The Reporter

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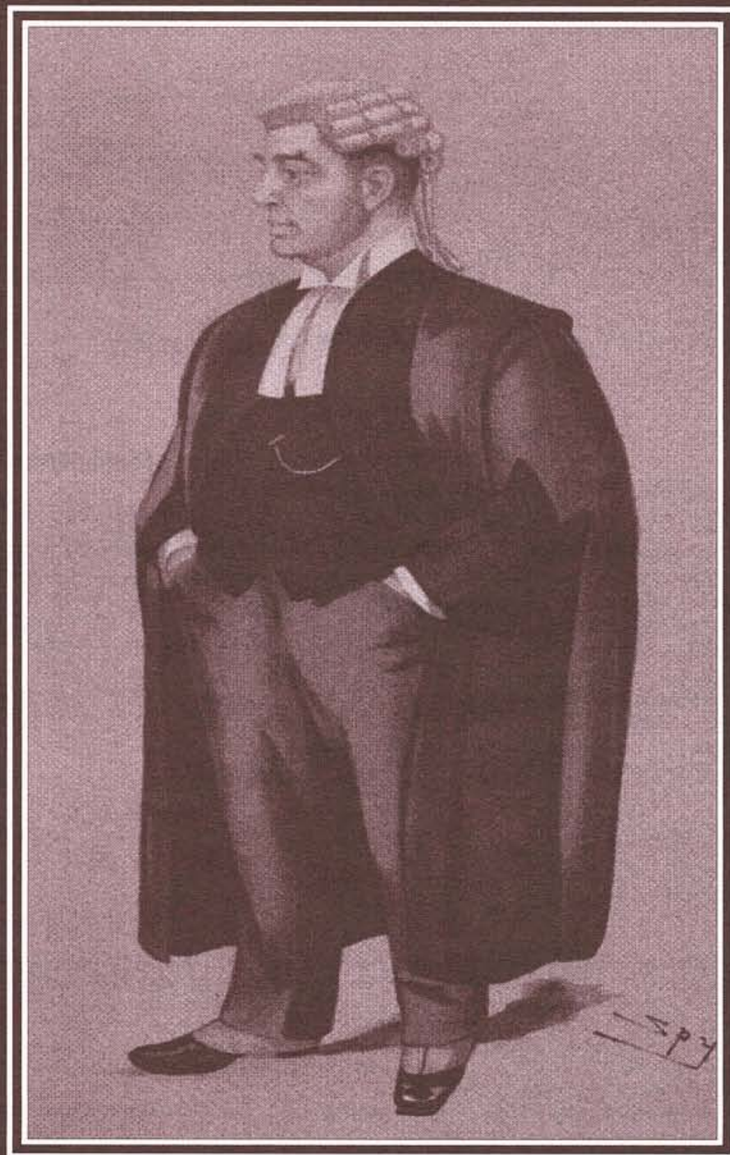

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The Reporter

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FROM THE EDITOR

This issue is dedicated to a view of criminal justice issues from a variety of perspectives. Present and former faculty from the JAG School military justice division look at military justice from the SJA's vantage point—in terms of building a solid base-level military justice program. We are pleased to re-run, after well more than a decade, Mr. Thomas Markiewicz' sage advice on how defense counsel can best protect the liberty interests of clients sentenced to confinement. From the bench, Col David Brash offers tips, based on his first-hand observations as a military judge, on how to conduct effective voir dire. Finally, Lt Col Ronald Ratton gives an eyewitness account of the first-ever use of the Military Extraterritorial Jurisdiction Act to initiate prosecution in the United States of a DoD civilian stationed overseas.

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Contributions from all readers are invited. Items are welcome on any area of the law, legal practice or procedure that would be of interest to members of The Air Force Judge Advocate General's Corps. Items or inquiries should be directed to The Air Force Judge Advocate General School, CPD/JAR (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802)
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Touch Every Case: The Staff Judge Advocate's Guide To Building A Successful Military Justice Program

Lt Col Walter S. King
Lt Col Polly S. Kenny
Lt Col Renee T. Bennett

You have already placed your strongest captain in the Chief of Military Justice position. Your daily focus mirrors that of your wing commander and cartwheels from labor problems to the upcoming air show to preparing the wing UTC's for deployment. It's tempting to take a "crisis action" approach to military justice, i.e. tell me when we have a problem. Unfortunately, that approach won't garner success. Direct personal involvement is key to the overall health of your military justice program. So what do you need to do?

An SJA's military justice duties can be divided into five primary components: (1) monitor case progress by conducting weekly military justice meetings; (2) ensure charges and specifications are legally correct and appropriate prior to preferral; (3) ensure the United States is well represented on your installation by monitoring trial preparation and advocacy; (4) act as primary, usually face-to-face, advisor to the wing commander on all military justice issues; and (5) promote justice within the system.

This article addresses the five components of an SJA's military justice duties in two ways. First, it provides a narrative discussion of AMJAMS. When used consistently, an SJA has no better tool than AMJAMS to effectively manage military justice. Second, it provides two practical and comprehensive checklists specifically identifying what you should be doing to fulfill each of your five primary military justice duties. The first checklist deals with military justice generally, but with a focus on courts-martial. The second checklist deals solely with prosecution of Article 15 actions.

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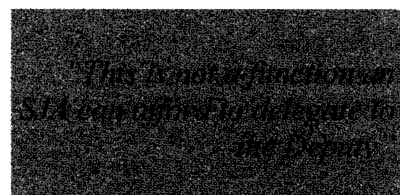
AMJAMS is your friend

The key to successfully using AMJAMS is consistency. For AMJAMS to be an effective tool, the savvy SJA must review AMJAMS reports on at least a weekly basis with the NCOIC and Chief of Military Justice. Once you develop the habit of reviewing the reports on a regular basis, it only takes a second to recognize where a problem exists or where your intervention is needed. A regular review of AMJAMS also provides the added benefit of allowing you to sound intelligent when the NAF calls, or more importantly, when the wing/group/squadron commander asks about the status of a case.

So, how do you develop the habit? The key is establishing a routine time each week to meet with the Military Justice Section. The SJA must consider this one of the most important meetings on the calendar and make it a priority to be present. This is not a function an SJA can afford to delegate to the Deputy.



At a minimum, the day before the justice meeting, the SJA should request a copy of the following reports for courts and Article 15s: Cases in Progress Report, Processing Time Report, and Pending Cases Report. Of course, if you really want to impress your NCOs, learn to print them yourself. It's easy to do (discussed below). A quick review of these reports the day before your meeting will give you the overall picture of the justice workload and how your process is working. Now you're prepared to attend the justice meeting armed with the right questions to ask and issues to address. This will equip you to have an efficient, productive meeting. Something your very busy justice folks will appreciate.

As a manager interested in the military justice process, you can access these reports at any time from the TJAG Webpage. The Reports tab is on the top of the

page at the far right. Click on Reports, and then choose AMJAMS.

The first thing you will see is a security screen like the one for FLITE. You will be challenged for a user ID and password. You will need a separate user ID and password for the AMJAMS reports. As an SJA, you should already have a password. If you've lost or forgotten it, your military justice NCOIC can get one for you or you can contact Mr Bob Penn (AFLSA/JAS, DSN 493-5266, or email bpenn@jag.af.mil) or Ms Hattie Simmons (AFLSA/JAJM, DSN 296-1542, or email hattie.simmons@pentagon.af.mil) directly.

Once you've passed the security screen that asks for your name and password, you'll find a list of all the available reports. All you have to do is decide which report you want and select from the list. After you've selected the report, look at the bottom left of the screen and choose the jurisdiction for the report. Then look to the right and choose the start and end date of the report. Now click the Query button at the far left bottom of the screen. The AMJAMS Reports Output Screen will appear. Just click on the blue link and you've got your report.

Remember, the reports you'll want are the Cases in Progress Report, Processing Time Report, and Pending Cases Report. Here's how to read them.

CASES IN PROGRESS REPORT

The Cases in Progress Reports for courts and Article 15 actions are similar. They are arranged by squadron. At the top of the report are the case "milestones" by which you can measure its progress (Case Ready, Charges Preferred, etc…) Above each milestone is a number. The number represents the average number of days between each event.

Below each milestone, for each case, are two sets of dates. The top line represents the date each milestone should occur in a "perfect" case. The second date is entered by the military justice paralegal showing when that event actually occurred. By comparing the two dates, you can see if you are on track to meet the metric. The final line "No Action in xx days" alerts you to how many days have elapsed since the last date entered into AMJAMS. This can be an extremely useful tool to monitor whether the Justice Section is "touching every case every day."

PROCESSING TIME REPORT

The Processing Time Report also refers to milestones. It shows the number of days between each event. It also shows the total number of days it took to complete the action, and whether it was within the time standards. The bottom line of the report gives a total number of days for each event. This is a very useful tool for evaluating where potential problems exist in the process. If a certain part of the process is taking an inordinate amount of time, it will show up here. This line also gives you the total percentage "within goal" for the period you chose to view (i.e. what the NAF is watching).

PENDING CASE REPORT

The Pending Case Report is a very straightforward report containing data on cases under investigation. It provides all the pertinent data on the individual, date of the earliest offense, offenses, investigative agency POC, a narrative description of the case, and the all important current case status. As long as you stay familiar with each case, you can stay up to speed on pending cases with a quick glance at the end of the narrative block and the current status block. You can also use this report to ensure cases are not dragging. For example, if the last entry is "awaiting OSI report," and it hasn't changed for two weeks, you should prompt your Justice folks to push OSI for a report, or for witness statements. They need this information as soon as possible so they can begin to analyze the case for potential charges, disposition, etc.

OTHER HELPFUL AMJAMS TOOLS

Individual and Special Interest Case Reports

Two other reports that are of great use are the Individual Case Report and the Special Interest Report. The Individual Case Report contains the same type of information as the Pending Case Report plus a list of all the important case dates, and data on the trial personnel. If you have cases that have been designated, either by your MAJCOM or AF, as special interest cases, you will definitely want to keep an eye on the Special Interest Report. This report is viewed by the Chief of Staff and the Secretary of the Air Force. You want to ensure you review the Special Interest Reports on a routine basis to ensure they accurately reflect the status of the case. Most of the data in the report is similar to the Individual Case Report.

AMJAMS Article 6 Slides

In addition to preparing management reports, AMJAMS also prints Article 6 slides. You can print the slides from AMJAMS and know exactly what TJAG and the MAJCOM are looking at before they arrive. They are also great tools to use at your Wing's Status of Discipline meetings. Most of the slides AMJAMS produces supply percentage metrics which compare your base's performance with the Goal, the Air Force average and the averages of your MAJCOM or NAF. These reports are "static." They are run at the end of each month showing data year-to-date. Current year-

to-date and previous year-to-date slides are also available.

AMJAMS Guide

For detailed step-by-step instructions on how to use AMJAMS as a management tool refer to the *Executive's Guide, Computer Programs & Reports, May 2002.* The Guide can be accessed on the JAS website, at the JAS Helpdesk, under Products. The direct link for the website: https://aflsa.jag.af.mil/JAS_HELPDESK/prod.htm.

AMJAMS SUMMARY

Using AMJAMS on a weekly basis in conjunction with a meeting with the Military Justice staff is the SJA's key to success in managing Military Justice. As long as your Military Justice staff is entering AMJAMS data in a timely fashion, you have at your fingertips all the data you need to track trends, identify trouble spots in the process, and forecast your military justice workload.

More importantly, you will have the ability to answer commanders' and first sergeants' questions intelligently and quickly. Consider keeping current AMJAMS reports sitting next to your phone. Maybe you're not an expert in Military Justice, and you feel a little intimidated trying to manage the section. AMJAMS is the tool that will help you overcome your hesitancy to be more involved. It gives you the information YOU NEED TO BE IN CHARGE!

INDIVIDUAL CASE CHECKLISTS

We tell those working in military justice sections that the key to preparing for trial is to "touch every case every day." Although that level of involvement is not required of an SJA, your direct participation in the military justice process is required to develop effective litigators and ensure justice is done. How to know, you ask, what aspects of the case to touch and when? The two attached checklists map out the way.

The first attached checklist, "Checklist for Building a Successful Military Justice Program," addresses all five component parts of an SJA's military justice duties: (1) monitor case progress by conducting weekly military justice meetings; (2) ensure charges and specifications are legally correct and appropriate prior to preferral; (3) ensure the United States is well represented on your installation by monitoring trial preparation and advocacy; (4) act as primary, usually face-to-face, advisor to the wing commander on all military justice issues; and (5) promote justice within the system. The second checklist is devoted to Article 15s and will take you through every wicket of their timely processing. For an electronic copy of either checklist, send an e-mail to steve.stevens@maxwell.af.mil.

Checklist for Building a Successful Military Justice Program

1. Weekly meetings with your Chief and NCOIC of Military Justice.

   a. AMJAMS

   _____ Cases in Progress Report
   _____ Processing Time Report
   _____ Pending Case Report

   b. Status of Cases Under Investigation

   _____ What cases are currently under investigation?
   _____ Who is lead investigative agency?
   _____ If a civilian agency has the lead, have we requested jurisdiction to prosecute or is there a good reason not to? Does the commander concur? (AFI 51-201, para 2.5.3)
   _____ When did the offense occur? Statute of limitation issues? (U.C.M.J., Article 43)
   _____ Does the accused have an impending separation or retirement date? DEROS? Deployment? Is the accused on administrative hold?
   _____ What is delaying the report? If the investigative agency is simply waiting for a test result or to interview one TDY witness, ask them to release the witness statements.

   c. Status of Completed Investigations

   _____ Assign trial counsel. Early appointment ensures continuity for victims, "buy in" on the charges and specifications, and additional time to hone the case.
   _____ Have interviews with witnesses been completed?
   _____ Has counsel reviewed the physical evidence and crime scene in person?
   _____ Discuss the strengths and weaknesses of the case and the type of court you will recommend to the commander.
   _____ When will they be ready to prefer?

   d. Status of Preferred/Referred Charges (See paragraph 2 below for review of charges prior to preferral.)

   (1) SPCM
   _____ Referral package hand carried to the wing immediately upon receipt of charges?
   _____ Is the correct order number referenced in the referral block of the charge sheet?
   _____ Does the order precede the referral? (R.C.M. 504 & 601(a) and discussion)
   _____ Does the order reflect the appropriate CM type?
   _____ Are special instructions reflected on charge sheet, if necessary? (R.C.M. 601(e)(1) and discussion)
   _____ Was the accused served after referral? (R.C.M. 602)
   _____ Is the trial scheduled for more than three days after service? (R.C.M. 602)
   _____ Circuit counsel obtained, if needed?
   _____ Members and witnesses notified of trial date?
   _____ Trial date prior to speedy trial date? If not, approved delays documented? (R.C.M. 707)
   _____ Status of plea negotiations/proposed pretrial agreements.

   (2) GCM
   _____ Article 32 appointment package hand carried to wing immediately after receipt of charges?
   _____ Article 32 conducted and report submitted within eight days?
   _____ Referral package and *Credit* data ready for forwarding upon receipt of Article 32 report?
   _____ Advance copy of Article 32 report sent to the NAF?

_____ Upon referral, does the charge sheet reflect any changes to charges and specifications recommended in the SJA advice and approved at the time of referral? (R.C.M. 603)
_____ Does the order precede the referral? (R.C.M. 504 & 601(a) and discussion)
_____ Does the order reflect the appropriate CM type?
_____ Are special instructions reflected on charge sheet, if necessary? (R.C.M. 601(e)(1) and discussion)
_____ Was the charge sheet (as amended) served on the accused after referral? (R.C.M. 602)
_____ Is the trial scheduled for more than three days after service? (R.C.M. 602)
_____ Circuit counsel obtained, if needed?
_____ Members and witnesses notified of trial date?
_____ Trial date prior to speedy trial date? If not, approved delays documented? (R.C.M. 707)

e. VWAP. MJ section ensuring compliance with the program and tracking numbers for the year-end report? (AFI 51-201, Chapter 7)

f. Article 15 Actions

(1). Drafting

_____ Specifications allege an offense, including each and every element of the offense? The model specifications set out in the MCM should be the guide used at every level of review. All is not lost, however, if the Art 15 spec omits a portion of the model spec; AFI 51-202, para 3.8 states the action is still valid provided "the alleged offender is reasonably informed of the nature of the alleged misconduct."

_____ Further, an evidentiary review of the spec is in order in many cases. For example, dishonorable failure to pay just debts should be dishonorable. Do not allege dishonor beginning on the day the payment was due.

_____ Officer/SNCO selection record letters drafted? Although these letters cannot be served until the action on appeal is complete or until the member waives the right to appeal, your office should draft the letters while drafting the Article 15. The letters should be served immediately upon the appellate action being taken! If you do not deal proactively with these letters, your processing times will suffer. (AFI 51-202, para 4.8 and AFI 36-2608)

(2). Offering

_____ Offered within 10 days of "case-ready" date? (AFI 51-202, para 3.3 and Atch 3)
_____ Member given three duty days to respond? – that means a full 72 hours! (AFI 51-202, para 3.12.)

_____ If the member was not given the required time, a memo signed by the member should be included stating that the member knew he had a right to the time, but that he was not prejudiced by being given less time.

(3). Punishment

_____ Change of commander letter needed? If the first commander involved in the process is not the same commander that finishes it, there must be a change of commander letter under almost all circumstances. (AFI 51-202, para 3.10) The very limited exception to this rule is when the change is only for the UIF decision.
_____ Is date of rank for "hard bust" the day punishment was imposed? The new date of rank for a hard bust is not discretionary! When the member is reduced in rank, the date of the hard bust is the date the punishment was imposed. It cannot be any other date. (AFI 51-202, para 3.18)
_____ Period of suspension exceed 6 months or go past the member's ETS? -- not allowed! The period of suspension runs from the date of punishment. A good rule of thumb for those who

are challenged mathematically is to add 6 months to the date of the punishment and subtract 1 day. If the date of suspension is on that date or before it, it is proper. Remember, the suspension period can be less than 6 months. (AFI 51-202, para 5.4.2)

_____ Is conditional punishment realistic? "You must sober up!" will not work. The conditional punishment must be clearly stated and capable of accomplishment during the period of suspension. i.e., "IAW MCM, Part V, para 6a(4), this suspension is subject to the additional condition of your attending the Alcoholics Anonymous meetings at Building 722 once per week during the period of (begin date) to (end date)." (AFI 51-202, para 5.4.4. and Atch 5.)

_____ UIF entry? UIF entry mandatory for punishments exceeding one month (i.e., any punishment suspended, and any forfeiture for two months) and all officer cases. (AFI 36-2909, para 1.3.1)

(4). Appeal

_____ On forwarding package to Appellate Authority, does the package include all written matters considered in imposing punishment and a summary of any oral presentation made by the member? The Appellate Authority needs to know what has previously been said by the offender. (AFI 51-202, para 4.6.3)

(5). Supplemental Actions & Post-Processing

_____ If vacating a suspension, did the misconduct occur during the period of the suspension? – this is a must! Supplemental actions have special rules that must be followed. Always check the AFI and the definitions in the MCM when dealing with a supplemental action. (AFI 51-202, section 5B)

_____ Checklist run? You staff must have and use a checklist – see attached example. No pencil whipping!

_____ All actions (offer through legal review) completed within 20 days? (AFI 51-202, para 3.3.2)

2. Courts -- review all charges and specifications prior to preferral to ensure they can be proven and are appropriate. The package you review should include the charge sheet, personnel RIP, the transmittal, the personal data sheet, a proof analysis and the evidence.

a. The Charge Sheet

_____ Does the accused's name, rank and organization match the RIP?

_____ Does the enlistment/service date match the RIP?

_____ Is the amount of pay correct based on the current year's pay chart?

_____ Is pretrial confinement/restriction correctly reflected?

_____ Is the correct UCMJ punitive article cited?

_____ Do the specifications match the model specs in the punitive article?

_____ Are the dates charged within the statute of limitations? (U.C.M.J., Article 43)

_____ Is the name, rank, organization of the accused correct and consistent in each specification?

_____ Advance copy to your NAF?

b. The Proof Analysis

_____ Does the proof analysis demonstrate there is sufficient evidence to sustain each element of the proposed charges and specifications?

_____ Is the conduct better characterized by another offense, i.e. obstruction of justice vs. communicating a threat? Ask counsel to brief you on the advantages and disadvantages of charging it each way.

_____ Is counsel "piling on?" Even if there is not a multiplicity problem, there is no need to charge the same misconduct nine different ways. Select the charge that best characterizes the misconduct

that can be proven. If you charge the same misconduct under more than one article, have a good reason.

c. The Evidence

_____ Do you have evidence to address each element of each offense?
_____ Legal issues? Was the search and seizure lawful? Was the accused properly advised of his or her rights? Ensure counsel have recognized, researched, investigated and are prepared to counter these issues.
_____ Has counsel thoroughly investigated the case or is he or she relying on the OSI report? Counsel must interview witnesses, examine evidence and research the issues **prior to preferral!** Relying on someone else's summary of what a witness said can result in some pretty nasty surprises at trial.
_____ Are there gaps in the evidence that should be filled prior to trial? Is counsel aware and prepared to obtain the evidence when the case is referred (and they have subpoena power)?

d. Allied Documents

_____ Has the squadron commander provided the necessary language for the transmittal? (R.C.M. 401 (c)(2)(A) and discussion; AFI 51-201, para 3.5 & figure 3.3)
_____ Does the transmittal reference the correct type of court?
_____ Is the Personal Data Sheet and evidence supporting the charges listed as attachments (and attached)? (R.C.M. 401(c)(2)(A) and discussion; AFI 51-201, para 3.5 & figure 3.4)
_____ SPCM: Is the referral package drafted and ready to go to the wing (to include prospective court members and *Credit* data) immediately after receipt of charges?
_____ GCM: Has an available Investigating Officer been identified and is the appointment package ready to go to the wing immediately after receipt of charges?

3. Monitoring Trial Preparation and Advocacy/Mentoring Young JAGS

a. Initial contact. Make sure your new attorneys understand the ground rules.

_____ Ensure new counsel understand preparing for trial is counsel's highest priority. Encourage them to talk to you or your deputy if they are having difficultly prioritizing work. "I didn't have time to prepare properly" is not an acceptable response on the eve of trial.
_____ Assign a senior counsel to walk them through trial preparation for their first two cases at a minimum, even if circuit is coming in for trial.
_____ Tell them your expectations: case overview two weeks prior to trial, full trial brief review two days prior to trial, and a murder board two days prior to trial if they will be doing closing argument.

b. Prior to Preferral.

_____ Witnesses interviewed?
_____ Physical evidence and crime scene viewed in person?
_____ Documentary evidence procured, if possible without a subpoena?
_____ Legal issues identified, investigated and researched?
_____ Detailed Proof Analysis completed?

c. After Referral.

_____ Witnesses notified of trial date?
_____ Expert witnesses retained?
_____ Subpoenas issued, as needed?

_____ Discovery provided to defense and discovery request made?

d. Schedule a meeting with trial counsel two weeks prior to trial. Counsel will likely get more out of this meeting than you will. Having counsel articulate the theory of the case, the evidence he or she will present and the issues likely to be raised will gel things in counsel's mind and highlight case weaknesses. With two weeks to go, counsel still has time to plug the gaps. The goal is to poke holes without destroying confidence.

_____ Review the proof analysis and discuss it with counsel.
- _____ What is their theory of the case/what do they intend to argue?
- _____ How generally do they intend to prove each element?
  - _____ Witnesses.
  - _____ Exhibits.
  - _____ Demonstrative Exhibits.
  - _____ What legal issues or motions does counsel anticipate? What testimony, evidence, and case law will counsel rely upon to respond to that motion? What is the likely result? Has counsel prepared a draft response?
  - _____ Instructions. If your counsel does not know what instructions will be read to the members and/or hasn't already read these instructions herself, counsel is NOT prepared for trial.

_____ Discuss the defense case.
- _____ What is their theory of the case/most likely defense?
- _____ Who will they call/what evidence will they present?
- _____ Is any of the evidence objectionable? Has a motion been prepared?
- _____ How does your counsel intend to handle/respond to this evidence?

e. Schedule a trial brief review two days prior to trial.

_____ Have they prepared for every aspect of trial from motions to sentencing argument? Review the documents in their trial folders. Discuss the entire trial chronologically, in detail. Can they prove their case? Are they ready to respond effectively to the defense? Are they intending to argue for a sentence approved by you or the NAF SJA in GCM cases?

_____ If your trial counsel is lead on the case, the trial brief review should be followed by a murder board/practice closing argument. Practicing in front of a group will result in significant improvement in delivery and content. Have the elements available to the "members" and ask them afterwards whether counsel convinced them the accused was guilty beyond a reasonable doubt and why or why not. Counsel still has time to not only adjust her argument but the evidence, if needed.

f. Seek feedback on counsel's performance from circuit counsel and the military judge. Take affirmative steps to assist counsel in mastering those deficiencies.

4. Primary Advisor to the Wing Commander on Military Justice issues.

a. Review and approve all military justice packages prior to forwarding to the wing, including referrals, PTAs, IO appointment packages, etc. The package should reflect **your** advice.

b. "Military Justice packages should have legs." Some experienced commanders dictate all military justice packages be hand carried by the SJA so they can discuss the case with them prior to taking action. If your commander doesn't already fall into this category, moving toward face-to-face advisement in military justice cases is desirable. At a minimum, you should have an understanding with the executive officer to fast track these packages.

c. Ensure delegations and appointments are in order.

_____ Has the commander delegated authority to receipt for charges? (R.C.M. 403; AFI 51-201, para 3.6)
_____ Has the commander delegated authority to sign for referral of charges? (R.C.M. 601; A.F.I. 51-201, para 4.7)
_____ Has the commander delegated authority to release court members? (R.C.M. 505; A.F.I. 51-201, para 5.8.4)
_____ Has the commander appointed pretrial confinement review officers? (R.C.M. 305; AFI 51-201, para 3.2.2)
    _____ Have they been trained? (AFI 51-201, para 3.2.1)
_____ Has the commander appointed military magistrates? (R.C.M. 315; AFI 51-201, para 3.1.1)
    _____ Have they been trained? (AFI 51-201, para 3.1.1)

5. Finally, as the SJA it is your duty to promote justice in every case. Friction will likely arise between your trial and defense counsel from time to time, particularly with more inexperienced counsel. You must remain above the fray and protect the integrity of the military justice system, even when that may not be in the best interest of the government's case.

DATE FWD GCM:		DATE RECEIVED GCM:
DATE GCM REVIEW:		DATE GCM AMJAMS:
TARGET OFFER DATE:	TARGET LEGAL REVIEW DATE:	TARGET TO NAF DATE:

ARTICLE 15 PROCESSING CHECKLIST

FOR USE WITHIN __ AF GCM JURISDICTION

NAME: ____________________________ RANK: ________ UNIT: ______________

THE ITEM NUMBERS CORRESPOND TO THE NUMBERED BLOCKS ON AF FORM 3070.

ITEM #	QUESTIONS DETERMINING LEGAL SUFFICIENCY	BASE Y	BASE N	BASE N/A	GCM Y	GCM N	GCM N/A
	IS THE COMMANDER ON G-SERIES ORDERS?						
	IS THE MEMBER PENDING AN ADMINISTRATIVE DISCHARGE?						
	IS THE INFORMATION IN THE "TO" BLOCK CORRECT? VERIFY MAJCOM.						
	IS THE ALLEGED OFFENDER AN OFFICER OR SNCO? IF SO, BEGIN DRAFT PROCESSING FOR SELECTION RECORD DECISION [AND CONTACT NAF].						
	ARE THE SPECIFICATIONS LISTED ON PAGE 3, ITEM 14, IAW THE MODEL SPECS IN THE MCM AND DO THEY CORRECTLY ALLEGE THE VIOLATED ARTICLE(S) OF THE UCMJ?						
	DO THE SPECIFICATIONS ALLEGE AN OFFENSE?						
1C	IS THE INFORMATION CONCERNING THE ADC CORRECT?						
1E	IS THE TIME AND DATE LISTED IN WHICH MEMBER MUST NOTIFY THE COMMANDER OF HIS/HER DECISION TO ACCEPT NJP?						
	WAS THE MEMBER GIVEN **3 DUTY DAYS (72 HOURS)** TO MAKE DECISION TO ACCEPT NJP? (IF NOT, EXPLAIN WHY IN REMARKS ON THIS CHECKLIST)						
1	HAS THE COMMANDER SIGNED AND DATED?						
2	IS THE TIME AND DATE MEMBER WAS SERVED LISTED? HAS COMMANDER (OR OTHER REPRESENTATIVE) SIGNED AND DATED?						
3	DID MEMBER ELECT TRIAL BY COURT-MARTIAL? IF SO, STOP PROCESSING THIS CHECKLIST [AND CONTACT THE NAF IMMEDIATELY].						
	DID THE MEMBER ***INITIAL*** ALL APPLICABLE ELECTIONS?						
	DID THE MEMBER SIGN AND DATE AFTER MAKING ELECTIONS?						
4	IS BLOCK A(1) OR A(2) MARKED?						
	IF BLOCK A(1) IS MARKED, STOP PROCESSING THIS CHECKLIST.						
14	IS THE PUNISHMENT LISTED AT ITEM 14 WORDED CORRECTLY AND IS IT LEGALLY SUFFICIENT?						
	IS THE PUNISHMENT WITHIN THE COMMANDER'S AUTHORITY (SEE MAXIMUM PERMISSIBLE PUNISHMENTS)?						
	HAVE YOU ENSURED ANY FORFEITURES OF PAY DO NOT EXCEED MEMBER'S ***REDUCED*** RANK? ***(INCLUDING SUSPENDED REDUCTIONS.)***						
	IS THE PERIOD OF SUSPENSION 6 MONTHS OR LESS (OR LESS THAN ACCUSED'S ETS)?						
	IF PUNISHMENT INCLUDED A HARD BUST, IS THE NEW DATE OF RANK INCLUDED, AND IS IT THE SAME DATE AS THE PUNISHMENT IMPOSED?						
	WAS THE PUNISHMENT COORDINATED WITH THE LEGAL OFFICE?						
	DID THE LEGAL OFFICE CONCUR WITH THE PUNISHMENT?						
	DO ANY CONDITIONAL PUNISHMENTS CONFORM WITH THE GUIDANCE IN AFI 51-202, ATCH 5, PARA. 10.C.?						
4	DID THE COMMANDER SIGN AND DATE?						
	IF THE COMMANDER IMPOSING PUNISHMENT IS DIFFERENT THAN THE ONE WHO OFFERED THE ACTION, IS A CHANGE OF COMMANDER LETTER ATTACHED?						

ITEM #	QUESTIONS DETERMINING LEGAL SUFFICIENCY	BASE			GCM		
		Y	N	N/A	Y	N	N/A
4C	IS THE TIME AND DATE INCLUDED WHEN THE MEMBER MUST NOTIFY COMMANDER OF HIS/HER INTENT TO APPEAL? ***(5 CALENDAR DAYS)***						
5	DID THE MEMBER SIGN AND DATE ACKNOWLEDGING RECEIPT OF THE ACTION AND HIS/HER APPEAL RIGHTS ON THE SAME DATE CC SIGNED BLOCK 4?						
6	DID THE MEMBER SIGN AND DATE ELECTIONS MADE?						
	DID MEMBER ELECT TO APPEAL?						
	IF MEMBER MADE AN ORAL PRESENTATION AT BLOCK 6, DID THE COMMANDER FORWARD A SUMMARY OF MATTERS PRESENTED?						
7	DID THE COMMANDER MARK WHETHER THE APPEAL WAS GRANTED OR DENIED?						
	IF APPEAL IS GRANTED, IS RELIEF GIVEN LISTED ON PAGE 3 AS ITEM 14?						
	IS THE COMMANDER'S NAME, RANK, AND ORGANIZATION LISTED AND IS IT CORRECT?						
	IS FURTHER ACTION REQUIRED ON THE APPEAL?						
8	DID THE APPELLATE AUTHORITY MARK WHETHER THE APPEAL WAS GRANTED OR DENIED?						
	IF APPEAL IS GRANTED, IS RELIEF GIVEN LISTED ON PAGE 3 AS ITEM 14?						
	IS THE APPELLATE AUTHORITY'S NAME, RANK, AND ORGANIZATION LISTED AND IS IT CORRECT?						
9	DID THE COMMANDER MARK THE BLOCK INDICATING HIS/HER DECISION TO FILE THE ACTION IN MEMBER'S UIF?						
	DID THE COMMANDER MARK "WILL BE FILED" FOR ALL MANDATORY FILINGS WHEN PUNISHMENT IS SUSPENDED OR EXCEEDS 30 DAYS?						
	DID THE COMMANDER SIGN AND DATE THE BLOCK?						
10	DID THE MEMBER SIGN AND DATE THE BLOCK ACKNOWLEDGING THE UIF DECISION AND APPEAL ACTION?						
	WAS MEMBER SERVED WITH OFFICER OR SNCO SELECTION RECORD LETTERS IAW AFI 36-2608 IMMEDIATELY AFTER APPEAL IS FINAL OR DECISION NOT TO APPEAL IS MADE? ARE THE LETTERS ATTACHED?						
	IF THERE ARE ATTACHMENTS TO THE ACTION, ARE THEY LISTED IN THE TOP RIGHT BLOCK OF THE AF FORM 3070, PAGE 1?						
11	IS THE NAME, RANK, AND ORGANIZATION CORRECTLY LISTED FOR THE OFFICER CONDUCTING THE LEGAL REVIEW?						
	IS THE BLOCK SIGNED AND DATED?						
12	IS THE DATE THE ACTION WAS PROVIDED TO AFO AND MPF INCLUDED?						
PAGE 3	IS THE MEMBER'S LAST NAME AND SSN CORRECTLY LISTED IN BOTTOM LEFT BLOCK?						
	IS THE DATE OF COMMANDER'S OFFER LISTED IN THE BOTTOM RIGHT BLOCK?						
	HAVE ALL AMJAMS INPUTS BEEN MADE?						
	HAS THE 3070, ALONG WITH AMJAMS RIP AND CHECKLIST BEEN [MAILED, FAXED, OR E-MAILED TO THE NAF?]						

____________ CASE READY DATE

____________ DATE OF BASE FINAL AMJAMS INPUT

REMARKS: ____

____

____

AS DEFENSE COUNSEL, WHAT DO YOU SAY AFTER YOU SAY YOU'RE SORRY?

Thomas S. Markiewicz

INTRODUCTION

We stand beside them when the sentence is read. It certainly affects us when the military judge "informs" our clients of the sentence, but it's clearly not the same. Even though we may have done our best to prepare our clients for this moment, there is shock. Fifteen years is about the average for an Air Force prisoner at the United States Disciplinary Barracks at Fort Leavenworth. Sure, they did it to themselves and to the family members now huddled in the courtroom around us, but we got to know these people and "feeling their pain" is often unavoidable. We console ourselves with the fact that we did the best professional job we could have done, but then to these accused, about to be inmates, we have little more to say than we're sorry. Whether they deserve "the time" or not, the loss to society of a previously productive member is a waste.

In my own experience as a defense lawyer, I frequently found myself ill-prepared for counseling my clients who had just been sentenced to long periods of confinement. None of my law school courses prepared me for the unique discipline of psycho/legal advice that needs to be applied at the time. When the trial is over, what you say to your client about the sentence and how you say it will often, I am convinced, be more important to him or her, in most cases and over time, than all the motions and briefs that were filed and that will be filed in their behalf. This article addresses both the dynamics of that advice and its substance.

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Note: This article was originally published in The Reporter about 15 years ago (vol. 15, no.3). In the intervening years, policies have changed, the military corrections system has ebbed and flowed, and the number confined is down, but the realities of "doing time" have remained unaffected. The Air Force takes great pride that in terms of rehabilitating its members to be productive members of society, we are leagues ahead of civilian corrections systems. We want to keep it that way, and the process begins the moment the accused becomes an inmate.

ROLE OF COUNSEL

It has long been Air Force policy that regardless of sentence length inmates should be released from confinement at times and under conditions most likely to ensure their earliest assumption of responsibilities as productive law-abiding citizens, consistent with justice. While this policy is primarily designed to guide those involved in the formal clemency and parole process, it also creates in defense counsel, I believe, an obligation to ready their clients and direct their clients' efforts in ways likely to minimize the time they will spend in confinement. While defense counsel have many responsibilities following a trial that may be geared to reducing an adjudged sentence, e.g. assembling clemency matters for the convening authority, preparing a new inmate to deal effectively and purposefully with the reality of an approved, long sentence to confinement is certainly a mark of the complete defense attorney. It may challenge counsel to learn what the jailer knows about the system and develop skills usually found with priests or social workers, but no one has a better perspective or is in a better position to facilitate the return to society of productive citizens than their lawyers.

So, what do you say to a client after you say you're sorry? In my experience it's best to say nothing right away, except that things are by no means over and, in fact, that your client has arrived at a place from which to make a fresh start. Counsel, the accused, and family are in no state of mind to discuss the significant matters that must be discussed immediately after an emotional trial. A date should be set, however, and the subject of the meeting understood, i.e., early release from confinement.

There are the whos, and wheres, and the whens that ought to be thought out before you meet with your client to discuss a matter no less significant than a substantial portion of the rest of his or her life. I would suggest setting the meeting for a day or two after sentencing to give all the players a chance to reflect on what has happened. This normally will preclude attendance by a circuit counsel who needs to catch a plane to get to the next base or get home to conserve TDY funds, but certainly the local ADC, armed with the latest edition of AFI 31-205, the Air Force Corrections

System, is equipped for the job. If the confinement facility has space where you can meet privately, do it there because this is the place where the inmate over time must come to feel he or she can make positive steps. If family is in the area, invite them to attend; they will feel better able to support their family member, and recognize their importance in the reintegration of that family member into society. Nothing is more important, however, than *what* is said.

GOAL SETTING

An inmate, at a very early stage of confinement, ought to establish goals, and develop a plan for how those goals can be achieved. Frequently, however, an inmate lacks the knowledge to make those goals realistic. All Airman Joe Jones knows for sure is that he wants out and as soon as possible, thank you. He heard all those motions you made at trial and may believe release at the direction of an appellate court is just around the corner. He normally is in desperate need of direction. This is where a good defense counsel can make a real difference.

First things first. Draw the line very clearly for your clients between the legal issues in their case and the road to release from confinement should they not prevail with respect to those issues on appeal—statistically, the likely result. Their primary focus should be the road to release. That is because they have some control over how this will turn out and very little control over what the appellate courts will do. All too often, inmates fail to make the kind of progress in confinement necessary for early release because they appear to have wasted time they could have spent on themselves waiting for the letter that never comes.

Next, be blunt with your clients. The fact is significant clemency to reduce the length of a sentence to confinement approved by a convening authority is rare and rarer still if the inmate is eligible for parole but opts to avoid the "hassle" of parole, placing all his eggs in the clemency basket. Most Air Force inmates who get out of confinement early do so on parole. The others, those not eligible for parole, those who do not apply for it, and those who fail to secure it, usually remain confined until their "minimum release dates," computed by subtracting good conduct abatement from approved sentences. "Minimuming out" does not mean an inmate is free and clear, however, since many of these inmates will be subject to mandatory supervision as if on parole for the remainder of their sentences. Slip up during that period and you can be brought back to a confinement facility to finish serving your sentence. Ouch!

Release on parole when first eligible (most usually at the one-third point of adjudged sentence time) should be a goal for prisoners desiring early release from confinement. Defense counsel ought to describe in detail the formal clemency and parole process. Your clients need to know when they can expect to be considered within the process and the steps that will be taken. While the Clemency and Parole Board takes final action on parole, the process begins with a Disposition Board at the confinement facility. The recommendations of the Disposition Board and those members of the confinement staff responsible for the rehabilitation and confinement of inmates are given considerable weight in the ultimate resolution. Inmates who know what to expect generally do better. Defense counsel can really earn their pay by advising their clients how they may impress all those involved in the process and improve their chances of achieving the goal of early release on parole.

GOAL REALIZATION

Parole is alive and well as an alternative to incarceration in military corrections, having been excepted from legislation that did away with it in the rest of the Federal prison system. With a sentence of a year or more, an inmate who has an approved punitive discharge normally becomes first eligible for parole after serving one-third of his or her sentence and at least six months in confinement. Parole, however, is not a matter of right in the military services. Because one is eligible for parole does not mean one will be released on parole. Still, if an inmate wants release on parole and is willing to abide by the conditions of release on parole, that disposition, not lightly taken, is made only after the Clemency and Parole Board or an appeal authority has concluded that the inmate's release on parole will not present a substantial risk to the civilian community. Many factors are considered in arriving at that determination. Some of the more significant are discussed below.

OUTSTANDING CONFINEMENT RECORD

If your clients want parole, and they should if they realistically want an early release from confinement, then no matter the length of the sentence they should be preparing for it from the time of your initial post-trial meeting. Inmates with less than outstanding confinement records often have difficulty making parole and just "minimum out." An outstanding confinement record means no unfavorable reports and certainly no Discipline and Adjustment (D&A) Boards where facility rules violations may well result in loss of good conduct abatement or privileges and a less favorable custody status.

The importance of following to a "T" the rules of the institution cannot be overemphasized. Even to one

quite used to following detailed regulations and one who has experienced the rigors of a basic training regimen, the rules of a prison can seem quite severe. Violations often sound worse than the confining offense. A female prisoner serving time for drug use received a facility D&A Board for "maiming"—what she did was put some eye make-up on, a rules violation. Another inmate who was convicted of AWOL received a D&A Board for "trafficking"—he gave a fellow inmate an extra apple on the chow line. If a rule says you may have two pairs of slacks in your cell, that's all you better have. Confinement personnel and the Clemency and Parole Board view ability to follow the rules inside the prison as a barometer of how successful a prisoner will be in adhering to the conditions of parole.

An outstanding confinement record is not just the absence of negative factors in an inmate's correctional treatment file. What inmates do for themselves and for the institution reflects well on them. Many volunteer for less desirable work details; many take college courses or become involved in church ministries that benefit other inmates trying to cope with the stresses of confinement; and some achieve "trustee" status or work "outside the walls," impressing those with whom they come in contact.

New prisoners do stupid things because frequently they don't know how to handle their new environment. Defense counsel can do their clients a world of good by just talking through things like lack of privacy, boredom, personality conflicts that may arise with other inmates or staff members, and fears (most quite unfounded) for personal safety. These inmates also need to get prepared for the shock of transfer from a "lock-up type" facility where the TV or pool table was always in use to the "big house" where all new inmates experience the isolation and deprivation of maximum custody for a period of time. Some inmates, especially those who do quite well in local confinement, need to understand that their prior confinement record is weighed in determining their custody level in a regional corrections facility, but that to some extent they will be called upon to prove themselves again to earn the privileges associated with less restrictive custody levels. Your client should view this as part of a natural continuum rather than as a source of frustration or even anger.

ACCEPTANCE OF RESPONSIBILITY

Remember, the goal is early release on parole, and before the Clemency and Parole Board will return an offender to society on parole, it must assure itself that the offender has so learned from the experience of apprehension, conviction, and confinement that he or she will not offend again. The burden of proof here is on the inmate. There ought to be a showing of some insight into confining offenses and a capacity to explain what has been learned that will give the Board some assurance that the inmate will not again take the road to perdition. Confinement is not the place to minimize involvement in a criminal enterprise or to shift the blame for conviction and presence in confinement to others. Confinement is a place to accept responsibility. Indeed, if your client can come to view confinement not as *punishment* (which is imposed on him or her), but rather as a *consequence* (I did it to myself) of some or many bad decisions, that attitude will serve the client well.

Expressions of remorse by inmates for their crimes, if perceived to be sincere, can help convince the powers that be that they have put the criminal conduct in their lives behind them and are good risks for parole. Opportunities for such expressions are many—to the mental health officer who does a prisoner's social history, to the facility parole officer, or to the Disposition Board, for example. For some, expressions of remorse come quite easily. For others, not so. Maybe it is because they see themselves as "not guilty," which is not to be confused with being blameless. An example might be—"I was entrapped by a person whom I thought was my friend, but who turned out to be an OSI informant." Such individuals need sound advice on how to handle this critical determinant in assessments of suitability for release on parole. Again, on this significant matter, remind your clients of the dichotomy between the legal avenues open to them and the road to release from confinement through the clemency and parole process. If they pled not guilty at trial, they need to know that accepting responsibility for their crimes in prison is not necessarily inconsistent. For those who maintain that they had nothing whatsoever to do with any criminal enterprise, they need to understand that, while their position will be respected, no re-trying of cases takes place in confinement facilities and no points are earned for such a position with those who assess suitability for release on parole.

PROGRAM PARTICIPATION

One of the ways acceptance of responsibility for crimes is demonstrated is through participation in facility programs. Inmates need to be encouraged to take programs related to their confining offenses. Waiting lists for entry into these programs often meet inmates when they arrive at regional confinement facilities, so it behooves them to actively seek entry into rehabilitation programs at the earliest possible time to insure that they are completed or substantially so by the time they become eligible for parole.

The Clemency and Parole Board values and rewards active program participation. (This is to be distinguished from "square-filling" which, if perceived, is not favorably looked upon.) On the other hand, if an inmate was eligible for a given program but failed to take advantage of it, it may be difficult for the Board to conclude that he or she has the tools to resist recidivism and to view such an inmate as a good parole risk. As importantly as program participation is viewed, some programs may not be available to the prisoner who has not "accepted responsibility" for his crimes. Accordingly, if you have a client convicted, for example, of sex offenses, who maintains his innocence, it would be in his best interest if he could come to some level of acceptance.

A very common refrain of inmates is "I can't participate in programs because my lawyer told me to keep my mouth shut until after the appeal is over." Well, you will have covered your posterior with that advice since, in fact, there is no privilege for admissions made to facility mental health practitioners. However, in my nearly two decades in the business, I've never seen a single case in which what was said in a confinement rehabilitation program was used against an inmate in the criminal system, but I've seen literally hundreds of inmates never go out on parole because they refused to participate in facility, offense-related programs, often on the advice of counsel.

SOLID PAROLE PLAN

The goal for release on parole may have been realistically set, and Airman Jones may have become a model inmate who both accepted responsibility for his crimes and fully participated in available programs. If, however, he does not have a solid and verifiable parole plan, accepted by a Federal probation officer, his goal will not be attained. Counsel should inform the client of what he will need. Quite simply, one who aspires to release on parole will need a decent living arrangement and either a job, offers of help to find a job, or acceptance at a *bona fide* educational institution. It is never too early to begin developing a good parole plan, and family members should be involved if possible. My experience is that their involvement gives them a sense of being able "to do something" and the Clemency and Parole Board feels much more comfortable about releasing a prisoner on parole when there is strong family support.

THE PAST

It is also important to address those things about which the prisoner can do nothing. The Clemency and Parole Board may, after balancing all of the competing considerations, declare the inmate's confining offenses so serious or the impact on the victims so aggravated that the interests of justice would not be served by release of that prisoner at the first opportunity. Inmates, without proper guidance and support, can do understandable, if self-defeating, things at such times. They can get discouraged and their confinement record can decline. The best advice to them from early on is to be patient, remain focused on their goal, accept the things about their past that they cannot change, and do something about what they can.

THE FUTURE

If, due to his or her hard work in confinement and dutifully following your advice, your client gets a nod from the Clemency and Parole Board for release on parole, let the client not forget to "run through the tape." Too many screw up between the time they receive their letter from the Board and the date they are scheduled to walk out the door on conditional release, the consequence being either a delay in release or a rescission of the Board's decision approving parole. And too many (about 10%) get their parole revoked after some period "on the street" for failing to follow the conditions of parole. Back many of them go to prison, often with little hope of another early release. Early release on parole should be the first goal of your clients facing long sentences to confinement, but it shouldn't be the only goal. When released, their new goal ought to meld with those of the Clemency and Parole Board, their families, and the community to which they are released, i.e, to become productive, law-abiding members of society.

CONCLUSION

An accused just sentenced to lengthy confinement is at the lowest point in his or her life. Most want to pay their debt to society, return home, and get on with their lives. An accused's counsel is in a unique position to promote those results. Counsel can assist clients to focus on the future and to direct their energy positively while in confinement. The loss of the case may have been inevitable, but more often than not the client is salvageable. After the trial is over, a defense lawyer should be able to do more than express regret that a client is going away for a long time. The best attorneys work to prepare the client to serve the shortest time possible, consistent with the ends of justice.

TRIAL BRIEF

LIEUTENANT COLONEL TIMOTHY J. COTHREL
MAJOR CHRISTOPHER C. VANNATTA

"And. And. And. And. And." There we said it. We both feel better now that we got it out of our systems. We have to be careful, though, because as soon as we're back in the courtroom, the urge to say it again will reappear. We are recovering obsessive-compulsive sayers of "and" in the courtroom. In fact, we are also recovering obsessive-compulsive sayers of "okay," "uh," and "er" too. If you are reading this article . . . chances are you are too.

Now, before you slam down this edition of *The Reporter* with as much defensive indignation as you can muster, hear us out. You are a litigator, a trial attorney. It is your job to stand up in front of people and talk. The trouble is, this is not always a comfortable thing. As a result, you, like the rest of us, develop crutches to help cope with everyone watching every single thing you do and listening to everything you say. Some people rub their hands like some evil laboratory sidekick out of a bad B horror movie. Some fiddle with a pencil or pen. Most of us, however, rely on verbal crutches like the word 'and.'

While comforting for us, the repeated use of these words can be a distraction for court members. One of the primary axioms of trial advocacy is that anything that is distracting is bad. "How bad can the innocent, maybe even unknowing, use of crutch words be?" you ask. Well, let an episode from Maj vanNatta's experience be your guide. We'll let him tell the story himself: "As the records of trial from my early days as trial counsel show, I was in the habit of using (unconsciously) the word 'and' between every question. In one particular case, I asked 'one' direct examination question with 37 'ands' in it. At the conclusion of my examination, several of the court members exchanged 'high fives,' and money suddenly started changing hands among the members. Turns out, the president was running a pool on the number of times I would say 'and' during the direct examination. The first lieutenant won – I think it was $75. I lost: the court members did not listen to a word of my direct examination. Well, they did listen to one word – 'and.'"

Others use the word "okay" in a similar fashion. During the examination, they use the word "okay" in between every question. It sounds, however, like a response from the attorney to every question, as if the attorney is saying, "Okay, thanks for answering that question exactly the way I wanted you to."

"Uh" is actually the worst. No one sounds good saying "uh" over and over again. Plus, "uh" usually accompanies "and" and "okay" in a way that makes a lawyer sound annoying *and* not so bright.

Okay, so how does one stop this from happening? There are a few things that will help you stop using verbal crutches and, in the process, improve your advocacy skills. One thing you can do is write the word "and" or "okay" (or whatever your special word may be) in big, bold, all-caps letters across the top of each page of your direct examination. Every time you look down at your direct examination questions, you will see the word and will be reminded not to say that word. This works surprisingly well.

Another technique is to practice your examination in front of a non-lawyer. Ideally, that person should be a spouse or significant other. They take special delight at and are highly accomplished in reeling us lawyers down to Earth by pointing out our errors and missteps. Have that person stop you or make an annoying noise every time you say the offending word. This will rid your examination of the distracting word.

Third, during the actual examination, simply say the word to yourself before asking the question out loud. Of course, you have to remember not to say the question to yourself too.

A final (but most important) method you can use is to listen – really listen – to your witness's answers and trade in the interrogation for a conversation. This sounds simple enough, but actually requires a three-pronged approach to preparing and executing the examination.

Number one, you must be clear in your own mind what you are trying to accomplish with each witness. Bright, articulate lawyers fumble for words because they are thinking while speaking. Trials are primarily for speaking. The thinking – as much as possible – should be done well in advance. You can ensure that you've done your thinking by preparing, for each witness, a list of the specific information, that is, the *answers* you want to elicit during the examination.

Number two, you must organize these answers in a way that maximizes their value to your case. This includes not only using primacy and recency to emphasize certain points, but using logical, natural or-

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ganization of the information. This will make it easy for the members to understand how the information relates to your theory and to other evidence in the case and easier for the witness to understand what particular information you want. Of particular importance given the topic of this article, it lets you think of your next question more quickly, eliminating the space occupied by those "uhs" and "ands."

Finally, you must ask good questions. Think of the examination not as a series of questions and answers, but as a story (or series of stories). Your questions are merely a device to extract the story in a fashion advantageous to your case theory. Good questions are unobtrusive--nobody remembers what they were, only what they accomplished. If you prepare and practice only short, simple questions seeking a single piece of information, there is less verbiage to forget or fumble.

Since we have a little space left in this column, one more thing about listening to your witness. Really listening not only helps you to avoid verbal crutches, it accomplishes several other helpful things as well. Most importantly, listening is the only way to ensure that you actually get the information you want. It also keeps the witness relaxed and focused on the examination rather than on the guy in the second row who may be from her basic training flight but he kind of looks taller so it's hard to tell while he's sitting...I'm sorry, could you repeat the question? It keeps the members focused on the witness rather than on whatever it is that you're scribbling on that sticky. It will allow you to effectively "loop" the answers into natural follow-up questions, maintaining the illusion you are a normal human being doing nothing more than eliciting information from another human being.

Think about it; how many times do we insert the word "and" in between questions we ask during normal conversation? Never! It is only when lawyers get into the courtroom that they stop talking like normal people. This is exactly backwards. The courtroom is the one place it is critical for lawyers to talk like normal people. Don't wait until one of the court members slaps the bench and yells, "Pay up, suckers!" to figure this out.

PRACTICUM

SEARCHING AND SEIZING GOVERNMENT COMPUTERS

The communications squadron commander calls you and says that OSI wants to seize a government computer because it might contain child pornography. How do you proceed? Do you need a search authorization to seize and review the stored information? The answer is, it depends. Simply allowing OSI to search and seize the computer because it belongs to the government may result in the evidence being suppressed. In order to accurately advise the commander, practitioners must apply two distinct legal principles. The first is a Constitutional right to privacy analysis. The second concerns application of the Electronic Communications Privacy Act (ECPA). Practitioners are urged to use general principles of Fourth Amendment, federal and military law in evaluating the specific facts for a given case.

The Supreme Court has determined that government employees may have an expectation of privacy in their work areas that is protected by the Fourth Amendment. This expectation extends to government provided offices, desks and computers. However, the Court has also recognized an important exception to the warrant requirement in such searches. In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Court adopted a "special needs" exception which allows warrantless searches where the goal of the search is for non-investigatory, work-related reasons or for investigations into work-related misconduct. A review of several federal cases reveals the courts have given government employers a great deal of latitude in searching employee's offices (and in a reported few cases, the employee's computers) without a warrant to uncover work-related misconduct. However, the term "work-related misconduct" is not well defined. The general rule of law from these cases is that unless a search is solely for law enforcement purposes, the majority of courts allow the secured evidence to be admitted at trial.

The leading military case involving a warrantless search of government computers is *U.S. v. Monroe*, 52 M.J. 326 (CAAF 2000). The Court of Appeals for the Armed Forces held that military members do not have a reasonable expectation of privacy with respect to personal e-mail residing on a government computer network discovered by a systems administrator. The court focused on the existence of a login banner that put the user on notice that computer use was subject to being monitored. The banner, coupled with existing Air Force regulations prohibiting unauthorized use of government computers, negated the member's expectation of privacy. It must be stressed, however, that *Monroe* involved a remote search of a computer network rather than a physical search of an individual's assigned government computer. Whether an expectation of privacy exists or whether the *Ortega* exception would be applicable in the latter case is an unsettled issue. The practitioner should be careful in relying on *Monroe* to say that no expectation of privacy exists in government issued computers.

The Electronic Communications Privacy Act (ECPA) delineates the legal authority to access electronic communications. Intercepting e-mail messages while in transit is governed by Title I, 18 U.S.C., §2511-21. Accessing stored communications is regulated by Title II, 18 USC §2701-11. Both statutes are complex and require extensive review to properly apply to a given fact pattern.

No bright line rule exists in this evolving area of the law. As a result, practitioners must conduct a thorough ECPA and right to privacy analysis in each case involving the search of government computers. For a much more detailed examination of this subject, read the Computer Search Analysis available on the JAJM web site at https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JUSTICE/JAJM/index.shtml.

2002 MCM ADDITIONS AND OMISSIONS

In the Practicum of the March 2002 issue of the Reporter, we highlighted changes in the military law based on the President signing Executive Order (EO) 13262 in March 2002 and the 2001 National Defense Authorization Act (NDAA) in December 2001. The much-anticipated 2002 edition of the Manual for Courts-Martial includes changes resulting from EO 13262, but does not include all the NDAA changes. Therefore, if you haven't already, you should note in your MCM the omitted changes. Article 111 now ties the blood alcohol content (BAC) limit to the state BAC limit in certain situations. While Appendix 2 of the MCM (the UCMJ) includes this change, Part IV does not. The Joint Service Committee is drafting proposed language for Part IV to address this omission. Also, for offenses committed after 31 December 2002, the required number of court-members increases to twelve in general court-martial cases that have been referred as capital. This change, which is not reflected in the latest printing of the MCM, affects Articles 16 (1)(a), 25a and 29(b), UMCJ. A document highlighting the changes to those Articles is also available on the JAJM web site.

On 1 December 2000, amendments to the Federal Rules of Evidence became effective in U.S. district

courts. On 1 June 2002, after 18 months had passed, IAW MRE 1102 those amendments became applicable to the Military Rules of Evidence. An EO, awaiting the President's signature, will state which of those amendments will *thereafter* apply to military courts. In the meantime, all the amendments apply. View the amendments on the JAJM web site.

POTENTIAL DISQUALIFICATION OF THE CONVENING AUTHORITY

The court-martial has ended. The accused was convicted and sentenced, and taken off to confinement. The record is complete and authenticated. The SJAR was written and served, and the accused and counsel have submitted clemency matters and a *Goode* response. The SJA prepares an addendum that contains no new matter. Does this mean that the convening authority can take action on the case without any concern for potential post-trial errors? Not necessarily!

According to R.C.M. 1107, the convening authority shall take action on the sentence, and in his or her discretion, the findings, unless it is impracticable. If impracticable, the convening authority shall, in accordance with AFI 51-201, paragraph 9.11, forward the case to an officer exercising general court-martial jurisdiction who may take action. When forwarded, the record should contain a statement of the reasons why the convening authority did not act. An example of when it would be impracticable for the convening authority to take initial action on the case would be when the convening authority is disqualified.

This issue arose recently in *United States v. Gudmundson,* 57 M.J. 493 (C.A.A.F. 2002). The Court of Appeals for the Armed Forces looked at whether a convening authority, who testified at a case dispositive suppression motion, was disqualified from taking RCM 1107 action in the case. The Court failed to decide the case based on that issue, instead relying on a waiver by the defense in failing to object to the convening authority taking the action.

The case involved a motion to suppress the results of a urinalysis from Little Rock Air Force Base's "Operation Nighthawk." The defense alleged the urinalysis was not a valid inspection, but rather, a pretext and subterfuge for an unlawful search. The Government called the convening authority (who had ordered the plan to collect urine samples from airmen returning to the base during the hours between 0300 and 0600 on a weekend morning that coincided with a scheduled off-base "rave" party and mid-month payday) to testify on the motion. The convening authority testified about his reasoning in ordering the urine collection and lack of any specific knowledge that any military personnel used or intended to use drugs. The defense did not present any evidence on the motion.

The military judge denied the motion to suppress. In the SJAR, the SJA did not discuss the motion and the defense did not challenge the validity of the inspection in his post-trial submission. Although the defense reminded the convening authority that he had testified, it did not request that he disqualify himself from taking action.

On appeal, the appellant contended that the convening authority should have disqualified himself because he testified on contested matters, had a personal interest in the case, and was put in a position where he had to review the propriety of his own actions. The CAAF held that the issue was waived because Appellant was aware of the convening authority's involvement but chose not to raise the issue at trial or in post-trial submissions.

Despite the narrow basis for their holding, the Court discussed potential disqualifications. Noting that testimony at trial does not cause a *per se* disqualification, the Court indicated disqualification may result if the convening authority has a "personal connection with the case." *United States v. Gudmundson, supra* at 495 (citing *United States v. McClenny*, 5 C.M.A. 507, 512-13, 18 C.M.R. 131, 136-37 (1955)). Where testimony is of an official or disinterested nature only, there is no disqualification. Thus, in a case where a convening authority had testified about having authorized a search, he was not disqualified. *United States v. Cansdale*, 7 M.J. 143 (C.M.A. 1979). The *Gudmundson* Court noted other cases where testimony was disqualifying.

In *McClenny*, the convening authority testified about the authenticity of an official document that was essential in proving guilt. This testimony potentially caused the convening authority to have to determine the factual accuracy of the substance of his testimony in reevaluating the evidence. Accordingly, the testimony was disqualifying. Similarly, in *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976), testimony on a speedy trial motion disqualified a convening authority because he would be in a position of reviewing his own diligence in processing the case.

When analyzing these cases in the context of *Gudmundson*, military justice practitioners must conduct a test of "objective reasonableness." If, from the testimony, it appears the convening authority has a personal connection with the case, he or she may not act as the reviewing authority. Thus, if the testimony would cause the convening authority to have to question the validity of his or her own actions, that convening authority is disqualified.

Gudmundson failed to demonstrate that the convening authority would have to question the validity of his

actions. He presented no evidence on the motion and did not raise the issue in post-trial matters. Had he raised the issue at trial or in post-trial submissions and the convening authority acted despite those protestations, an appellate court may have set aside the action and required a new, disinterested convening authority to act.

Potential disqualifying factors for the convening authority is another item to add to post-trial checklists. Failure to do so may result in yet another post-trial processing error highlighted by an appellate court.

CAVEAT

A REAL WAIVER SAVER

The Air Force Clemency and Parole Board has the authority to waive the regulatory requirement that a candidate for the Air Force Return-to-Duty Program (RTDP) have 30 days remaining to serve on his or her sentence to confinement upon arrival at the Charleston Brig (home of the RTDP). In at least two recent cases, we suggested that the CA's action entering an airman into the RTDP be made conditional on the granting of a waiver by the Clemency and Parole Board. After the actions were taken, the respective SJAs faxed them to JAJR along with a brief summary of the circumstances (including the specific offenses involved). We then communicated the data to the Clemency and Parole Board for its decision. In each case, the Executive Secretary of the Board communicated the Board's decision (to grant the waiver) directly back to the CA's SJA. The SJA then contacted the SF folks and they took it from there.

If you have a case where the CA is willing to enter an airman into the RTDP but there appears to be a problem with time remaining to be served on a sentence to confinement, recommend that the following language be used in the action:

"In the case of ________________________, United States Air Force, ________________________, [only so much of the sentence as provides for ____________________ ______________________________ is approved and (except for the bad conduct discharge) will be executed] (or) [the sentence is approved and (except for the bad conduct discharge) will be executed]. I direct that ________________________ be entered into the Air Force Return-to-Duty Program at the Naval Consolidated Brig Charleston, South Carolina, conditioned on waiver by the Air Force Clemency and Parole Board of minimum confinement requirements." (Note--If the airman received a punitive discharge that is being approved in the CA's Action, the following language should be added: "In the event that ________________________ is not returned to duty, (he) (she) will be required, under Article 76a, U.C.M.J., to take leave pending completion of appellate review of the conviction.")

WAIVING WHAT?

Another question we received concerning the RTDP had to do with when the waiver of good conduct time applies. In this case (one of those discussed above), the accused volunteered for the RTDP, and the CA in his action directed his entry into the program. As indicated, since the adjudged confinement was too short to assure that the accused would have at least 30 days remaining to serve upon arrival at the Charleston Brig as required by program rules, a waiver of the minimum time requirement was sought and obtained from the Air Force Clemency and Parole Board. See AFI 31-205, *The Air Force Corrections System*, 9 April 2001, ¶ 11.4.3.11.

Incident to volunteering for entry into the Charleston program, the accused signed a standard statement in which he agreed to waive any good conduct time and extra good conduct time he had accrued or would accrue while in the RTDP. He understood that signing the waiver might result in extending his time in confinement beyond the maximum release date. AFI 31-205, *supra*, Attach. 17.

Despite having been entered into the program by the CA in his action, the accused was detained in confinement at his local base for an indefinite period so he would be available to testify against a co-conspirator. On the basis of his two-month sentence, the accused was entitled to a credit of 10 days of good conduct time. The question posed was, "Since the accused had signed the volunteer statement prior to the start of his term of confinement, was the waiver of good conduct time applicable while he was in local confinement pending his transfer to Charleston?"

The clear import of the statement the accused signed was that he would waive his accrued good conduct time while he was *in the RTDP*. In our view, the purpose of the waiver is to ensure that airmen engaged in the program will have sufficient retainability in the confinement environment to complete it. Here, although the CA had directed the accused's entry into the RTDP, until such time as he arrived at Charleston and formally entered the program, the waiver he agreed to would not be operative. If he were still in local confinement when he reached his minimum release date, he would be entitled to release from confinement at that time. However, on the basis of the

waiver of the minimum confinement time requirement earlier granted by the Clemency and Parole Board, he could still be entered into the program.

MILITARY AND CIVILIAN CONFINEMENT TIME-SHARES

The issue before the Air Force Court of Criminal Appeals was how to provide a meaningful remedy to an accused who, through the "shared responsibility" of all those involved, did not receive credit on his sentence to confinement for a five-day period he served in civilian confinement prior to his court-martial.

The problem developed when the accused was arrested by civilian authorities at a "strip club" for supplying an ecstasy pill to one of the club's exotic dancers. After being confined by the civilian authorities for five days, he was turned over to the Air Force. Ultimately, the civilian authorities decided not to prosecute. Instead, he was tried and convicted by a general court-martial for offenses that included the ecstasy distribution to the "strip club" dancer.

In the case of the *United States v. Sherman*, 56 M.J. 900 (A.F.Ct. Crim. App. 2002), the Air Force Court agreed with the defense that the accused had never received credit for the five days he served in civilian confinement prior to his trial by court-martial. It was clear to the court that those five days should have been applied against his approved 12 month term of confinement (citing, among other authorities, Department of Defense Instruction 1325.7 (17 July 2001), 18 U.S.C. § 3585(b), and the court's prior case of *United States v. Murray*, 43 M.J. 507 (A.F. Ct. Crim App. 1995)).

Unfortunately, the accused had already completed his sentence to confinement by the time this issue was considered on appeal. Thus, the Court had to decide how best to provide the accused the "meaningful relief" to which he was entitled with regard to the remainder of his sentence. *United States v. Hilt*, 18 M.J. 604 (A.F.C.M.R. 1984). Referencing the punishment equivalencies in Rule for Courts-Martial 305 (k), the Court noted that in a proper case an accused so deprived would be entitled to compensation for the excess confinement served as well as restoration of any benefits denied as a result of the excess confinement. In the case of the accused, however, the Court found there was nothing to restore because he had been required to take appellate leave following his confinement and was not entitled to pay while in that status. The only relief it could direct was five days' pay (in the grade to which the accused had been reduced) to compensate for the time that should have been credited towards the term of confinement.

This case should serve to remind practitioners that a military accused whose sentence by court-martial includes approved confinement, must be given credit toward service of the sentence for any days spent in military or *civilian* custody for offenses or acts for which the sentence was imposed.

TORT CLAIMS AND HEALTH LAW

The HIPAA Privacy Rule (45 C.F.R. Parts 160 and Subparts A and E of Part 164, hereinafter "the Privacy Rule") came into effect on 14 April 2003. DoD Health Information Privacy Regulation, DoD 6025.18-R, implementing the Privacy Rule, came into effect on the same date.

The Privacy Rule applies only to "covered entities" – health plans, health care providers, and health care clearinghouses. DoD administers health plans and engages in covered health care provider activities. The Military Health System (MHS) includes all DoD health plans and all DoD healthcare providers that are either institutions of, or assigned to or employed by the TRICARE Management Activity, the Army, the Navy, or the Air Force. Under the Privacy Rule, "Protected Health Information" (PHI) may be used or disclosed for treatment, payment or health care operations (Individually identifiable health information. *See*, 45 C.F.R. 164.501).

Any other uses or disclosures of PHI are generally prohibited unless the patient has provided prior written authorization for such uses or disclosures. Exceptions to this prohibition are enumerated in DoD 6025.18-R, Chapter 7. Two notable exceptions are "Uses and Disclosures Required by Law" (C7.1) and "Uses and Disclosures for Specialized Government Functions" (C7.11)

A framework for addressing HIPAA Privacy Rule implementation questions was developed and follows:

- Claims Officers will consult with their hospital's/clinic's HIPAA Privacy Officer on all procedural issues; and consult with their regional Medical Law Consultant (MLC) on all legal issues.
- MLCs, after reviewing DOD 6025.18-R, will answer all questions they can answer from the regulation; then forward any legal questions they need assistance on to JACT, and copy all MLCs by e-mail to ensure cross feed of information.
- JACT, in coordination with AF/SGJ, will answer any questions that it can and forward

all others to the Legal Advisor for the AF/SG HIPAA IPT. She, in turn, coordinates unresolved issues with the TRICARE Management Activity. All answers are e-mailed to all MLCS to ensure cross-feed of information.

RES GESTAE

The 2003 Medical Law Consultant Conference was held from 2-4 April in Rosslyn, VA. Graduates of the recently completed Medical Law Consultant Course, as well as incumbent MLC's, staff from JACT and the Surgeon General's office, were in attendance. Topics included implementation of HIPAA (see above), improved turn-over times in the investigation of malpractice cases, mature minor records, and handling disruptive patients.

The 2003 Medical Law Mini-Course is tentatively planned for 20-24 October 2003 at Travis AFB, California. This course is geared to claims officers and other attorneys who are involved in health law and medical malpractice issues at their bases, as well as paralegals. Instruction will be provided by staff of the David Grant Medical Center, JACT and AF/SGJ. Registration for the course will be at the end of the summer, and local funding will be required for this highly acclaimed course.

VERBA SAPIENTI

It is critical in being able to successfully adjudicate malpractice claims that these investigations be done in a timely manner. Unfortunately, JACT is seeing too many claims arrive for adjudication well after six months have passed since filing and after the plaintiff has already filed suit (which, under the Federal Tort Claims Act, they may do six months after the claim is filed). Often, there are problems getting the records accumulated and evaluated at the local medical facility. Sometimes, expert medical reviews take an inordinately long time to accomplish. Finally, some cases, which may have six or seven figure damage potential, may simply be put aside at the local legal office because of seemingly more visible issues.

It is wise, when malpractice cases are filed, to keep the regional Medical Law Consultant appraised as to its status, and to work closely with the local medical facility in achieving timely assimilation of records and analyses. This will allow for more timely adjudication. Statistics have shown that, if claims can be settled prior to litigation, the amounts awarded tend to be significantly less than those settled by U.S. Attorney's offices or in judgment.

ARBITRIA ET IUDICIA: GLOSSING OVER THE BOILER PLATE CAN BE COSTLY

In May 2001, a government employee was involved in a rear end collision, which was the fault of the employee. In March 2002, claimant filed a $250,000.00 personal injury claim, under the provisions of the Federal Tort Claims Act (FTCA). Although liability was clear, damages were at issue. Unfortunately settlement negotiations did not go well, and the claimant became the plaintiff in March 2003.

After the wing claims office and AFLSA/JACT spent a lot of time and effort adjudicating the claim and preparing to litigate the case (through an appropriate U.S. Attorney's office), an incredible fact surfaced: the claim being litigated had been settled already. Initially the plaintiff submitted an SF 95 listing property damage only. In August 2001, he settled what he thought was only the property damage portion of the claim. Then nearly two years later he filed the personal injury portion of the claim, which the claims office then adjudicated separately.

The bad news is the unnecessary amount of time, effort, and expense spent by both the wing claims office and JACT in adjudicating a claim and preparing a litigation case that already was settled. The good news is the base used the standard settlement and release form (Stipulation of Compromise Settlement and Release of Federal Tort Claims Act Administrative Claims Pursuant to Title 28, United States Code, Section 2672), which includes the following language:

The United States of America agrees to pay the sum of _______ DOLLARS AND ____ CENTS ($___.__), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement....

Consequently, by agreeing to the settlement provisions in the standard settlement and release form, the plaintiff settled both his property damage and his future personal injury claim. Therefore, the U.S. attorney anticipates having no trouble winning a motion to dismiss plaintiff's complaint with prejudice.

Lessons learned: (1) Even if local law permits splitting a claim, the installation claims office should not pay or settle a split claim without prior JACT approval. See Draft AFMAN 51-505. (2) Always check AFCIMS for related claims. If there is a related claim or claims, be sure, at a minimum, that it is

noted in the seven-point memo. (3) Continue to use the "Stipulation of Compromise Settlement and Release" form (available from the JACT home page: https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jact/) and do not remove any of the standard language. DOJ requires us to use this form and you should not significantly deviate from it. Be careful, the claim above is a perfect example. It was settlement of a property damage claim so removing the language in the above highlighted paragraph referencing bodily and personal injury seems natural. But in this case leaving the form as is saved the United States a costly litigation. (Case provided by Maj Stenton, JACT)

GENERAL LAW

PROCESSING HOMOSEXUAL STATEMENTS CASES

Recently a fact scenario arose at a base that required a fairly extensive knowledge of the application of the policy on homosexual conduct to resolve. Shortly after being notified of his deployment, a military member informed his commander that although he had never engaged in homosexual acts, he had a homosexual orientation and a desire and propensity to engage in homosexual conduct. Based on various factors, including the impending deployment, the timing, and the statement, the commander concluded that the statement was not true and was made solely for the purpose of avoiding continued service in the Air Force.

AFI 36-3208, paragraph 5.36, provides that a statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation. Further, paragraph 5.40.2 states, the unit commander "must initiate discharge processing if a basis for discharge…is found." Accordingly, if the analysis had ended at that point, the commander seemingly would have no option but to initiate discharge action. However, where a statement is inherently unbelievable or incredible, based on conflicting statements or circumstantial evidence to the contrary, it simply does not invoke the homosexual discharge policy and a commander need not initiate separation. The policy was never intended to be an exit tool for those simply seeking separation. Therefore, JAG recommended that discharge processing not be initiated.

Even assuming the statement was believable, under limited circumstances a commander may elect not to immediately initiate discharge processing. AFI 36-3208, paragraph 5.43, provides that a member need not be processed for separation when the commander determines that the member engaged in homosexual acts or made statements for the purpose of avoiding or terminating service and separation of the member would not be in the best interest of the Air Force. Accordingly, if a member is integral to an aircrew, maintenance crew, or any other operational capability and separation of the member would negatively impact the mission, the commander could exercise the option not to immediately process the member for discharge. Exercising this option at one point in time does not forego initiation of separation at a later time--when operational conditions change and it is no longer in the best interests of the Air Force to delay processing for separation, separation must then be initiated.

In this case, AF/JAG was notified of the case at an early stage, as required by TJAG Special Subject Letter 2002-3, Reporting Homosexual Conduct Cases, and worked with the MAJCOM and base office to ensure proper implementation of the homosexual discharge policy.

THE DoD SMALLPOX VACCINATION PROGRAM

As you read this article, the probabilities are strong that a United States military member somewhere in the world is receiving a smallpox vaccination. In fact, sooner or later, *you* may be identified to receive the vaccination. But whether you are selected to be immunized or not, as an Air Force attorney you need to be familiar with the program and its implications for commanders and their organizations.

On December 13, 2002, the Under Secretary of Defense for Personnel and Readiness signed a policy memorandum that initiated DoD's Smallpox Vaccination Program (SVP) to ensure that military members, and selected others, would be protected from smallpox as a form of biological warfare or terrorism. The Air Force implemented the DoD program on January 7, 2003, by memorandum signed by the Chief of Staff of the Air Force. Both of these documents can be found on the official USAF website for chemical and biological resource materials: https://chembio.xo.hq.af.mil/oea/index.shtml

Although DoD's procedural approach to the smallpox vaccination program is highly similar to that taken with the anthrax vaccination program, there are some differences, based on differences in the vaccines. For example:

Anthrax vaccine: Immunization through a series of six shots.
Smallpox vaccine: Immunization through one shot.

Anthrax vaccine: Almost no probability of serious side effects.

Smallpox vaccine: Some probability of seri ous side effects.

Anthrax vaccine: Almost anyone can take without risk of harm.
Smallpox vaccine: Certain medical condi tions preclude vaccination

Anthrax vaccine: Follow-on care of the vaccination site is not critical
Smallpox vaccine: Follow-on care of the vaccination site is critical

Like the anthrax vaccination program, the smallpox program will be implemented in stages, based on military needs and risk assessments. For example, the first vaccinations will go to those in the medical community who will be giving vaccinations to others, and to emergency response teams. After the medical "first responders" are vaccinated, the program will expand to those assigned to high-risk areas of the world and those who would provide mission-critical capabilities (as well as those who would soon replace them). The information on these groups is classified and will be released internally on a "need to know" basis. Obviously, details on which units are protected (and which are not) constitute sensitive information for purposes of operational security.

One of the most important "lessons learned" from the anthrax vaccination program was the importance of communicating clear, straightforward guidance about the illness and the vaccine. Any medical procedure has supporters and detractors -- vaccination programs are no exception. This means that some people and groups will surely challenge the merits of this program based on their assessment of the risks and benefits. Thus, it is important for commanders to address the concerns raised by military members and to understand that there are many resources available to reassure those who fear the vaccination. Both the DoD and USAF programs emphasize the importance of establishing an education plan (at the installation/wing level) so that key spokespersons are identified and accurate information is disseminated.

Another lesson learned from the anthrax vaccination program is that some airmen will refuse the vaccination even after every type of counseling and education has been provided. If the member remains steadfast in refusal even after counseling from their commander and medical authorities, he or she will be referred to an area defense counsel to explore the potential consequences of such continued refusal. As with any other misconduct, commanders have the full range of administrative and disciplinary options to encourage compliance and enforce the program.

Finally, the smallpox and anthrax vaccination programs may impact Federal civilian employees and contractor personnel. "Emergency essential" civilians and contractors providing "emergency services" may be directed to take the vaccinations. Emergency essential civilians are required to take mandatory vaccinations by reason of their job descriptions. Non-emergency essential civilians are normally not required to take vaccinations. In the case of contractor personnel, key contractor personnel should already be known to commanders and contracting officials prior to any deployments. If the existing contract does not address mandatory vaccinations, then a contract modification will probably be necessary before the commander can enforce the program. In these cases, staff judge advocates should coordinate with their resident experts and elevate any problems to the next highest command.

These programs, and their proper implementation, may involve life and death contingencies, as well as situations where accomplishment of the mission is at stake. The threat of biological warfare and/or terrorism is real -- recent events have proven that. Air Force attorneys must be ready to advise and support commanders as they carry out their responsibilities...now and for the indefinite future.

VOIR DIRE—AN EXERCISE IN DYNAMICS

Colonel David F. Brash

Voir dire is difficult. It is difficult for counsel. It is difficult for court members. It is difficult for military judges. The *Manual for Court-Martial*[1] provides that the purpose of voir dire should be to determine whether a basis for challenge exists against any court member.[2] Advocacy instructors chant that voir dire is the first opportunity to argue the case. Counsel, military judges, and court members are caught in the crossfire.

In thinking through an approach to voir dire, one should consider the different component parts and players involved: 1) the rules, 2) the judge, 3) the members, 4) opposing counsel, and 5) your trial plan. Working from these various frames of reference as both a starting point and checklist puts the practitioner in the best position to develop questions which will test the impartiality of the panel, ferret out fodder for intelligent exercise of challenges, comply with relevant court rules and practice customs, survive objection by opposing counsel, establish credibility with the members, educate the members, and, yes, even argue the case.

KNOW THE RULES

The first critical *Manual* provision regarding voir dire is that which provides for court member information before trial, Rule for Courts-Martial (R.C.M.) 912. Commonly known as *Credit*[3] data, this is the background information on the court members typically collected by the Government and provided all counsel before trial. The Rule provides for background data on the members such as age, sex, race, dependents, education, and past assignments.[4] This provision, and the information it requires, should not be overlooked as the first step in getting to know the members, discussed below. Put it first on the checklist and never begin a voir dire plan without first thoroughly reviewing this material.

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R.C.M. 912 sets forth the guidelines which impact voir dire. The most telling provision, found in R.C.M. 912(d), *Discussion*, explains the intended purpose of voir dire: "The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges."[5] Simplistic as this may appear at first blush, it simultaneously provides both wide latitude and significant restriction. Even though the purpose is couched in terms of the use to which it "should" be put, it limits counsel's ability to argue their case. Although there are ways to think about arguing one's case within the ambit of the stated purpose for voir dire, this provision provides military judges significant authority to restrict the same.

Use of the term "challenges," without qualification, sanctions the use of voir dire as a vehicle to obtain information upon which to exercise challenges for cause as well as peremptory challenges. Certainly, the enumerated bases for challenge for cause contemplate a rather restricted field of questions, most of which are posed by the military judge in the first instance.[6] However, the authority to develop information upon which to lodge a peremptory challenge carries with it the attendant expansion of subject matter, moving to those areas which allow counsel to get a "feel" for the members' overall attitudes.

Counsel should be familiar with those areas which give rise to challenge for cause in R.C.M. 912(f)(1). Most, such as a member's status as accuser, witness, investigating officer, counsel, or convening authority in the case, are rather "black and white" and readily resolved on the record with a single question. One enumerated ground for challenge, however, lends itself to much wider latitude in the questioning of members. It provides, "[a] member shall be excused for cause whenever it appears that the member should not sit in the interests of having the court-martial free from substantial doubt as to legality, fairness and impartiality."[7] This last provision arguably gives counsel more latitude in posing questions which move beyond the stated purpose of voir dire and into such areas as arguing one's case.

Finally, counsel should be familiar with relevant court rules. The Air Force Rules of Court were re-

cently amended to require counsel to provide the Court all proposed voir dire questions before trial.[8] Some courts, via local court rule or *sua sponte* action by the trial judge, may restrict counsel questions and provide that the military judge will ask all questions. There may also be other local rules which have a direct bearing on the presentation of voir dire. Do not neglect to check this source as well.

KNOW THE JUDGE

Military judges have significant control over the voir dire process. Therefore, counsel operate from a significant disadvantage in attempting to expand their use of voir dire if the judge is disinclined to allow it. There are just too many ways a judge can restrict voir dire, and be well within the law in doing so. Consider some examples. The attendant *Discussion* of the Rule itself provides, "[t]he nature and scope of the examination of members is within the discretion of the military judge."[9] The case law embraces this proposition. For example, a military judge may preclude altogether group questioning of the panel by counsel and conduct the questioning herself.[10] Further, a trial judge's practices on appeal will be treated with great deference, and will be measured for whether the practices collectively, "... properly tested for a fair and impartial panel and allowed counsel to intelligently exercise challenges."[11] Therefore, regardless of the restrictions a military judge may impose in dealing with voir dire, he will likely be supported absent a clear abuse of discretion.

Many military judges are resistant to lengthy voir dire beyond the standard questioning of members by the trial judge. The reasons are many. It is often awkward for the members and inexperienced counsel. Counsel may try to be cute or "trick" the panel. Counsel may argue their case. Counsel may not protect the record, especially when faced with a flurry of responses to an inartfully worded question. Regardless of the reason for the military judge's position on voir dire, the personal inclination of the judge is just a fact of trial life. Given the wide discretion vested in the judge at this phase of trial it is best to learn of the judge's practice and prejudices from other counsel who have practiced before her and develop a voir dire plan accordingly. For those judges who are not voir dire friendly, less is better. An approach to go with more and test the Court's patience early creates a risk of being shut down before the most important questions are posed. Also, less argument and more challenge ferreting are best. While one need not stick to the "black and white" enumerated challenges for cause when venturing into the arena of exploring bases for peremptory challenges, one should avoid argument and, instead, seek personal opinion – that is, draw from the member with open-ended questions, rather than just have him agree with your argument.

Finally, know how the judge fields individual voir dire issues. Some judges are quick to take a member individually on such matters as prior court experience and knowledge of a witness, while others tend to reserve individual voir dire only for those matters where it is critical, like knowledge of facts of the case or sensitive prior member victimization scenarios. Unless the judge takes an obvious and contrary stance, consider erring on the side of requesting individual voir dire for two reasons. First, opinions and precedent drawn from panel members during general voir dire, particularly senior ones, may have a significant impact on junior members. Secondly, the individual voir dire setting gives counsel a real chance to talk with the folks, one on one, and establish some personal rapport. An added benefit here is the member's likely willingness to be a bit more forthcoming.

KNOW THE MEMBERS

The starting point for knowing the members is the *Credit* data. Review it carefully and have military justice paralegals fill in gaps as necessary. These forms usually provide a wealth of useful data. As noted above, the law provides that certain information must be reported. Some bases provide additional data such as the member's rater and additional rater, and prior discharge board experience. Consider the importance of this collective information, given the facts of your case. Obvious examples jump out which are valuable on a case specific basis, for example, whether a member has children is important in a child abuse case. There is also other data which is important in a generic sense, for example, prior court-martial experience. Do not neglect, however, informal court member background data. Indeed, this type of information is often far more valuable than the official *Credit* data. If one is trying the case locally, personal efforts to get out and meet your fellow officers can pay big dividends when it comes time to assess the temperament of a panel when you know, or know of, the members you face. If one is trying the case away from home, local counsel can provide this valuable local insight.

In considering an approach to take with the members, start with what you want to avoid. Do not embarrass a member. The embarrassment problem comes in two "flavors," the unavoidable and avoidable. The unavoidable category embraces such situations as the member who was the victim of child sexual abuse or whose son suffered through a cocaine addiction. In a child molestation case and a drug case, these questions must be posed. Take the safest approach: propose that

the judge ask these questions. It takes away the potential that you will embarrass a member, while getting you the necessary information.

On the avoidable front, be sensitive to the members' career progression when you ask questions about their experience. Again, go back to that *Credit* data and make sure you understand the positions the officer has held prior to venturing into their professional background. For example, mid-grade or senior officers who have not held a command billet are often sensitive that they have not been selected for command. Therefore, if you ask a member whether she has been a commander before, you may open an old wound. If, on the other hand, you ask the same member whether she has had the opportunity to discipline a subordinate you can probably get where you are trying to go without hitting that sore spot.

Do not put your credibility at risk. In voir dire, there are at least two opportunities for an attorney to lose credibility in front of the members. The first is the cute question. The second is acting like a lawyer. The cute question can come in several forms, but the most dangerous is that which all members may perceive as an attempt to trick them. For example, asking an individual member if he could consider no punishment in a violent rape case not only forces that member into a corner unnecessarily, but also likely leaves the remaining members with the impression that you are trying to trick them. Moreover, in this situation, you are also likely to get intervention from the bench which may do even more to reduce your credibility.

An attorney can also lose credibility by acting like an attorney. The proposition that we should distance ourselves from "typical lawyer" conduct is certainly subject to professional disagreement. However, at the least, careful counsel should reflect on the possibilities. As attorneys, we have a reputation within some corners of the community as shysters who readily straddle the ethical fence. Of course, we know this is not true, but one cannot deny the prevalence of lawyer jokes and the portrayals of this type of conduct on television. Working from this premise, the more one does in a courtroom to avoid acting like the "typical lawyer," the more likely one is to preserve credibility. For example, speak like a regular person versus an intellectual. Certainly, however, be professional and incorporate military courtesy and deference into your presentations.

Along these same lines, when defense counsel repeatedly refers to the accused as "my client," a similar negative perception may be generated in the panel. Generally, those who use this reference are intentionally, or even unintentionally, simply trying to sound like a lawyer. Television defense lawyers always refer to the defendant as "my client." Instead, defense counsel end up depersonalizing their client who would be far better served if their counsel referred to them by their military rank and last name.

LISTEN TO THE MEMBERS

Counsel should listen to members during the course of voir dire as they would listen to a witness on the witness stand. Their responses are no less important. Consider the following exchange in a stolen credit card case:

TC: Now, Major Evans, you just told the judge that the fact that you had a credit card stolen earlier in your life wouldn't effect your decision in this court, right?

MBR (MAJ EVANS): Yes.

TC: Are you sure about that?

MBR (MAJ EVANS): I certainly believe so.

TC: No doubts about that?

MBR (MAJ EVANS): No.

TC: So, you can be fair and impartial?

MBR (MAJ EVANS): Yes. (*What part of my response does he not understand? Was he sleeping when I answered the judge's questions about this? Does he think I'm lying to him? I just took an oath as an officer to answer these questions truthfully – this is getting a bit insulting.*)

This happens all the time and creates a real credibility problem. The problem is solved by simply listening to the member first when questioned by the judge, and second when the member is responding to your questions.

The best opportunity you will have to really listen to a member and assess their gut feel on a variety of issues is individual voir dire, but only if you are accomplished enough to essentially carry on a conversation with a court member in the formal and sterile environment of a courtroom. This chance does not often present itself for three reasons. First, trial judges, justifiably, require counsel to state the basis for individual voir dire before calling a member back and are unlikely to grant the request just so counsel can have a chat. Second, the member is going to be very circumspect in their response. They alone are in the spotlight in a very unfamiliar environment and do not want to say the wrong thing. Consequently, it can be like pulling teeth. Third, most counsel are just as nervous about the prospect as the member. Not knowing what to say next, they are continually trying to think of the next question or looking at notes. Such distractions

during a conversation do not provide fertile ground for a comfortable give and take. However, there are some possible solutions.

First, you may have to fight to get your foot in the door. Be prepared to lose because many judges reserve individual voir dire on a strict necessity basis. Other judges are more liberal, but, in either circumstance, make sure you can articulate a need for the individual session based upon a response by the member in general voir dire, or a relevant matter of which you are personally aware, like the member's attendance at Quality Force briefings. In the end, like in so many areas of voir dire, the trial judge maintains great control. The law is clear. Neither the *Uniform Code of Military Justice* nor the *Manual for Courts-Martial* provides counsel the right to individually question the members.[12]

Second, fight to have the member speak. Obvious as it may be, ask open-ended questions, very open ended questions. This is nothing new to counsel, the method is employed all the time in interviews. Ask, "What do you think about....?" Ask, "Why?" Do not ask, "Do you have any strong feelings about...?" The latter question gives the member an option of saying, "not really." It is like a chess game, and, if well prepared, you can get even the cagiest senior master sergeant to open up.

Third, fight to keep your attention with the member and not on your notes or your next question. Nothing is more uncomfortable than facing the member you have called back for individual voir dire, staring him down, and having nothing to say. Rest assured the member is not going to start the conversation. It's up to you. Put the courtroom environment out of your head. Forget you are a lawyer. Just talk to the person as you would at a bus stop. Use those truly open-ended questions early and often.

Ultimately, you must know your limitations. If you are not comfortable leading an informal conversation, if you just can't get away from those notes, or if you don't have many trials under your belt, you may not want to call for individual voir dire unless it's absolutely necessary.

LISTEN TO THE JUDGE

Begin listening to the military judge well before she gets to the voir dire section of the script. Review the preliminary instructions in the *Military Judge's Benchbook* for valuable fodder in building your own series of questions about the law. It is also a good idea to check with the judge to make sure she indeed does follow the *Benchbook* guide in preliminary instructions if you intend to refer to statements of the law therein. Listening to what the judge actually says will complete this exercise.

Know that you will test the patience of the court and members if you repeat the questions just posed by the judge. Instead of repeating them, use them as a take off point for further different questions. For example, many counsel follow up on the standard question about prior court-martial service with a question regarding prior discharge board service, or past appearance as a witness in a court-martial. Further, knowing what the judge will ask in the first instance gives counsel the opportunity to move the court to ask additional questions like those which may venture into embarrassing areas, discussed above.

LISTEN TO OPPOSING COUNSEL

Listening to opposing counsel during voir dire allows you to gain some insight as to their case theory. This can be accomplished regardless of whether one is serving as trial or defense counsel. On the defense side, counsel have the added benefit of observing how the judge controls voir dire and tailoring your presentation accordingly. For example, if the judge is obviously intolerant of lengthy questions geared to argue one's case and has repeatedly shot down trial counsel in this effort, you have the advantage of avoiding this controversial area and completing voir dire without interruption from the judge. Consequently, you may come off looking a little better at that early credibility stage. Also on the defense side, it is important to listen to trial counsel to ensure again that you are not repeating questions posed, at this point, by either the court or trial counsel.

HAVE A PLAN

In building a voir dire plan, begin with the goal. Do you want to educate the members? Do you want to argue to the members? Do you have a specific basis to explore a challenge for cause with an individual member? Certainly, all are legitimate. However, in most cases, the right plan is one of integration. Considering the appropriate questions and approaches from all perspectives presented above puts you in the best position possible to explore panel impartiality, make intelligent peremptory challenge decisions, comply with court rules and survive objections, establish that critical credibility at the outset, and argue your case. Execution is a matter of planning – you now have some tools.

[1] MANUAL FOR COURTS-MARTIAL UNITED STATES (2002).
[2] R.C.M. 912(d), *Discussion*.
[3] *United States v. Credit*, 2 M.J. 631 (A.F.Ct.Crim.App. 1976); *rev'd on other grounds*, 4 M.J. 118 (1977).

[4]R.C.M. 912(a)(1).
[5]R.C.M. 912(d), *Discussion.*
[6]U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 42-45 (1 Apr. 2001).
[7]R.C.M. 912(f)(1)(N).
[8]TJAG Policy Memorandum: TJAGD Standards – 3, Air Force Standards for Criminal Justice, Attachment 2:Uniform Rules of Practice Before Air Force Courts-Martial (15 Jan. 2003).
[9]R.C.M. 912(d), *Discussion.*
[10]*United States v. Dewrell*, 55 M.J. 131, 136 (2001).
[11]*Id.* at 137.
[12]*Id.* at 136; *United States v. Lambert*, 55 M.J. 293, 296 (2001).

Case Study: Use of the Military Extraterritorial Jurisdiction Act to Prosecute Misconduct by a Civilian Employee in Japan

Lieutenant Colonel Ronald R. Ratton

INTRODUCTION

When the United States stations military forces abroad, it generally enters into Status of Forces Agreements (SOFA's) to define the rights, duties, and immunities of the force and its uniformed members, civilian employees, and dependents. Perhaps the keystone to any such arrangement is the sharing of criminal jurisdiction.[1]

The standard foreign criminal jurisdiction (FCJ) formula is as follows.[2] The sending state retains exclusive jurisdiction over offenses against sending state law that do not violate the law of the receiving state. Similarly, the receiving state has exclusive jurisdiction over offenses solely against receiving state law. Between these two poles lies the area of concurrent jurisdiction. In that region, the sending state has the primary right over offenses committed by members of its armed forces or civilian component that are solely against the property or security of the sending state, solely against the person or property of another member of the force or civilian component or of a dependent, or arising out of any act or omission done in the performance of official duty. The receiving state has the primary right of jurisdiction over all other offenses.

Over the years, a "jurisdictional gap" opened in the FCJ structure. A series of Supreme Court cases, starting with *Reid v. Covert*[3], virtually eliminated the ability of the United States to exercise jurisdiction over civilian employees accompanying the U.S. forces overseas. In recent years, the only way to assert criminal jurisdiction over civilian employees has been to point to an offense under Title 18 of the U.S. Code with extraterritorial application. The list of criminal statutes with such effect is quite short.[4]

Because the United States could not generally point to a provision of American law a civilian employee violated, host nations have had exclusive jurisdiction over most crimes committed by civilians. Many of those crimes, however, occurred on U.S. military bases or affected only United States citizens. In such cases, many host nations have had little interest in pursuing prosecution.

This unfortunate situation seemingly ended with the passage of the Military Extraterritorial Jurisdiction Act (MEJA) in 2000.[5] Numerous commentators heralded the passage of this law and its expected closure of the jurisdictional gap.[6]

The statute created a new federal crime that makes punishable conduct occurring overseas that would have been a felony had the conduct occurred within the United States.[7] The act applies to persons employed by or accompanying the U.S. Armed Forces overseas and certain uniformed personnel, such as separated personnel whose crimes were not discovered prior to discharge.[8]

Section 3261 is the heart of the MEJA, since it is that provision that creates the new offense, effectively opening the door to prosecution of civilians accompanying the U.S. forces abroad for all federal felony offenses. Sections 3262 through 3265 deal with arrest, delivery to foreign authorities, removal from the foreign country, initial appearances, detention hearings, and use of military defense counsel. Section 3266(a) states that the "Secretary of Defense . . . shall prescribe regulations governing the apprehension, detention, delivery, and removal of persons under this chapter and the facilitation of proceedings under section 3265." Those regulations, said to be in final coordination, are still forthcoming.

The lack of regulations implementing the statute is problematic, but not a total bar to using the MEJA. As this article will show, the MEJA can work despite the lack of implementing regulations, though determined efforts and a little luck is helpful. Furthermore, the MEJA is not only useful to fill the jurisdictional gap that occurs when foreign sovereigns decline to prosecute civilians who commit crimes overseas, but also as a vehicle for the U.S. Government to maximize its jurisdiction where the host-nation is not so reticent about prosecuting.[9]

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U.S. v. BRYAN: MEJA APPLICATION AT YOKOTA AB, JAPAN[10]

Allegation and Initial Response

On 11 August 2002, the parents of an 11-year-old girl informed AFOSI that their daughter had been sexually assaulted by Mr. Billy Bryan, a 40-year-old civilian employee (WG-10) working at the 730th AMS, Yokota Air Base, Japan. The child victim is the daughter of a Defense Commissary Agency employee at Yokota. Mr. Bryan and the victim's family lived in the same neighborhood in Yokota's military family housing.

OSI agents immediately interviewed the little girl. She stated that on or about 2 August 2002, she was sleeping over at Mr. Bryan's house. During the evening, Mr. Bryan entered the room where she was sleeping and touched her breasts and genital region. On 12 August 2002, AFOSI advised Mr. Bryan of his rights and interviewed him. During the interview, he admitted to touching the victim's pubic hair and her breasts.

On 14 August 2002, the 374th Airlift Wing commander placed Mr. Bryan on international hold and Mr. Bryan voluntarily surrendered his passport. He also agreed to move out of his house and into billeting (later a dormitory room) and to remain away from the victim's house. (On 13 August 2002, his family voluntarily returned to the Tacoma, Washington area, where they had been stationed less than a year before.) The wing legal office also provided Mr. Bryan a SOFA briefing, informing him of his rights under the US-Japan SOFA.

Initially, it appeared that Mr. Bryan's case would fall into the jurisdictional gap. An initial check of Title 18 of the United States Code revealed that the alleged crime did not fit under any of the offense provisions with extraterritorial application.[11] The offense clearly was a crime under Japanese law.[12] However, because the offense occurred on base and involved only U.S. citizens, it was not clear that the Japanese authorities would have an interest in prosecuting the case.

Working the Issue of Japanese vs. U.S. Prosecution

As noted above, this was, in essence, an *inter se* case where one might easily conclude that the Japanese government would have little or no interest in prosecuting. The reality is more nuanced than that, however. Absent the MEJA, the United States would have no basis to assert jurisdiction. Thus, in the past, this would have been a case of Japanese exclusive jurisdiction in accordance with the US-Japan SOFA, article XVII, paragraph 2(b). In discussions with Japanese prosecutors, it became clear that they were quite willing to prosecute the case if the victim's parents filed a complaint with the Japanese police.

Certainly the easiest way to ensure Mr. Bryan would be prosecuted would have been to ask the Japanese to do so. As noted above, had the victim's family filed a criminal complaint, they would have willingly done so. However, this approach runs counter to U.S. policy generally to maximize jurisdiction over its personnel.[13] Also, while the crime did occur on Japanese soil, because the offense involved only United States citizens and was committed on a USAF base, the most appropriate forum to adjudicate this allegation was a United States court.

Accordingly, almost immediately after the incident, we began looking for ways for the United States to exercise criminal jurisdiction over Mr. Bryan. Initially, we contacted the U.S. Attorney's office in Guam. They were willing to take the case, but it soon became apparent that there were numerous practical difficulties. First, Guam would only have venue if Guam happened to be the first U.S. jurisdiction Mr. Bryan happened to enter after leaving Japan.[14] We could not force Mr. Bryan to go to Guam, so short of encouraging him to take a vacation there or seeking his assent to be tried there, venue would be problematic. Also, Mr. Bryan had no ties to Guam, so unless he were to be put in pretrial confinement, he would have no place to live and no support network.

Fortunately in this case, Mr. Bryan had only recently PCS'd to Yokota from McChord AFB near Tacoma, Washington, and his family had already returned there. The U.S. Attorney in Guam contacted his colleague in Seattle. We subsequently discussed the case with that office, and they agreed to have their Tacoma office look at the evidence.

Thus began several weeks of coordination. We contacted the McChord AFB legal office and sought their assistance in presenting the case to the United States Attorney's Office in Tacoma. We also arranged for AFOSI to send all of the evidence to the particular Assistant United States Attorney (AUSA) handling the case. Eventually, the OSI case agent traveled to Washington to testify before a United States grand jury.

When we advised the Japanese prosecutor that the United States would potentially be able to prosecute the case after all, he agreed to give up Japan's right to prosecute only after we assured him that such prosecution would occur and then only if the victim's family indicated in writing that it would not be filing a report with Japanese authorities.[15]

Consequently, once the U.S. Attorneys office in Tacoma had assured us that an indictment was forthcom-

ing,[16] we contacted the victim's family. We advised them of the pending prosecution in federal court. We asked them if they would be willing to make a statement to the Japanese prosecutor's office indicating that, in light of the U.S. ability and willingness to prosecute Mr. Bryan, they would not be filing a criminal complaint in Japan. They did provide such a statement, and the Japanese prosecutor subsequently sent a letter to this office stating that he would not indict Mr. Bryan.

U.S. Indictment and Return.

On 31 October 2002, a United States grand jury in Tacoma, Washington indicted Mr. Bryan, and the magistrate judge issued a bench warrant. On 1 November 2002, the court issued an arrest warrant.

Analogous to charging under the Federal Assimilative Crimes Act (18 U.S.C. § 13), under the MEJA, an accused is charged with violating the MEJA (18 U.S.C. § 3261), not the underlying offense. The indictment should also cite to the latter, however, to put the defendant on notice of the elements of the offense with which he is charged.[17] Thus, Mr. Bryan's indictment cites to the MEJA, the venue statute, 18 U.S.C. § 3238, as well as 18 U.S.C. § 2244(a)(1) and (c).

With both the indictment and the Japanese "waiver" of jurisdiction in hand, the civilian personnel office quickly cut PCS orders for Mr. Bryan back to McChord AFB.[18] Mr. Bryan departed Yokota Air Base via military charter on 15 November 2002.

We had previously communicated his travel arrangements to the AUSA and the U.S. Marshals' office. He was met at the airport on 15 November by U.S. Marshals and taken into custody. He had an initial appearance before a magistrate judge that afternoon and was ordered detained until his detention hearing, which was held 20 November. Finally, on 9 January 2003, Mr. Bryan pled guilty pursuant to a plea agreement. On 4 April 2003, the court sentenced Mr. Bryan to 18 months confinement, followed by three years of supervised release.

LESSONS LEARNED

As this article shows, the MEJA can be an effective tool for filling the jurisdictional gap, and can work despite the lack of implementing regulations. However, this case also demonstrates the need for those regulations. We were fortunate that the accused had come to Japan from McChord AFB only within the past year, allowing us to firmly establish his last known residence for venue purposes. We were also lucky to have the strong support of the U.S. Attorney's office for the western district of Washington. Despite their unfamiliarity with the MEJA, they were willing to lean forward and prosecute this case. The stars seemed to line up in other ways as well. For example, we were able to take advantage of an existing strong relationship between the McChord AFB legal office and the United States Attorney's Office in Tacoma. Also, the AFOSI Special Agent who investigated the case at Yokota was coincidentally called to testify at an Article 32 hearing at McChord AFB the same week the grand jury convened to consider the Bryan case.

Even though we were extremely lucky, this case still took five months to process. Had regulatory provisions implementing the MEJA been available, this case could probably have been completed much faster. For example, AFOSI completed the essential aspects of the investigation in weeks, if not days, of learning of the offense. Ideally, at that time, we could have either asserted primary right of jurisdiction or obtained a waiver of jurisdiction from Japan. USAF law enforcement personnel could have immediately arrested Mr. Bryan, and, in all likelihood, he would have been back in the United States shortly after the crime was committed, with civilian authorities managing and overseeing his case in a U.S. Article III court almost immediately.

Finally, this case also shows that U.S. country representatives must now consider approaching host-nation governments to change, in many cases, existing understandings and arrangements with respect to application of SOFA FCJ provisions to civilian personnel. The list of offenses committed overseas for which civilian personnel may now be prosecuted has been greatly expanded by virtue of the MEJA. Thus, in cases where, in the past, the United States would have been forced to admit that the host-nation had exclusive jurisdiction or make attenuated claims of primary concurrent jurisdiction based on potential administrative actions that could be taken against civilian employees, the United States can now forthrightly assert primary concurrent jurisdiction in most situations.

[1] Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, A.F. L. REV. at 140 (stating that SOFA's are based on two broad principles, the sharing of criminal jurisdiction and the acceptance of the legal fiction that members of the force and their dependents are not considered permanently present in the territory of the host nation)

[2] *See, e.g.*, Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan [hereinafter US-Japan SOFA], art. XVII; Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67, art. VII.

[3] 354 U.S. 1 (1957) (holding military court-martial jurisdiction unconstitutional when applied to civilians during peacetime). *See generally* Mark J. Yost & Douglas S. Anderson, *Current Development: The Military Extraterritorial Jurisdiction Act of 2000: Clos-*

ing the Gap, 95 A.J.I.L. 446 (April 2001).

[4]*See* http://www.afjai.hq.af.mil/ilaw/default.htm

[5]Military Extraterritorial Jurisdiction Act, 18 USC §§ 3261-3267 (2000) [hereinafter MEJA]. The law was hastened into passage by another court case. In *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000), a civilian dependent sexually abused his stepchild in military family housing at an army base in Germany. He was prosecuted for violating 18 U.S.C. § 2243(a). The Second Circuit Court of Appeals held that an overseas military housing area was not within the special maritime and territorial jurisdiction of the United States. However, the Court took the unusual step of providing copies of its decision to Congress, urging its action to close the gap in jurisdiction. *See* Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad - - Problem Solved?* ARMY LAW., Dec 2000, at 1.

[6]*See generally* Andrew D. Fallon & Captain Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F. L. REV. 271 (2001); Yost & Anderson, *supra* note 3; Schmitt, *supra* note 5.

[7]Section 3261 uses the jurisdictional phrase "if committed within the special maritime and territorial jurisdiction of the United States," however, conduct that would be a federal crime regardless of where it takes place in the United States, such as Title 21 drug crimes, also fall within the scope of MEJA. Schmitt, *supra* note 5, at 3.

[8]MEJA § 3261(a).

[9]Similarly, it also strengthens the position of U.S. delegations negotiating SOFA FCJ provisions. *See* Yost and Anderson, *supra* note 3, at 447 (noting how the MEJA enhances the credibility of United States delegations by "assuring the receiving state that, if it declines to prosecute, the United States has both the jurisdiction and the will to prosecute Americans accused of committing crimes within that state's territory").

[10]The *Bryan* case appears to have been the first case prosecuted under the MEJA. A second case is presently being prosecuted: in June 2003, a civilian spouse alleged to have murdered her husband, an Air Force Staff Sergeant assigned to Incirlik AB, Turkey, was indicted under the MEJA in the U.S. District Court for the Central District of California. *See* http://www.estripes.com/article.asp?section=[illegible]&article=[illegible]&archive=true (last visited 10 Jun 03)

[11]*See* note 4 *supra*.

[12]Keiho (Penal Code) art. 176 (Compelling Indecency).

[13]While rarely done, there is precedent for the U.S. Government to ask the Government of Japan to prosecute a case that would otherwise fall into the jurisdictional gap. We did have preliminary discussions with United States Forces Japan J06 in case the U.S. Attorney was unable to indict Mr. Bryan.

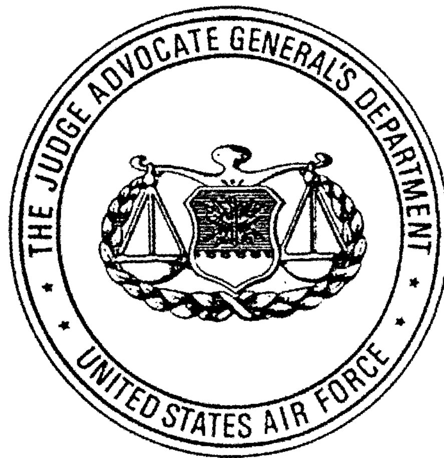
[14]18 U.S.C. § 3238. Section 3238 determines venue when an offense is committed outside any judicial district. That provision states that trial shall be in the district in which the accused "is arrested or first brought," or, if not so arrested or brought, then an indictment can be filed in the district of "the last known residence of the offender." If the last residence is unknown, then the indictment may be filed in the District of Columbia.

[15]In this case, under long-standing practice, the Government of Japan had exclusive jurisdiction. Thus, technically, we were not seeking a waiver of jurisdiction but rather a commitment by the host nation not to indict under the circumstances. Waiver requests are for concurrent jurisdiction cases where the host nation has the primary right, whereas in cases of host nation exclusive jurisdiction, the United States asks the host nation to abstain from indicting. *See* JOSEPH M. SNEE, S.J. & A. KENNETH PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION 31(1957) (noting that "[a] waiver in such case, however, is rather a *nolle prosequi* granted at the request of the sending State").

[16]*See supra* notes 12-13 and accompanying text; and i*nfra* notes 16-17 and accompanying text.

[17]Yost & Anderson, *supra* note 3, at 450-51.

[18]In such cases, the "gaining" base is not likely to be enthusiastic about having an alleged criminal PCS to their location. In this regard, it was useful for the 374th Airlift Wing commander at Yokota AB to contact his counterpart at McChord AFB to explain the situation


THE JUDGE ADVOCATE GENERAL'S DEPARTMENT
UNITED STATES AIR FORCE