping Operations "Peace can not be kept by force. It can only be achieved by understanding."[14]

The question facing the drafters of the GFAP was how to create an environment where the cease-fire could mature into a genuine peace. In keeping with second generation peacekeeping operations,[15] a third principal objective and authority to achieve it was added to the more traditional provisions of ceasing hostilities. Besides giving IFOR the authority to act against those breaking the peace, this provision sought to "establish lasting security and arms control measures which aimed to promote a permanent reconciliation and to facilitate the achievement of all political arrangements agreed to in the GFAP."[16, 17] Congruent with that provision, the supporting authorizations were added: "to help create secure conditions for the conduct by others of other tasks associated with the peace settlement; to assist the movement of organizations in the accomplishment of humanitarian missions; and to assist the UN agencies and other international organizations in their humanitarian missions."[18, 19] Consequently, the GFAP attempts to blend the use of force with political measures to develop a genuine peace.

Quite simply, the GFAP employs the political model of nation building.[20] In a political model, focus is placed "on addressing the main grievances of the population... on all fronts: political, economic, cultural, social, administrative, and military. Social services, such as schools, sanitation and healthcare facilities, and community programs are extended. Economic reforms, such as land redistribution, are introduced. . . elections are held. . .The military is used...but is not the lead agency...."[21] In a nutshell, this was the GFAP plan and the roadmap of how NATO'S Civil Military Cooperation (CIMIC) organization would win the hearts and minds of the populace.

Short History of CIMIC/Civil Affairs Activities in Bosnia

The achievement of the humanitarian aspects of the GFAP was a cornerstone of IFOR's exit plan. To achieve this, NATO would engage in Civil Military Operations (CMO). CMO in Bosnia follows the basic doctrine in military operations other than war and focuses on "addressing the main grievances of the population in order to remove support from those who would remove the legitimate government"[22] agreed to in the Dayton Peace Accords. In essence, the goal is to win the hearts and minds of the people, and that exactly describes CIMIC's mission. Success in this arena would also mean the rebirth of a nation and a return to normalcy not found since the bloody war.[23] The initial responsibility for achieving this vital task was given to the staff of NATO's CIMIC section.

It was planned that CIMIC would then transfer the task of coordinating the efforts of civilian assistance and aid organizations to a civilian lead agency. In this case, the Office of the High Representative would be that agency. To perform the initial coordination of civilian organizations, CIMIC would have to capitalize on its ability to interact with the vastly different views and personalities of local civilians; civilian (both local and international) organizations in theater; and NATO military forces. In essence, it was being tasked to perform advanced Civil Affairs type actions. While CIMIC did have these abilities, it had never been tasked to perform on that scale[24].

The success of CIMIC in Bosnia was not easy. While CMO is now acknowledged as a tremendous force multiplier, if deployed early,[25] this was not the case in early Bosnian force deployments. Their mission not understood by theater commanders, CMO assets were assigned low priority and delayed at the early stages of the initial Implementation Force (IFOR) deployment. Indeed, after action analyses of early Bosnian deployments reveal that not only were commanders unfamiliar with the capabilities of CMO, but even CMO units were unaware of the abilities of other CMO units within NATO. This delay and confusion of abilities progressed to the point of mission degradation,[26] which only worsened as more CMO assets were rushed in to counter the late deployment.

As additional CMO assets were rushed in, they were told by various NATO countries that they were not needed in their particular Area of Responsibility (AOR).[27] These assets were then diverted to CIMIC Headquarters, inflating the HQ staff as much as three times than required.[28] As would then be expected of an over staffed HQ, CIMIC HQ got involved in the day to day activities of lower command levels resulting in further degraded efficiency.[29]

Other problems with coordination among the participating CMO units were apparent early on. Mostly these stemmed from a lack of a comprehensive and standardized CIMIC doctrine. The forces of the different nations often had to put together an *ad hoc* civil affairs approach that came from their individual nation's cultural standards.[30]

The U.S. approach calls for a quick decisive victory through the securing of popular support. Ironically, this has resulted in U.S. CMO forces taking on major infrastructure projects which, while possibly winning popular support, also eliminates the possibility of a quick victory.[31] Russian forces view the GFAP as a written order and will only provide the limited support that document calls for.[32] Both France and United Kingdom forces (both of which turned down U.S. CMO forces) employ a much more active approach. They often directly support local projects that can win the "hearts and minds" of the local populace.[33] In the middle lies the Nordic approach, which is strict neutrality and mediation.[34] NATO tries to take in all approaches and harmonize them into one cohesive approach.[35] This can best be summed up as observing, interposition, and transition assistance to normalcy. Consequently, depending on which country was in charge of a particular AOR, the level of civil assistance could vary dramatically and led to confusion by civilian organizations working in multiple AORs.

The Office of the High Representative IFOR to SFOR, Transitional Problems

The Office of the High Representative (OHR) was created by the GFAP to coordinate the activities of civilian organizations and liaison with IFOR.[36] As such, it is not a UN organization, nor does it have the UN as its support base. Ideally, it should have begun operations concurrently with CIMIC. However, where CIMIC had an existing infrastructure and personnel, OHR did not. Nor did any of the other civilian organizations mandated by GFAP. This vital step, overlooked by those who planned the implementation of GFAP, was a major cause of delay and confusion. Consequently, OHR and those other organizations were not able to begin functioning immediately as they not only had to build themselves from scratch, but also secure enough funding to function.[37]

During the interim period, IFOR bowed to public pressure and began to perform tasks that were OHR's mandated responsibilities. This led to further blurring of individual mission objectives.[38] Moreover, as OHR struggled to become operational, it and IFOR often brokered deals that were meant as temporary measures and not written down. However, as people and troops rotated in, the temporary nature of the agreements was forgotten and became accepted as formalized. Occasionally, the murky origins of support and responsibility understandings can still cause repercussions.

Civilian organizations did not appreciate the additional responsibility and support that a reluctant IFOR was providing, in some cases far beyond original IFOR scope. Most of these civilian organizations were accustomed to the support that UN Protection Forces (UNPROFOR) had provided, which was much more generous than IFOR or its successor SFOR were inclined to provide. Consequently, the 'bonus' support these organizations enjoyed was accepted merely as business as usual. This eventually led to frustration as OHR stood up and IFOR/SFOR began to reduce its direct involvement in favor of OHR.

An important point, often disregarded by many of the civilian organizations, is that IFOR, and its successor SFOR, will leave well before the reconstruction of the BiH is complete. The exit plan has always called for the return to civilian independent governing. Once the BiH government can ensure, on its own, the ability to maintain a peaceful environment without the need for NATO forces, SFOR will begin to demobilize. However, the restoration/reorganization of Bosnia will be far from complete. The need for humanitarian agencies will continue long after SFOR departs. Consequently, SFOR wants to encourage self-sufficiency among the civilian organizations and is very cautious about providing assistance that could turn into dependency.[39] What the civilian organizations perceived, however, was an organization (IFOR/SFOR) with huge resources at its disposal that could help them, but would not.

It is ironic that there have also been reports of complaints when NATO forces do take on a project within the purview of civilian organizations.[40] This conflict with philosophy and perception has created tension that remains ever present.

Another early problem that still exists seems to be inherent in the U.S. application of force protection measures to CMO doctrine. The National Defense University (NDU) and Institute for National Strategic Studies (INSS) observed that force protection measures often hampered or reduced, the ability of CIMIC personnel to accomplish their missions. This stemmed either from the early lack of understanding by commanders about the CIMIC mission, or a failure to recognize the difference between a military show of force mission and that of building working relations with local civilians and civilian organizations. For example, initially, all CIMIC personnel worked within the confines of an IFOR installation and could only leave the installation in four vehicle groups. This, the NDU and INSS noted, resulted in loss or reduced accessibility by the civilian organizations that CIMIC was supposed to be interacting with. Further, the arrival of CIMIC personnel at civilian organization meetings with a heavy military presence made the civilian organizations uncomfortable and conflicted with the message that CIMIC was trying to send to the local populace. Specifically, that message was that the local situation was safe and returning to normal,[41] which was nullified when CIMIC showed up armed and ready for military battle.

A British Army Officer on his fourth tour wryly noted to the author that when US Civil Affairs teams performed hearts and minds missions, such as delivering toys to schools, they would often arrive with overwhelming military force. The good that comes from a child receiving a toy is negated by the fear instilled by the gunner sitting behind the M-60 in the escort HUMVEE. This anecdote illustrates the perception by some in allied forces of the problems caused by overwhelming force protection. Accurate or not, the perception exists. The tension between adequate force protection measures and efficient CIMIC mission accomplishment continues to be a challenging balancing act even now under SFOR.

The AF JAG MISSION

"The world has grown smaller, in recent years ever more rapidly. It is hard to divorce our country from a number of conflicts to which years ago we would have hardly paid any attention. While we cannot engage ourselves in all conflicts, we now have a choice...[in civil affairs we] have a tool which can help in the early resolution of enormously difficult, potentially intractable situations...". Ambassador T.R. Pickering (remarks to a NDU conference)[42].

The roots of this USAF TJAGD (The Judge Advocate General Department) CMO support mission began in late August 1991. Major Frank A. Titus,[43] was reviewing lessons learned from the debriefings of 41 AFJAGs returning from deployments in Southwest Asia. These JAGs had been deployed in support of Operation Desert Shield/Storm.

One of the problems returning JAGS often referred to was shortfalls in their ability to effectively link up with the robust U.S. Army Civil Affairs in the AOR. Major Titus compared the debriefing comments with Annex -R, unclassified, to USAF War and Mobilization Plan-1, (WMP-1).[44] He found that WMP-1, Annex-R,[45] had a comprehensive plan for integration of AF and Army Civil Affairs efforts. However, this plan had not been fully integrated into actual AF activities in the several operating locations within South West Asia.

Major Titus immediately contacted Brigadier General Allen C. Pate,[46] who directed him to prepare a briefing paper on the AF Civil Affairs mission and how Air National Guard Judge Advocates might be integrated into that mission. Major Titus did so. General Pate, pleased with the results, hand delivered this briefing paper to the TJAG, Major General David Moorehouse, in October 1991. General Moorehouse, in turn, asked Col Robert Bridges[47] for his legal opinion on the matter. Col Bridges informed General Moorehouse that the primary points in the paper were accurate. Furthermore, it was appropriate to address ways to enhance AF civil affairs capabilities via the TJAGD, as Annex -R, WMP-1, specified TJAG as the office of primary responsibility for civil affairs planning in the USAF.

After much research and several joint Army-AF briefings on the ANG Civil Military Operations Support initiative, General Moorehouse formally directed General Pate to move forward and work with active duty AF planners to integrate ANG JAGs into the AF Civil Affairs plans. Their charter was to develop organic civil affairs support capability within the AFTJAGD.

Four years later, in March 1995, Brigadier General Timothy J. Lowenberg[48] now had the ANG watch. He, and then Lt Col Frank A. Titus, were invited to participate in a U.S. Army planning conference on Bosnia conducted at Fort Monmouth, N.J. This proved to be a historic meeting. Senior NATO planners attending the conference informed the two participating ANG JAGs that ANG JAGs were being included in the projected civil military force mix for peace operations in Bosnia[49].

Under the leadership of Major General Timothy J. Lowenberg,[50] not only had the ANG identified vision for an important new mission area that would take advantage of the full range of legal talents within the Air Force Judge Advocate General Department Reserve been continually developed, but more importantly, it moved from theory to reality. This new mission would make an important contribution to peace and the role of the United States in restoring order to troubled sections of the world. The ANG JAG component continued to take the point position and took on the first (and at that time, only) AF CMO support program.[51]

It was a modest beginning. At the request of the Commanding General, the ANG found and provided a JAG who was fluent in French: Lt Col Don Perrault (ret), New Hampshire (NH) ANG, the son of French Canadian parents. His mission was to perform a judicial survey to measure the functioning of the criminal and civil courts in Haiti on a nationwide basis. This judicial measurement would provide vital data for the reconstitution of the civil infrastructure following the departure of the Cedras regime and the implementation of a democratic government. The working conditions were challenging, yet this trail blazing ARC JAG pressed on. Lt Col Perrault visited court facilities that had only a single light bulb for the entire courtroom and were only accessible by land rovers and dugout canoes.[52]

After the successful deployment to Haiti, the ANG JAG component has not only continued to take point in fulfilling the charter of the TJAGD civil affairs support responsibilities, but has also witnessed a continuing expansion of its role.[53] JAGs were next tasked to support the Office of the High Representative (OHR), the sole governing authority in BiH under the Dayton Peace Accords, in such roles as monitoring local elections under the supervision of the Election Appeals Sub-Commission,[54] Natural Resource Reform, War Crimes Investigations, Criminal Justice Reform, and Anti-fraud and Corruption investigations and prosecutions.[55] Even now, based on the unqualified mission success to date, demands for TJAGDR assistance continue to grow. In addition to the flagship OHR mission, two ANG JAGs are being processed to augment the military staff at the US Mission to the UN, others have deployed to South Africa, Bolivia and Jamaica as legal advisors in UN sponsored peacekeeping theater and regional exercises,[56] and other members of TJAGDR have composed and will be teaching a comprehensive curriculum in International Humanitarian Law to UN peacekeepers and international governmental civilian and military officials in many world capitals.

Building on the historic achievements of the ARC JAGs in the previous four deployments, the fifth rotation of Air Force Reserve and Air National Guard JAGs in support of OHR began in October 1999 with eight ARC judge advocates, the largest contingent assigned to OHR to date. Under the leadership of Col Ben Lucas, Staff Judge Advocate, Headquarters Maryland ANG, the ARC JAG team deployed to three locations within Bosnia-Herzegovina. The team is also notable because it is the first to include members from all three of the TJAGDR components: ANG (3), CAT A (1), and CAT B (4).[57] It is a shining example of a seamless integration of all air reserve components working side by side. Finally, it was the first contingent to deploy an element to OHR North (Brcko) as part of the Brcko Law Revision Commission.

Generally the ARC JAG mission is to provide legal expertise to help the OHR guide BiH to establish a democratic government, and to ensure that the new government has the legal mechanisms it needs to govern at local and national levels—in essence, to help create a new governmental infrastructure for a country torn apart by four years of bloody war and centuries of ethnic and religious strife. This involves substantial interaction with international civilian organizations, non-governmental organizations (NGO), local attorneys, international attorneys and jurists, and a host of other governmental experts, as well as interaction with NATO's Combined Joint Civil Military Cooperation (CJCIMIC) staff, the lead civil affairs agency within NATO's Peace Stabilization Force (SFOR).

Members of the Sarajevo element were part of the OHR's Anti-Fraud Unit (AFU) and dealt primarily with implementing OHR's Anti-Fraud strategy across BiH. The ultimate goal of the AFU is to help BiH implement systemic reforms to prevent and eliminate fraud. The JAG role is to draft and review legislation; help educate prosecutors and judges; and review monitor and assist with specific fraud cases in BiH. With their critical assistance, the first anti fraud prosecution in BiH was completed successfully. The historical significance of this achievement is the breaking of the logjam of more than 200 fraud and corruption cases against public officials that up to then had been awaiting trial with no court dates in sight.

The Sarajevo team element is also notable because it has a JAG dedicated specifically to the legal issues concerned with civil aviation. A main goal of the OHR is to strengthen the civilian aviation institutions of BiH and ultimately transfer "ownership" of the institution back to the people of BiH. The OHR civil aviation team, with the significant assistance of Maj Robert Statchen,[58] reached a milestone by concluding international agreements on the control of the upper airspace of BiH, which will be realized for civilian use on January 27, 2000. The High Representative to BiH, Wolfgang Petritsch, issued a press release welcoming the agreement and congratulating the three Directors General of the BiH Department of Civil Aviation for reaching agreements with neighboring countries to provide the necessary air traffic control services. The OHR thinks that the agreements will result in substantial revenue for BiH, which will enable this country to build its own aviation infrastructure.[59]

Colonel Lucas, aside from the administrative duties inherent as Team Chief, liaisons with HQ CIMIC, HQ SFOR, and the Expeditionary Aerospace Support Operations Group (EASOG) Commander on command issues and policies. His OHR support duties include supervising the Legal Department in the Banja Luka OHR; providing general legal services and support; Liaison with the Ministry of Justice in the Republika of Srpska; coordinate and monitor OHR Legal Department coverage of the legislative activities of the Republika Srpska National Assembly; and Liaison with the several ministries and governmental organizations in the Republika Srpska as requested. He also provides military supervision to the United States Air Force attorneys assigned to the OHR.

Maj Risenhoover is working as the Legal Advisor for the Natural Resource Reform Unit in Banja Luka, RS, BiH, a unit within the Legal Department of OHR. Her primary duties are to work with the government of the RS and international donor organizations to implement legal and economic reforms in the use and management of natural resources.[60]

The primary focus of Maj Risenhoover's duties is reform of water management from the socialist system to a European Union compatible system. Presently almost half of the people in the country do not have potable water in their homes on a 24-hour basis.[61] The reforms will allow the economically sustainable development of modern local water distribution systems and waste water treatment plants to serve the residential and industrial needs of the country. Nor is the reforming limited merely to economics and hardware, but also involves the restructuring of government Ministries and the formation of a single Ministry of the Environment. She also works in the other natural resource sectors including programs of institutional strengthening in forests/timber industry and in solid waste management.

The final element of the team deployed to the northern city of Brcko, a once-prosperous town on the Sava River that runs along the Bosnian border with Croatia. Brcko remained in Serb hands at the end of the fighting in 1995 and was the site of very bloody house to house fighting. Competing interests of the two warring entities gave Brcko a strategic importance that kept its final disposition in international arbitration for years. For the Republika Srpska, Brcko is part of the vital Posavina corridor connecting the two parts of their state. For the Bosnian Federation, however, this formerly majority-Muslim city is the only link with Croatia in the north. Consequently, not only was Brcko a hotly contested area during the war, but its final disposition was equally contentious. The warring parties finally agreed that they could not agree. With this 'agreement' the entities resorted to binding international arbitration, with the final annex to the arbitrated award being finally announced in August 1999.

Basically, the result of the arbitration was to make Brcko a small 'state' unto itself, yet still part of a nation state. The closest example of this in the U.S. would be the District of Columbia. Brcko's unique status is the main basis for the Brcko Law Revision Commission (BLRC). The BLRC's mission is to harmonize the laws of the two entities (the Republika Srpska and the Federation of Bosnia and Herzegovina (Federation)) into a single set of laws for the District of Brcko. These laws will then be used in the operations of a judiciary, privatization, criminal and civil codes.

During this tour, the Brcko ARC JAG team element, like their colleagues in the Sarajevo anti-fraud and aviation elements, participated in and witnessed history. The Statute of Brcko, which the BLRC helped draft, was presented to the public by Ambassador Robert Farrand on December 7, 1999. It is not an exaggeration to say that this document, in essence the constitution for the District of Brcko, will be monumental to the peaceful governance of Brcko and Bosnia-Herzegovina. The District of Brcko became a reality on 8 March 2000.

Brigadier General Robert I. Gruber[62] proudly comments that: "For nearly two and one half years, through the pioneering vision of Maj Gen Timothy Lowenberg, Col Frank Titus, ANG assistant to AFSOC/JA for the ANG civil affairs mission, and Col Andrew Turley, OCONUS Deployments Coordinator for TJAG's ANG Council, Air Reserve Component Judge Advocates have, and continue, through their talents, dedication and sacrifice, to help rebuild the war ravished land of Bosnia i Herzegovina. They have unselfishly and enthusiastically employed their expertise and skills acquired as Air Force officers and citizen professionals to contribute to the ultimate goal of a stable and democratic government of, by, and for the people of BiH. The ARC JAGs on the current team, like the proud members of the four ARC JAG teams that preceded them, have built on the work of their predecessors, and have similarly distinguished themselves individually and as a team. The entire Judge Advocate General's Department and United States Air Force can point with pride to these true Warrior Diplomats."

The Future

The AF mission has changed dramatically in the last ten years — or has it? Upon reflection, perhaps not. "Flexibility is the key to air power" was the mantra when I first entered the Air Force, and the underlying principle remains true. Like the Air Force as a whole, in order for the Air Force TJAGD to remain not only strong, but more importantly, relevant in the 21st Century, it must anticipate the changing world environ-

ment and be proactive in meeting future requirements.[63]

Taking part in this CIMIC mission is a terrific example of TJAGD proactively meeting the challenges expected in the future. Increasingly, the armed forcesare being called upon to perform missions that are Operations Other Than War (OOTW)[64] and AF JAG involvement in Civil Military Operation support missions can only be expected to increase. The harsh reality of the future is stated best by Richard Holbrooke, *"There will be other Bosnias in our lives."*[65] It seems inevitable that the TJAGD will continue to be called upon to supply Warrior Diplomats. Five rotations of this mission have provided the invaluable training and experience to ensure that the TJAGDR will have proven resources to draw from in the future to meet those 'other Bosnias'.

However, the knowledge gained so far is perishable. JAGs who have participated in this mission retire, change status, or positions. Consequently, that corporate knowledge must be continually refreshed with new Warrior Diplomats.

The Air Force does not have Civil Affairs units. However, that is not the same as stating that the Air Force will not form or create support teams for Civil Military Operations missions of the future. In fact, AIR FORCE DOCTRINE DOCUMENT 36, clearly states that *"Although the US Air Force does not possess civil affairs units, US Air Force resources can provide lateral support to joint US CA operations. . . ."*[66] The time may soon be upon us, when the TJAGD will not only have JAG teams for operational contingencies, but also teams composed of Warrior Diplomats.

(The author wishes to thank General Gruber, Col Turley, and Col Titus for their time, comments, insights and encouragement in producing this article and offer a special thanks the team members of OHR ARC JAG Support Team V, Makers of History Across A Millennium, Oct 99 – Mar 00 for their inputs. Excerpts of this article appeared in Citizen Airman and The JAG Warrior Magazines.)

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[1] Capt (now Lt Col) Rick Naughton, Foxtrot Flight Commander, 11 Tactical Missile Squadron (GLCM), 501 Tactical Missile Wing, RAF Greenham Common, UK during flight pre-departure briefing of the last GLCM field deployment in the UK. Foxtrot flight was awarded the CINCENT Scroll of Honor Award while under Lt Col Naughton's command, the only missile unit to ever be awarded this prestigious NATO award. Lt. Col Naughton, formerly of the Office of the Assistant Secretary of Defense, Peacekeeping and Humanitarian Assistance Office, is Military Assistant to the Assistant Secretary Of Defense (S&TR) Strategy and Threat Reduction.

[2] Ground Launched Cruise Missile (GLCM) BGM 109G. Pronounced "Gli-come." GLCM Rangers were AF personnel dedicated to the care and protection of the BGM 109G weapon system while in a deployed field environment.

[3] *Bosnia Country Handbook*, DOD-2630-BK-023-98 (July 1998) p 4-1

[4] Turkish for Mountains

[5] Clark, Arthur L., *Bosnia, What Every American Should Know*, Berkley Books (1996)

[6] Wentz, Larry, Ed. *Lessons from Bosnia, The IFOR Experience,* citing *Benjamin Disreali*, while standing near the Dispatch box, British House of Commons (1878),

[7] Clark, Arthur L. *Bosnia, What Every American Should Know*, Berkley Books (1996) p.1

[8] Wentz, Larry, Ed. *Lessons from Bosnia, The IFOR Experience,* CCRP publications in conjunction with the National Defense University. (Jan 98) p. xix

[9] Kaplan, Robert D., *Balkan Ghosts, A Journey Through History,* Vintage Books (1996) p.xi

[10] Id.

[11] Id.

[12] John F. Kennedy, *The Military Quotation Book*, James Charlton, Ed, St. Martin's Press (1990)

[13] *Bosnia Country Handbook*,DOD-2630-BK-023-98 (July 1998) p 4-1

[14] Albert Einstein, *The Military Quotation Book*, James Charlton, Ed, St. Martin's Press (1990)

[15] Landon, James J. with Wentz, Larry, Ed. *Lessons from Bosnia, The IFOR Experience,* CCRP publications in conjunction with the National Defense University. (Jan 98) Chapter V. p.125

[16] Landon, James J. with Wentz, Larry, Ed. *Lessons from Bosnia, The IFOR Experience,* CCRP publications in conjunction with the National Defense University. (Jan 98) Chapter V. p.120

[17] GFAP Art. I § 2

[18] Landon, James J. with Wentz, Larry, Ed. *Lessons from Bosnia, The IFOR Experience,* CCRP publications in conjunction with the National Defense University. (Jan 98) Chapter V. pp.120-1

[19] GFAP Art. VI § 3

[20] Rich, Paul B. and Richard Stubbs, Eds, *The Counter-Insurgent State, Guerrilla Warfare and State Building in the Twentieth Century,*St. Martin's Press, Inc (1997) pp 6-7

[21] Id.

[22] AFDD 2-3, *MILITARY OPERATIONS OTHER THAN WAR,* (October 5, 1996)

[23] Landon, James J. with Wentz, Larry, Ed. *Lessons from Bosnia, The IFOR Experience,* CCRP publications in conjunction with the National Defense University. (Jan 98) Chapter V. pp.121

[24] Id.

[25] Id. at 129

[26] Id.

[27] Id. at 129. Notably France, but also the U.K.

[28] Id.

[29] Id.

[30] Id. at 126

[31] Id. at 127

[32] Id. (It is also noted that this limited interpretation seems selective and only used with Slavic Orthodox groups.)

[33] Id.

[34] Id. at 128, figure 5-1

[35] Id. at 127

[36] Id. at 133

[37] Id.

[38] Id.

[39] Id.

[40] Id. Noted but no specifics within the article, other than to say it was a UN project that was not successful. When NATO took it on and successfully completed it, the UN agency com-

plained. The author of the chapter speculated that this was due to UN embarrassment.

[41] Id.

[42] Introduction, JP 3-57, *Doctrine for Joint Civil Affairs, (*21 June 1995)

[43] Now Colonel. ANG Assistant to AFSOC/JA

[44] Often referred to as the "wimp"

[45] Colonel D. Kay Cannon, served on EAD at AF/JAI and is responsible for the drafting of Annex R. Col Cannon envisioned the concepts of operations in Annex-R, WMP-1, while deployed to Canada on a Combined And Joint Exercise in 1988. While deployed Col Cannon was impressed with the outstanding work of US Marine Civil Affairs Officers, 3rd Civil Affairs Group, U.S. Marine Corps Reserve. She approached the TJAG MG Keith Nelson with the need for planning coordination with the other services on Civil Affairs Matters. General Nelson agreed and later signed Annex-R, WMP-1. Col Cannon is now a Cat B Reservist and has a civilian position as General Counsel, Defense Security Cooperation Agency.

[46] ANG Assistant to TJAG, later retired as Major General

[47] then Chief, HQ USAF/JAI

[48] then ANG Assistant to TJAG

[49] Interview notes, Col Frank A. Titus, Ohio ANG, 25 Jan 00

[50] Major General Lowenberg is now the Adjutant General for the State of Washington. In this role, he leads both the Army and Air National Guard organizations that comprise the Washington National Guard.

[51] Alexander, William G. Col. NC ANG and Marsh, Sandra G. Lt Col, AL ANG, *The ANG Journey, Junior Associate to Full Partner*, The Reporter, Special 50th Anniversary Edition 1999, at 40

[52] Email, dated 1/20/00, Col Frank Titus to Col Andrew Turley: Subject: Haiti

[53] Alexander, William G. Col. NC ANG and Marsh, Sandra G. Lt Col, AL ANG, *The ANG Journey, Junior Associate to Full Partner*, The Reporter, Special 50th Anniversary Edition 1999, at 40.

[54]Five ANG judge advocates were selected to serve as election monitors for the 1997 parliamentary elections in Republika Srpska, Because of the sensitivity of election issues in BiH, they were seconded by DoD to the US State Department, who in turn seconded them to the Organization for Security and Cooperation in Europe (OSCE). All five performed this mission in civilian status.

[55] Alexander, William G. Col. NC ANG and Marsh, Sandra G. Lt Col, AL ANG, *The ANG Journey, Junior Associate to Full Partner*, The Reporter, Special 50th Anniversary Edition 1999, at 40..

[56] Id. at 41

[57] It may also be the last all reserve team. Thanks to the tireless devotion to this mission by Reserve JAGs such as Col Titus and Turley, the mission has matured to the point where plans are being made to include two AD JAGs in future rotations.

[58] Connecticut Air National Guard, 103 FW/JA

[59] Combined Joint Civil Military Task Force, JA Weekly Highlight Report, 15 Jan 2000

[60] E-mail, 9 Dec 99;Maj Paula W. Risenhoover to Maj John Case, Subject: AFMC Wide Publication Article Inputs

[61] Id.

[62] ANG Assistant to TJAG

[63] Foreword, AFDD 2-3, *MILITARY OPERATIONS OTHER THAN WAR, (*October 5, 1996)

[64] Mason, Air Vice Marshal Tony, (RAF (ret)), *Air Power Confronts an Unstable World*, Hallion, Dr. Richard P, Ed, Chapter 6, *Operations in Search of a Title: Air Power in Operations Other Than War.* Redwood Books (1997).

[65] Holbrooke, Richard, *To End A War*, Modern Library Paperbacks (1998)

[66] *AIR FORCE DOCTRINE DOCUMENT 36,* 6 JANUARY 1995, Paragraph 4.4.2.3.1.

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CAVEAT

CAVEAT: La Comedie OF ERRORS!

It seems that it cannot be said enough, so here at the Caveat, we are going to repeat the message as well. It keeps coming back, so it is hard not to voice a concern. Since we last spoke to you, case after case has been issued by the Air Force Court of Criminal Appeals noting that the post-trial processing has been, shall we say, inadequate. *United States v. Pruitt*, ACM 33810 (A.F. Ct. Crim. App. May 17, 2000) is a case in point. In *Pruitt*, not only was the post-trial processing inadequate, but so was the administrivia of the documents prepared for court-martial. The litany begins with a pre-trial agreement that erroneously referred the case to a special court-martial, not a general court-martial (they called it a typographical error). The military judge correctly advised the maximum sentence to confinement Airman Pruitt faced was 7 years, but the staff judge advocate in his recommendation (SJAR) said 10 years. The trial defense counsel noted the mistake and the correction was then made in the SJAR addendum (at least one good catch). The convening authority's action is undated and nothing in the record indicated he or she reviewed the airman's clemency matters. The Court had to comb through the documents to satisfy themselves that the convening authority had actually reviewed the clemency matters submitted for his review. Finally, the promulgating order incorrectly labeled the charges and the articles on which the accused was arraigned, the facts of the specifications, and the pleas. Overall, it seemed like much more than one bad day.

Other cases, while not nearly so rife with errors, include a court-martial order that incorrectly listed the airman's rank and failed to include pleas or finding on a charge (*U.S. v. Niemeyer*, ACM S29796, (A.F. Ct. Crim. App. June 21, 2000)); promulgating orders with the charges not numbered, the correct pleas not listed, the military judge not served with a copy, the Report of Result of Trial incorrectly listing the charges and pleas (*U.S. v. Jones*, ACM S29754 (A.F. Ct. Crim. App. May 30, 2000)); Report of Result of Trial incorrectly prepared with the "charges and specifications not numbered and the offenses listed by name and appropriate citation to the UCMJ without further explanation," and an incorrect summary of the airman's pleas and trial judge's findings on a charge and some of its specifications—the result of which was a set aside and dismissal of one of the specifications by the Court (*U.S. v. Krugler*, ACM 33060 (A.F. Ct. Crim. App. May 30, 2000)); convening authority's action failing to accurately reflect his decision on the case to include deferment of the effective date of the airman's reduction in rank pursuant to Article 57(a), UCMJ, and incorrectly stating a deferral rather than a waiver of forfeitures, with the mistakes further reflected in the promulgating order (*U.S. v. Herring*, ACM S29740 (A.F. Ct. Crim. App. May 22, 2000)); court-martial order incorrectly noting the sentence to forfeitures adjudged which, without correction, would have reduced the amount of forfeitures (*U.S. v. Walton*, ACM 229717 (A.F. Ct. Crim. App. May 24, 2000); SJAR failing to note to the convening authority the requirement he or she must consider any matters submitted by the accused before approving or disapproving the sentence (*U.S. v. Pandya*, ACM 33977 (A.F. Ct. Crim. App. May 22, 2000)); and *U.S. v. Acree*, ACM 33951 (A.F. Ct. Crim. App. June 26, 2000) where court-martial order incorrectly states the pleas. As has been noted many times over the years, catching these trifling types of errors before they occur in "final" form is essential. The rules are simple. Sloppy staff work is not excusable, when the consequence is a need for affidavits from convening authorities and counsel, dismissal of charges or specifications, incorrect withholding of forfeitures, and just plain old loss of time when appellate counsel and the Court to have to bother with administrivia in order to insure a proper record.

One more note on *U.S. v. Krugler*, ACM 33060 (A.F. Ct. Crim. App. May 30, 2000), the case involved pretrial restraint. The trial judge found that "the restrictions were not tantamount to pretrial confinement and did not constitute illegal pretrial confinement. The SJAR did not mention the restriction. However, the Court recommended that such restriction should be mentioned in a SJAR, especially when, as in this case, the charge sheet had been modified to reflect the restrictions.

PRACTICUM

POST-TRIAL PROCESSING ERRORS

Errors in post-trial processing frustrate everybody associated with the military justice process including the accused. Even more, they often cause unnecessary work for everybody involved. A little attention to detail in this area by NCOICs and Chiefs of Justice and SJAs will go a long way to reduce the number and variety of post-trial errors repeatedly identified by military justice personnel and the appellate courts.

This problem was highlighted in *United States v. Jones*, ACM S29754 (30 May 2000). Although the court found no error prejudicial to the substantial rights of the accused, they found the case, presented on its merits, "replete with inexcusable administrative errors," which were "at best, indicative of a complete lack of attention to detail and, at worst, [demonstrative of] a *laissez faire* attitude...." *Laissez faire* for you non-french scholars means a policy or practice of letting people do as they please without interference or direction. The court noted that three pages in the record of trial were misplaced and two pages were missing from the original record and had to be obtained from appellate defense counsel in order to complete their review. While bad enough, they found the significant number of errors in the court-martial promulgating order more disturbing. These errors included the charges not being numbered; the accused's plea of guilty by exceptions and substitutions, which had been accepted by the military judge, shown as guilty as charged; the plea and finding omitted for a specification; and, finally, the order was distributed to a mili-

tary judge, who wasn't the military judge in the case, with no indication that the judge who did try the case ever received a copy of the order. The status of the record and the order absolutely begs the questions, who wrote it? Who read it? And, did anyone care?

Several additional cases involved errors in the court-martial promulgating order. For example, in *United States v. Walton*, ACM S29717 (24 May 2000), the adjudged sentence included forfeitures of $639.00 "pay per month for a five month period." The Staff Judge Advocate's Recommendation (SJAR) and the Addendum thereto, recommended approval of the sentence as adjudged. However, the court-martial order omitted the "per month" language. In this case the court found the convening authority intended to approve the adjudged sentence and returned the record for administrative correction. More typical are the errors that occurred in *United States v. Niemeyer*, ACM S29796 (21 June 2000), where the court-martial order incorrectly listed the accused's rank and failed to include a plea or finding for the specification to a charge, and *United States v. Acree*, ACM 33951 (26 June 2000), where the court-martial order reflected the accused's plea as not guilty to the charge rather than accurately indicating his pleas of guilty by exceptions and substitutions to two of the three specifications and guilty to the charge. In both of these cases the court held that the errors could be administratively corrected.

Errors in handling post-trial submissions by the defense have also been addressed by our appellate court. The court in *United States v. Pandya*, ACM 33977 (22 May 2000), found a series of events led to prejudicial error. In *Pandya*, the accused was tried by general court-martial. He and his counsel submitted clemency matters IAW RCM 1005 on 28 Dec 99. The SJAR was dated 6 Jan 00 and included, as attachments, the accused's clemency matters. The accused was served with the SJAR on 7 Jan 00, and on 18 Jan 00, the accused's defense counsel submitted written notice to the SJA that no further matters would be submitted by the defense. Accordingly, there was no requirement for an addendum and the package was forwarded to the convening authority without one. The convening authority took action on 18 Jan 00. On 20 Jan 00, defense counsel submitted a signed receipt indicating she had received the SJAR. RCM 1107(b)(3)(A)(iii), requires the convening authority to consider any matter submitted by the accused under RCM 1105, or, if applicable, RCM 1106(f). The SJAR did not indicate that the convening authority was required to review these matters nor was an affidavit submitted by the convening authority attesting to the fact that the matters were indeed considered. Therefore, the accused's showing of "possible prejudice" was supported by the court which returned the case to the convening authority for an addendum to the SJAR indicating the matters submitted by the defense must be considered, service on defense counsel and a new action.

Another case involving post-trial submissions by the defense is *United States v. Walker*, ACM S29798 (6 June 2000). While the accused acknowledged receipt of the SJAR and declined to submit a response, his trial defense counsel departed the base on terminal leave before the SJAR was completed. Although the accused did not waive his right to post-trial assistance of counsel, no attempt was made to serve the defense counsel at her terminal leave address nor was another counsel detailed to represent the accused as required by RCM 1106(f)(2). The court vacated the convening authority's action, ordered the record returned to TJAG, and required substitute counsel be detailed to form an attorney client relationship with the accused, examine the recommendation and prepare a response, after which a new action would be accomplished.

The Report of Result of Trial has also been an appellate issue. Since this document is incorporated into the SJAR that goes to the convening authority, it is imperative that great care be exercised in its preparation. In addition to the significant errors related above, the court in *Jones* found the Report of Result of Trial failed to indicate the accused's plea to one of the charges was by exceptions and substitutions. Id. The court held this error was without prejudice, the saving grace being that the document accurately reflected the language of which the appellant was found guilty.

Defense counsel's examination of the Record of Trial is another item that has not escaped appellate review and comment. RCM 1103(i)(1)(B) states that "Except when unreasonable delay will result, the trial counsel shall permit the defense counsel to examine the record before authentication." The discussion to the rule provides, in part, "A suitable notation that the defense counsel has examined the record should be made on the authentication page." In *United States v. Brooks*, ACM 33985 (14 June 2000), the certification was signed by a defense paralegal "for" the defense counsel. The court found this practice to be unacceptable and indicated that given the state of telecommunications today it was difficult to imagine why a counsel would be unable to personally acknowledge, in some recorded form, that examination of the record had been accomplished. The court, in dicta, stated that "while not preferred, it would be sufficient for a defense paralegal, under personal signature, to state that the defense counsel examined the record on a certain date." This should only be used as a last resort.

In *United States v. York*, ACM 33239 (25 April 2000), the accused was sentenced to a BCD, forfeiture of all pay and allowances and reduction to E-1. With respect to the forfeitures, the convening authority approved "forfeiture of $617.00 pay per month until the bad conduct discharge is executed[.]" The court found such action not inconsistent with the Manual for Courts-Martial and that paragraph 9.8.1 of AFI 51-201, which specifically allows approval of forfeitures of two-thirds pay per month until discharge is executed, did not exceed the Secretary's authority. However, for trial practice, the court recommends military judges use the following language when advising on forfeitures:

> If you decide not to confine the accused, then the maximum forfeiture you may adjudge is two-thirds pay per month for (the maximum period of confinement authorized).

Finally, inaccuracies in a Staff Judge Advocate's Recommendation as to how adjudged forfeitures and automatic forfeitures under Article 58b relate to one another has been addressed. In *United States v. Yetter,* ACM 33422 (9 June 2000), the accused asked that the convening authority waive all his forfeitures for the benefit of his wife and child. The advice given by the SJA in the SJAR was incorrect. The action was set aside and the record returned to the convening authority for a new SJAR and action. Extra care should be used in this area.

Post-trial processing errors continue to be the single most frequent error on appeal and both the Air Force court and USCAAF are becoming far less tolerant. Future Practicums will cover other post-trial processing errors. Based upon what the court's have emphasized, it appears that at least some of the errors are resulting from the use of form letters. Beware of cut and paste! It is this sort of shortcut that causes a judge totally uninvolved in a case to be the one listed in distribution of the court-martial order.

While impossible to get to the ultimate root of these problems, it boils down to the fact that post-trial documents need to be proofed by multiple individuals and Staff Judge Advocates need to devote additional diligence to reading what they sign and what goes before the convening authority for his or her action.

• REVISED FORMS

AF Form 304, *Request for Appellate Defense Counsel,* and AF Form 3212, *Record of Supplementary Action under Article 15, UCMJ* were revised on 1 May 2000. These new forms should be used when processing justice actions.

• SUB ROSA AGREEMENTS

Counsel are prohibited from forming unwritten agreements, undisclosed to the military judge (*sub rosa* agreements) that involve terms or conditions such as those listed in RCM 705(c)(2). Such agreements render a guilty plea improvident and run the risk of mistrial. *United States v. Caylor,* 40 M.J. 786 (A.F. Ct. Crim. App. 1994). In addition, such agreements may raise ethical concerns if not disclosed in open court upon the request of the military judge. A recent case highlighting the problems that arise from inattention to this fundamental and longstanding rule is *United States v. Rhule,* CCA LEXIS 126, May 19, 2000. The court stressed that counsel are encouraged to discuss issues and arrive at mutually agreeable provisions resulting in pretrial agreements, but, nevertheless must keep the military judge aware of all developments on the record.

ALTERNATIVE DISPUTE RESOLUTION

• ALTERNATIVE DISPUTE RESOLUTION - ITS PLACE IN THE SPECTRUM OF CONFLICT RESOLUTION

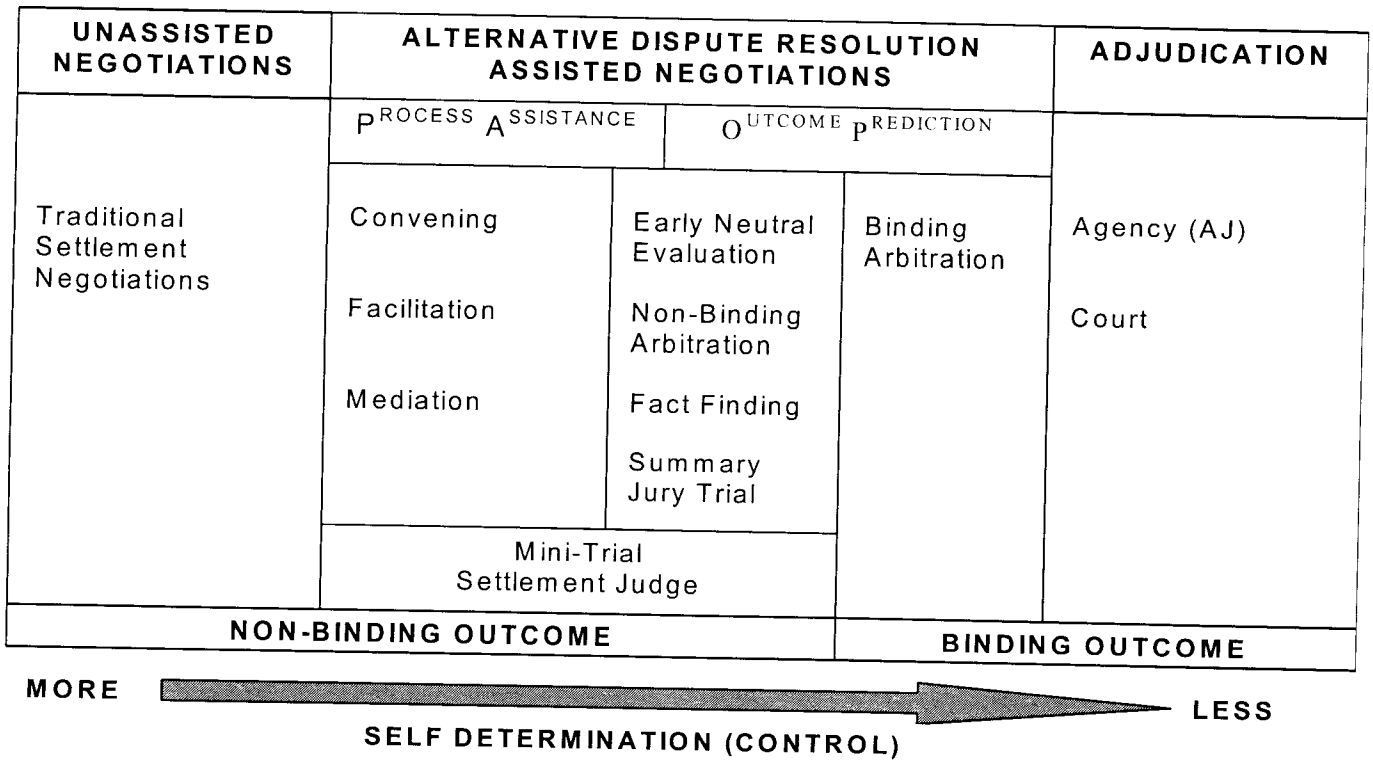
INTRODUCTION

Alternative Dispute Resolution (ADR) has become more and more prevalent in what used to be areas reserved for traditional litigation. From increasing use in settling contract and environmental disputes to its availability mandated by EEOC regulation, ADR has become a growing force that is a vital weapon in the JAG's arsenal. When strategically applied, ADR has proven to be a useful tool in reducing agency costs both in time and money, improving working relationships, and increasing the efficiency of problem solving programs. Used tactically, ADR has been shown to assist the parties in overcoming impasse; by identifying creative solutions to daunting problems, a neutral can help turn difficult negotiations into problems solved. To be able to effectively employ this weapon, one must be familiar with the spectrum of ADR methods and techniques.

The Administrative Disputes Resolution Act defines alternative means of dispute resolution as "any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombuds, or any combination thereof."[1] More commonly, ADR is a process for resolving disputes out of court using a neutral third party.

As the table below illustrates, ADR expands the options traditionally available for dispure resolution (negotiating or going to court) and can be accomplished in a variety of ways. We have these tools organized according to how the neutral is used to assist the parties in settling the dispute, *e.g.*, process or outcome assistance. The arrow from left to right represents the degree of control over the solution and the process the parties give to the neutral when engaging in any of these procedures. For example, if a party wants to maintain maximum control over the process and remain very flexible with the solutions available, mediation rather than arbitration would be the ADR method of choice.

[1] ADRA, 5 U. S.C. § 571(3) (1999).



ADJUDICATION

Adjudication is a process familiar to attorneys as it represents the traditional litigation fora such as administrative boards and state and federal courts. The neutral will decide the outcome for the parties by applying the law to the facts. Remedies are limited according to how the case is filed (money versus equitable relief). Rules of procedure and evidence control what gets before the decision-maker. The process is adversarial. There is nothing "wrong" with any of this; sometimes litigation *is* the most appropriate method for achieving resolution. On the other hand, when there is great uncertainty in how the case will turn out, when we would like relief earlier than what the court system can offer, when we would rather have a less adversarial method for getting to the solution, we do have alternatives.

ASSISTED NEGOTIATIONS

All ADR methods can be thought of as "assisted" negotiations. The type of assistance, however, can vary considerably. In the table, the significant distinction is whether the neutral is providing "process" assistance or "outcome prediction." It is important to understand your problem well enough to know which type of assistance is really needed to solve it, but it is important to also keep in mind that ADR is a very flexible tool, and sometimes the line between "process" and "outcome" assistance is blurred. For example, the parties may want a mediator to provide some assessment of the case at some point during the mediation. As we discuss each of these methods of ADR, you should be able to see how the methods offer certain attributes, the application of which can be more appropriate to certain problems than to others.

OUTCOME PREDICTION

In outcome prediction assisted negotiations, the neutral provides the parties with an opinion on the outcome of the case. The opinion is non-binding; the parties either continue to negotiate or prepare their cases for litigation. If negotiations continue, the neutral can remain part of the negotiation to help develop a solution or not. The methods discussed in this section focus more on the facts and or legal issues in the dispute as opposed to the relationship between the parties (the cornerstone concern in the "process" model).

Arbitration

Arbitration is probably the best known of the ADR techniques. It was the first alternative to traditional litigation, dating back to the 1920s and has been utilized by the Air Force for many years in resolving disputes with labor unions. The decision of the arbitrator can be either binding or non-binding. In the Air Force, however, binding arbitration is only authorized in those cases with collective bargaining agreements calling for this procedure. Of all the ADR procedures, only binding arbitration binds the parties to the neutral's decision as a feature of the ADR technique. The remaining tools

require a contractual agreement to be bound short of a settlement agreement, usually absent.

Arbitration also closely resembles litigation in appearance (opening statements, witnesses, documents, arguments, etc.) and in procedure (there are prescribed guidelines for the arbitration, and the arbitrator has some authority to move the case along). Finally while the parties can introduce some flexibility, the arbitrator's (or panel of arbitrators') role will be to apply the law to the facts as they find them.

Arbitration is more attractive in those cases in which the parties want the decision to a dispute relatively quickly (or they would otherwise be satisfied with litigation), or where there is very little likelihood of a negotiated agreement between the parties, but both sides wish to avoid litigation. Arbitration can also be particularly well suited for those cases where either or both parties would negotiate an agreement, but are concerned whether the result will withstand scrutiny (both internal and external).

Summary Jury Trial

A summary jury trial is forum where the parties present an extremely abbreviated case (generally, a recitation of the facts, short arguments, and clear instructions from the bench) to a mock jury which then deliberates and announces its "verdict." The "verdict" is not official, of course, but the parties and their counsel get an opportunity to see how well or how poorly their case would play out in court. Will that intricate legal point be understood? Will the jury be unpersuaded because of the credibility problems? If the parties resume negotiations, they are more educated and can be more efficient. If negotiations fail, they know where they have more work to do. Considerable effort goes into preparing and executing a summary jury trial, so this tool should be reserved for those cases where it is important to see how the case would be decided by a jury.

Early Neutral Evaluation

This process has the parties presenting their case to the neutral with subject matter expertise, who assesses the strengths and weaknesses of each party's case, and provides an opinion of the likely outcome or litigation result. The parties are then free to take this information and reanalyze how they might choose to resolve the case. It's a tool appropriate when the parties have unrealistic expectations about the case, or could benefit from narrowing the issue, or are just uncertain about the case value. This tool is especially appropriate for those cases where legal theories are complex or fact-intensive. The key is in selecting a mutually respected neutral whose opinion will be valued and respected by both parties.

Fact-Finding

This ADR tool is similar to early neutral evaluation, but here, the parties only need an opinion on the facts. It is well suited for those cases where liability is clear, but the question is quantum; or where the quantum is clear, but the parties are uncertain about who is responsible. The parties present their information to the neutral, who renders an opinion on how he found the facts. The parties then go about their negotiations on the issues.

PROCESS ASSISTANCE

There are some types of disputes where the inability to settle has little to do with the facts or the law, and where a neutral's opinions on the merits would add little value to the already on-going negotiations. These are the cases where the parties cannot communicate, where they have become polarized, where there is a principle-agent problem, or where settling feels like merely conceding to the other side. In these cases, developing a mutually satisfactory solution requires getting the parties to think beyond their positions toward their interests, and these are the types of cases where process assistance is most valuable.

Mediation

Mediation is a process in which a third party neutral facilitates the parties' own settlement through interest based negotiation techniques. The parties maintain significant control over the process and the settlement. This extremely adaptable process can allow the parties the opportunity to address underlying problems beyond the dispute at hand. Creativity in designing resolutions, especially to the extent hidden problems are solved, can result in a high rate of compliance with the settlement agreement. The process is entirely voluntary, and is relatively inexpensive. The neutral has no power to impose settlement on the parties; but the value added by the neutral is to get the parties over the barriers they may have developed in their unassisted attempts at negotiation. The mediator does this by allowing the parties to discuss the problems and clarify their issues, vent their emotions, and problem solve together. A key tool for the mediator is the private caucus, which is confidential, providing each side an opportunity to meet privately with the mediator to discuss issues and solutions. Mediation is particularly well suited for those cases in which emotions are driving the differences, and cases where facilitating the relationship between the parties is important.

Facilitation

Resolution in this model is achieved through the understanding of the process by which people observe and experience events and how they then formulate a response to those events. In facilitation this is accomplished through establishing the objective facts or events in the dispute. Once these facts are gathered, the reflections of each party to those events are discussed. This includes the associations and feelings triggered by the events. The implications of those responses are then examined and options are developed for how to respond. Finally consensus is reached by the parties choosing responses to the events that take into account all the factors and relationships that are involved. This tool allows the parties to discover the underlying roots of problems, generate excitement about new options, build up vital trust between stakeholders, and reduce the insecurity of implementing new solutions without their input.

Convening

Convening is a process by which the neutral calls for the assembly of the parties to a dispute, as well as others who may have a stake or an insight into a potential resolution. After discussion of the problems, the convenor builds a common commitment for action by creating an environment in which all are encouraged to express thoughts and propose solutions. From this in-depth exploration, common goals are identified and the parties then brainstorm alternatives together. Fostering participation, and assisting parties to find the common ground by guiding the parties' self-interest toward a general interest, increase the likelihood of buy-in to the ultimate decision by all concerned. Often a new procedure or manner of conducting business is the result of the convening process.

HYBRID PROCESS ASSISTANCE/OUTCOME PREDICTION

As stated earlier, an advantage of ADR is its flexibility. The parties are free to design a process and modify it accordingly to meet their needs. On occasion, the parties to a mediation might request an assessment of the neutral who is a subject matter expert. A neutral hired to provide an early neutral evaluation might be able to see that the parties need more than just "the answer," and might assist the parties in subsequent negotiations. In these examples, the neutral's contribution crosses over from process to prediction assistance and from prediction to process assistance, respectively. There are, however, methods of ADR in which the ADR tool, by design, provides for both process and outcome assistance.

Mini-Trial

A mini-trial is a process that combines an abbreviated trial presented to senior executives of both parties, typically with a third party neutral moderating the presentations. Following presentation of the parties' cases, the principles begin negotiating the issues. The neutral mediates or provides evaluative assistance in accordance with the agreement of the parties. This tool is well suited for those disputes that are complex, but early resolution is desired.

The advantage of this processes is that the principles are brought into the case early on, getting an opportunity to hear both sides of the issue and attempting to resolve the dispute before large investments of time and money are spent on litigation. Senior level decision-makers must be willing to devote significant amounts of time to this process, because *they* will be hearing the cases of both sides and engaging in the negotiations. On the other hand, these cases do take considerable effort to prepare, and the speed with in which this model operates is not without costs. This tool is best reserved for those high-visibility, complex cases needing early resolution.

Settlement Judge

The use of settlement judges is not uncommon in some of the areas in which we practice. The court assigns a magistrate or judge to assist the parties' negotiations and to render opinions as to facts, law, or even the ultimate outcome. If the parties fail to settle, another judge is assigned to try the case, and the settlement judge is barred from further action on that case. Often the position of the settlement judge as an adjudicator of cases similar to the one being negotiated, as well as the perception of his professional neutrality, give him a great amount of credibility with the parties.

UNASSISTED NEGOTIATIONS

Unassisted negotiations are the traditional one-on-one negotiations between parties and their representatives. While certainly an often-used alternative to litigation, these types of settlement negotiation, without the use of a third party neutral, are not considered ADR. We mention unassisted negotiations here, however, to keep the reader mindful that a negotiation, while unassisted, remains a valuable and powerful method of settling disputes, and has its place in the spectrum of dispute resolution. An attempt to negotiate a satisfactory solution is always advised before bringing in neutrals and designing ADR processes. The question is not whether to negotiate, but instead one of determining the quality of the negotiations. If the parties are satisfied with both the process and the progress of their negotiations, they should press on.

CONCLUSION

The Air Force has used a broad array of ADR techniques in almost all areas of practice. Selectively choosing the technique best suited for the dispute, the parties involved and the environment in which the dispute exists allows ADR to be a "smart" weapon for the JAG in problem solving for the client. Many of the ADR tools discussed above are readily available for use at the base level. If you have questions about what ADR tools may be best suited to your dispute or what resources are available to you at the base level, contact Major Barbara Zanotti at DSN 426 9034.

Previous editions of The Reporter can be found in electronic format through FLITE. Go to the FLITE home page, open "Files," open "Air Force," open "Reporter," and enjoy!

CLAIMS

• CLAIMS OFFICE MANAGEMENT USING AFCIMS REPORTS AND METRICS

For those of you who have not had the opportunity to actually work with AFCIMS, AFCIMS is a computer program that helps you adjudicate claims. It's also used for tracking and recording all types of claims in your section. AFCIMS produces reports, both from your local AFCIMS computer and also the AFCIMS host computer at JAS at Maxwell AFB. The main AFCIMS host report is the Claims Management Summary, which each office can get from the JAS web page every month. The Claims Management Summary and AF claims metrics used together make excellent management tools for your claims office.

There are six claims metrics used in the AF JAG Department. The first two metrics, the Percent of Personnel Transportation (PT) claims processed within 10 days and the Percent of PT Dollars Paid versus Claimed, tell us how you're treating your clients. These two metrics answer a simple question: how long does it take you to turn out good quality, fairly adjudicated claims. The next four metrics reflect how well you're protecting the government's interest. We examine how much you are collecting versus paying out, what's overage and what you are collecting versus asserting against the carriers. No single metric alone tells the story. Look at all of them together to get an accurate reading of what's going on in your claims office.

The Air Force Claims Metrics are posted on the JACC web page quarterly at **http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacc**

For a practical example, have your claims examiners create a chart much like the one on our JACC web page under the link called "metrics." It's a simple PowerPoint slide that they can copy and edit, then fill in your numbers in place of Air Force or MAJCOM numbers. Each slide also has notes. Then, have them print a copy of the latest Claims Management Summary and the Hospital Recovery Statistics for your base. You may want to look also at your MAJCOM and the Air Force. Now, we're ready to analyze your claims program, but first, let's get a clear explanation of the tools.

The Claims Management Summary and Hospital Recovery Statistics have corresponding guides on the JAS web page. Have the guides ready for ease of reading the reports and I'll provide the explanation of the metrics below.

Metrics Breakdown

Percent of Personnel Claims Processed Within 10 days.

This metric reflects how long it takes us to take care of folks who have suffered a loss due to transit or incident to service. The percentage of personnel claims processed within 10 days is the metric, but remember personnel claims are *overage* after 30 days. The clock starts when a claimant presents a claim to base claims personnel. The time includes every day the claim is open for adjudication at base level, including "reopenings." Air Force claims offices continue to meet and exceed the goal of 80% within 10 days. As of 30 Jun 00, the Air Force average processing time for all personnel claims of 8.3 days. It was 5.8 for FY99. Your processing times and percent within 10 days are on page one of the Claims Management Summary.

Personnel Transportation Dollars Paid versus Claimed

This metric shows how well we are taking care of our claimants who sustain damage to their household goods in shipment. Over a 15-year period, our payments ranged between 62% and 69% of the amount claimed with a mean of 65%. What this means is for every dollar claimants have asked for, we have paid them between 62 and 69 cents. The lower level variation for the Air Force over the last 15 years was 62 cents. If you look at your Claims Management Summary Report, also on page one, and your paid versus claimed ratio is far outside the 15 year lower variation, you may have a problem in your office. Likewise, if your numbers are substantially higher than the 15-year upper variation level, there could be a problem. The important thing is that you ask question. Find out why this anomaly happened in your numbers. It could be that your number is low because you had a large insurance claim where the claimant asked for $10,000, USAA paid $7,000 and you may have paid $3,000. When this happens, the paid to claimed ratio is $3,000 versus $10,000, or 10%. You do not need to be a statistics wizard to know that a claim that has a 10% paid versus claimed ratio is going to skew your numbers.

These next four metrics reflect how well you're protecting the government's interest. We look at how you're doing on your carrier and hospital recovery program, and whether you have overage claims in your office. Having overage assertions in your office is like leaving thousands of dollars in checks lying around in the house. The reason we care about your dollars paid/dollars collected ratio, your dollars collected versus asserted ratio, your overage claims ratio and whether you have money in the drawer is because the money you have lying around in your office is the government's money. That's real money that could be used to buy fuel, aircraft parts, office supplies, or to pay claims. We all need to understand that dollars are assets too, and we need to guard them as zealously as we would guard our aircraft and other government assets.

Carrier Dollars Collected Versus Personnel Transportation Dollars Paid

This metric reflects the amount we collect from the carriers compared to the dollars we pay out on household goods claims. The 7-year mean AF-wide as of the end of Jun 00 was 73%. This metric measures the overall rate for all types of carrier shipments, but the metric chart on the JACC web page shows a breakdown between code 1 and 2 shipments and all other type shipments. Although no single metric tells everything about the health of a claims program, this metric is a very good indicator of how well you are doing. For every dollar you pay to the claimant, this metric will tell you how much you have collected from the carrier. The mean shows that AF-wide, we are collecting 73 cents on the dollar. If you look at your Claims

Management Summary (page three) and this number is low, say 50%, that could reflect a problem, but not necessarily—you'll have to investigate. It could be low if you have a high value Nontemporary Storage or Direct Procurement Method (NTS/DPM) claim or several NTS/DPM claims. These type of shipments reduce your CR/PT ratio because the carrier liability is low even though we have to pay the claimants what they are due. To make that point clear, let's say a claimant receives her shipment from storage with four line items and she sustains $2,000 in damage by the storage facility. You adjudicate and pay $1,800. Since it's a warehouse claim, the carrier's liability may only be $50 per line item, which is only $200. Your CR/PT ratio on that claim would be $200/$1,800 which is roughly 11%. Granted, it's only one claim, but if you only processed 20 claims in that particular month, this could have a drastic effect on your numbers. Another legitimate reason it could be low is if you gave the claimant the benefit of the doubt on a high value item and the carrier refuses to pay. By the way, if the carrier refuses to pay, and you asserted the proper amount, you should send the claim to JACC for setoff. When JACC collects from the carrier, the JACC collection will increase your dollars collected from the carrier in AFCIMS. There are bad reasons this ratio could be low: 1) your examiners are "opening up the checkbook" and the carriers are refusing to pay you; 2) you are not doing inspections; 3) or, perhaps your examiners are not aggressively pursuing the carriers. If it is the latter, you will also see a problem in your Carrier Recovery Dollars Collected Versus Asserted ratio, which I will discuss later.

So what if you look at the Claims Management Summary and this number is high, say 90%? Again, you'll need to investigate. It could be that you have a claims program performing head and shoulders above the 7-year AF average. However, it could also mean that your examiners are adjudicating claims based on what they know they will recover from the carrier, instead of fairly adjudicating the claim and giving the claimant what he or she is due. The bottom line is to investigate if your numbers are drastically different from the AF mean.

Carrier Recovery Dollars Collected versus Asserted

This is an easy one. It simply shows a ratio of how much money you have received from the carriers versus what you requested. This is measured on 5-year mean and as of the end of FY99, the mean was 82%. As of the end of June 00, the AF was at 85%. On page three of your Claims Management Summary, if your number is really low, 60% for example, that simply means the carrier is not giving you what requested. If you asserted for the proper amount, and eventually send your claims to JACC for setoff, this number will correct itself in AFCIMS in time. However, this number may be low because you are not asserting for the proper amount, or you are not actively pursuing the carrier.

If the number is high, again, you could be performing head and shoulders above everyone else, BUT, be cautious if this number is 100%. If you have dealt with carriers at all, you know they almost never pay exactly what we assert. Remember that if you assert for a certain amount and then later compromise with the carrier, you can not change in AFCIMS the amount initially asserted. As with the previously mentioned metrics in this article, if it looks high or low, investigate.

Percent of Carrier Recovery Claims Overage

This metric shows the percentage of carrier claims overage when closed in AFCIMS. The Air Force goal is 10%. Right now the Air Force is averaging about 14%. The percentages are not currently reflected on the Claims Management Summary but we do maintain them here at JACC. You can check our web page quarterly to see what your MAJCOM is doing, and in the event of an Article 6 visit, we will provide the base reports for the appropriate reporting period.

NTS and DPM carrier recovery claims not resolved after 365 days are considered overage. All other carrier recovery claims are considered overage if they are not resolved after 180 days. When your percentage of overage CRs goes up, it means you're actually closing old claims, which is not necessarily a bad thing. The management issue here is to find out why these claims are going overage and get them resolved before they do. Also on the JAS web page and your local AFCIMS reports, you can actually see which claims are open and overage in your office, or even those getting close to overage. This is a remarkable capability...use it!

Percent of Hospital Recovery Claims Overage

This metric shows the percentage of hospital recovery claims (to include potentials) which are open and overage in AFCIMS. HR claims (FMCRA, COB-Third Party or COB-Health Insurance Collection) are overage when more than 730 days old from the date of the incident. A potential HR claim is overage if it accrues more than 180 days from the first opening in AFCIMS. The reason we track HRs from the date of incident is so you won't miss the 2-year statute of limitations and lose out on the opportunity to collect on the government's behalf. The clock stops when potentials are converted, closed or withdrawn, and when HRs are settled or go into litigation status. If you have greater than 10% of your HRs overage, you need to make sure you know why each claim is overage and work towards getting the claim resolved.

The bottom line is don't let metrics manage you. Metrics are there to guide your claims program. Do not get so caught up in processing times or ratios that you lose sight of the purpose of the rules. The bottom line is to do the right thing. Our primary purpose is to pay the payable claims but only after proper adjudication of the facts. The best way to ensure goals are met is to take control. Find out what works best for your office. If possible, get a handle on the claims you take in and the hours, but balance that with the amount of time it takes for a person to get an appointment to turn-in their claim. Take a look at how work is distributed and focus on weak areas. If you're processing PT claims in two days but you have 18% of your carrier recovery claims overage, you obviously need to refocus your resources.

Hopefully with this article and the tools you already have, you can have the best claims program in the Air Force! Good luck!

ENVIRONMENTAL LAW

RECENT EVENTS CONCERNING THE "GREENING OF GOVERNMENT"

On April 22, 2000, President Clinton issued Executive Order (E.O.) 13148, *Greening the Government Through Leadership in Environmental Management.* The E.O. revoked the following items: E.O. 12843, E.O. 12856, the Executive Memorandum on Environmentally Beneficial Landscaping of April 26, 1994, E.O. 12969, and section 1-4 of E.O. 12088.

With respect to release reduction, one of the E.O.'s goals for each federal agency is to "reduce its reported Toxic Release Inventory (TRI) releases and off-site transfers of toxic chemicals for treatment or disposal by 10 percent annually, or by 40 overall by December 31, 2006." Addressing reduction in the use of toxic chemicals, "each agency shall reduce its use of selected toxic chemicals, hazardous substances, and pollutants, or its generation of hazardous and radioactive waste types at its facilities by 50 percent by December 31, 2006." Use of all nonexcepted ozone-depleting substances is to be phased out by December 31, 2010.

To this end, the E.O. established several deadlines of note for federal agencies. Within 12 months of the order, each agency is required to incorporate the goals and requirements of the order within its existing agency guidance. Within 18 months of the order, each agency is required to conduct an agency-level assessment according to EPA guidance of "agency environmental leadership goals, objectives, and targets." Also, within 18 months, federal agencies are required to develop and support goals to reduce the use of certain listed toxic and hazardous substances by 50 percent by December 31, 2006. Within 24 months of the order, federal agencies are required to implement environmental management system pilot projects with the ultimate goal of implementing environmental management systems at all facilities by December 31, 2005. Each environmental management system will include measurable environmental goals, objectives, and targets that are reviewed annually. Each agency is required to submit an annual report concerning implementation of the order. By March 31, 2002, each federal facility will be required to have a written plan in place describing that facility's "contribution" to the order's goals and requirements.

The E.O. provides for compliance audit programs which must be established within 12 months of the order, if a federal agency does not have an established regulatory environmental compliance audit program. The Air Force does have an established compliance audit program, its Environmental Compliance Assessment and Management Program (ECAMP). Because the Air Force does have such a program, it "may elect to conduct environmental management system audits in lieu of regulatory environmental compliance audits at selected facilities." From a practical perspective, ECAMP should remain relatively unaffected with some changes to incorporate the principles concerning environmental management system audits.

Another E.O. that "greens the government" in other ways is E.O. 13101, *Greening the Government Through Waste Prevention, Recycling and Federal Acquisition.* This E.O. required the Air Force to implement an effective affirmative procurement program. Pursuant to that requirement, a recent joint memorandum to the CE and LG communities from HQ USAF/IL and SAF/AQCO, dated 31 May 2000, reminds Air Force installations that the Air Force's affirmative procurement program requires a team approach. The memorandum further reminded the field that AFI 32-7080 places responsibility for the program upon the Environmental Protection Committee (EPC) or the Environment, Safety and Occupational Health Committee (ESOHC) at each base. The memorandum emphasized the need to educate and train all base personnel on affirmative procurement, specifically what the program is all about and where to find the necessary Comprehensive Procurement Guidelines (CFG) from the EPA and the Recycled Materials Advisory Notices. The memorandum further advises that contracts should have the appropriate FAR clauses specifying CFG items in order to meet legal requirements for vendor certification.

Although the memorandum emphasized the CE and Contracting Office roles in this regard, it goes without saying that base legal offices must be involved in the team effort as well, due to the environmental and contracting issues. In view of AFI 32-7080 placing responsibility upon the EPC or ESOHC to implement the Air Force's affirmative procurement program, which means that the commander or vice-commander will be directly involved, base legal offices need to be effective members of the team to ensure compliance.

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GENERAL LAW

RELIGIOUS ACCOMMODATION IN THE AIR FORCE

Religious accommodation cases arise when a military member wishes to do something that is not authorized, or avoid doing something that is required, because of his or her religious beliefs. Cases involving religious accommodation present interesting and challenging issues for the civil law practitioner. Religious accommodation requests are handled in accordance with the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb); DoD Directive 1300.17, *Accommodation of Religious Practices Within the Military Services*, 3 February 1988; and various Air Force instructions.

In the 1960s and 1970s, a series of Federal court cases established a "compelling government interest" test in situations where government actions placed a burden on the free exercise of religion. This legal standard was overturned in the case of *Employment Division v. Smith*, 494 U.S. 972 (1990), in which the Supreme Court held that the Free Exercise Clause of the First Amendment did not relieve individuals of the duty to comply with valid and neutral laws.

In response, in 1993 Congress passed a law called the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, to reinstate the "compelling government interest" test for government actions which impact religious practices. The RFRA provides that the government may not substantially burden the free exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that the burden: (1) furthers a compelling government interest; and (2) is the least restrictive means of furthering that interest. Subsequently, the Supreme Court held that the RFRA was unconstitutional as applied to state and city governments. *City of Boerne v. Flores*, 521 U.S. 507 (1997). However, the Department of Justice determined that the RFRA still applies to Federal Government practices that burden religious freedoms.

DoD Directive 1300.17, *Accommodation of Religious Practices Within the Military Services*, has not yet been revised to reflect the RFRA standards. Therefore, attorneys faced with religious accommodation issues should apply the directive in conjunction with the statute.

The directive states that commanders should approve requests for religious accommodation when they will not have an adverse impact on military readiness, unit cohesion, standards or discipline. The directive sets out "goals" of religious accommodation for different types of religious practices, including the observance of worship services and holy days, waiver of immunizations, and the wear of religious apparel. In determining whether to grant a request for religious accommodation, commanders should consider the following factors:

- The importance of military requirements in terms of individual and unit readiness, health and safety, discipline, morale and cohesion
- The religious importance of accommodation to the requester
- The cumulative impact of repeated accommodations of a similar nature
- Previous treatment of the same or similar requests, including treatment of requests made for other than religious reasons

When a request for accommodation is not in the best interest of the unit and continued tension between unit requirements and an individual's religious belief is apparent, administrative action may be necessary. This action includes reassignment, reclassification or separation. Also, nothing in the directive precludes action under the Uniform Code of Military Justice in appropriate circumstances.

There is no comprehensive Air Force instruction on religious accommodation. Instead, three instructions address different aspects of this issue.

The most general guidance is found in AFI 36-2706, *Military Equal Opportunity and Treatment Program*, section 4F, which discusses how to handle religious accommodation cases that do not involve wear of the uniform or medical immunizations. This instruction sets out basic procedural guidance on how to handle requests for religious accommodation. These procedures include submitting the request in writing, seeking the advice of the military chaplain and, when necessary, forwarding the case to higher command for review.

The next is AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, Table 2.8 - Religious Apparel Waivers. This table explains that members who request permission to wear religious apparel must obtain Air Staff approval. While the table does not address other types of religious accommodation, we suggest that any request that impacts the wear of the uniform be forwarded to MAJCOM-level officials.

Finally, AFJI 48-110, *Immunizations and Chemoprophlaxis*, discusses waivers of required immunizations for religious reasons. MAJCOM-level surgeons general have the authority to grant temporary immunization waivers based upon religious objections. These waivers may be revoked if the member is at imminent risk of exposure to a disease for which immunization is available.

There is a temporary DoD policy in effect concerning the sacramental use of peyote by Native American service members. The Assistant Secretary of Defense for Force Management Policy established the interim guidance by memo dated 25 April 1997. The policy references the American Indian Religious Freedom Act Amendments of 1994 (42 U.S.C. 1996a), which provides that military personnel who are members of recognized Indian tribes may not be penalized for using, possessing, or transporting the peyote cactus as a religious sacrament. However, DoD policy requires that peyote will not be used on duty or 24 hours before performing military duty. Also, with the exception of peyote worn as an amulet, peyote may not be used, possessed or distributed aboard military aircraft or on military installations. Further, members who use peyote must promptly notify their commander upon return to duty. Upon notification, the commander must verify that the

member is enrolled as a member of a recognized Indian tribe. An issue not addressed by the policy is how peyote use affects a member's PRP-status.

While AFI 36-2706 encourages officials to handle religious accommodation issues at the lowest level of command when possible, staff judge advocates should not be reluctant to seek advice on these cases from higher headquarters or levels of command. It is not unusual for MAJCOM legal offices to contact AF/JAG for guidance in this area. For example, AF/JAG has reviewed cases involving a male officer who requested a waiver from serving missile crew duty with females, a female pilot who requested a waiver from wearing slacks, an airman who requested separate meal rations for purchasing special meals, and an airman who wished to wear a beard. The issue of Wiccans practicing their religious ceremonies on military installations also generated legal issues, as well as media attention.

In sum, civil law attorneys must handle religious accommodation cases very carefully because of the Constitutional rights involved and the unsettled (and ever changing) nature of the law in this area. The risk of civil litigation in this area is high because of the significance most Americans place on their religious freedom and the existence of advocacy groups that actively pursue cases involving First Amendment rights. The civil law attorney must help the commander balance an individual's right to practice his or her religious beliefs with the unit's need for good order and discipline within the framework of the RFRA, DoD and Air Force policy. For these reasons, attorneys should not hesitate to seek help from their MAJCOMs and AF/JAG on religious accommodation issues, as needed.

LABOR LAW

• RECENT FEDERAL CIRCUIT DECISION HAMPERS REMOVAL EFFORTS

Deciding officials should be careful when taking into account an employee's past disciplinary record to determine an appropriate penalty for a current offense. The United States Court of Appeals for the Federal Circuit ruled in *Maria A. Gregory v. United States Postal Service*, 212 F.3d 1296 (May 15, 2000), *reh'g den* 2000 U.S. App LEXIS 17774 (July 13, 2000) that "as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." The court stated, "to conclude otherwise would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." In this case, the court concluded that the testimony of the employer's witnesses were credible and provided substantial evidence to support factual findings warranting disciplinary action, but found that the penalty of removal was improper based on the employee's *pending* disciplinary actions which were subject to potential reversal.

With this decision in mind, please ensure that when a deciding official is going through the Douglas Factors to determine an appropriate penalty, he or she does not consider an employee's past disciplinary action *that is itself on appeal.* As the court stated, "[t]here is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances ...but there can also be no doubt that a penalty determination cannot be supported by an earlier prior disciplinary action that is subsequently reversed."

Some of you have appeals pending on cases that were initiated prior to *Gregory*, where the deciding official had already considered an employee's past discipline (that is currently on appeal) in determining a punishment. At one base, the MSPB judge went back to the management representative and offered three suggestions on how to deal with the case. First, the MSPB judge suggested the possibility of remanding the case back to the base so that the deciding official could determine what the appropriate penalty should be without considering the past appealed discipline. Second, the MSPB judge suggested that the case be dismissed without prejudice pending the outcome of the appeal of the previous discipline. Third, the judge offered to reopen the hearing and have the agency provide evidence to prove that the employee committed the previous offense. If you have a similar case out there, you might expect that an MSPB judge would make a similar offer.

The *Gregory* decision is on appeal by the Postal Service. As it stands, the decision makes no reference to the present ability of the Merit Systems Protection Board to hear requests for reconsideration if just such a rare case arises.

Office of Special Counsel Issues – Keep Your Higher HQ's Informed

This year the CLLO reviewed a list of labor and employment law issues and areas that cause the most problems for base level legal offices. One such issue is base-level involvement in Office of Special Counsel (OSC) cases. While valid cases don't arise very often, OSC investigations typically are fraught with traps for the unwary and uninitiated. During the past year, we have received more inquiries from TJAG's office about OSC cases than all other labor and employment law issues combined.

There are several reasons for TJAG's concern. These cases may have great media interest. They often place the legal office in the unenviable position of defending their clients from allegations of committing prohibited personnel practices involving factual scenarios that are difficult (if not impossible) to defend. It has happened where base legal offices became convinced their clients have done nothing wrong and became emotionally wrapped up in defending the base actions. This is then compounded by the high burden the agency must overcome to defend its interests once a complainant establishes a prima facie case.

Whatever the case, all of us need to be aware of the rules and our responsibilities in processing OSC complaints. AFI 51-1102, *Cooperation With The Office of Special Counsel*, assigns various responsibilities and establishes procedures

for cooperation with the OSC. SAF/GC, CLLO and the base liaison officer, designated by the base SJA, all have important responsibilities under the AFI. SAF/GCA provides overall guidance on OSC matters, reviews all reports to the OSC for legal sufficiency and coordinates on all recommended corrective actions resulting from investigations. The CLLO monitors on-going investigations, prepares recommendations to SAF/GC when OSC recommends corrective or disciplinary action, and seeks OSC approval when disciplinary action is proposed against employees accused of a prohibited personnel practice or other misconduct. The base liaison officer serves as the official POC for the OSC investigator, assists the investigator with all administrative matters, arranges witness interviews and processes all OSC requests for documents. The base liaison officer must consult with CLLO on all policy and legal issues arising from the investigation, and keep the CLLO chief up to date on all aspects of the investigation.

If you have an OSC case on the horizon, now would be a great time to review your responsibilities under the AFI. As with all high interest items, base level SJAs must keep their higher headquarters informed of what is happening in these cases. Bases must also ensure they keep their NAF and MAJCOM informed about the OSC investigation.

CLLO'S ELECTRONIC LIBRARY

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• REEVES V SANDERSON PLUMBING: A LONG ROAD TO A SMALL HOUSE.

The recent case of *Reeves v Sanderson Plumbing Products Inc,* 530 US ____, 120 S.Ct 2097 (2000) has finally sounded the death knell for the so called "pretext plus" concept. But make no mistake, regardless of what plaintiff's counsel may say, pointing to some stray dicta in the case: the demise of "pretext plus" is all the case stands for. (For more detail on the now deceased "pretext plus" concept see, Lanctot, *The Defendant Lies and the Plaintiff Loses: the Fallacy of the "Pretext Plus" Rule in Employment Discrimination Cases,* 43 Hastings L.J. 59 (1991). This article is by no means an exhaustive summary of employment discrimination law but serves merely as a broad overview of the likely implications of the *Reeves* case.

By way of background, generally, in employment discrimination cases, a plaintiff's prima facie case consists of 4 elements: 1) plaintiff belongs to a protected class, 2) plaintiff suffered an adverse employment action (demotion, firing, suspension, failure to hire, whatever), 3) plaintiff was qualified for the position 4) the position was open and was filled by a non-protected class member (see generally *McDonnell Douglas v. Green* 93 S.Ct 1817 (1973), *Texas Department of Community Affairs v. Burdine* 101 S.Ct 1089 (1981) and *St Mary's Honor Center v. Hicks* 113 S.Ct 2742 (1993). Following *McDonnell Douglas*, a series of cases including subsequent Supreme Court decisions interpreted and wrestled with the notion of burdens and order of proof and production of evidence in employment discrimination cases. The law can be fairly summarized as follows: The burden of proof by a preponderance of the evidence always rests with plaintiff. Once plaintiff has made out the prima facie case, a rebuttable presumption of discrimination arises and the burden of *production* shifts to the defendant to show some legitimate non-discriminatory reason for the adverse employment action. After the defendant does so, this presumption of discrimination drops out and the ball is back in plaintiff's court to show that defendant's "legitimate non-discriminatory reason" is not 'legitimate' at all but a merely pretext for discrimination. For a good summary see *Reeves* at 2106-2109 and see generally *Burdine* and *St Mary's Honor Center, supra.*

Here's where some of the fun began. A minority of circuits (specifically the 1st, 2nd, 4th, and 5th as noted by the court in *Reeves*, at 2104, 2105) required more of plaintiffs. Not only did plaintiffs have to make out the prima facie case and prove pretext (e.g. the "legitimate non-discriminatory reason" was false) but plaintiffs were required to show direct evidence of discrimination. While "pretext plus" was always a minority view in the circuits, and truly seemed illogical and somewhat at odds with the burden shifting scheme of *McDonnell Douglas* and its progeny, now it is no more. *Reeves* has done away with the concept. But let me hasten to add, regardless of what some plaintiff's counsel may try and tell you, that is ALL that *Reeves* did.

Specifically, *Reeves* involved an Age and Discrimination in Employment Act (ADEA) claim brought by a 57 year old plaintiff. Reeves claimed he was fired because of his age. Sanderson Plumbing countered that he was fired for failure to maintain correct time records on employees he supervised. At trial, Reeves presented significant and convincing evidence that this stated reason was downright false. On appeal from an adverse ruling under FRCP 50 (judgment as a matter of law in jury trials) , the Fifth Circuit reversed the trial judge and held for Sanderson Plumbing. In reversing the Fifth Circuit, the Court held that they had applied the wrong standard in their analysis and review of the trial judge's dismissal of Sanderson Plumbing's FRCP 50 motion. The Court further held the Fifth Circuit erred when it ignored much of Reeves' evidence making his prima facie case and showing the falsity of Sanderson Plumbing's stated reasons for his firing. The court thus put an end to those minority of circuits which adhered to the "pretext plus" principle in employment cases. As the court framed the principle issue in noting the conflict in the circuits "...whether a plaintiff's prima facie case of discrimination ...(citation omitted), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination" *Reeves* at 2104 . The court then noted that the 1st, 2nd, 4th and 5th circuits required that a plaintiff not only prove that an employer's stated reason is false but must prove that discrimination was the real reason for defendant's actions.

The court took some pains to explain they were making no other fundamental changes to the area of discrimination law save eliminating "pretext plus". The Court made clear that the

burden still of proof still rests with plaintiff, quoting from their earlier decision in *Texas Department of Community Affairs v Burdine* 450 US 248 (1981) and also reaffirming and restating their holding in *St Mary's Honor Center v Hicks* 509 US 502 (1993) that the presumption of discrimination raised by plaintiff's prima facie case drops out when the defendant meets it burden of production. *Reeves,* at 2108 *supra*. In reversing the Fifth Circuit's ruling in *Reeves*, the Court noted the Fifth Circuit "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence". The Court also restated their holding from *St Mary's* that a

> "...factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. *509 U.S. at 511.* The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason ... is correct." *Id. at 524.* In other words, "it is not enough ... to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id. at 519." Reeves* at 2108

The Court had noted however, that it is "*permissible* for the trier of fact to infer the ultimate fact of the discrimination from the falsity of the employer's explanation" id. Therefore, if a plaintiff is able to make out a prima facie case and show the employer's non-discriminatory reasons for the employment action are false, then this alone *may* be enough for plaintiff to win, remembering that the ultimate burden rests with plaintiff. Extra evidence that discrimination was the ***real*** reason for the employment action can no longer be ***required*** of a plaintiff.

It is important to note that the court was also reviewing an FRCP 50 motion, not an FRCP 56 motion, from below. Aside from eliminating the requirement of "pretext plus," nothing in the opinion alters the standard for FCRP 56 motions. The court referred to FCRP 56 motions only in passing, noting that a similar standard is applied to FCRP 50 motions and all the evidence in the record should be reviewed. *Reeves* at 2110. The court took pains to point out they were not eliminating or limiting the possibility of FRCP 50 motions:

> "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred... To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not "'treat discrimination differently from other ultimate questions of fact.'" *St. Mary's Honor Center, 509 U.S. at 524* (quoting *Aikens, 460 U.S. at 716)* Reeves at 2108-2109

The Court also pointed to several factors in assessing whether an FRCP 50 motion was appropriate. Among these are strength of plaintiff's prima facie case, "probative value" of plaintiff's pretext case, and "any other evidence" that supports defendant's case. *Reeves* at 2109. The critical point the court makes is that the Court eliminated the ***requirement*** for plaintiff to introduce extra evidence, aside from their prima facie case and proving defendant's stated reason is false, for plaintiff to have any chance of winning. In *Reeves,* the Fifth Circuit erred in disregarding large chunks of very probative evidence offered by plaintiff.

It is most important to see the Reeves case for what it really does; kill the notion of pretext plus. The plaintiff's bar has been (and probably will continue to be) quick to seize upon *Reeves*, as they have other recent Supreme Court decisions when still hot off the press, and say it means summary judgement can no longer be granted to defendants, summary judgment will be severely limited or that the law in discrimination cases has been radically re-written (or some combination of the three). Nothing could be further from the truth and, as noted above, the Court in *Reeves* was making this clear in their opinion. Reeves did away with pretext plus and that's all it did.

• MILITARY PERSONNEL LAW

The Air Force was recently successful in defending an action where a physician who received $60,000 from the Air Force during his pediatric residency through the Armed Forces Health Professions Scholarship Program/Financial Assistance Program (AFHPSP/FAP) alleged his recruiter made certain misrepresentations to him concerning the contract. The doctor

argued the misrepresentations would allow him to avoid his three year active duty commitment, which was his part of the bargain.

In the case of *Carling v. Peters,* CV-00- 2958, United States District Court for the Eastern District of Pennsylvania, Dr Carling alleged his recruiter represented to him that as a captain in the Air Force practicing pediatrics, he would earn $81,000 during his first year of active duty service. In fact, Dr Carling will be receiving approximately $6,000 less than he expected, due to his assignment location. A TRO hearing was held in mid-June, but plaintiff was unsuccessful his attempt to have the judge interfere with his active duty orders which placed him on active duty a month later.

The matter proceeded on an expedited trial schedule, and the issue was analyzed under general contract principles. The recruiter testified he had told Dr Carling he would earn between $70,000 and $80,000. Dr Carling testified he knew his pay was subject to federal law and could vary. The judge found both witnesses equally credible and therefore held plaintiff failed to prove the existence of a misrepresentation. The court found the $6,000 difference in pay (which would be further reduced by federal taxes) was not material in light of plaintiff's decision to serve on active duty for three years and the $60,000 plaintiff had already received. The judge further found, based on the contract and surrounding documents, even if there was reliance, it was not justifiable. Judgment was entered for the Air Force.

TORT CLAIMS, LITIGATION AND HEALTH LAW

AFI 44-119, *Clinical Performance Improvement*, has been recently updated as of 1 August 2000. This revised Instruction includes clearer guidance on adverse action procedures against health care providers and will be useful to those attorneys who are involved in Clinical Privilege Hearings.

• RES GESTAE

The 2000 Medical Law Mini-Course will be held at Travis AFB, CA from 23-27 October 2000. This sixteenth course will be attended by claims officers and other attorneys with significant dealings in health law matters, paralegals, and quality assurance officials from medical facilities. Representatives from the Army and Navy will also be in attendance. The course will be instructed by the medical staff from David Grant USAF Medical Center, the United States Attorney's office in Sacramento, CA, the Surgeon General's Clinical Quality Assurance Division, and members of the Medical Law and Health Affairs Branches from AFLSA/JACT.

• VERBA SAPIENTI

Despite continued efforts to overcome the problem, there remain during the course of the year a handful of incidences where medical personnel are reluctant to share medical information or records of a patient with legal or investigative officers. Some of this reluctance comes from education received in the civilian world where privacy of medical information is treated somewhat differently. In the military, medical records are governed by the Privacy Act, along with its exceptions. Military officials with a valid need to know should have access to that information. Unfortunately, some of the misunderstanding occurs when personnel approach health providers or records custodians and demand information without offering some official basis for doing so. Medical information in the wrong hands could easily result in significant emotional distress to the patient as well as the patient's family. It is for this reason that whenever such requests for records are made, there be, if possible, some written authority for the request along with the reason the request is being made. Even when giving a specific reason may be imprudent, such as in some criminal investigations, efforts should be made to reassure the holder of the information that the request is part of a legitimate military mission and that the information will be contained by only those who need it.

Finally, it is wise to offer in briefings to medical personnel the rules governing release of medical information and the assurance that the integrity of the records will be respected. This will go a long way to avoiding unnecessary confrontations when such records are needed.

• ARBITRIA ET IUDICIA

The importance of accurate and timely medical records proves itself in the settlement of an orthopedic malpractice case. A patient was scheduled for a hemi-laminectomy procedure, where a portion of the connective tissue of the vertebrae is removed. The operation was performed, but it was three weeks before the surgeon found time to record the surgical report into the record. In the interim, the surgeon had performed numerous other surgical procedures, and unfortunately recalled this particular procedure in his report as a laminectomy, which denoted a complete removal of the connective tissue.

When the patient became aware of the record, he was extremely upset and did not trust the surgeon's reassurances that the correct procedure had indeed been done but was simply improperly recorded. The patient underwent independent testing to confirm that the correct procedure had been done, and filed a claim for his time, expenses and distress due to the mistake. While the claim was settled for a nominal amount, it exemplified the need for accuracy and timeliness in operative record keeping. This is one of the reasons why delay in documentation is a basis for privilege action in a substantial number of hospitals.

IMPEACHING A SILENT ACCUSED
"It *is* about credibility."

MAJOR CHRISTOPHER MATHEWS
CAPTAIN JOHN E. HARTSELL

The ability to impeach a witness is a powerful weapon in any trial counsel's arsenal. The outcome of a case may turn upon a single instance of effective impeachment. However, since the defense is under no obligation to present a case—much less put the accused on the stand—trial counsel rarely have the opportunity to employ this effective tool. More often than not, impeachment is utilized by defense counsel against victims, eyewitnesses, and investigative agents. Recent case law now provides trial counsel with an opportunity to impeach an accused regardless of whether or not the defense offers any evidence in their case. Through the use of examples, the following article seeks to educate trial counsel on the law and the methodology that can be used to impeach an accused even if he or she elects not to testify.

Imagine a fairly routine factual scenario: a barracks larceny. The Accused is charged with stealing an Automated Teller Machine (ATM) card and later using the ATM card to steal $200.00 from Victim A's personal bank account. The Accused is also charged with stealing a check from Victim B and later forging the check to obtain cash and merchandise.

The Accused in the scenario was questioned about the ATM card larceny and affirmatively denied any wrongdoing. In a written statement, the Accused explains that Victim A actually gave him permission to take the ATM card and to use it to borrow cash. The Accused contends that once permission was granted, he used the ATM card to withdraw $200.00. The Accused maintains that he always intended to repay Victim A and that Victim A is making a false allegation in the instant case. The Accused also claims that Victim A is not truthful and suggests that Victim A is lying in order to seek attention and/or empathy from other dormitory residents. Counsel for the Accused later provides notice of his intent to call several witnesses on findings: all state that they've been told they will be witnesses to impeach the character for truthfulness of Victim A.

The case scenario also includes evidence that someone stole a check from Victim B and later forged it to obtain $50.00 in cash and a limited-edition Polo brand sweatshirt from the Base Exchange. The Accused was questioned about the stolen and forged check, and verbally denied any involvement with the check. Moreover, he denied ever having such a sweatshirt, but immediately prior to a search of his room "remembered" having borrowed a Polo brand sweatshirt … but not from whom he borrowed it. A sweatshirt matching the one bought with the stolen and forged check is found in the Accused's room.

Obviously, the credibility of the Accused and witnesses are at issue. Now assume that there are a number of witnesses who would testify that the Accused has a bad character for truthfulness; and that the Accused has a recent, unrelated civilian conviction for an offense involving dishonesty or fraud; and that the maximum penalty for the civilian offense was confinement for ten years.

Under the Military Rules of Evidence (Mil.R.Evid) there are a number of articulated methods by which a counsel can impeach the credibility of a witness. The credibility of a testifying witness may be impeached by opinion evidence that the witness has a bad character for truthfulness. Mil.R.Evid. 608(a). A witness may also be impeached by evidence of a civilian criminal conviction, if the maximum penalty for the offense was more than a year's incarceration. Mil.R.Evid. 609(a)(1). In addition, a witness may be impeached by evidence of a conviction in which the underlying offense involved dishonesty or false statements, regardless of the punishment. Mil.R.Evid. 609(a)(2). Finally, any party, including the party who calls the witness, may attack the witness' credibility. Mil.R.Evid. 607. As noted above, trial counsel don't often have the opportunity to employ Mil.R.Evid. 608(a), 609(a)(1), and 609(a)(2); however, they should not be timid about trying. The key is to properly analyze an accused's out-of-court statements and utilize the facts, impressions, and inferences that put the accused's credibility in issue. Keep in mind, the United States is entitled to offer an accused's written and oral statements at trial because he or she is a party-opponent. Mil.R.Evid. 801(d)(2)(A). Thereupon, the credibility of an accused (a declarant whose out-of-court statement is offered at trial) may be attacked. Mil.R.Evid. 806. Consequently, the credibility of the accused (a declarant) may be challenged using any evidence that would be admissible for that purpose if the accused (a declarant) were to testify at trial. *Id.*

In the example provided above, the Accused, in his written statement, admits that he took Victim A's ATM card, and that

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he then used that card to take $200.00 from Victim A's personal bank account. The statement thus establishes several elements of the charged larceny. However, the Accused's statement *also* alleges that he had Victim A's consent to take the card and the money. If believed, this exculpatory claim would constitute a complete defense to larceny. *See* Manual for Courts Martial Part IV, paragraph 46; DA Pamphlet 27-9, paragraph 3-46-1, note 2. Further, the Accused alleges that he intended to repay Victim A the money at a later date. If believed, this exculpatory claim would also constitute a partial defense to the offense of larceny, though the Accused might still be convicted of wrongful appropriation if the finder of fact believed Victim A did not consent to the taking. *Id.*

In addition, the hypothetical Accused's statement impugns the truthful character of Victim A and suggests a motive for Victim A to lie – *i.e.,* to get attention and/or empathy. These statements, if believed, would also tend to exonerate the Accused, as would any character witnesses called by the Accused to impeach Victim A.

Similarly, in his oral statement regarding the stolen and forged check, the Accused initially denied having possession of a Polo brand sweatshirt, and then later changed his story. A factfinder may reasonably infer that this change is evidence of the Accused's consciousness of guilt. However, the Accused attempted to explain away his possession of the sweatshirt by claiming that he borrowed it from someone else. If believed, this claim would also tend to establish his innocence.

Thus, the Accused's statements in our example, while providing the United States with crucial evidence corroborating the testimony of the victims and the other evidence against the Accused, *also* contain evidence potentially fatal to the United States' case. Further, the Accused may be expected to suggest, through his counsel, that his willingness to make a verbal statement and also provide a written statement is *itself* evidence of innocence. Even if not argued by the defense, the members may reasonably infer that the Accused's cooperation by openly discussing the allegations is evidence of his innocence. This inference necessarily assumes that the Accused provided *truthful* statements. *Cf. United States v. Borland*, 12 MJ 855 (A.F.C.M.R. 1981) (false exculpatory statements may be used as consciousness of guilt).

Under our example, the credibility of the Accused is of critical importance in evaluating his statements about his own actions; his statements attacking Victim A's credibility and proposing a motive for Victim A to lie; his explanation for possessing a Polo brand sweatshirt; and the inferences to be drawn from his cooperation with the investigation. As a result, the United States is entitled to present evidence demonstrating that the Accused's exculpatory statements are not to be believed. DA Pamphlet 27-9, paragraph 7-7-1.

If the Accused were to testify in his own behalf and to offer the exculpatory claims contained in his statements, the United States would be entitled, under Mil.R.Evid. 608(a), to impeach that testimony by presenting evidence as to his character for untruthfulness. Furthermore, the United States would be entitled to present evidence concerning his criminal conviction under Mil.R.Evid. 609(a)(1) because the accused was convicted of a crime carrying a maximum penalty in excess of one year's confinement. The United States would also be entitled to present evidence of the conviction because the offense involved dishonesty or false statements. Mil.R.Evid. 609(a)(2). A recent clarification of the law ensures that the Accused's exculpatory claims are subject to impeachment, even if he chooses not to testify.

If the Accused does not testify, the United States is still entitled to present evidence to impeach the exculpatory claims made in the Accused's out-of-court statements, because Mil.R.Evid. 806 permits impeachment of non-testifying declarants. The Accused may claim that this Rule does not apply, and that his out-of-court statements cannot be impeached in this way because they are non-hearsay offered under Mil.R.Evid. 801(d)(2)(A). But on 28 December 1999, the Air Force Court of Criminal Appeals held exactly the opposite: it held that Mil.R.Evid. 806 *does* apply to out-of-court statements of an accused offered by the prosecution under Mil.R.Evid. 801(d)(2)(A). *United States v. Goldwire,* 52 M.J. 731 (A.F. Ct. Crim. App. 1999).

In *Goldwire*, the appellant was convicted of rape and wrongfully possessing alcohol while under age. The United States called as a witness one of the investigative agents who interviewed the appellant. On cross-examination, the defense counsel intimated that appellant's statements were consistent and by implication more worthy of belief than the victim. The case thus boiled down to a classic credibility battle: who should the court believe, the victim or the accused? The United States attempted to answer this question by calling the appellant's first sergeant to opine on the appellant's character for truthfulness.[1] The First Shirt testified that the appellant was not trustworthy, and a conviction soon followed. On appeal, the Air Force appellate court held that although the appellant's statements were offered by a prosecution witness, because the appellant's credibility was at issue, the United States was properly allowed to impeach his credibility as if he had testified at trial.

In its opinion, the court noted that Mil.R.Evid. 806 is taken from Fed.R.Evid. 806 without change, and it looked to federal case law to determine the application of the Rule to statements offered under Mil.R.Evid. 801(d)(2)(A). at 733. Applying federal law, the *Goldwire* court held that the prosecution is entitled to impeach the credibility of an accused's out-of-court statements offered under Mil.R.Evid. 801(d)(2)(A). Indeed, the drafters of Rule 806 clearly stated that a statement of a party-opponent "*is always subject to an attack on his credibility.*" at 733, *citing United States v. Velasco,* 953 F.2d 1467, 1473, n.5 (7th Cir. 1992) (emphasis added by the Air Force appellate court). It is therefore clear that the United States may offer evidence to impeach an accused's credibility, whether he takes the stand or whether his statements are offered by the United States under Mil.R.Evid. 801(d)(2)(A). *See also United States v. Dent,* 984 F.2d 1453 (7th Cir. 1993), *reh en banc denied,* 1993 U.S. App. LEXIS 6829 (7th Cir. Apr. 2, 1993), *cert. denied,*; 510 U.S. 875, 126 L.Ed. 2d 165 (1993); *United States v. Shay,* 57 F. 3d 126 (1st Cir. 1995) (both holding that Rule 806 applies to

statements of a party-opponent).

The hypothetical case in this article turns on the credibility of the Accused and the witnesses against him. The Accused affirmatively denied his role in the crimes, proffered explanations for the allegations, and revealed through the witnesses he proposed to call during his case an intent to attack the credibility of his accusers. Under these circumstances, it would be patently unfair to permit him to hide evidence of his own untruthful character from the finder of fact. The United States should offer the Accused's statements, and should then proceed to impeach the Accused's exculpatory claims by calling character witnesses and offering evidence of the Accused's civilian conviction. The prosecution should, of course, also be prepared to craft whatever limiting instructions may be appropriate. The recent clarification by the *Goldwire* court regarding the opportunity to impeach ensures that an accused will not be able to savage his victims' credibility in court while cloaking himself in a false mantle of trustworthiness. If credibility is the issue, then everyone's credibility is equally subject to scrutiny by the factfinder.

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[1] The Air Force appellate court also provides a helpful analysis on the foundation and basis required for an opinion on character for truthfulness.

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