The Reporter

September 2001

OFFICE OF THE JUDGE ADVOCATE GENERAL

AIR FORCE RECURRING PERIODICAL 51-1, VOLUME 28 NUMBER 3

The Reporter

Editorial Staff

EDITOR
Capt Eric F. Mejia

ASSISTANT EDITORS
AFJAGS Faculty
Major Bruce Ambrose

CONTRIBUTING AUTHORS

PRACTICUM
Lieutenant Colonel Keith Alich

CAVEAT
Mr. David Orser

COMMUNICATIONS LAW
Mr. Charles E. Laedlein

GENERAL LAW
Ms. Jane S. Love

TORT CLAIMS AND HEALTH LAW
Mr. Joseph A. Procacino

UTILITY LITIGATION
Lieutenant Colonel Doug Shropshire

FROM THE EDITOR

Our lead articles include a variety of topics including a spirited defense of the role of the convening authority, an introduction to pretrial agreements that should be required reading for all new JAGs, and a piece on foreign military flying training. In the FYI section, you'll find a provocatively titled article with an important message. As always, you'll find useful articles on a variety of topics. We extend our sincere appreciation to the authors whose submitted the pieces that appear in this edition.

Table of Contents

The Reporter is published quarterly by the Air Force Judge Advocate General School for the Office of the Judge Advocate General, United States Air Force. Views expressed herein, unless otherwise indicated, are those of the individual author. They do not purport to express the views of The Judge Advocate General, the Department of the Air Force, or any other department or agency of the United States Government.

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)

Subscriptions: Paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

Citation: Cite as [Author], [Title], The Reporter, [date], at [page number]

Distribution: Special, Air Force legal offices receive *The Reporter* from AFLSA/CCQ, Bolling AFB, D.C. 20332-6128 (Comm (202) 757-1515/DSN 297-1515).

A Defense of the Role of the Convening Authority: The Integration of Justice and Discipline

Lieutenant Colonel Timothy W. Murphy

One component of the celebration of the Fiftieth Anniversary of the Uniform Code of Military Justice has been a series of retrospectives, as well as critiques of various aspects of the present administration of justice. One such endeavor that has received a measure of attention is the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice—the so-called "Cox Commission." This commission was created through the efforts of the National Institute of Military Justice, an organization composed primarily of academics, retired judge advocates, and civilians practicing defense litigation in military courts-martial.[1]

The commission, under the leadership of the Honorable Walter T. Cox III, former Chief Judge of the United States Court of Appeals for the Armed Forces, produced a report making four recommendations designed, in its view, to respond to "legislative and executive inattention" toward the military justice system since 1972. The four recommendations include modifying the pretrial role of the convening authority in the court-martial process, changing the responsibilities of the military judge, implementing additional protection in capital cases, and modeling the prosecution of criminal sexual misconduct after the Model Penal Code.

While what press attention this effort has garnered[2] has focused on general dissatisfaction with the military justice system, or the recommendation concerning the modification of aspects of criminal sexual activity, the more significant, and more troubling, recommendations focus on the relationship of the convening authority to the court-martial process. The first specific recommendation focuses on the selection of court-members by the convening authority. The second specific recommendation suggests removing the convening authority from certain aspects of the pre-trial process, to be replaced by a military judge. Taken together, these two recommendations alter the relationship between the military justice process and command, removing the convening authority as a discretionary actor in the creation and preliminary stages of the court-martial process.

Lt Col Murphy (B.A., M.A., J.D., Duquesne University, Pittsburgh, PA) is assigned as the Chief, Appellate Defense Counsel, Appellate Defense Division, Air Force Legal Sercies Agency, Bolling AFB, DC .

The suggestions limiting the role of the commander are not new. They have been proposed and rejected by Congress previously. Indeed, one can infer that "the lack of new and novel issues reflects well upon the basic soundness of the military justice system."[3] Additionally, there are innumerable operational difficulties with the recommendations that render them problematic—and indicate a lack of appreciation for the practical aspects of the administration of military justice by the commission.[4]

Removing command discretion to this degree in the court-martial process is ill advised for two reasons. First, it ignores the uniqueness of the military culture in American society, and seeks to undermine the role of the commander in that culture; secondly, it is based on the faulty premise that discipline and justice in a criminal system are incompatible.

"Removing command discretion to this degree in the court-martial process is ill advised…."

MILITARY CULTURE

The fundamental purpose of a nation's military is to fight and win its nation's wars.[5] War is a violent enterprise. "War is a course of killings, assaults, deprivations of liberty, and destruction of property."[6] Although war has been a regular occurrence throughout history, the death and destruction that war causes is not desirable. Those who wage war, then, are engaged in conduct that is counter to the interest to survive.

Success in warfare requires military members who are able to overcome this self-survival interest. It requires members who are able to sacrifice—to perform one's duty, no matter the cost.[7] Thus, the ethics of the military culture promote those moral characteristics that enhance teamwork—integrity, selfless service, loyalty, sacrifice, and patriotism. That these values

result in the cohesion necessary to successfully engage in battle is evidenced by the history of American warfare.[8]

> When the chips are down, there is no rational calculation in the world capable of causing an individual to lay down his life. On both the individual and collective levels, war is therefore primarily an affair of the heart. It is dominated by such irrational factors as resolution and courage, honor and duty and loyalty and sacrifice of self. When everything is said and done, none of these have anything to do with technology, whether primitive or sophisticated.[9]

Indeed, the "values based" foundation of the military culture infuses words like discipline, obedience, and leadership with content beyond simple definition. The concept of discipline must be viewed, and understood, in the context of creating a force that is capable of waging war. "Military discipline is but an extension and a specialized application of the discipline to which all peoples are accustomed. It is subordination of the individual to the good of the team. It is not synonymous with punishment."[10] Obedience is not a "blind or mindless" acquiescence, but is a response to the call to service, a statement of trust in the leadership of the force, and loyalty to comrades.[11] Fostering military discipline stems from practicing, and expecting others to practice, the "core values" of military service—thereby creating a service capable of performing its mission.

AMERICAN LAW AND MILITARY CULTURE

A culture's criminal justice system is a reflection of its values. The presumption of innocence, for example, reflects the American value of liberty. Due process reflects the American value of fairness. The American system reflects the value of "justice." "Justice," like "discipline," is a word of multiple meanings. "Social justice" reflects the obligations of each individual to society toward attainment of the "common good."[12] In the context of law, justice is conformity to the law—the "constant and perpetual disposition to render every man his due."[13]

Over the course of the past century, American law has repeatedly recognized and respected the uniqueness of the American military culture. It is important to recognize that although the civilian and military cultures are different, the values that serve as the foundation of each are the same. Values such as service, integrity, and sacrifice are held in esteem throughout American culture. Likewise, the fair and just treatment of military personnel is a vital aspect of effective command. "When a country looks at its fighting forces it is looking in a mirror: if the mirror is a true one the face that it sees will be its own."[14] It is the emphasis placed upon certain values, due to the imperative of the military mission, which distinguishes the military culture from civilian society—and the military justice system from its civilian counterpart.[15]

American jurisprudence has consistently recognized "that the military is, by necessity, a specialized society separate from civilian society." The unique requirements of an effective military—grounded in the values of obedience, unity, commitment and subordination of individual desires to the needs of the service—has resulted in a "different application" of Constitutional rights in the military environment.[16] Thus, the values that make imperative the creation and maintenance of a disciplined military also make equally imperative a "just and fair" military justice system. The Uniform Code of Military Justice is a testament to the careful application of those rights to the military environment by Congress.[17] It has resulted in a system responsive to the unique nature of military discipline, yet remains fundamentally fair and just in its protections of service members.

Most importantly, American jurisprudence recognizes that the command relationship "is at the heart of the necessarily unique structure of the Military Establishment."[18] It recognizes that commanders are obligated to foster morale, loyalty and discipline among subordinates, and authorizes discretion in attaining these goals.[19]

COMMAND

Leadership—including the values that characterize an effective leader—are a consistent and constant theme of military career development and practice.[20] A central component of military leadership is the need for personal adherence to the values of the organization. "The Commanding Officer's uniform obligates him to conduct himself as 'the first servant of the unit under his command.'"[21]

It is the leader—usually a commander—who is responsible for ensuring that a particular unit successfully performs its mission. A commander's responsibility is not solely defined in terms of missions launched, miles traveled, or even battles won. Command responsibility includes the maintenance of discipline—that is, the inculcation of military values within the unit that foster teamwork. It also includes, to some extent, personal responsibility for the conduct of the members of the command.[22] Breaches in discipline

are themselves unjust, because they undermine the "common good" of unit cohesion. Similarly, unfair treatment of those who breach discipline undermines unit cohesion.

> [G]ood discipline presupposes just treatment. If the trials are conducted in such a way or punishment of such severity is imposed as to create a feeling among the troops that courts-martial are arbitrary and unjust, the disciplinary effect will be impaired or destroyed. It is necessary not only that the system function fairly but that its fairness be recognized by [service members].[23]

Thus, in the context of command, the values of discipline and justice are not merely consistent, but integrated.[24]

In the military justice system, it is the Convening Authority who personifies this integration of discipline and justice. The Convening Authority is trusted with the responsibility for choosing a court-martial panel,[25] and trusted with the responsibility for various court-martial actions, because of the unique responsibilities inherent in command. Thus, Convening Authorities who engage in unlawful command influence violate not only the law,[27] but violate the trust bestowed upon them as commanders of a military organization, their legitimacy as leaders, and their oath to "protect and defend the Constitution of the United States."

THE COMMISSION REPORT

The rationale for the commission's proposal to remove the discretionary role of the commander from the military justice process is flawed because it is based on a distorted understanding of the commander's role in the military justice system.

According to the report, the Convening Authority is viewed as a "barrier" to the operation of a "fair system," and is depicted as "loom[ing] over courts-martial, able to intervene and affect the outcomes of trials in a variety of ways." In exercising their duties, Convening Authorities operate in a system that invites "mischief" and provides an opportunity for "corruption of the trial process." The role of the Convening Authority is deemed "unacceptable in a society that deems due process of law to be the bulwark of a fair justice system."[28]

This perspective ignores the uniqueness of military culture and the duties of the commander within that culture. The commission's characterization of the Convening Authority interjects a level of suspicion into the command-subordinate relationship that is at the core of an effective military force.[29] The report demonstrates a severe mistrust in a Convening Authority's ability to faithfully and impartially exercise discretion in "legal matters." The commission transforms a Convening Authority into a simple functionary aligned with the criminal prosecution of a military member rather than the quasi-judicial function the Code envisions. It presumes the worst of the Convening Authority, and ignores the role a commander often performs within the military justice system as its "conscience."

To justify its recommendations, the commission points to a supposed "perception" of unfairness in the process. As noted above, a perception by the military force of unfairness or harshness in the administration of military justice can have a direct impact on discipline.[30] But this is not the basis for the "perception" articulated by the commission. Rather, this perception is based primarily on the "experience" of the commission membership and the "input" received from various "submissions and testimonies."[31] Indeed, the report contains no assertion that the military justice system, as presently constituted, is actually harsh or unfair—only that it "deviates" from the civilian criminal justice system. Given the recognized uniqueness of military culture, process deviation is an inadequate and dubious basis for the fundamental changes proposed by the commission.

CONCLUSION

Values such as "justice" and "discipline" are not guaranteed through processes, but through the character of the men and women who are faced with, and responsible for, making decisions those processes create. The genius of the Uniform Code of Military Justice is that it does not simply serve a bureaucratic branch of government, but an institution grounded in traditions and values and focused on a well-defined purpose.

At the heart of this institution is the commander, uniquely obligated to produce a military society imbued with a sense of service. To the extent a commander is excised from a military process, that process becomes less vital to the military mission. Removal of the commander from the military justice process to the extent advocated by the commission would render that process alien to the culture it is designed to protect and serve. It would ultimately lead to less reliance on that process by commanders. Moreover, placement of the commander in an adversarial relationship with any military subordinate—including an accused—is a distortion of that relationship, and has a corrosive effect

on the discipline and unity required to achieve the military mission. For these reasons, the recommendations of the Cox Commission limiting the role of the Convening Authority should be rejected—again.

[1] Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001). The Commission Executive Summary can be located at the website of the National Institute of Military Justice found at www.nimj.org.
[2] "Panel: Bring Military law into 21st Century" Air Force Times, (4 June 2001) p. 25. Also see, e.g. Stephen Koff and James Ewinger, "Military Tips Scales of Justice, Critics Charge," The Cleveland Plain Dealer, (3 July 2001).
[3] Moorman, Major General William A., "Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to Be Changed?" 48 A.F. L. Rev. 185 (2000).
[4] Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial, Department of Defense Joint Service Committee of Military Justice (1999). The report details a number of practical difficulties with proposed "random" forms of member selection in operational environments that require operational mobility and flexibility.
[5] *United States ex rel Toth v. Quarles,* 350 US 11, 17 (1955).
[6] Remarks of Justice Robert Jackson, Chief Prosecutor of the United States at the Nuremberg Trials of the Major Nazi War Criminals, as printed in *Excerpts of the Nuremberg Trials*, 6 USAFA Journal of Legal Studies 5, 90-92 (1995-1996).
[7] Brinsfield, John W., "Army Values and Ethics: A Search for Consistency and Relevance," *Parameters* (US Army War College Quarterly Autumn 1998). Brinsfield cites General Douglas MacArthur's "Duty, Honor, Country" speech at West Point in 1962 as encapsulating the "ethos" of the military professional.
[8] The paramount value of unit cohesion is clearly evident in works such as *Black Hawk Down,* by Mark Bowden. (New York: Atlantic Monthly Press, 1999) and *Flags of Our Fathers,* by James Bradley, with Ron Powers. (New York: Bantam Books, 2000).
[9] US Army Research Institute for the Behavioral and Social Sciences, Determinants of Effective Unit Performance (Alexandria, VA: US Army Research Institute for Behavioral and Social Sciences, 1994), cited in Brinsfield, *supra*. n.8.
[10] Pennington, Hough and Case, *The Psychology of Military Leadership*, (Prentice-Hall, NY 1943).
[11] Vriesenga, Major Michael P., "Thinking About Core Values," *Air Chronicles* (www.airpoer.maxwell.af.mil/airchronicles).
[12] Black's Law Dictionary, (Sixth Edition, West Publishing Co., St. Paul, MN 1990) p. 864.
[13] Black's Law Dictionary, (Fourth Edition, West Publishing Co., St. Paul, MN 1968) p. 1002.
[14] Sir John Hackett, "Society and the Soldier: 1914-18," from *War, Morality, and the Military Profession*, Malam M. Wakin, ed., (Westview Press, Inc., Boulder, CO 1986) p. 88 as quoted in Vriesenga, Michael P., "Thinking About Core Values," *supra*. n. 12.
[15] *Schlesinger v. Councilman*, 420 US 738 (1975).
[16] *Parker v. Levy*, 417 US 733 (1974); also see *Goldman v. Weinberger* 475 US 503 (1986); *Orloff v. Willoughby*, 345 US 83, 92 (1953).
[17] In its opinions dealing with military issues, the US Supreme Court has consistently deferred to the statutes and regulations created by Congress and the President. This deference is grounded in the Constitution itself, which places "plenary authority" for the maintenance of armed forces with Congress. Art. I, § 8, cls. 12-14. The court explained this deference in *Orloff*, 345 US at 94: "[Judges] are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."
[18] *Chappell v. Wallace*, 462 US 296 (1982).
[19] *Greer v. Spock*, 424 US 828, 840 (1976).
[20] Consider the "Leadership Special Edition" of the *Aerospace Power Journal* (Summer 2001).
[21] Ellenbeck, *Der Kompegnie Fuehrer*. (Leipzig Detke, K.G. 1940), translated in Pennington, et al, *supra* n.11. This sentiment was penned by a German officer during World War II—a testament to the fact that the values providing the foundation for military effectiveness do not necessarily correlate with the values of a just society.
[22] *In Re Yamashita*, 327 US 1, 15 (1946).
[23] Report of Advisory Committee on Military Justice, War Department (1946), p. 12.
[24] Gilligan, Francis A. and Lederer, Frederick I., *Court-Martial Procedure* § 1-30.00 (2nd Ed. 1999), cited in Grammel, Timothy "Justice and Discipline: Recent Developments in Substantive Criminal Law*," The Army Lawyer* 63 (April 2001). Gilligan and Lederer assert that in the military, the "United States uses a justice-oriented system to ensure discipline; [because] justice is essential to discipline."
[25] Article 25(d)(2), UCMJ.
[26] *See, e.g.* RCM 706; RCM 403-405; RCM 601-604
[27] Article 37, UCMJ.
[28] Committee Report, *supra*. n. 2, pg. 8.
[29] In *United States v. Thomas*, 22 MJ 388 (1986), the Court of Military Appeals noted that "a commander who causes charges to be preferred or referred for trial is closely enough related to the prosecution of the case that the use of command influence by him and his staff equates to 'prosecutorial misconduct.' Indeed *recognizing the realities of the structured military society*, improper conduct by a commander may be even *more injurious* than such activity by a prosecutor." (Emphasis added)
[30] *Supra*. n. 24.
[31] Among the organizations cited in the report supporting the perception of unfairness are the Citizens Against Military Justice (www.militaryinjustice.org), the United States Council on Veteran's Affairs (www.uscova.org), Sailors United For Self Defense, (communities.msn.com/SAILORSUNITEDFORSELFDEFENSE), American Gulf War Veterans Association (www.gulfwarvets.com), and (www.militarycorruption.com).

PRETRIAL AGREEMENTS: AN INTRODUCTION

Major Richard D. Desmond

INTRODUCTION

The Bill of Rights protects criminal defendants against self-incrimination, guarantees them a speedy and public jury trial, and allows them to confront their accusers.[1] However, many defendants, hoping either to receive more lenient punishment or to avoid the uncertainty of the trial process, agree to waive their Fifth and Sixth Amendment rights by entering into plea agreements with prosecutors.

In military practice, an agreement between the accused and the convening authority that the accused will plead guilty or waive certain rights in return for some form of specified relief is known as a pretrial agreement.[2] While pretrial agreements have existed in military criminal practice since the mid-1950s, it was not until the 1984 version of the Manual for Courts-Martial that any specific guidance as to the conditions and terms of pretrial agreements was laid out.

With the frequent use of pretrial agreements in military criminal practice, trial counsel, defense counsel, staff judge advocates, and military judges must be familiar with the law regarding such agreements. With the hopes of increasing the awareness of military law practitioners, this article is offered as a back to basics primer on pretrial agreements in the military. It briefly examines the origin of plea bargaining in American criminal procedure, its adoption by the military, and then focuses on significant appellate decisions relating to permissible and impermissible conditions of pretrial agreements.

ORIGIN OF PLEA BARGAINING

The U.S. Constitution provides that "the trial of all Crimes, except in Cases of impeachment, shall be by Jury."[3] While the framers cherished this principle,[4] plea bargaining existed in the early years of the country.[5] The earliest reported decision addressing a guilty plea demonstrates one trial court's reluctance to permit a guilty plea for an indictment of a capital crime.[6] After allowing the defendant an additional day to consider his plea, the trial court "examined, under oath, the sheriff, the jailer and justice as to the sanity of the prisoner; and whether there had been tampering with him, either by promises, persuasions, or hopes of pardon if he would plead guilty."[7] The trial court's concern for whether a state official had offered the defendant a promise in exchange for his guilty plea suggests that at least some implicit bargaining did occur during the early years of the country.

The transformation of the criminal justice system over the course of the nineteenth century certainly explains the increased use of plea bargaining.[8] At common law, the "jury trial was a summary proceeding,"[9] conducted by private individuals or sheriffs. The framers of the Constitution laid the foundations of an adversarial justice system in the new republic.[10] But during the early part of the nineteenth century, many criminal prosecutions occurred without lawyers for the defendant, the prosecution, or both.[11] As the American legal profession grew, and more trials involved lawyers, the length of the jury trial increased.[12] Correspondingly, guilty plea rates increased.[13] Therefore, plea bargaining may be viewed as a natural outgrowth of a progressively adversarial criminal justice system.

The United States Supreme Court did not address the constitutionality of plea bargaining until well after the establishment of plea bargaining as part of the criminal justice system. In *Brady v. United States*,[14] the Supreme Court validated the use of plea bargaining in the American judicial system. Acknowledging the prevalence of guilty pleas in American courts, the *Brady* court observed that defendants who plead guilty benefit by incurring lesser penalties than they would if they were found guilty after trial.[15] *Brady* also acknowledged that plea bargains allow the state to conserve its overburdened judicial and prosecutorial resources.[16] In light of these circumstances, the *Brady* court concluded that even though plea bargains potentially threaten the fifth amendment privilege against self-incrimination and the sixth amendment right to a jury trial, extending such a benefit to a defendant who ex-

Maj Desmond (B.S., Northeastern University; J.D., Loyola University of Chicago School of Law), is currently attending Air Command and Staff College. He is a member of the Illinois Bar.

tends a benefit to the state in return does not violate the Constitution.[17]

PLEA AGREEMENTS IN MILITARY PRACTICE

Notwithstanding the fact that pretrial agreements were not specifically mentioned in either the Uniform Code of Military Justice or the Manual for Courts-martial until the 1984 Manual, they had long been sanctioned in military courts-martial.[18] In an effort to bring military practice into line with its civilian counterpart and to deal with a growing backlog of courts-martial, Major General Franklin P. Shaw, Acting The Judge Advocate of General of the Army, sent a letter dated 23 April 1953 to the staff judge advocates of major commands in which he advised them to follow the civilian practice and encourage pretrial agreements between the convening authority and the accused.[19] He cautioned judicious use of pretrial agreements, noting that "it would be better to free an offender completely, however guilty he might be, than to tolerate anything smacking of bad faith on the part of the government."[20] Although he encouraged his subordinates to incorporate plea bargaining into their trial practice, Major General Shaw offered little guidance as to how they should accomplish the mission.

In the absence of regulation, questionable practices arose in the administration of plea bargaining that required military courts to act to ensure the "effectiveness and integrity of the trial and appellate processes."[21] The earliest military cases concerning plea bargaining were decided by the Army Board of Review.

In *United States v. Callahan*,[22] the accused, as part of a pretrial agreement, waived his right to present matters in extenuation and mitigation. The central concern of the board was that this agreement deprived the trial court of the "essential facts" required to adjudge an appropriate sentence.[23] Although the board found plea bargaining in general "legal, proper, and under appropriate circumstances, highly desirable," it held that "this right [the right to present matters in extenuation and mitigation] is an integral part of military due process, and the denial of such right is prejudicial to the substantial rights of the accused."[24]

United States v. Banner[25] involved a complicated factual issue concerning personal jurisdiction. Pursuant to a pretrial agreement, the accused waived his right to litigate the jurisdiction motion.[26] On appeal, the board held that there was no jurisdiction and that the pretrial agreement provision was void. The court said that "in the usual case involving jurisdiction, neither law nor policy could condone the imposition by a convening authority of such a condition."[27] Noting that jurisdiction can be raised at any time, even for the first time on appeal or in collateral proceedings, the court said that "where questions of fact must be determined…due process of law may require that the accused's opportunity to litigate the jurisdictional matter at trial be not foreclosed by pretrial negotiations between the accused and the convening authority."[28]

One year after *Callahan* and *Banner,* the United States Court of Military Appeals acknowledged the validity of pretrial agreements for the first time. *United States v. Allen*[29] was very similar to the issue in *Callahan*; as part of the pretrial agreement, no evidence in extenuation or mitigation was offered during sentencing. The Court of Military Appeals recognized the validity of pretrial agreements between the accused and the convening authority, but like the Army Board of Review, it cautioned that "the agreement cannot transform the trial into an empty ritual."[30]

THE MANUAL FOR COURTS-MARTIAL

With the promulgation of the 1984 Manual for Courts-martial (Manual), the President set forth specific limits for pretrial agreements. Under Rule for Courts-martial (R.C.M.) 705 of the 1984 Manual, there are many terms that the accused may offer to encourage the convening authority to enter into a pretrial agreement.[31] Typically, a pretrial agreement will include an offer to plead guilty to one or more charges and specifications. It usually includes an agreement to enter into a stipulation of fact concerning the charges and specifications to which the accused will plead guilty. Additionally, the accused may agree to waive certain procedural requirements, such as an article 32 investigation, trial by members, or the personal appearance of witnesses during the sentencing proceedings.[32] The accused may also agree to waive motions pertaining to substantive legal issues.[33] The accused can agree to testify in the trial of another or to provide restitution.[34] In certain situations, the accused may agree not to engage in further misconduct for a specified period of time.[35]

In return for the accused's promises, the convening authority may agree to refer the charges to a certain level of court-martial, to refer a capital offense as non-capital, to withdraw one or more charges or specifications, or to direct the trial counsel to present no evidence on one or more charges or specifications.[36] The convening authority may also agree to take specified action on the sentence, such as approving no sentence in excess of a specified maximum.[37]

The 1984 Manual specifically prohibits the enforcement of pretrial agreement terms that deprive the accused of certain fundamental rights. The rights listed

are the right to counsel, the right to due process, the right to challenge jurisdiction, the right to a speedy trial, the right to complete sentencing proceedings, and the right to appeal.[38] This provision in the 1984 Manual codifies earlier decisions of military courts that prohibited pretrial agreements containing promises to waive fundamental rights.

PERMISSIBLE TERMS AND CONDITIONS

The Manual clearly recognizes the right of an accused to make certain promises or waive procedural rights as bargaining chips in negotiating a pretrial agreement, while at the same time, recognizing provisions that he may not waive. The Manual also prohibits provisions that violate public policy.[39] However, R.C.M. 705 is not exclusive, and the Court of Appeals for the Armed Forces has sanctioned several pretrial agreement provisions over the years that are not specified in R.C.M. 705.

• Waiver of Motions

Perhaps the most significant early opinion of the then Court of Military Appeals dealing with waiver of motions in pretrial agreements is *United States v. Cummings*.[40] The accused pled guilty at Camp Pendleton, California, pursuant to a pretrial agreement which included a chronology of the processing of his case and provided that "the accused waives any issue which might be raised which is premised upon the time required to bring this case to trial (and specifically waives any issue of speedy trial or denial of due process)."[41] The court, in an opinion authored by Judge Ferguson, concluded that "the inclusion in this agreement of a waiver of accused's right to contest the issues of speedy trial and due process are [sic] contrary to public policy and void."[42] The court cited the opinions of the Army Board of review in *Callahan*[43] and *Banner*[44] and found, as with the jurisdiction issue in *Banner*, neither the statutory right nor the constitutional due process right to speedy trial were waived by a guilty plea.[45] Like the board in *Banner*, the court thought itself faced with an unresolved legal issue which, owing to the pretrial agreement, had not been litigated below, and accordingly, it lacked an adequate record for review.[46]

Limited to this holding, *Cummings* should be read to say only that waiver of a motion, pursuant to a pretrial agreement, which is not waived upon entry of the plea of guilty, is against public policy because it undermines the ability of the appellate court to review the issue when raised for the first time on appeal. This is consistent with the earlier cases that were concerned with protecting the effectiveness of the trial and appellate processes.

• Pretrial Punishment

In *United States v. McFayden*,[47] the accused argued that public policy prohibited him from waiving his right to litigate an allegation of pretrial punishment in violation of Article 13, UCMJ. The accused had been placed in pretrial confinement in a Navy brig. While not arguing that this constituted pretrial punishment per se, the accused claimed that he had been stripped of his rank, denied an opportunity to contact counsel, and, when he could contact his attorney, he claimed their calls were monitored.[48]

Although he believed these actions violated Article 13, the accused nevertheless offered to waive his right to litigate that claim as part of his pretrial agreement.[49] The government acceded and agreed to the pretrial agreement (PTA). At trial, the military judge fully explored the PTA with the accused, and conducted a thorough inquiry of the accused's understanding of the provision waiving the Article 13 motion. During sentencing, the military judge allowed the accused to discuss the circumstances of the pretrial punishment and also permitted defense counsel to argue those circumstances as matters in mitigation and extenuation.[50] On appeal, the accused contended that public policy should preclude him from waiving a right to litigate a claim of punishment in violation of Article 13.[51]

Addressing the validity of the waiver, the Court of Appeals for the Armed Forces credited the military judge with conducting a thorough inquiry into the PTA.[52] The Court noted that the waiver of the pretrial punishment issue originated with the accused and that the defense did not wish to raise the motion. The Court, however, remained somewhat concerned about such terms in future cases. It created a prospective rule to ensure that such waivers are truly knowing and voluntary. For all cases tried after 20 November 1999, a military judge faced with such a provision should "inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion."[53]

Despite the Court's favorable review of the military judge's actions and the sanctioning of a new pretrial agreement provision, the *McFayden* holding is problematic. For example, should the military judge hold an evidentiary hearing? Or, since military judges have broad discretion in fashioning Article 13 violations,[54] should the military judge fashion a remedy without a hearing? What happens after the military judge informs the accused of the potential remedy for an Article 13 violation and the accused then withdraws from the pretrial agreement? Counsel for both sides must be

alert for such issues when confronted with the type of waiver in *McFayden*.

- **Stipulations of Fact**

Most pretrial agreements require that the accused enter into a stipulation of fact concerning the offenses that are the subject of the agreement. The military judge must "satisfy himself that the accused understands the nature of the stipulation, its effect and that the accused assents thereto."[55] The Manual states that ordinarily the military judge should ensure that the accused understands the stipulation, the right to not stipulate, and that he consents to it.[56]

In *United States v. Taylor*,[57] the accused pled guilty pursuant to a pretrial agreement and entered into a stipulation of fact that incorporated, by reference, a sworn statement made by the accused. The defense objected to the stipulation and statement. The military judge heard argument, ruled that the stipulation was proper, and redacted certain portions of the statement.[58] On appeal, the accused claimed that the documents admitted at the trial were prejudicial because they contained "uncharged misconduct and exaggerated facts."[59]

In its appellate review, the Army Court of Military Review found it necessary to comment on the propriety of litigating motions to redact stipulations. It opined that the proper place to consider the contents of stipulations is in counsel's office prior to trial.[60] The military judge is not an arbiter in pretrial negotiations and by entertaining such motions, he improperly inserts himself into such negotiations. The court declared that the military judge's role with respect to contents of stipulations is to assure fundamental fairness and prevent plain error.[61] Beyond that, he should grant a recess to allow the parties to come to an accommodation. If they cannot, he should sustain any defense objection, advise the accused that he has not complied with the pretrial agreement, and that the convening authority is no longer bound by it.[62]

A second approach to the same issue was addressed in *United States v. Glazier*.[63] Pursuant to a pretrial agreement, Glazier pled guilty to wrongful use of marijuana and wrongful appropriation of a motor vehicle. At trial, he moved to redact certain aggravating matters from the stipulation of fact.[64] The military judge ruled that the aggravating matters were relevant to the offenses and denied the motion. The accused then withdrew his objection to the stipulation.[65] On appeal, he claimed that the military judge erred in admitting the evidence. The Army Court of Military Review disagreed and affirmed.

After satisfying itself that the ruling in the trial court was correct, the court found it necessary, in light of *Taylor*,[66] to discuss the role of the military judge when motions to redact stipulations of fact are raised. The court declared that *Taylor* unnecessarily restricts the military judge in the handling of evidence.[67] It stated that if the military judge refused to rule when such a motion is made, it would be "an abrogation of his responsibility to insure cases are fairly decided upon relevant admissible evidence."[68] Moreover, the accused has a right to an evidentiary ruling. A procedure that conditions a pretrial agreement on the acquiescence to the admission of inadmissible evidence is fatally flawed. Once the evidentiary ruling is made, however, the military judge does not redact the stipulation. Rather, the judge permits the parties to decide if they want to go along with the stipulation or come to a compromise.[69]

Thus, under *Glazier*, the defense has the right to make its motion and to obtain a ruling from the military judge on the admissibility of such evidence. However, the military judge may not enforce the ruling by the usual method of denying admissibility. Instead, the judge can only tell the parties that the evidence is inadmissible and ask what they want to do. At that point, the defense can try to bargain further with the prosecution, accede to the stipulation, or withdraw from the agreement. Thus, the defense can win its motion, have the judge rule the evidence is inadmissible, and then be forced to take it or leave it. In the last analysis, the defense has the ability to obtain a ruling that it is right, but it has no right to a judicial remedy.

The admissibility of a stipulation of fact that contains evidence of uncharged misconduct remains far from settled. In *United States v. DeYoung*,[70] the Court of Military Appeals held that when an admissibility clause is included in the stipulation and the government has not overreached its authority in obtaining the stipulation, the defense counsel's only alternative to stipulating to uncharged misconduct is to withdraw from the stipulation and any associated pretrial agreement. In a narrowly-worded opinion by Judge Sullivan, the Court of Military Appeals neither overruled *Glazier* nor addressed the situation in which the stipulation is silent as to admissibility. The parties can still "agree to disagree" by entering into a stipulation, less the admissibility clause, and by litigating the issue at an article 39a session.[71] In such a situation, the trial judge has an obligation to determine: 1) whether the evidence is relevant to prove or disprove a matter set forth by Rule for Courts-martial 1001(b)(1)-(5); and 2) assuming the evidence is relevant and admissible, whether the prejudicial impact outweighs any probative value.[72]

- **Unlawful Command Influence**

In *United States v. Weasler*,[73] the Court of Appeals for the Armed Forces held that a defense-initiated waiver of unlawful command influence that occurred in the accusatory stage was a permissible term in a pretrial agreement.

Specialist Weasler wrote $8920 worth of bad checks. After discussing Weasler's misconduct with the battalion commander, Weasler's company commander, Captain Morris, decided to recommend a general court-martial.[74] As she was about to go on leave, Captain Morris briefed First Lieutenant Hottman, who would be the acting commander while Captain Morris was on leave, about the impending preferral of charges against Weasler. Captain Morris told 1Lt Hottman that if the Weasler charges appeared while she was on leave, 1Lt Hottman should simply sign them.[75] The charges appeared, and 1Lt Hottman preferred the charges as instructed and recommended a general court-martial. Weasler's battalion and brigade commanders also recommended a general court-martial, which was ultimately the disposition directed by the convening authority in referring the case to trial.[76]

During voir dire of the panel, facts surrounding the preferral came to light, and the defense moved to dismiss the charges because of the alleged unlawful command influence exerted by Captain Morris over 1Lt Hottman during the preferral process.[77]

After hearing testimony from Captain Morris, the military judge found that the defense had met its burden of a *prima facie* showing of unlawful command influence. The military judge granted a continuance for the Government to attempt to secure the testimony of 1Lt Hottman.[78] During the recess, defense counsel proposed to waive the motion to dismiss in exchange for a favorable sentence limitation. Back in court, defense counsel explained that the idea to waive the unlawful command influence motion originated with defense and was offered in light of the almost certain re-preferral of charges that would result if the defense prevailed on the motion. Defense counsel convinced the military judge of the propriety of the waiver, and the military judge ultimately agreed that the pretrial agreement was valid.[79]

The Court of Appeals for the Armed Forces, while declaring that government-mandated waivers of unlawful command influence are against public policy, held such waivers are permissible when they originate with the defense.[80] The Court noted that the command interference complained of "did not affect the adjudicative process" but instead impacted only upon the "accusatory stages" of the case.[81] In upholding the validity of the agreement, the *Weasler* court relied in large part upon the United States Supreme Court decision in *United States v. Mezzanatto*.[82] In *Mezzanatto*, the government, as a pre-condition to proceeding with pretrial discussions with the accused and counsel, required the accused to agree that any statements made during the meeting could be used to impeach contradictory statements made at trial. The Court of Appeals for the Armed Forces in *Weasler* (quoting *Mezzanatto*) noted the "mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether."[83] In *Mezzanatto*, the Supreme Court declared that even "the most basic rights of criminal defendants are…subject to waiver,"[84] including "many of the most fundamental protections afforded by the Constitution."[85]

Concurring only in the result, Chief Judge Sullivan pronounced the majority opinion in *Weasler* to be "a landmark decision…which, for the first time permits affirmative waiver of a prima facie case of unlawful command influence."[86] Chief Judge Sullivan warned against allowing an accused a "blackmail" option whenever the accused discovers a commander may have committed unlawful command influence.[87] In a separate concurrence, Judge Wiss noted with disfavor attempts to distinguish pretrial command influence from command influence occurring later in the trial process.[88] Judge Wiss argued that "the greatest risk presented by unlawful command influence has nothing to do with the stage at which it is wielded."[89]

Perhaps the most important part of *Weasler* was the Court's promise, in response to Judge Sullivan's and the late Judge Wiss' concurrences, to conduct special review of all future cases that involve pretrial agreement terms based on unlawful command influence.[90] Since *Weasler*, neither the intermediate service courts nor the Court of Appeals for the Armed Forces have had the opportunity to review a case involving an unlawful command influence term in a pretrial agreement. The emphasis for post-*Weasler* cases has been directed toward informing practitioners to review *Weasler* with a modest eye – that is, terms in a pretrial agreement must not violate R.C.M. 705 and public policy.

- **Withdrawal from the PTA**

In *United States v. Bray,*[91] the accused was charged, *inter alia*, with assault and battery on a five-year-old child, kidnapping that child, and committing indecent acts on the child.[92] He negotiated a pretrial agreement that limited the potential confinement to twenty years.[93] The accused completed the providence inquiry. During sentencing, a defense witness, a psychiatric social worker, testified that "it was possible that appellant was not responsible for his actions because of having sprayed insecticide at some unspecified ear-

lier period of time..."[94] The military judge informed the accused of the potential defense to the charge.[95] The military judge also informed the accused of his right to withdraw his plea and the meaning and effect of that action. After a short recess and receipt of counsel's advice, the accused withdrew his plea.[96] Shortly thereafter, the accused negotiated a new pretrial agreement with the convening authority that only limited the accused's confinement to thirty years.[97] The military judge sentenced the accused to thirty-seven years of confinement. On appeal, the Court of Appeals for the Armed Forces considered whether the accused was prejudiced when the convening authority increased the quantum portion by ten years.

The Court held that when an accused withdraws from a pretrial agreement, especially after receiving the benefit of counsel's tactical advice, he is left to the unpredictable forces of the market in negotiating a second pretrial agreement.[98] A convening authority can increase the sentence cap without violating the spirit and intent of R.C.M. 705, absent any defense reliance on the original pretrial agreement.[99] In holding that the accused was not prejudiced, the Court noted that this rule was neither new nor unique to the military.[100]

In addition, the *Bray* court noted the disparity of authority between an accused and a convening authority to withdraw from a pretrial agreement. Rule for Courts-Martial 705(d)(4) grants an accused almost unlimited authority to withdraw from a pretrial agreement. Conversely, R.C.M. 705 (d)(4)(B) provides that a convening authority can only withdraw from a pretrial agreement in certain circumstances. The relative positions of the parties, as specified in the Manual, give an accused the advantage by severely restricting a convening authority's right to withdraw from a pretrial agreement-the government and the defense are on a level playing field.

The *Bray* court easily resolved the issue. The Court noted that the accused: 1) had the benefit of a level playing field regarding withdrawal under the Manual; 2) decided to forego the military judge's offer to reopen the providence inquiry; 3) had the benefit of informed counsel's advice; 4) received two explanations of his rights from the military judge based on a term in the pretrial agreement that dealt specifically with withdrawal of his pleas; and 5) still received a substantial benefit from the second pretrial agreement.[101]

As a practice tip, *Bray* should be a warning to defense counsel that, even with a pretrial agreement, proper case preparation is a must. What started as testimony for mitigation led to the raising of a defense. Better witness preparation may have produced better results. Here, the accused was deprived of a ten-year reduction of his confinement because of a sentencing witness' testimony.

CONCLUSION

Plea bargaining was a natural outgrowth of increasingly crowded American criminal court dockets. Plea trial agreements were adopted by the military to bring military criminal practice into line with its civilian counterpart. This article reviewed some of the significant appellate decisions concerning pretrial agreements. This article was not intended as, nor does it purport to be, a complete survey on the caselaw of pretrial agreements. While a military accused enjoys wide latitude in proposing terms to the convening authority, R.C. M. 705 and appellate caselaw place certain areas off-limits. All military law practitioners are advised to remember the overarching principle that pretrial agreements must not violate the specific prohibitions of R.C.M. 705(c) or public policy.

[1] U.S. Const. amends. V,VI,VII.
[2] Manual for Courts-Martial 1984, Rule for Courts-Martial 705.
[3] U.S. Const. Art III, 2. *See also* U.S. Const. VI ("in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State.").
[4] *See* The Federalist No. 83 (Hamilton) ("The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury").
[5] *See* Albert W. Alschuler, Plea Bargaining and Its History, 79 Colum. L. Rev. 1, 3 (1979).
[6] *Commonwealth v. Battis*, 1 Mass. 95 (1804).
[7] *Id* at 96.
[8] *See* Lawrence M. Friedman, Crime and Punishment in American History 235 (1993).
[9] *Id* at 262.
[10] *See* U.S. Const amend V.
[11] See Friedman, *supra* note 8, at 245.
[12] *Id*.
[13] Raymond Moley, The Vanishing Jury, 2 So. Cal L. Rev. 97, 107 (1928).
[14] 397 U.S. 742 (1970).
[15] *Id* at 759.
[16] *Id*.
[17] *Id*.
[18] *See* 1 Francis A. Gilligan & Frederic Lederer, COURT-MARTIAL PROCEDURE § 12-10.00, 454 & n.2 (1991).
[19] *Id*.
[20] *See* Charles W. Bethany Jr., The Guilty Plea Program 4-7 (April 1959)(unpublished Advance Course thesis, The Judge Advocate General's School)(on file in The Judge Advocate General's School Library, Charlottesville, Virginia).
[21] *United States v. Mitchell*, 15 MJ 238, 240-41 (1983).
[22] 22 C.M.R. 443 (A.B.R. 1956).
[23] *Id* at447.
[24] *Id* at 446-47.
[25] 22 C.M.R. 510 (A.B.R. 1956).
[26] *Id* at 519.
[27] *Id*.
[28] *Id*.
[29] 8 C.M.A. 504, 25 C.M.R. 8 (1957).
[30] 8 C.M.A. at 507, 25 C.M.R. at 11.

[31] MCM, *supra* at note 2 , R.C.M. 705(c)(2).
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] MCM, *supra* at note 2, R.C.M. 705(b)(2).
[37] *Id.*
[38] MCM, *supra* at note 2, R.C.M. 705(c)(1).
[39] *Id*.
[40] 17 C.M.A. 376 (1968).
[41] *Id*. at 378.
[42] *Id*. at 379.
[43] *See supra* notes 25-27.
[44] *See supra* notes 28-31.
[45] *Cummings*, 17 C.M.A. at 379.
[46] *Id*.
[47] 51 M.J. 289 (1999).
[48] *Id*. at 290.
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*. at 291.
[53] *Id*.
[54] *See, e.g*., *United States v. Newberry*, 37 M.J. 777, 781 (A.C.M.R. 1992).
[55] *See United States v. Terrell*, 7 M.J. 511, 512 (A.C.M.R. 1979).
[56] R.C.M. 811(c) discussion.
[57] 21 M.J. 1016 (A.C.M.R. 1986).
[58] *Id*. at 1017.
[59] *Id.* at 1016.
[60] *Id*. at 1017.
[61] *Id*. at 1018.
[62] *Id*.
[63] 24 M.J. 550 (A.C.M.R. 1987).
[64] *Id*. at 552.
[65] *Id*.
[66] *See supra* notes 58-62.
[67] *Glazier*, 24 M.J. at 553.
[68] *Id*. at 554.
[69] *Id*. at 553.
[70] 29 M.J. 78 (C.M.A. 1989).
[71] *Id*. at 80.
[72] *Id*. at 81.
[73] 43 M.J. 15 (1995).
[74] *Id*. at 16.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] *Id*. at 19.
[81] *Id*. at 17-18.
[82] 513 U.S. 196 (1995).
[83] *Weasler*, 43 M.J. at 18.
[84] *Mezzanato*, *supra* note 85 at 201.
[85] *Id*.
[86] *Weasler*, 43 M.J. at 20.
[87] *Id* at 21.
[88] *Id*.
[89] *Id*.
[90] *Id* at 19.
[91] 49 M.J. 300 (1998).
[92] *Id* at 301.
[93] *Id* at 307.
[94] *Id* at 302.
[95] *Id*.
[96] *Id* at 303.
[97] *Id*.
[98] *Id* at 308.
[99] MCM, *supra* note 2.
[100] *Bray*, 49 M.J. at 308.
[101] *Id*.

FOREIGN MILITARY FLYING TRAINING IN THE CONUS THE UNITED STATES AS A RECEIVING STATE

Colonel Robert F. Stamps (USAFR)

INTRODUCTION

During World War II and the following Cold War the United States Air Force (USAF) maintained a large number of overseas air bases. These USAF air bases spanned the globe in Europe, Africa, the Middle East, Asia and the Pacific. In order to train its aircrews the USAF built and maintained training ranges and flying routes in foreign countries. The foreign ranges also provided air space for our allies to train and for the USAF to train allied foreign air forces. After the Cold War ended the USAF closed many of its overseas air bases and foreign training ranges. As the USAF reduced its overseas presence, many of our allies, especially those in densely populated countries, no longer had access to flying training ranges or flying routes.

The USAF is the world's premier air force and operates the worlds best flying training ranges. Most of these ranges are in the continental United States (CONUS). The USAF has trained foreign pilots and aircrews on these ranges since the beginnings of the Cold War, but during the last decade foreign military flying training in the CONUS has matured and expanded. The expansion of foreign flying training in the CONUS has raised a variety of interesting international and domestic legal issues.[1] This article examines the legal basis for foreign flying training in the CONUS and some issues of international law that have arisen because such training.

AUTHORITY

Authority for foreign flying training in the CONUS is found in the Arms Export Control Act (AECA).[2] The AECA authorizes the President to sell defense articles and defense services from the stocks of the Department of Defense (DoD) to eligible countries or international organizations.[3] The President may sell foreign military flying training services because the AECA definition of "defense service" includes "training."[4] The term "training" is broadly defined in the AECA to include the concepts of "formal or informal instruction of foreign students in the United States;"[5] it includes as well the concept of the military "training exercise."[6] This definition recognizes that the military has traditionally encompassed two distinct and different concepts in the term "training." The first concept of training is the teaching of new skills, such as basic training and advanced individual training courses. The second, and much broader, concept of training is to *maintain proficiency for combat*. This second concept includes flying training activities such as practice bombing runs, mock aerial combat, air-to-air refueling, and air mobility rodeos as well as the attendant maintenance and logistics functions.

The AECA authority to sell defense articles and defense services, such as flying training, is implemented through the Department of Defense's (DoD) Foreign Military Sales (FMS) program. The President has delegated most of his AECA authority to the Secretary of Defense (SECDEF).[7] SECDEF delegated to the Director, Defense Security Cooperation Agency (DSCA)[8] the authority to direct, administer, and supervise the execution of security assistance programs, including SECDEF's responsibilities under the AECA.[9] SECDEF also directed DSCA to develop and promulgate Security Assistance procedures.[10] DSCA implemented this responsibility by issuing the Defense Security Management Manual (SAMM).[11] SAMM Chapter 7 provides the procedures for preparing and processing FMS cases and states that the Letter of Offer and Acceptance (LOA) is the authorized document for use by the USG to sell defense articles to a foreign government.[12] The FMS LOA contains Standard Terms and Conditions (STCs) that set forth the obligations and responsibilities of the parties.[13] The USAF writes FMS LOAs for foreign military flying training in the CONUS. The FMS LOAs contain specific provisions for command and control of foreign military flying training in the CONUS.

BACKGROUND

Foreign flying training in the CONUS before 1980

Col Stamps (A.B., University of Illinois; J.D., Wake Forest University; LL.M., George Washington University) is assigned to the International and Operational Law Division, Office of The Judge Advocate General, Headquarters United States Air Force, Washington, DC.

was generally limited to students from allied air forces that trained in USAF courses. The German Air Force (GAF) was one of the first foreign air forces to train in the CONUS. Using its own T-37B and T-38A aircraft, the GAF conducted Undergraduate Pilot Training at Sheppard Air Force Base, Texas pursuant to FMS procedures and the *Sheppard Agreement*.[14] In 1980 the GAF flying program at Sheppard AFB was opened to all North Atlantic Treaty Organization (NATO) member nations and the *Sheppard Agreement* expanded into the Euro-NATO Joint Jet Pilot Training Program (ENJJPT) for undergraduate pilot training. Initially, the ENJJPT Program included eleven NATO nations and the USAF.[15] ENJJPT now includes twelve NATO nations and the USAF. The ENJJPT Program is an international cooperative training program,[16] with a multinational steering committee, multinational instructor pilot cadre, a unique training syllabus, and a multinational budget. ENJJPT has expanded to include courses in undergraduate pilot training and introduction to fighter fundamentals.

During the 1980s the USAF, through the Arizona Air National Guard (ANG), engaged in a cooperative F-16 training program with The Netherlands in Tucson, Arizona. The USAF also authorized Singapore to train on F-16 aircraft at Luke AFB, Arizona. Germany was authorized to train on the F-4 aircraft at George AFB, California. Both of the F-16 programs, however, were discontinued.

When the Cold War ended the USAF closed many of its overseas bases and training ranges. Many foreign nations, no longer fearing imminent invasion from communist powers and/or responding to citizen complaints about jet noise over urban areas, significantly curtailed the ability of their military flying forces to train on low level routes. The USAF also closed many CONUS bases, including George AFB, where the Germans were flying F-4 aircraft. When George AFB closed the German F-4 program moved to Holloman AFB, New Mexico. After The Netherlands terminated the cooperative F-16 training program in Tucson the ANG opened an "international schoolhouse" to train foreign F-16 pilots from allied nations.

At approximately the same time that the USAF began to reduce its overseas presence and close domestic bases it adopted a new theory of base management. Under this management theory the USAF eliminated the roll of the "base commander" and consolidated all authority for bases under the wing commander. This management theory was commonly referred to as "one base, one Wing, one boss."

In the early 1990s the Republic of Singapore Air Force (RSAF) requested authority to renew its F-16 training program at Luke AFB. This program inaugurated the modern era of foreign flying training in the CONUS. Negotiations with the RSAF stressed the USAF concept of "one base, one Wing, one boss." The FMS LOA with Singapore recognized that the USAF wing commander controlled all flying operations originating from the base.

Day-to-day contact at Luke AFB between the USAF and RSAF was placed with the operations group commander and the senior RSAF officer. Only significant national issues could be raised by the senior RSAF officer to the wing commander. RSAF flying was placed in a combined USAF-RSAF squadron commanded by an USAF officer and detailed management arrangements were included in the FMS LOA.

Germany flies the TORNADO fighter-bomber, a plane that is not in the USAF inventory. For years the GAF trained its TORNADO crews at the United Kingdom's (UK) Cottesmore range. In the early 1990s the UK notified Germany that it was going to cease TORNADO training at Cottesmore. The GAF asked the US if it could locate a small TORNADO detachment at Holloman AFB,[17] where it was already conducting F-4 training.[18]

The USAF's written arrangement with the RSAF at Luke AFB served as a template for negotiating Germany's request to perform flying training at Holloman AFB. Since the USAF does not fly the TORNADO the "model" developed for RSAF F-16 flying at Luke AFB had to be tailored. In addition to the FMS LOA, the USAF and Germany negotiated the *Holloman TORNADO Agreement* to set forth the obligations and responsibilities of the parties. Again, as at Luke AFB, the wing commander was given responsibility for all flying operations originating from Holloman AFB. The GAF commander, after coordinating with the USAF operations group commander, was given responsibility for TORNADO flying training. The original *Holloman TORNADO Agreement* authorized the GAF to base twelve TORNADO aircraft at Holloman AFB. Subsequently, the *Holloman TORNADO Agreement* was amended to authorize the GAF to base forty-two TORNADO aircraft at Holloman AFB.

Foreign military flying training in the CONUS continued to grow throughout the 1990s. Singapore was authorized to fly F-16 aircraft at both Luke AFB and Cannon AFB, New Mexico and to fly KC-135 tanker aircraft at McConnell AFB, Kansas. The management of, and USAF-RSAF administrative arrangements for, both the Cannon and McConnell programs were modeled on the Luke program. Taiwan, using a management program modeled on the USAF-RSAF arrangements, is flying F-16 aircraft at Luke AFB. Other nations are also negotiating with the US for authority to engage in military flying training in the CONUS.

In addition to those nations that engage in year-round CONUS flying training, many foreign air forces engage in flying training in the US when they participate in USAF military exercises such as *Red Flag* and *Green Flag*. These exercises simulate actual combat conditions and take place on instrumented ranges near Nellis AFB, Nevada. USAF flag exercises offer the best military flying training available anywhere in the world and attract many foreign participants.

INTERNATIONAL LEGAL ISSUES

Foreign flying training in the CONUS has raised a number of interesting international legal issues relating both to the presence of foreign military forces and to their flying activities. Germany and the ENJJPT nations are all parties to the *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces (NATO SOFA)*.[20] The *NATO SOFA* is a treaty[21] and sets forth the legal status of NATO member State military forces when in each other's territory. Accordingly, the provisions of the *NATO SOFA* apply to German and ENJJPT military members in the US.[22]

The *NATO SOFA* refers to military forces as belonging to either a "sending State"[23] or a "receiving State."[24] The USAF, because of its history of overseas basing, has abundant experience as a sending State. Before the 1990s, however, the USAF had little experience as a receiving State. With the expansion of foreign military flying training in the CONUS the USAF is developing experience as a receiving State.

USAF bases overseas have traditionally included commissaries, exchanges, hospitals, flying clubs, stockades for military prisoners, and other amenities. The legal basis for many of these activities, at least in NATO member States, is the *NATO SOFA*.[25] Nevertheless, when the GAF notified the USAF that it planned to station a flight surgeon at Holloman AFB the USAF was concerned about the flight surgeon's ability to practice medicine in the CONUS without a valid US medical license. A legal review determined that German medical officers had been providing medical care to German personnel in the CONUS since at least 1986 relying for authority on NATO SOFA Article IX, paragraph 5.[26] The GAF, again relying on NATO SOFA for authority, also opened a small commissary at Holloman AFB for its personnel. The USAF concurred with the GAF that its commissary was exempt from both US taxation[27] and customs duties.[28]

Maintaining discipline is a critical responsibility for all military forces. The USAF's arrangements with the GAF, the ENJJPT nations, Singapore and Taiwan all state that the foreign nation is responsible for maintaining military discipline among their forces in the CONUS. The foreign military members are, however, subject to Federal and state criminal laws. Fortunately, there have been no significant disciplinary problems among these forces.

CLAIMS: FMS "100% LIABILITY" OR SOFA COST SHARE

Military flying training involves sophisticated high-performance aircraft engaged in complex aerial maneuvers. Several foreign aircraft participating in flying training in the CONUS have crashed giving rise to a number of third party claims for damages. Foreign military personnel stationed at CONUS Air Force bases have also been involved in ground transportation accidents that have given rise to third party damage claims. Settlement of third party claims arising from these incidents has been complicated by competing legal theories on financial liability.

The FMS LOA STCs provide that the foreign nation will indemnify and hold the USG harmless from any loss or liability, whether in tort or in contract, which might arise in connection with the LOA.[29] The NATO SOFA provides for sharing the cost of third party claims between the responsible sending State(s) and the receiving State.[30] During the 1980s and early 1990s, albeit in the absence of any aircraft or ground transportation accidents, the USAF and DSCA argued that foreign military forces in CONUS pursuant to FMS LOAs were liable for one hundred percent (100%) of third party claims. NATO member nations argued strenuously that the cost sharing claims provisions in the NATO SOFA should apply to third party claims arising from their military activities in CONUS, regardless of whether or not the military activities were under a FMS LOA.

During the 1980s and early 1990s the financial stakes were low because there was little foreign flying in the CONUS and those nations that were flying in CONUS had few, if any, incidents giving rise to third party claims. During this period the argument between the USAF and DSCA on one side, and NATO nations on the other side, over whether the FMS LOA provisions or the NATO SOFA provisions control in the event of liability for third party claims simmered along with each side tacitly agreeing to disagree. In the mid-1990s, however, the financial stakes became higher as Germany entered into negotiations to establish a wing-sized Tornado training operation at Holloman AFB.

The original *Holloman Tornado Agreement* provided for approximately twelve German Tornados to be assigned to Holloman AFB. In 1998 the *Agreement* was amended to increase the number of Tornado aircraft at

Holloman AFB to approximately forty-two.[31] Germany urged the USAF to include a provision in the *Agreement* recognizing the applicability of NATO SOFA. The USAF concurred, but tried to reserve its position on liability for third party claims by drafting the text as follows:

> The Agreement between the Parties of the North Atlantic Treaty Regarding the Status of their Forces (NATO SOFA) signed in London on 19 June 1951 is applicable to activities under this Agreement. Financial obligations, however, will be in accordance with the terms and conditions of the FMS Letter of Offer and Acceptance (LOA) implementing this Agreement.[32]

During this same period the United States Marines sought to engage in training exercises in France. The French asked the Marines to sign an agreement with liability provisions similar to the liability provisions in FMS LOAs. After review, the Marines determined they did not have authority to commit to unlimited financial liability for third party claims and that the claims provisions of NATO SOFA should apply to their training activities in France. The French noted that the FMS LOAs offered by the DoD to them for combined exercises such as *Red Flag*, at Nellis AFB, Nevada[33] contain similar provisions for unlimited financial liability for third party claims. The Director, DSCA decided that the claims provisions of the NATO SOFA should be applied to third party claims arising from combined exercises in the United States. Specifically, the Director wrote to the military services and a number of Defense Agencies that:

> In cases where the DoD provides defense articles and services through Foreign Military Sales (FMS) to NATO countries to support their participation in a combined exercise with the United States, some NATO countries have requested application of NATO SOFA claims provisions which have been applied to U.S. exercise activities in their countries. They have objected to the Standard Terms and Conditions of FMS Letters of Offer and Acceptance (LOAs) on the mistaken assumption that, contrary to the NATO SOFA, the terms require the Purchaser to indemnify the USG fully with respect to all claims arising from exercise activities instead of just to claims arising under the LOA.
>
> It should be noted that Foreign Military Sales procedures are not the only authority for providing defense articles and services to support foreign country participation in combined exercises. The military services . . . also use Acquisition and Cross-Servicing Agreements (ACSAs) . . . .
>
> Whether support to a NATO country is provided under FMS or ACSA authority, liability for claims arising out of combined exercises shall be dealt with under Article VIII of the NATO SOFA. * * *[34]

Further clarification regarding whether FMS LOA provisions or NATO SOFA provisions are applicable to third party claims arising from foreign military activities in CONUS was obtained by DSCA from the Department of Justice's Civil Division, Tort Branch (hereinafter referred to as DOJ/CDTB). On October 19, 1998 a German Tornado flying on the Navy's China Lake test range crashed causing property damage, personal injury to one person, and substantial damage to USG property. The injured person sued both Germany and the USG in Federal Court.[35] The General Counsel, DSCA, provided DSCA's view to DOJ/CDTB on the issue of "whether the liability provisions in the standard terms and conditions of Foreign Military Sales (FMS) Letter of Offer and Acceptance (LOA), a government-to-government agreement, or the claims provisions of Article VIII of the NATO SOFA standards should apply to this claim."[36] The General Counsel observed that "over the years there has been debate and confusion about the applicability of FMS liability * * * (and that) FMS liability does not apply to activities, such as exercises, that are supported by FMS sales."[37] In fact, after noting that Germany was purchasing range services under the FMS LOA, the General Counsel stated that "even a broad reading of the LOA liability provisions does not sustain the argument that damages pleaded by the Plaintiff arose 'in connection with' the provision of range services. The fact that Germany was flying over the range does not establish the requisite nexus between the defense services and the crash."[38] The General Counsel concluded that "the FMS LOA liability provisions do not apply to claims arising from the China Lake Crash, and that such claims should be handled consistent with the provisions of NATO SOFA."[39] DOJ/CDTB adopted the General Counsel, DSCA's views and advised both Germany and DoD that the claim would be handled pursuant to the NATO SOFA.[40]

DSCA's General Counsel argues that the "FMS

LOA indemnification and hold harmless provisions apply only to claims directly related to the defense articles and services provided under a particular FMS LOA."[41] DSCA has, however, in the two memoranda quoted above, sharply limited the applicability of the FMS LOA liability provisions for FMS flying in foreign aircraft. Foreign flying in CONUS is over access routes, training areas and ranges. If foreign aircraft "flying over a range" does not establish a nexus between the defense services and the crash, it is hard to imagine an accident scenario that would provide such a nexus if a foreign aircraft is flying over an access route or training area - or even during a take-off or landing at a USAF base. Accordingly, USAF attorneys involved in claims resulting from foreign military flying in CONUS should seek guidance from AF/JAI and AF/JACT. This is because the interplay of FMS LOA liability provisions and the NATO SOFA liability provisions is still evolving and the rules are not yet settled.

For most non-NATO nations the FMS liability provisions require the foreign nation to assume responsible for the complete cost of third party claims resulting from their FMS military activities in the CONUS. Some non-NATO nations may enter into international agreements with DoD which contain third party claim cost sharing provisions similar to those in the NATO SOFA. Singapore, for example, has signed an agreement with DoD that contains an article dealing with claims.[42] However, the agreement with Singapore states that "in the event of conflict between the provisions of this Agreement and provisions of a . . . (FMS LOA) . . . the provisions of the . . . (FMS LOA) shall take precedence over the provisions of this Agreement."[43] Again, as with crashes involving NATO aircraft, USAF attorneys involved in claims resulting from non-NATO foreign military flying in CONUS should seek guidance from AF/JAI and AF/JACT.

CONCLUSION

For the foreseeable future the USAF will remain the world's premier air force and its flying training ranges will continue to excel above all other nations. The USAF expects to continue training foreign pilots and aircrews on CONUS ranges and training routes. USAF anticipates it will be encountering more interesting international and domestic legal issues resulting from the presence of foreign military forces engaging in flying training in the CONUS.

[1] A significant domestic legal issue involves litigation under the Administrative Procedures Act (5 USC 701) alleging violations of the National Environmental Policy Act (NEPA); in particular NEPA's requirement for federal agencies to analyze major federal actions significantly affecting the quality of the human environment and to prepare an environmental impact statement (EIS). An interesting side effect of NEPA litigation relating to foreign flying training is the beneficial effect of explaining NEPA to foreign government officials. Senior USAF attorney E. David Hoard, a renowned NEPA lecturer, who has lectured on NEPA to academics in Oxford, England and to German Ministry of Defense officials in Bonn, Germany, said "when I explain that a NEPA-style analysis creates a better project the foreign officials recognize NEPA's value and seek to emulate it."

[2] 22 USC 2751 *et seq*.

[3] 22 USC 2761(a)(1).

[4] 22 USC 2794(4).

[5] 22 USC 2794(5).

[6] 22 USC 2794(5).

[7] Executive Order No. 11958, as amended.

[8] DSCA was formerly called the Defense Security Assistance Agency (DSAA).

[9] DoD Directive (DODD) 5105.38, paragraph 2.

[10] DODD 5105.38, paragraph 4.1.9.

[11] DoD 5105.38-M.

[12] DoD 5105.38-M, paragraph 70002.A.2.

[13] A copy of the STCs may be found in DoD 5105.38, Table 701-1. The STCs cover indemnification and assumption of risks, financial terms and conditions, transportation and discrepancies, warranties and dispute resolution.

[14] *Agreement between the Federal Minister of Defense of the Federal Republic of Germany and the United States of America regarding T-37/T-38 Pilot and Undergraduate Pilot Training Conducted in the United States for the German Federal Armed Forces (Sheppard Agreement)* (signed January 7, 1975).

[15] Participating nations are Belgium, Canada, Denmark, Germany, Greece, Italy, The Netherlands, Norway, Portugal, Turkey, Spain, United Kingdom and the US.

[16] International cooperative training programs are authorized under the AECA (22 USC 2761(a) and 2761(g)).

[17] The Heads of State conducted the initial discussions between Germany and the US, but the implementing arrangements were worked out between the German Ministry of Defense and the USAF.

[18] Holloman AFB is the closest Air Force Base to the Army's Ft Bliss, in El Paso, Texas where the GAF conducts air defense training. Locating its flying training near its air defense training was both convenient and cost effective for the GAF.

[19] *Memorandum of Agreement (MOA) Concerning the Conduct of Operations for German Air Force TORNADOS in the U.S. at Holloman Air Force Base, New Mexico ("Holloman TORNADO Agreement")*(signed 1994). The Holloman Tornado Agreement has been amended three times; twice in 1998 and once in 1999.

[20] 4 UST 1792; TIAS 2846; 199 UNTS 67 (Date of entry into force with respect to the United States of America: 23 August 1953). The NATO SOFA is a reciprocal agreement; i.e., its provisions apply not only to US military forces in NATO member States, but it also applies to military forces of NATO member States that are stationed in the CONUS.

[21] In *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), Chief Justice Marshall wrote that "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature . . .."

[22] Singapore and Taiwan, however, do not have a similar agreement with the US covering members of their military forces in the US.

[23] NATO SOFA Article I, paragraph 1d states: 'sending State' means the Contracting Party to which the force belongs.

[24] NATO SOFA Article I, paragraph 1e states: 'receiving State' means the Contracting Party in the territory of which the force or civilian component is located, whether it be stationed there or passing in transit.

[25] The international agreements setting forth the rights and obligations of US military forces in non-NATO nations, and the status of

US military personnel, are generally non-reciprocal; i.e., the agreement applied only to US military forces in the foreign country and not to foreign forces in the CONUS.

[26] Letter from DoD Office of the General Counsel to the Legal Affairs Section, Armed Forces Administrative Agency, Federal Republic of Germany, dated April 30, 1986, which stated, in part: "This will confirm the view I conveyed to you informally that Article IX (5) of the NATO Status of Forces Agreement authorizes German medical officers to provide medical care in the United States exclusively for members of the German forces, the civilian component and their dependents, without the necessity of obtaining licenses to practice medicine from local authorities."

[27] NATO SOFA Article X.

[28] NATO SOFA Article XI.

[29] FMS LOA STC paragraph 3 reads as follows:

3. Indemnification and Assumption of Risks

3.1 The Purchaser recognizes that the USG will procure and furnish the items described in this LOA on a non-profit basis for the benefit of the Purchaser. The Purchaser therefore undertakes to indemnify and hold the USG, its agents, officers, and employees harmless from any and all loss or liability (whether in tort or contract) which might arise in connection with this LOA because of:

3.1.1 Injury or death of personnel of Purchaser or third parties, or

3.1.2 Damage to or destruction of (a) property of DoD furnished to Purchaser or suppliers specifically to implement this LOA. (b) property of Purchaser (including the items ordered by Purchaser pursuant to this LOA, before or after passage of title to Purchaser), or (3) (*sic*) property of third parties, or

3.1.3 Infringement or other violations of intellectual property or technical data rights.

3.2 Subject to express, special contractual warranties obtained for the Purchaser, the Purchaser agrees to relieve the contractors and subcontractors of the USG from liability for, and will assume the risk of, loss or damage to:

3.2.1 Purchaser's property (including items procured pursuant to this LOA, before or after passage of title to Purchaser). And

3.2.2 Property of DoD furnished to suppliers to implement this LOA, to the same extent that the USG would assume for its property if it were procuring for itself the items being procured.

[30] NATO SOFA, Article VIII, paragraph 5 reads, in part, as follows:

> 5. Claims (other than contractual claims and those to which paragraphs 6 or 7 of this Article apply) arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:
>
> * * * * * * *
>
> e. The cost incurred in satisfying claims pursuant to the preceding sub-paragraphs and para. 2 of this Article shall be distributed between the Contracting Parties, as follows:
>
> i. Where one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 per cent. chargeable to the receiving State and 75 per cent. chargeable to the sending State.
>
> ii. Where more than one State is responsible for the damage, the amount awarded or adjudged shall be distributed equally among them: however, if the receiving State is not one of the States responsible, its contribution shall be half that of each of the sending States.
>
> iii. Where the damage was caused by the armed services of the Contracting Parties and it is not possible to attribute it specifically to one or more of those armed services, the amount awarded or adjudged shall be distributed equally among the Contracting Parties concerned: however, if the receiving State is not one of the States by whose armed services the damage was caused, its contribution shall be half that of each of the sending States concerned.
>
> iv. Every half-year, a statement of the sums paid by the receiving State in the course of the half-yearly period in respect of every case regarding which the proposed distribution on a percentage basis has been accepted, shall be sent to the sending States concerned, together with a request for reimbursement. Such reimbursement shall be made within the shortest possible time, in the currency of the receiving State.

[31] *Holloman Tornado Agreement, Amendment Number One* (entered into force on June 8, 1998).

[32] *Holloman Tornado Agreement, Amendment Number Three* (entered into force on April 6, 1999).

[33] *Red Flag* provides realistic training in a combined air, ground and electronic threat environment for U.S. and allied air forces.

[34] Director, DSCA Memorandum 01/000429-GC *Application of NATO Status of Forces Agreement (SOFA) to Combined Exercises with NATO Countries (DSCA 01-02)*, 19 Jan 2001.

[35] *Bowen v. Federal Republic of Germany and the United States*, (U.S.D.C., E.D. Cal., Civ F-01-5220 REC LIO).

[36] General Counsel, DSCA Memorandum I-01/007089 *Application of NATO Status of Forces Agreement (SOFA) to Claim Arising from October 19, 1998 Crash of German Tornado Jet Fighter*, June 13, 2001. The phrasing of this issue is interesting because it refers to the FMS LOA as a "government-to-government agreement." DoD Directive 5530.3 *International Agreements*, Enclosure 2 *Definitions*, paragraph 1c(3) states that FMS LOAs "are not considered to constitute international agreements for the purposes of this Directive." Air Force attorney Donald P. Oulton, an FMS expert, writing in the *Suffolk Transnational Law Review*, stated that FMS LOAs "are not considered international agreements for purposes of the Case-Zablocki Act (requiring the reporting of international agreements to Congress) . . . . LOAs, however are considered international agreements (for other purposes) . . . ." Oulton, 23-1 *Suffolk Transnational Law Review* 101, 117-118 (Winter 1999).

[37] *Id*.

[38] *Id*, page 2.

[39] *Id*.

[40] U.S. Department of Justice, Civil Division, Torts Branch, Aviation & Admiralty Litigation, letter to Federal Republic of Germany, Office of Defense Cooperation, *et al*., *Renee Smith Bowen v. Federal Republic of Germany and the United States*, (U.S.D.C., E.D. Cal., Civ F-01-5220 REC LIO), JC/DJ# 157-11E-2183, June 14, 2001.

[41] General Counsel, DSCA Memorandum, at 1.

[42] *Agreement Between the Government of the United States of America and The Government of the Republic of Singapore on the Status of Singapore Personnel in the United States of America* (*Counterpart Agreement*), December 3, 1993

[43] *Id*, Article XX. DSCA has issued no guidance on whether or not it perceives a "conflict" exists between the Agreement's claims provisions and the FMS LOA liability provisions.

PRACTICUM

• SPEEDY TRIAL PRIMER

An accused is entitled to a speedy trial. Violation of this right may result in dismissal of all charges. It is important for military justice practitioners to thoroughly understand the law behind the right to a speedy trial and aggressively advance their cases.

The right to a speedy trial in the military comes from five sources: Rules for Courts-Martial (RCM) 707, Article 10 of the Uniform Code of Military Justice (UCMJ), the Fifth and Sixth Amendments of the Constitution, and case law.

RCM 707(a) mandates an accused shall be brought to trial within 120 days after the earlier of preferral of charges; the imposition of restraint under RCM 304(a)(2)-(4); or, for certain reserve component personnel, entry on active duty under RCM 204. The first day of the count is the day after the triggering event, and the last day is when the accused is arraigned under RCM 904. RCM 707(b)(1). An accused is arraigned when the charges are read and the accused is called on to enter pleas. *See U.S. v. Price*, 48 M.J. 181, 182 (1998). *But see also U.S. v. Doty*, 51 M.J. 464 (1999). Excludable delays include pretrial delays approved by the convening authority (before referral) or the military judge (after referral). RCM 707(c). The most common pretrial delay a convening authority approves is a delay of an Article 32 hearing. If an Article 32 Investigating Officer approves a delay, it should be ratified by the convening authority to be excluded for speedy trial purposes. *United States v. Thompson*, 46 M.J. 472, 475 (1997). Time covered by a military judge's docketing decision (*see U.S. v. Nichols*, 42 M.J. 715 (AFCCA 1995)) and the time an accused is AWOL (*see U.S. v. Dies*, 45 M.J. 376 (1996)) are also excludable. RCM 707(b)(3) explains events which affect the 120-day time period. *See U.S. v. Ruffin*, 48 M.J. 211 (1998) (if accused is released for a significant period, the clock shall run from the earlier date of preferral, restraint is reimposed, or entry on active duty); *U.S. v. Becker*, 53 M.J. 229 (2000) (RCM 707(b)(3)(D) applies to rehearing on both findings and sentencing).

Article 10 of the UCMJ directs that when a person subject to the UCMJ is placed in arrest or confinement before trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him. Note that this requirement is triggered only by confinement. Instead of a bright line rule, "reasonable diligence" is the standard. *U.S. v. Kossman*, 38 M.J. 258 (C.M.A. 1993). Therefore, Article 10 may be violated where an accused in pretrial confinement is arraigned in less than 120 days or even in less than 90 days. A violation can occur when the government "could have gone to trial … but negligently or spitefully chose not to." *Id.* at 261. The factors announced in *Barker v. Wingo*, 407 U.S. 514 (1972), relating to Sixth Amendment speedy trial issues, can be used to analyze Article 10 cases. *U.S. v. Birge*, 52 M.J. 209 (1999).

The Fifth Amendment of the Constitution protects against due process violations. A violation of fundamental fairness occurs when an act "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' and which define the 'community's sense of fair play and decency.'" *U.S. v. Lovasco*, 431 U.S. 783, 790 (citations omitted). To analyze a due process speedy trial claim, the court "must consider the reasons for the delay as well as the prejudice to the accused." *Id. See also U.S. v. Marion*, 404 U.S. 307, 321 (1971); *U.S. v. Vogan*, 35 M.J. 32 (C.M.A. 1992).

Finally, the Sixth Amendment of the Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…." The U.S. Supreme Court has adopted a balancing test to determine whether an accused has been deprived of this right. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The Court identified some of the factors a court should assess in determining whether a speedy trial violation has occurred. These are: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's assertion of his right; and (4) prejudice to the accused. *Id.*

The best approach for handling speedy trial issues is prevention. The SJA, chief of justice and trial counsel should each know when the 120th day will fall and should always keep one eye on the calendar. Where pretrial confinement is concerned, everyone must be a day watcher. Know the status of the accused from the beginning, pay attention to the date(s) pretrial constraint is imposed and/or charges are preferred, and touch your case every day.

• DEFERMENT OF FORFEITURES AND REDUCTION IN GRADE

In *United States v. Key*, 55 M.J. 537 (A.F. Ct. Crim. App. 2001), the Air Force Court, in addition to ruling on the admissibility of mission-impact evidence and the military judge's inquiry into the terms of the pretrial agreement, determined that the requirements of Article 60, UCMJ, do **not** apply when processing a request for a deferment of forfeitures or reduction in grade. The Court stated:

> There is nothing in Article 57(a), UCMJ, which suggests that the formal requirements of Article 60, UCMJ, are intended to apply to requests for deferment - indeed, the short 14 day period before the automatic forfeitures go into effect is inconsistent with the elaborate requirements of a formal recommendation, service on the appellant and counsel, a 10 day period for response, an addendum, and convening authority action which form the typical process under Article 60, UCMJ. The language of Article 57(a), UCMJ, regarding deferment of forfeitures is strikingly similar to the language of Article 57a, UCMJ, regarding deferment of confinement, which has never been held to require the process dictated by Article 60, UCMJ.

See also United States v. Carpoff, ACM S29860 (A.F. Ct. Crim. App. 16 Jul 2001) and *United States v. Brown,* 54 M.J. 289, 292 (2000) (where CAAF declined to address the issue).

However, any request for a waiver of automatic forfeitures is a request for clemency and triggers the requirements of Article 60, UCMJ (*United States v. Spears,* 48 M.J. 768 (A.F. Ct. Crim. App. 1998), *overruled in part on other grounds by United States v. Owen,* 50 M.J. 629, 631 (A.F. Ct. Crim. App. 1998).

• EXPIRATION OF TERM OF SERVICE

Recently, we have fielded several questions on extending active duty military members beyond their expiration of term of service (ETS) for the purpose of court-martial. RCM 202(c) sets out the rules for attachment of jurisdiction over the person. "Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken." RCM 202 (c)(1). The actions which attach court–martial jurisdiction include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges. RCM 202(c)(2). This rule has been used as the basis for several appellate court decisions interpreting when the government loses jurisdiction over a military member. In *United States v. Fitzpatrick*, 14 M.J. 394 (CMA 1983), the Court outlined three ways the Government may retain jurisdiction over a servicemember. In *Fitzpatrick*, the Court held the Government will lose jurisdiction to try a servicemember unless the Government either (a) takes some official action which "authoritatively signaled its intent to impose its legal process upon the individual"; or (b) after the member's date of separation, the member does not object; or (c) if the member objects to continued retention, the Government must take official action with the view to prosecution within "a reasonable time" after the member's objection. Although it appears the Court may have established a bright-line test in *Fitzpatrick*, practitioners should be aware of the Court's holding in *United States v. Poole*, 30 M.J. 149 (CMA 1990). In *Poole*, the Court held that even an unreasonable delay by the Government will not cause the Government to lose jurisdiction to court-martial the member. The Court cautioned, however, that a service member unreasonably retained on active duty may have other remedies and the delay may affect the member's obligation to perform some military duties.

Extensions of ETS for enlisted members are accomplished pursuant to Air Force Instruction 36-3208, *Administrative Separation of Airmen*, paragraph 2.4. This paragraph authorizes the retention of airmen beyond ETS "in anticipation of the preferring of charges," although it notes "[t]he SJA determines what type of appropriate action is sufficient to authorize retention pending the preferring of charges." Likewise, Air Force Instruction 36-3207, *Separating Commissioned Officers*, paragraph 1.11, authorizes the retention of commissioned officers beyond their date of separation for purposes of court-martial and again the trigger to the military personnel flight (MPF) is notification by the SJA that action has been taken against the officer with a view to trial. AFCSM 36-699, Volume I, Table 5.24, Rule 3, authorizes the involuntary extension of both commissioned officers and enlisted members for 1 to 3 months (renewable at up to three month intervals). Local MPFs are the office of primary responsibility (OPR) for such actions.

The facts of your case will affect a court's decision as to whether you complied with RCM 202 as interpreted by CAAF. The March 2001 *Trial Counsel Deskbook* contains a good recap of the law in this area. In any case in which you contemplate involuntarily extending a servicemember, it's important to remember to communicate with your local MPF to ensure the MPF does not discharge (i.e., deliver an authorized DD Form 214) to the servicemember; and 2) make sure you take action (preferral is best) before the expiration of the ETS/DOS or obtain an extension of the ETS/DOS.

CAVEAT

• GIVING CREDIT WHERE (AND WHEN) DUE

An alert circuit defense counsel noticed in a recent

published decision of one of our sister service appellate courts an apparent policy change that, if true, would shiver the timbers of any red-blooded military defense advocate. It seems that in its decision concerning an issue involving entitlement to pretrial confinement credit, the court dropped a footnote indicating that the current version of the DoD Directive concerning corrections policy, namely, DoDD 1325.4, Sept. 28, 1999, unlike the superseded version, does not make federal sentence computations applicable to courts-martial. This discovery got the defense counsel's attention big time. As he pointed out, in the landmark case in the area of credit for pretrial confinement, *U.S. v. Allen,* 17 M.J. 126, 128 (CMA 1984), the court based its rationale on the fact that the then-existing DoD directive, DoDD 1325.4, May 19, 1988, should be read as "voluntarily incorporating the pretrial-sentence credit extended to other Justice Department convicts." See also, *U.S. v. Murray,* 43 M.J. 507 (A.F.Ct.Crim.App. 1995), *rev den,* 43 M.J. 232 (CMA) which extends the "*Allen*" credit to civilian pretrial confinement. Counsel quite understandably read *Allen* and *Murray* as grounding their holdings on DoD policy not principles of equity. He accordingly feared a persuasive argument could be made that as a result of the apparent change in DoD policy, military accused are no longer "legally" entitled to pretrial confinement credit.

Appearances (in the footnote) to the contrary notwithstanding, the policy underpinning of *Allen*, *et al*, does not appear to have changed. The policy in question is delineated in paragraph H5 of the superseded DoD Directive 1325.4 which states: "Procedures employed in the computation of sentences shall conform to those established by the Department of Justice (DoJ) for Federal prisoners unless they conflict with this Directive." While it is true that the current version of DoD Directive 1325.4 does not include the quoted provision, such omission does not signal a policy shift. The fact is that the latest iteration of DoD corrections policy has been divided into two separate publications, DoD Directive 1325.4, which delineates policy guidance, and DoD Instruction 1325.7, December 17, 1999, which is devoted to the implementation of corrections policy. The computation of sentences provision, essentially unchanged from the old DoD Directive, now appears in paragraph 6.3.1.5 of the Instruction. Mystery solved, hopefully.

• NOT SO FAST

As many military justice practitioners know, pursuant to DoD Instruction 1325.7, December 17, 1999, military prisoners who have approved sentences that include unsuspended punitive discharges and confinement for 12 months or more, are generally first eligible for parole consideration when they have served one-third of their sentences, but in no case less than six months. Also generally known is that prisoners with sentences in excess of 30 years and up to life are not eligible for parole until they have served at least 10 years of their sentences to confinement.

What is not generally known in the area of parole eligibility is a relatively new rule applicable to prisoners who are sentenced to confinement for life. This rule provides that if any act of which a prisoner with a life sentence is convicted occurred 30 days after the effective date of the cited DoD Instruction, that is, after 17 January 2000, such prisoner is not eligible for parole until he or she has served at least 20 years of confinement. ¶ 6.17.1.2.3, DODI 1325.7. "Lifers" whose offenses occurred prior to that date are first eligible for parole when they have served not more than 10 years of confinement. After their initial consideration, they are considered for parole at least annually thereafter. Of course, Article 56a, Uniform Code of Military Justice, now provides for sentences of confinement for life without eligibility for parole. The Article further provides that an accused sentenced to such punishment will be confined for the remainder of his or her life unless the sentence is set aside or modified by such authorities as the convening authority, the Secretary concerned, or an appellate court, or if the accused receives a Presidential pardon. Thus far no Air Force accused has been sentenced to life without eligibility for parole, but military judges are including the possibility in their sentencing instructions when appropriate.

COMMUNICATIONS LAW

• SECTION 508 AND THE AIR FORCE LAWYER

By now there are few Air Force members, including JAGs, who have not heard of Section 508. Most of us are aware that it has something to do with information technology. A few even suspect this new law impacts accessibility in some manner. However, because Section 508 has been in effect since June of this year and has legal "teeth" in the form of formal complaints and lawsuits, lawyers should have more than a passing familiarity with its terms, conditions, and applications.

Simply put, Section 508 of the Rehabilitation Act, amended in 1998, changes the way the government, including the Air Force, buys and uses electronic and information technology (EIT). The law requires EIT

developed, purchased, used, or maintained by the government to be accessible to federal employees with disabilities to a comparable degree that it is accessible to employees without disabilities. The same standard of accessibility also applies to members of the public who are seeking information or services from a Federal agency. The law does not apply to the private sector, except as that sector interacts with the federal government.

The law permits people with disabilities (either in the federal workforce or members of public) to file complaints or to sue in federal court to compel compliance with Section 508 accessibility requirements. While the law excludes recovery for punitive damages, it does provide for injunctive relief and award of attorneys' fees – remedies which could result in delay of critical contract programs and also, in some cases, result in significant monetary legal fee awards.

The Architectural and Transportation Barriers Compliance Board has published standards describing basic accessibility objectives for EIT products. Essentially, there are 65 technical elements, 6 functional performance criteria, and 3 information, documentation, and support requirements. These are described in detail at the Access Board's web site (http://www.acess-board.gov/sec508/508standards.htm).

It is important to note Section 508 is not about developing specific adaptive technology or retrofitting solutions to existing information technology products or systems. Instead, it focuses on acquisition of commercial EIT products that satisfy its extensive standards.

EIT products are an inclusive group, including web sites, multimedia, telephones, xerox machines, support services for computer use, and information kiosks.

Further, Federal Acquisition Regulations (FAR) make the federal purchasing agency responsible for compliance – not the commercial vendors. Briefly, the FAR tasks "requiring activities" (basically the office responsible for buying the EIT – not the contracting officer) with responsibility for determining accessibility standards which apply to a particular procurement action.

Furthermore, the activity must also conduct a market review to assess the availability of EIT that meets all, or part, of applicable accessibility standards. Under the FAR (section 39.203(c)), "an agency must comply with those accessibility standards that can be met with supplies or services that are available in the commercial marketplace in time to meet the agency's delivery requirements." This FAR section makes the requiring official responsible for documenting, in writing, the non-availability of conforming EIT, which will be provided to the contracting officer. This information must include a description of the market research conducted and indicate which standards cannot be met.

In addition to commercial non-availability, there are exceptions that may excuse an agency from complying with Section 508 standards. These exceptions for EIT products are enumerated in FAR section 39.203 and include: micro-purchases (purchases of $2,500 or less made before 1 Jan 03); purchases for a national security system; acquisitions by a contractor incidental to a contract; items used only by service personnel for maintenance, repair, or occasional monitoring of equipment; or when purchase would impose an undue burden on the agency.

While some of the exceptions are very clear-cut, others will require legal research and coordination. In particular, determination of "undue burden" will require thorough documentation and legal participation. According to Federal Register notes (Vol. 66, No. 80, 25 Apr 01), "substantial case law exists on this term," and the "Access Board chose not to disturb the existing understanding of the term by trying to define it."

This means the term "undue burden" will be interpreted and applied in accordance with Americans with Disabilities Act and Section 504 of the Rehabilitation Act case law. The "undue burden" exception may apply in cases in which acceptance of Section 508-compliant EIT would result in a severe, mission-degrading impact upon existing Air Force network systems. The concept of interoperability and plug-and-play information technology is a critical element of an effective expeditionary Air Force, and it may be argued that introduction of EIT that adversely impacts operation of Air Force networks imposes an undue burden.

Because Section 508 Standards cover such a broad area of EIT accessibility concerns and because these standards come with both administrative and legal remedies, it is clear JAGs will be fully engaged in providing assistance to commanders, requiring officials, and contracting staff.

Section 508 standards offer a powerful incentive for contractors' support of Air Force initiatives to provide full and equal workplace opportunities to individuals with disabilities. At the same time, the law contains important exceptions that permit recognition of vital Air Force mission needs. The successful balancing of these two interests will require a JAG expertise in this evolving area of EIT acquisition law.

GENERAL LAW

- **FREE SPEECH AND PUBLIC GRIEVANCES**

The First Amendment of the United States Constitu-

tion provides that Congress shall make no law abridging the freedom of speech or the right of the people to petition the government for a redress of grievances. However, as lawyers, we know that Constitutional rights are not absolute. Obviously, the First Amendment provides only limited protection to military members, who endure personal restrictions on the right to exercise free speech in order to ensure morale, good order and discipline within the military community. The question of when military members may voice their personal views in a public forum outside the military can present difficult issues for commanders and their staff judge advocates. This article outlines restricted areas of speech for military personnel and describes the standards of conduct implications of speaking in a personal, versus official, capacity. It also suggests that commanders and judge advocates set the ground rules with the member early, so that enforcement is less likely to be seen as retribution or censorship.

The clearest restrictions on military members' speech are found in the UCMJ, which sets forth types of speech that constitute criminal conduct for military personnel. Some examples include: soliciting desertion, mutiny, sedition or misbehavior before the enemy (10 U.S.C. § 882; UCMJ Art 82); using contemptuous words by a commissioned officer against certain officials (including the President)(10 U.S.C. § 888; UCMJ Art 88); engaging in disrespect toward a superior commissioned officer (10 U.S.C. § 889; UCMJ Art 89); and uttering disloyal statements, criminal libel, communicating a threat, and soliciting another to commit an offense (10 U.S.C. § 934; UCMJ Art 134).

Another sensitive area for military personnel is political speech. Under *DoD Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty,* and AFI 51-902, *Political Activities by Members of the USAF*, active duty military personnel may not: make public speeches in the course of partisan political campaigns; speak before partisan political gatherings of any kind in promotion of a candidate or cause; solicit or engage in fundraising activities for partisan causes; or publish articles that solicit votes for or against a political party or candidate. These regulatory restrictions on political activities are punitive under UCMJ Art 92.

Other regulatory guidance on the issue of "free speech" is found in DoD Directive 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces* and AFI 51-903, *Dissident and Protest Activities*. According to this guidance, military commanders must preserve a service member's right of expression to the maximum extent possible, consistent with good order, discipline and national security. On the other hand, commanders cannot be indifferent to conduct that, left unchecked, would destroy the effectiveness of the unit. Commanders must balance individual rights of expression with Air Force interests and apply "calm and prudent judgment" (hopefully with the advice of their staff judge advocate).

Ordinarily, dissatisfied military personnel understand that they have the right to seek redress for their grievances through official channels. There are many ways to do this, including:

- Seeking relief directly from the commander or first sergeant, or their chain of command
- Filing a grievance under UCMJ Art 138 (see AFI 51-904, *Complaints of Wrongs Under Article 138, UCMJ*)
- Filing a complaint with the Inspector General (AFI 90-301, *Inspector General Complaints)*
- Submitting an application with the Board for Correction of Military Records (AFI 36-2603, *Air Force Board for Correction of Military Records*), and/or
- Contacting a member of Congress without fear of reprisal (10 U.S.C. 1034)

If these measures fail, however, members may see nothing to lose in pursuing media attention as a way to obtain relief. As long as the member's pursuit of media attention does not trigger any of the prohibitions discussed above, the member is not legally prohibited from seeking support in the form of public opinion. However, there are further considerations regarding the methods by which the individual chooses to make his or her message known.

Unless the member has been given authority to speak in his or her *official* capacity on behalf of the Air Force (a rare event in dissident cases), a member voices his or her grievance in a *personal* capacity. Stated differently, this means that dissident activities should be viewed, and treated, as a personal activity, not an official activity. Although this might seem to be an obvious statement, the distinction can be easily lost when the subject of the member's grievance concerns the member's affiliation with the Air Force.

Why is it important to focus on the member's personal capacity in these situations? The reason for the distinction is that when a military member acts in a personal capacity, he or she must comply with certain standards of conduct rules under the Joint Ethics Regulation (JER) (DoD 5500.7-R). The standards of conduct restrictions fall generally into four categories.

First, personal activities may not be pursued with government resources, should not be conducted on military installations or in government facilities, or pursued on government time (*i.e.*, in a duty status) (5

C.F.R. § 2635.704(a); JER sec. 2-301). As a corollary to the restrictions on the member's use of government resources, officials should not provide support for the member's personal activities (*e.g.,* using SAF/PA resources to arrange access to the media).

Second, personal activities or agendas should not be furthered by use of one's Air Force position or title or any authority associated with public office (5 C.F.R. § 2635.702(b)). Military personnel may reference their rank and service in personal activities (*e.g.*, Captain Smith, USAF), but not their position, title or organizational name (JER sec. 3-209). An Air Force member who uses or permits the use of his military grade and service in connection with personal speeches or writings devoted to Agency matters is required to include a disclaimer if the subject of the speech or writing deals in significant part with any ongoing or announced policy, program or operation of the member's Agency (and the speech or writing has not be cleared as "official"). Agency designees (*i.e.*, supervisors) may not provide speakers in support of non-Federal entity events unless they determine that the speech will serve a legitimate public interest and will not reflect adversely on DoD or the Air Force (among other factors).

Third, Air Force members may not wear their military uniform when participating, in a personal capacity, in public speeches, interviews, picket lines, marches or rallies when Air Force sanction of the cause may be implied (AFI 36-2903*, Dress and Personal Appearance of Air Force Personnel*, Table 1.3*)*. Again, this is consistent with the fact that when military members are pursuing their own agendas, they are not acting in an official capacity, even when the problem involves their military status or activities. That is why public appearances in furtherance of personal agendas should be conducted in civilian clothes--not in uniform.

The last category involves conflicts of interest. When an Air Force member knows that a person (or entity) with whom he has a "covered relationship" is, or represents, a party to a particular matter, and the circumstances would cause a reasonable person with knowledge of the facts to question his impartiality, the employee should not participate in the matter in his or her official capacity without Agency permission (5 C.F.R. § 2635.502). A member has a "covered relationship" with family members, as well as with organizations in which the employee has served in the last year as an officer or in which the member is an "active participant." "Active participation" includes service as an official of the organization or participation in directing organizational activities, as well as devoting significant time to promoting specific programs of the organization, including fundraising. "Active participation" in one's own *cause celebre* would also disqualify that member from any official action on behalf of the Air Force in connection with the matter.

Another "free speech" challenge for command is publicity generated by a member's involvement with military justice actions. Base officials should handle any such publicity in accordance with AFI 51-201*, Administration of Military Justice*, Section 12C - Direct Communications and Reports; and AFI 35-101, *Public Affairs Policies and Procedures*, Chapter 6 - Media Relations. Both instructions provide detailed guidance on the type of information that Air Force officials may release to the media in conjunction with Air Force disciplinary actions.

A real concern for commanders and judge advocates is handling dissident members in a manner that enforces the rules, yet avoids the appearance of retribution or vindictive prosecution. The first important point is to treat all similar situations the same way. Although every case will be different, the rules should be enforced uniformly to the extent possible. This means that commanders must avoid taking more restrictive measures against a member who publically voices one problem than another member who challenges another problem. It also means that commanders may not pick and choose which complaints they wish to restrict. The more selective the commander is in this area, the more the commander's actions will appear to be based on censorship or retribution. Commanders must especially avoid the appearance that the degree of punishment depends upon the subject matter of the complaint.

A good approach for commanders, first sergeants, and public affairs officials to take in this area is to identify these situations early, so that the military member can be given early notice of the rules. Given the complexity of our standard of conduct rules, it is only fair to place the airman on notice that there are limitations in this area. Trying to apply the rules on an *ad hoc* basis after the member has started his or her media campaign creates the impression that "The Establishment" is punishing the member simply for speaking out. Also, commanders must remember the concept of graduated punishment when they handle these cases. The harsher the punishment (especially for minor or unintended violations and first offenders), the more likely the member, the media and others will see the commander's actions as retribution rather than the necessary enforcement of the rules.

In conclusion, military members may be legally prohibited from pursuing certain types of speeches or writings that would violate the UCMJ by disrupting good order and discipline within the military commu-

nity, or the punitive regulations on political activities. In other cases, members are not prohibited from speaking publicly about issues, but they must do so the right way; that is, in a manner that complies with the JER and DoD standards of conduct policies. Finally, commanders should avoid an impromptu reaction in these cases, but should work closely with their staff judge advocate to develop a proactive and reasonable plan to ensure the rules are enforced fairly.

TORT CLAIMS AND HEALTH LAW

The Joint Commission on Accreditation of Health Care Organizations (JCAHO) implemented new hospital standards effective 1 July 2001 regarding Medical Incident Reporting. Under these standards, patients, and when appropriate, family members, must be informed about outcomes of care, including unanticipated outcomes (e.g. medical malpractice). These standards have been incorporated into a recently signed DoD Instruction on patient safety as well, and publication is due soon. The intent is to promote trust between patient and facility/provider, and to enhance quality assurance. There may be liability issues with this because reporting errors may be construed to be admissions against interest. The key will be how the message is given - truthful and complete, but without reaching liability conclusions. Additionally, it will have to be balanced with protection of quality assurance information under 10 U.S.C. 1102.

• RES GESTAE

As of 3 August 2001, the Air Force has experienced 23 Class A aerospace mishaps during FY01, involving 13 F-16 mishaps, 3 F-15 mishaps, 3 RQ-1 (Predator) mishaps, 1 C-130 mishap, 1 KC-135 mishap, 1 T-38 mishap, and 1 A-10 mishap. There were eight fatalities, of which six were military and two were civilians. A Class A mishap involves either a death or serious personal injury, and/or $1 million in damages to government property. Each Class A mishap requires both a Safety Investigation Board (SIB) and an Accident Investigation Board (AIB). While the SIB report contains privileged safety information and is not releasable to the public, the AIB report is fully releasable. To provide real time information to the public on the status of all AIB investigations, AFLSA/JACT maintains a public website which lists each Class A mishap, including the date of the mishap, the type of aerospace vehicle involved, the location of the mishap, and either a short factual statement on the mishap (if the AIB investigation is ongoing) or the Executive Summary from the AIB report (after the AIB report is approved). The website is accessible to the public at https://usaf.aib.law.af.mil/

• VERBA SAPIENTI

If and when personnel, especially medical personnel, are allowed to be on permissive TDY, it is important for them to realize that they may be held personally liable for acts or omissions committed while in that status. Merely being given commander's permission to attend training or participate in a project and not be charged for leave does not insure that the liability protections normally afforded while in scope of employment will exist. It is wise to recommend these personnel purchase or maintain insurance coverage if they will be involved with any instrumentality or program that may lead to a tort action.

• ARBITRIA ET IUDICIA

In a medical malpractice case for which appellate action was recently concluded, plaintiff filed an FTCA claim alleging that she had been injected with a contraceptive medication "early in pregnancy," causing severe birth defects to her child. By her own statement, however, the latest she could have received the injection was 11 months before delivery, and not during her pregnancy. On that basis we denied the claim. Plaintiffs then filed suit in United States District Court alleging the same facts in her administrative claim. Summary judgment was granted when Plaintiff, at deposition, repudiated the original factual allegations in her claim, and, for the first time, alleged instead that our providers failed to provide proper informed consent regarding the medication. The District Court granted the U.S. summary judgment because this new allegation was materially different from the allegation in her administrative claim. Plaintiff appealed. In a 2-1 decision, a 4th Circuit panel overturned the District Court and held that Plaintiff had provided enough information in her claim to alert the Air Force to the possibility of an informed consent allegation, even though not specifically articulated in her administrative claim. We were thus on notice of this potential allegation. However, an *en banc* hearing resulted in an evenly divided court (5-5) reinstating the District Court's summary judgment. The U.S. Supreme Court denied certiorari to Plaintiff. *See Drew v. U.S.*, 231 F.3d 927, Cert. Den. 121 S.Ct.1998 (2001).

UTILITY LITIGATION

• IS IT A UTILITY CONTRACT MODIFICATION, A PERMIT, OR JUST AN AGREEMENT? WATER PRE-TREATMENT REQUIREMENTS UNDER THE CLEAN WATER ACT

Most Air Force installations have a contract with a local water utility company[1] under which the utility company accepts, moves, treats and disposes of sewage and wastewater from the installation, for a periodic fee. Typically this has been a simple and very satisfactory arrangement from the installation's perspective, and such contracts have been in place, often unchanged except for periodic rate modifications, since the installation was established.

However, in the 1990s some installations may have entered into what I refer to as an "additional relationship" with the local utility (additional to the basic sewage treatment contract). This additional relationship deals with "pretreatment" of certain industrial wastes included by the installation in its sewage, and may have required payment of additional amounts of money by the installation to the local utility, on a one time or continuing basis. Because of uncertainly at the time as to the proper treatment of these additional relationships, some installations may not have appropriately structured them. In some (perhaps most) cases these additional relationships may be related to ongoing payments to the local utility. It is important to have these relationships appropriately and legally structured. It is the intent of this note to provide an overview of this topic, so that base legal staff can determine if this issue affects their installation.

Most sewage treatment plants are designed only to treat domestic (i.e., residential) sewage.[2] More specifically, they are not usually designed to process toxic waste from industrial and business processes. Such toxic wastes, if included in the inflow to the utility company plant, typically passes through untreated or accumulates in sewage sludge at the sewage plant. This waste may interfere with the plant's operations by killing bacteria required by the plant for processing domestic sewage.

However, a significant amount of industrial waste is discharged into local sewer systems, in addition to domestic sewage.[3] Sources of such industrial waste range from chemical factories to small local automotive repair garages, gas stations, local laundromats and dry cleaning businesses. In 1984 Congress directed the EPA to study and report to Congress on this issue, and further directed the EPA, after it completed its report, to issue such additional regulations as the EPA might find in its report were needed. The EPA submitted its report to Congress in 1986, and in its report found that additional regulation was needed. In 1986 the EPA began the process of promulgating the additional regulations, and on 23 November 1988 the EPA published proposed rules.[4] On 24 July 1990 the EPA published the final rules effective 23 August 1990.[5]

Under the new 1990 rules, local water utilities were required to become local regulators. They had to set detailed local standards governing all aspects of discharge of industrial waste into the local sewage system. The local utility then had to identify all entities in their service area that were discharging industrial waste into the system, and document what types, how much, and how often each entity was discharging industrial waste into the sewer system. Finally, the local utility had to individually interact with each discharging entity, and impose local standards on that entity in a legally enforceable manner. It is at this point that some Air Force installations were told by the local utility that a new and additional relationship, relating to pretreatment, was required between the installation and the local utility.

Unfortunately, the new EPA rule was vague as to how to structure the new relationship:

> **A [public utility] pretreatment program must be based on the following legal authority and include the following procedures. These authorities and procedures shall at all times be fully and effectively exercised and implemented.**
>
> (1) * * *
>
> (iii) **Control through permit, order, or similar means**, the contribution to the [local utility] by each Industrial User to ensure compliance with applicable Pretreatment Standards and Requirements. (Emphasis added)[6]

Thus, there was no consistency imposed by the EPA, and local utilities were free to use orders, permits, agreements, etc., to obtain compliance with local entities concerning pretreatment requirements. One commentator indicates that the EPA itself, in 1986 guidance, envisioned that local utilities would obtain legally enforceable "agreements" with local industrial users, and put such agreements in the form of "permits."[7]

Beginning in the early 1990s, local utilities began approaching some of their customers, including some Air Force installations, that discharged industrial waste into the local sewer system, to impose these pretreatment requirements on those customers.

As suggested above, the local utility may have told the installation that it had to enter into an "agreement" with the local utility concerning pretreatment. Particu-

larly if the local utility approached the base civil engineer staff without involvement by base legal and contracting, what may have happened in some instances was that base engineering simply executed and filed the agreement, in what at the time might understandably have appeared to be the most expeditious solution to the matter. In such instances the additional costs to which the installation may have become obligated under the agreement, were likely simply added by the local utility to the overall monthly sewage charge under the existing sewage contract. In such instances the "agreement' was in effect a modification of the installation's sewage service contract, but in many cases was never processed as such, so that the additional payments may not have been legal.

There may have been other instances in which the new requirements were presented to the installation as a "permit." Here again, the "permit' may have obligated the installation monetarily, and at least the monetary side of the transaction should have been processed as a modification to the sewage contract, but may not have been.

Regardless of how the new requirements were presented to the installation, there will be the issue of how it affected the installation's sewage contract, which probably required negotiation of any changes

Because the factual situations may vary so much from one installation to another, no universal answer can be given as to how to handle the matter if you discover you have this problem on your installation. A general rule of thumb is that any payment that is not a one time filing fee should be assumed to be a contractual matter, as should any amounts that are expended for actual services beyond a regulatory inspection (design, construction, testing, etc). Make sure you coordinate with environmental law staff and the contracting officer. The goal is to ensure compliance with all environmental requirements, without violating fiscal and contract law requirements

[1] The phrase "utility company" is used in the text just for convenience, and is not used restrictively. It should be understood to include all types of entities that provide sewage processing service, the most common of which is probably local governmental entities such as municipal, county, or regional water treatment authorities.

[2] Gold, EPA's Pretreatment Program, 16 Boston College Envtl. Aff. L. Rev. 459 (1989) at 462.

[3] The history set forth in this paragraph is drawn from Gold, EPA's Pretreatment Program, 16 Boston College Envtl. L. Rev. 459 (1989), and EPA's own recounting of the history of its pretreatment program, provided when it published related rules in 1988, at 53 Fed. Reg. 47632.

[4] 53 Fed. Reg. 47632.

[5] 55 Fed. Reg. 30129; 55 Fed. Reg. 30082. The rule was codified at 40 CFR 403.

[6] 40 CFR 403.8(f), as published at 55 Fed. Reg. 30082 on July 24, 1990.

[7] *See* Gold, *supra*, at 519:

> [T]he EPA suggests that an [industrial users's] **agreement** with a [local utility] to discharge into that [local utility] be contained in a legally enforceable document. This document should be in the form of a discharge or sewer use **permit…**

Emphasis added. Citing to EPA, Pretreatment Compliance Monitoring and Enforcement Guidance 3-1 (Sept. 1986).

PUT SOME CLOTHES ON THAT NAKED URINALYSIS CASE

Major Charlie Johnson-Wright

What is a naked urinalysis case? Prosecutors refer to an illegal drug case as a "naked urinalysis case" when the only evidence of drug use is the scientific laboratory report. That lab report identifies a specific urine sample as having tested positive for the presence of an illegal drug metabolite. In the late 1980's and early 1990's, it was fairly easy to successfully prosecute naked urinalysis cases. Unfortunately, over the years it has become more challenging to convict a drug user based solely on a scientific test. This article addresses two prevailing challenges prosecutors face when trying a naked urinalysis case, provides suggested solutions to those challenges, and addresses two landmark cases: *U.S. v. Campbell*[1] and *U.S. v. Green*.[2]

One challenge is a belief by some that the laboratory tests that are performed at the Air Force Drug Testing Lab at Brooks Air Force Base, Texas (Brooks Lab)[3] are scientifically unreliable. We know that the prosecutor's burden in an illegal drug use case is to prove beyond a reasonable doubt two elements: (1) that the accused used a controlled substance, and (2) that that use was wrongful.[4] Knowledge of the presence of the illegal drug is a required component of the use element of a crime.[5]

Arguments that challenge the reliability of the test results from the Brooks Lab are not new. Defense counsel in the late 1980's and early 1990's routinely attacked the reliability of the lab test. Defense arguments during that period were not as convincing as they are today. What has changed since then? The answer is the occurrence of a glitch at the Brooks Lab in June 1997 in which the lab reported an administrative false positive.

Essentially, in September 1997 notification was made indicating a urine sample tested positive for cocaine. While the urine sample contained the cocaine metabolite, the sample should not have been reported positive because the concentration of the cocaine metabolite in the sample did not exceed the DoD cutoff level of 100 ng/ml.[6] Human error in the review process caused the mistake, not the test.[7] This was the first time in over 13 years of testing that the Brooks Lab reported a false positive result.[8] Although it was an isolated incident, it tarnished the reputation of the Brooks Lab thereby making it easier for defense counsel to argue reasonable doubt.

The second challenge to the successful prosecution of the naked urinalysis case is getting the scientific evidence (lab report, expert testimony, etc) admitted as evidence during the government's case in chief. In recent years, we have seen many cases that have focused on naked urinalysis evidence. One of the landmark cases, *United States v. Campbell*[9] has caused prosecutors much concern. In *Campbell*, the appellant had been convicted of wrongful use of lysergic acid diethylamide (LSD).[10] The prosecution's sole evidence of wrongful use of LSD consisted of a urinalysis test.[11] At trial, the accused challenged the reliability of the scientific test, alleging the scientific methodology used in the test did not meet reliability standards.[12] The U.S. Court of Appeals for the Armed Forces (CAAF) held that the prosecution failed to prove that the particular scientific test (gas chromatography tandem mass spectrometry) reliably detected the presence of LSD metabolites.[13] Further, the prosecution failed to prove that the DoD cutoff level of 200 pg/ml was greater than the margin of error and sufficiently high enough to reasonably exclude the possibility of a false positive and establish the wrongfulness of the use.[14] Of particular concern to the court was the fact that the prosecution failed to introduce evidence to show it had taken into account what is necessary to eliminate the reasonable possibility of unknowing ingestion or a false positive.[15] CAAF held if the prosecution seeks to rely on the permissible inference of knowledge from the presence of the drug in a urine sample, the cutoff level must be such as to rationally permit factfinders to find beyond a reasonable doubt that the accused's use was knowing.[16] The court reversed the conviction and dismissed the charge. Not only was the scientific evidence insufficient, but also the *Campbell* court seemingly added an additional component to the elements for drug use in naked urinalysis cases.

The *Campbell* court held the prosecution may demonstrate the relationship between the laboratory test result and the permissive inference of knowing and wrongful use through expert testimony, by showing:

Maj Johnson-Wright (B.S., Cornell University; J.D., Albany Law School) is currently the Executive Officer to the Staff Judge Advocate of Air Combat Command.

1. That the metabolite is not naturally produced by the body or any substance other than the drug in question;

2. That the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion AND to ***indicate a reasonable likelihood that the user at some time would have experienced the physical and psychological effects of the drug*** (emphasis added); and

3. That the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.[17]

Naturally, it is quite challenging, if not impossible, to prove that at some point the accused would have experienced the physical and psychological effects of the drug. In these cases, we don't have a statement by the accused or other witnesses who observed the illegal drug use. Therefore, we don't know exactly when the illegal drug was ingested. We don't know exactly how much was ingested, what was felt, or how the accused acted while under the influence of the drug. Fortunately, for prosecutors, CAAF provided additional guidance on naked urinalysis cases on 11 June 2001 in *U.S. v Green*.[18]

In *Green*,[19] appellant had been convicted of AWOL and 2 specifications of wrongful use of cocaine. The court granted review of the following issues:

1. Whether the lower court erred by ignoring the *Campbell* case as binding precedent;

2. Whether the appellant's conviction for wrongful use of cocaine was legally sufficient because the prosecution failed to establish predicate facts necessary to sustain a permissible inference; and

3. Whether the lower court's decision to affirm the conviction of wrongful use of cocaine ***without*** (emphasis added) expert testimony concerning the physiological effects violated the due process clause.

At trial, the government's evidence of wrongful use consisted of a lab report and the testimony of an expert in the field of forensic chemistry. The expert described the lab procedures and explained the results of the test.

CAAF held the lower court had not erred by ignoring the *Campbell* case. One of the deficiencies in that case was the "absence of evidence establishing the frequency of error and the margin of error in the testing process with respect to the novel scientific procedure."[20] The deficiency in the reliability of the test rendered the scientific test inadmissible.[21] Concerning the second issue on appeal in Green, CAAF reiterated where scientific evidence provides the sole basis to prove the wrongful use of a controlled substance, expert testimony is required to provide a rational basis upon which the factfinder may draw an inference that the substance was wrongfully used.[22] Whether the prosecution has offered sufficient expert testimony to establish this rational basis is a question for each military judge to determine.[23] The court reiterated military judges are the "gatekeepers" charged with admitting into evidence expert testimony that is relevant and reliable. This is not a new requirement. The judge has the discretion to determine the admissibility of the expert testimony by considering whether:

1. The metabolite is naturally produced by the body or any substance other than the drug in question;

2. The permissive inference of knowing use is appropriate in light of the cutoff level, the reported concentration, and other appropriate factors; and

3. The testing methodology is reliable in terms of detecting the presence and quantifying the concentration of the drug or metabolite in the sample.[24]

Concerning the last issue on appeal in *Green*, CAAF held "a urinalysis properly admitted under the standards applicable to scientific evidence, when accompanied by expert testimony, provides a legally sufficient basis upon which to draw the permissive inference of knowing and wrongful use ***without*** (emphasis added) testimony on the merits concerning physiological effects."[25] What does this all mean? Prosecutors are challenged to provide sufficiently relevant and reliable expert testimony/evidence to convince the military judge to admit it into evidence in a naked urinalysis case.

In light of the substantial challenges discussed above, what is the solution to secure a conviction in a litigated naked urinalysis case? The simple answer is to "put some clothes" on that naked urinalysis case. The 'clothing' is made by a thorough and intense investigation.

As the prosecutor, it is imperative that you get deeply involved early on with the investigators and guide and assist them in their evidence-gathering. Ensure the investigators 'turn over every rock' to develop corroborating evidence. The completed Office of Special Investigation (OSI) or Security Forces (SF)

Report is just the beginning for the prosecutor. First, you must read every word in the report. There are leads in virtually every report—follow them. On occasion, you will get a report with no witness statements and no leads and just an attempt to interview the accused who elected to remain silent. (In some cases, you won't have a completed report because OSI or SF has not yet completed it.) Look beyond the report and think logically. Who knows the accused and his/her habits? Who might the accused tell about his illegal drug activity? The answers are his friends, supervisors, co-workers, neighbors, etc. Find out where the accused spends his/her leisure time. Talk to those people in that environment.

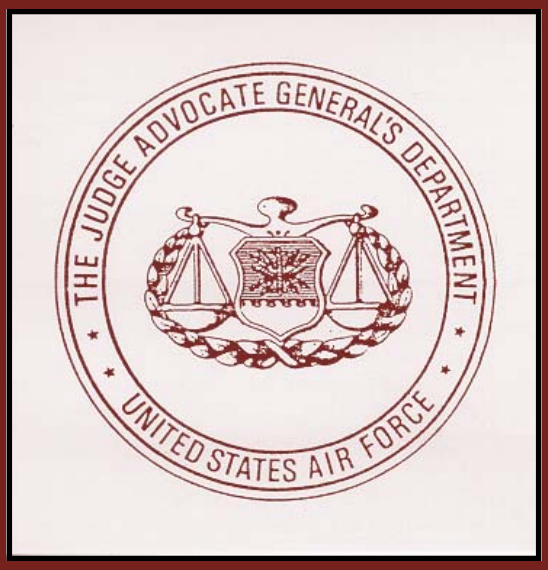
Take the time to thoroughly research the illegal drug. Visit with your OSI detachment or SF drug unit and read the multitude of manuals, pamphlets and books on the pertinent drug. You need to know how to identify it, what physical and psychological effects it has on the human body (both short and long term), and whether and how long the drug can be detected in the urine, blood or hair follicle. Knowing all of this beforehand makes your interviews more effective and efficient. Thorough preparation of this nature also provides you with an excellent method to establish a good rapport with potential witnesses and a means to determine the evidence that will help you meet your burden of proof at trial.

Interview the urinalysis monitors (chain of custody witnesses), the orderly room trusted agent, co-workers and supervisors. How did the accused act when notified of the random urinalysis test? Was the accused nervous, worried, or reluctant to provide a sample? Answers to these questions could be the corroboration you need. Obviously, you must interview all witnesses (prosecution and defense) before they testify—interview them before the Article 32 hearing and certainly before the trial. Often, you will interview your main witnesses several times before calling them to testify.

After you have interviewed all witnesses, review the accused's medical records. Medical records can be very helpful. For example, chronic cocaine abusers typically suffer nasal complications. Snorting this powdery substance through the nose tends to irritate the nasal mucous membranes. This is evidence that you might be able to use to corroborate the scientific urinalysis data. Interview the doctor who treated the accused for the nasal condition. Identify a medical expert who can testify that the medical condition is consistent with someone who abuses cocaine. (Naturally, you will have to do some legal research to lay the proper foundation for admission of this evidence. Always anticipate that the defense will challenge every piece of evidence you intend to introduce.)

This turn-over-every-rock investigation technique is the solution to the challenges of the typical and far-too-frequent naked urinalysis case. Before *Green*, many prosecutors were concerned about trying naked urinalysis cases and believed it might be more prudent to dispose of the case by other means. Now that the perceived burden of proving the physiological effects of the illegal substance created by *Campbell* has been lifted, the litigator must now concentrate on reducing the number of naked urinalysis cases. Prosecutors, let's clothe these naked cases by thoroughly investigating and effectively prosecuting them.

[1] 50 M.J. 154 (C.A.A.F. 1999).
[2] 54 M.J. _____ (C.A.A.F. 2001).
[3] Although the Air Force Drug Testing Laboratory is officially called the "Armstrong Lab," it is routinely referred to as the "Brooks Lab."
[4] Paragraph 37b(2), Part IV, Manual for Courts-Martial (2000 Edition).
[5] Paragraph 37c(10), Part IV, Manual for Courts-Martial (2000 Edition).
[6] Special Inspection Report on the Drug Testing Division, Armstrong Laboratory, Brooks AFB, TX, by the Office of the Department of Defense Coordinator For Drug Enforcement Policy and Support, Washington DC, dated 8 October 1997.
[7] *Id.*
[8] *Id*.
[9] 50 M.J. 154 (C.A.A.F. 1999).
[10] *Id*.
[11] *Id*. at 156.
[12] *Id*.
[13] *Id*. at 161.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 162.
[17] *Id*. at 160.
[18] 54 M.J. ____ (C.A.A.F. 2001)
[19] The court dismissed one of the specifications of wrongful use of cocaine on grounds unrelated to the issues on appeal. *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id.*
[24] *Id*.
[25] *Id*.


THE JUDGE ADVOCATE GENERAL'S DEPARTMENT
UNITED STATES AIR FORCE