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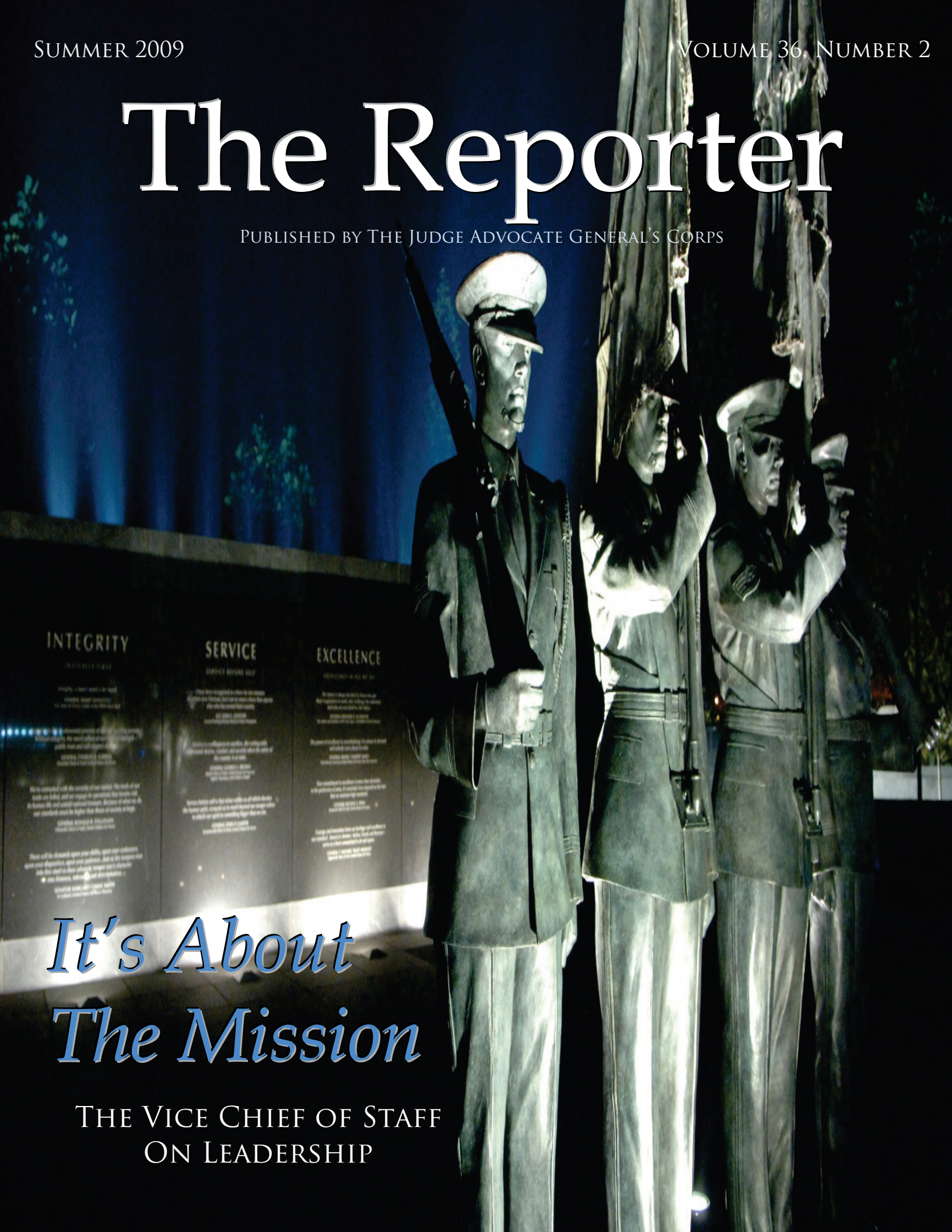

It's About The Mission

The Vice Chief of Staff On Leadership

The Reporter

Published by the Judge Advocate General's Corps

Summer 2009 *Volume 36, No. 2*

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On The Cover:

The entrance to the Air Force Memorial at night, featuring four eight-foot bronze statues of the Honor Guard sculpted by Zenos Frudakis (U.S. Air Force photo by Technical Sergeant Christopher J. Matthews)

The Reporter

Summer 2009
Volume 36, Number 2

The Reporter is published quarterly by The Judge Advocate General's School for the Office of The Judge Advocate General, United States Air Force. Contributions from all readers are invited. Items are welcome on any area of the law, legal practice, or procedure that would be of interest to members of The Judge Advocate General's Corps. Items or inquiries should be directed to The Judge Advocate General's School, AFLOA/AFJAGS (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802).

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MAJOR RYAN D. OAKLEY
MAJOR KYLE W. GREEN
Editors

Message from the Commandant

Colonel Tonya Hagmaier

"IT'S ABOUT THE MISSION." This summer, the JAG School was privileged to host General William M. Fraser III, then Vice Chief of Staff of the Air Force, who shared his leadership lessons honed from 35 years of service in uniform. In this edition of *The Reporter*, we pause to remember what it means to dedicate your life to a cause greater than self, whether on active duty, in the Reserves, or after military service.

Brigadier General Steven Lepper reflects on the historic life of Judge Robinson Everett, his former law school professor and a retired judge advocate, who dedicated over a half-century in the classroom and on the bench as a leading authority in military justice and national security law. At the same time, we honor Brigadier General Edward Rodriguez, Jr., USAFR (Ret.), who fittingly received the 2009 Robinson O. Everett Lifetime Achievement Award on behalf of the Judge Advocates Association, for his decades of service strengthening the JAG Corps.

Also in this edition of *The Reporter*, Lieutenant Colonel Le Zimmerman, a military judge, reminds us about the legal significance of the often-overlooked trial script. Lieutenant Colonel Ken Sibley provides an evidence primer on how to certify electronic documents. Sharing his experience as an appellate government counsel and former defense counsel, Captain Ryan Hoback discusses how to avoid ineffective assistance of counsel claims. And on a lighter note, we also unveil our new photographic feature, *Where in the World?*

Last but not least, Master Sergeant Lisa Swenson offers our inaugural *Paralegal Perspective* based on her recent deployment in Afghanistan. I strongly encourage all paralegals to share your personal experiences on the cutting-edge work you perform.

We hope these examples of innovative JAG Corps professionals and practices inspire you to rededicate yourself to mission-accomplishment in the broadest sense. Now, more than ever, Air Force leaders are counting on you.

Tonya Hagmaier

IT'S ABOUT THE MISSION

Leadership Lessons from the Vice Chief of Staff of the Air Force

"I've always told people that it's about the mission. People make it happen, but really, why do we exist? It's about the mission—to defend the Constitution of the United States against all enemies, both foreign and domestic. That's why we all volunteer to do what we do, and we must find legal means to continue to accomplish the mission."

-- General William M. Fraser III, USAF

On 22 June 2009, General William M. Fraser III, the Vice Chief of Staff of the Air Force, spoke to over 100 judge advocates and paralegals attending the Staff Judge Advocate and Law Office Manager Courses at the JAG School, Maxwell Air Force Base, Alabama. In his remarks, General Fraser shared his diverse leadership experiences and lessons learned from 35 years of service in uniform, stressing how commanders rely on JAG Corps members every day to get the mission accomplished.

"It is very important that you understand the role that you play in leading Airmen, Soldiers, Sailors, Marines, wherever you may be, and how important your job is to our Air Force," General Fraser said. "Folks like you help us gather information, make decisions, do what is right, and move forward. You help us better understand so we can measure the risk we take in the decisions we make. You help us find the right thing to do."

General Fraser takes questions from JAG Corps members

General Fraser spent the morning with course participants, engaging them on the importance of leadership and sharing from his perspective the role of the JAG Corps in the current national security environment. General Fraser shared examples from his career where he has relied on the counsel of his JAG, stressing how important it was for him to have his JAG close by when making difficult decisions throughout a myriad of command assignments. General Fraser also recognized the Deputy Judge Advocate General, Major General Charles Dunlap, as one of the JAGs he has depended on most during his military career. "[General Dunlap] and I have known each other for years, and I've often relied on his counsel in both legal and leadership matters." Highlighting the critical role that JAGs play in providing informed legal advice to commanders, General Fraser encouraged attendees to learn from the examples that General Dunlap had made throughout his career in becoming a trusted advisor to the commander.

The Vice Chief also encouraged course attendees to expand their horizons past the normal duties of the JAG Corps, ensuring they are both well-rounded JAG Corps members and Air Force leaders. "You probably feel very comfortable about the things you know the best. But you, especially as judge advocates and paralegals, need to get out and learn the things you don't know about. It may be uncomfortable at times, but you won't have an appreciation for others if you're not out and engaged in different areas. People love to show what they're doing, and you will grow as a person, as an individual, and as an officer or enlisted leader."

General Fraser concluded his address by returning to the theme of service, inspirationally reminding the attendees about the importance of military service. "It has been an honor and a privilege to serve our Air Force. However, the experiences I've had with all the Services are why I bleed purple at times. I have the utmost respect and admiration for the other Services and what they bring to the fight. It is different on the flight deck of a carrier working with Sailors. It is different in the foxhole with Marines or Soldiers. Good things are happening, and it takes all of us working together with you, giving us good advice, that helps us keep it legal. I know that you will continue to help us do that, and so it is an honor and a privilege to serve with each and every one of you."

General Fraser now serves as Commander, Air Combat Command.

Remembering Judge Everett

(1928-2009)

by Brigadier General Steven J. Lepper, USAF

Our Nation recently lost one of its most loved and respected jurists, educators, and military officers when, on 12 June 2009, Judge Robinson O. Everett passed away quietly in his sleep. He was 81 years old.

I first met Professor Everett in 1981 when I began my studies at Duke University School of Law. He taught at Duke for over 50 years and was still teaching at his death. I was one of a number of military officers from all services studying law at Duke under the Funded Legal Education Program; all of us gravitated quickly to Professor Everett because he was one of a very few law school professors with military experience. Not only was he a retired Air Force JAG Reserve colonel, at the time—1981 to 1984—he also was the Chief Judge of the United States Court of Military Appeals. Being Chief Judge was a role he cherished as much as he loved the other roles my fellow students and I watched him perform: father, husband, son, and professor.

Most students know little about their professors' lives outside the classroom. Judge Everett, as we knew and called him, took the military students under his wing and treated us not only as students, but as officers and friends. He clearly understood that the military world we lived in before coming to Duke posed as difficult a transition as living in North Carolina did to a Yankee like me. He eased both transitions for me and helped all of us adapt to our new "civilian" environment.

Judge Everett's intellect, patriotism, and humility were his strongest and best-known qualities. To be honest, he didn't look like a judge, professor, or retired officer. A big, lumbering man, he was so at ease with even the most lowly first-year law student that many of us found it hard to believe he could be as comfortable inside Washington's corridors of power as he was inside the classroom. A couple of memories will hopefully illustrate just how kind and gentle a man he was.

During my second year of law school, Judge Everett taught a course in military law. I enrolled, just as I had enrolled in every other course he taught. Rather than holding the class during the day at the school, we gathered once a week in his mother's apartment in a complex near the school. The Everetts owned the complex; Judge and Mrs. Everett lived with their three children in two apartments with the wall

between them removed. His mother, Katharine, lived right next door. The class met on Wednesday evenings; Judge Everett returned to Durham on Wednesdays from the court to see his family and teach this class and then returned to Washington, D.C., on Thursday morning. Getting to know Katharine Everett gave us much better insight into Judge Everett's compassion, intellect, and character. She, too, was an attorney and continued to practice well into her 80s. She was one of the first female attorneys licensed to practice law in North Carolina and, with her husband, had formed a formidable legal team. As hostess for this class in her apartment, she would serve a couple of liters of Coke and a bag of Oreos. While we drank, ate, and talked, she participated in our academic discussions and told us stories about her practice and experiences—stories that made each Wednesday evening the most eagerly anticipated event on our class schedules. Those evenings with Judge Everett, his mother, and sometimes with Lynn, his wife, made us mere students feel like part of the Everett family.

After graduation, Judge Everett stayed in touch with his military protégés. I recall several occasions over the years at Duke and in Washington, D.C., when our paths crossed. We used those chance meetings to tell each other what we'd been doing lately, how our families had grown, and how our lives had been enriched by our mutual experiences long ago at Duke. Of course, he always remembered more than I did. His mind seemed always to work at high speed and with amazing accuracy. No matter how much time passed, he always remembered his military students fondly and spoke of us and to us more like a father or friend than as a teacher or mentor. He was always proud of our military service and we did our best to let him know how proud we were to have had him as our teacher and friend. Of his many accomplishments in life, it was always clear to us that he was most proud of his military service, both as an officer and as the Chief Judge of our highest court. Three weeks before his passing, my class—the Class of 1984—held our 25th reunion. I didn't go; I was too busy. My first reaction upon hearing of his death was deep regret that I hadn't taken the time to return to Duke and see him one last time. That regret will remain forever; it compelled me to resolve to make time for the important people in my life no matter how busy my life might otherwise be. In an effort to honor this man for whom I have always held such high regard and respect—and maybe also to help me deal with my regret—I asked and was allowed to represent the Air Force at his memorial service and funeral. At his gravesite, as I handed our Nation's flag to his widow, Lynn, I uttered words that too many military widows have heard lately: "This flag is offered by a grateful Nation, in memory of the faithful service performed by your loved one." As I spoke them, I meant them more than I ever had before.

Our Nation should be grateful to have had such a wise, compassionate man in its service for so many years. I will always be grateful for his life's example—an example I try to live every day as an Air Force officer. Every day, I try to lead by embracing and displaying the core values that were Judge Everett's before they were the Air Force's or JAG Corps'. Although Judge Everett is no longer with us in body, he will always remain part of the spirit of the Air Force and the JAG Corps and part of the students he taught throughout the years. He will be missed.

Brigadier General Steven J. Lepper (B.S., U.S. Air Force Academy, J.D., Duke University) currently serves as the Staff Judge Advocate, Air Mobility Command. *Special thanks to Duke University School of Law for the photographs used in this article.*

Champion of JAG Corps Honored With Lifetime Achievement Award

Brigadier General Rodriguez receives the 2009 Distinguished Life Service Award from its namesake, the late-Judge Robinson O. Everett, and JAA President, Major General John Altenburg, United States Army (Ret.).

"One never knows when their greatest opportunity to do significant JAG service might come," said Brigadier General Edward F. Rodriguez, Jr., USAFR (Ret.) accepting the Judge Advocates Association's 2009 Robinson O. Everett Distinguished Life Service Award. "It might be on active duty. It might be in the reserve components. Or, as in my case, it might even be in retirement."

The Judge Advocates Association is a national legal society that was organized in 1943 by a small group of Army attorneys in Washington, D.C. Its membership now includes active duty, Reserve, and retired judge advocates from all services. It is the only national professional legal organization that is exclusively dedicated to judge advocates and practitioners of military and veterans' law.

The Distinguished Life Service Award was expressly established to recognize individuals who have demonstrated: (1) a lifetime of dedicated service to the principles of military and veterans' law; and, (2) justice and devotion to and furtherance of the mission and objectives of the Association and its members. In 2000, the award was first presented to Chief Judge Robinson O. Everett of the U.S. Court of Military Appeals. The Association then received permission from Judge Everett to name the award after him. The award is the Association's highest honor. Brig Gen Rodriguez personally accepted his award from Judge Everett and thanked him for his myriad of contributions to the practice of military law. "It is an honor to receive this award, which carries your distinguished name. This prestigious award is made more so because of it," Brig Gen Rodriguez said. Sadly, Judge Everett passed away on 12 June 2009, less than a month after the awards ceremony was held in Arlington, Virginia.

Brig Gen Rodriguez also thanked his wife Alicia for her patience and support. "Forty years ago, when we were married, she knew that we would spend four years in Air Force, but she didn't know that I would spend 25 [years] in the Air Force Reserve." In closing, he challenged all attorneys to always be on the lookout for the opportunity to perform pro bono work.

"This is a first for me: an award from the joint JAG community. That makes it extra special," Brig Gen Rodriguez said reflecting on decades of service supporting the JAG Corps in and out of uniform. "Now would I do it all over again if need be? Yes, I would, and yes, we can!"

Coming soon—the air force legal assistance website

Development of the new Air Force Legal Assistance Website began in September 2008, and the site is expected to be completed no later than 31 October 2009. The website is designed to increase efficiency and customer satisfaction with the Air Force legal assistance program. Because it is a public site, active duty and Reserve members, retirees, and dependents will have access to the site from the comfort of their homes without a CAC card, and will be able to perform three primary functions: (1) access basic legal information on common legal assistance topics; (2) complete online legal worksheets for wills, advance medical directives (AMDs), and powers of attorney (POAs) prior to their legal office visit; and (3) complete a client feedback survey following the client's visit to the legal office.

While clients will be able to complete online legal worksheets for wills, AMDs, and POAs, the client will be required to visit their local legal office to obtain the actual legal document they are seeking. Legal office personnel will be able to access the client's pre-filled online worksheets through use of a ticket number generated by the website and provided to the legal office by the client. Completion of the online will or AMD worksheets prior to visiting the legal office should help ensure that clients have obtained the necessary information, or discussed difficult issues with family members, prior to visiting the legal office to obtain their documents. For those clients that have completed online POA worksheets, the website will allow legal office personnel to generate a POA with the client's information directly from the website.

In addition, legal offices at all levels of command (base-level, numbered air force, and major command) will have access to client feedback surveys. The survey's rating system will allow legal offices to gauge areas such as wait times for appointments, clarity of advice, and professionalism. While the website is designed to increase efficiency to some degree, it will be critical for all legal office personnel to remember that the website does not, and cannot, replace consultation with an attorney. It will also be critical for front desk personnel to continue to be vigilant and use sound judgment in recognizing when an attorney consult is necessary. Expect guidelines to be published when the website becomes operational so that you will be able to educate yourself and your office on the website's features, and determine how best to incorporate the website into your legal assistance program. Thank you to everyone who participated in testing the website in June and August 2009. Your honest feedback has been critical to the development process.

Recent developments from the field

The JAG School continues to develop legal assistance learning centers in CAPSIL to provide additional resources for specific legal assistance topics. CAPSIL facilitates community communication, and the site provides a powerful array of tools that allow for quick distribution of information. For example, many learning centers contain an online forum where registered participants may post questions or information that the learning center manager or other participants may reply to. Also, some learning centers allow any registered participant to contribute documents or other information to the learning center to leverage the combined experience of the field. The following legal assistance learning centers have been released:

Pro Bono/Client Referral Learning Center. The Pro Bono/Client Referral Learning Center lists national and state pro bono/referral services available to assist JAGs and qualifying clients. Many of the services listed are not new; however, the center serves as a centralized location to track what resources are available and provide updates on new services as they become available. The learning center also contains a forum where you may post questions or feedback on pro bono and referral services listed or inform the field of other helpful services.

New Developments Learning Center. The New Developments Learning Center is maintained by the Air Force Chief of Legal Assistance and provides an avenue for quickly posting information on new legislation, programs, or other developments that impact legal assistance. The learning center's forum also provides an avenue for the field to post questions or request that other new developments be highlighted on the learning center.

Homeowners Assistance Program Learning Center. This learning center provides information on the Homeowners Assistance Program (HAP). The American Recovery and Reinvestment Act (ARRA) signed by President Obama in February 2009 expanded eligibility for HAP, a program historically designed to provide some reimbursement for service members and federal employees who face financial loss when selling their primary residence in areas where real estate values declined due to base closure or realignment announcements. Under the expanded HAP, eligibility now extends to certain wounded service members and DOD employees, surviving spouses of service members and DOD employees who died during, or as a result of a deployment, and service members who transferred stations during the housing crisis. Visit the learning center to learn more about the details of the program and information about HAP.

Survivor Benefit Plan and Casualty Affairs Webcast

In August 2009, Ms. Pat Peek (Survivor Benefit Plan Program Manager) and Ms. Susan Parson (Chief, Benefits and Entitlements) gave a webcast on the Survivor Benefit Plan (SBP) and Casualty Affairs. Ms. Peek and Ms. Parson provided details on both programs, and most importantly, discussed the roles a JAG might play in advising clients or assisting casualty affairs officers following the death of an Airman. Both subjects can be extremely important discussion points for Airmen who are deploying, building estate plans, or generally planning for their family's future in the event of their death. While JAGs are not the primary points of contact for these subject areas, an understanding of SBP and the benefits associated with the death of a service member can be critical in assisting a client. If you missed the webcast, you may view a recorded session on CAPSIL. If there are specific areas you would like to see covered in a webcast in the future, please notify Major Jeff Green, DSN 493-3428, jeffrey.green@maxwell.af.mil.

U.S. Air Force photo (SrA Sean Adams)

CAPSIL
Capturing Wisdom

New as Chief of Legal Assistance?

The Judge Advocate General's School has developed division chief courses, including a Chief of Legal Assistance Course. This three-hour course provides guidance for leading the base legal assistance program and offers key substantive law pointers on will drafting, consumer law, and Veteran's Administration benefits. By TJAG direction, completion of the course is mandatory before a judge advocate may assume division chief responsibilities within the legal office.

Your Legal Assistance Chief

Thank you for all of the hard work you are performing for our legal assistance clients. The current economy and new stimulus plans enacted by Congress present a challenging environment for legal assistance attorneys. If your office is successful in assisting clients with issues related to the economy, please let The Judge Advocate General's School know so that we can better assist legal assistance attorneys in the field.

If you have any questions, please contact Major Jeff Green at DSN 493-3428, jeffrey.green@maxwell.af.mil.

ELIGIBLE TO SERVE:
Chaplains on Court-Martial Panels

by Lieutenant Colonel Eric F. Mejia and Major Andrew J. Turner, AFLOA/JAJM

CHAPLAINS TRADITIONALLY HAVE BEEN EXEMPT FROM SERVICE on court-martial panels under Air Force and other service regulations. Accordingly, staff judge advocates automatically removed chaplains (and other categories of personnel likely to be challenged for cause) from the list of potential court members provided to a convening authority. But in July 2008, the Court of Appeals for the Armed Forces (CAAF) held in *United States v. Bartlett* that an Army regulation prohibiting selection of members in certain career fields (including chaplains, medical personnel, and persons assigned inspector general duties) violated Article 25 of the Uniform Code of Military Justice (UCMJ). The following discussion addresses the implications of the *Bartlett* decision, provides pointers, and describes relevant initiatives currently underway.

U.S. Air Force photo (SSgt Joshua Garcia)

ARTICLE 25

Article 25, UCMJ, provides in pertinent part:

> a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.
>
> (b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.
>
> (c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial.
>
> (d)(1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.
>
> (2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial

> temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

United States v. Bartlett

In *United States v. Bartlett*, 66 M.J. 426 (2008), CAAF considered a challenge to an Army convening authority's selection of court members. The convening authority detailed members in compliance with Army Regulation (AR) 27-10, which exempted from court-martial service officers assigned to the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, and Veterinary Corps, and those assigned Inspector General duties.[1] The court observed that Congress cast eligibility to serve on court-martial panels "in broad and inclusive terms" in Article 25, and included no limitation based on "branch, corps, or occupational specialty." The court noted that Congress prohibited only specific persons from acting as panel members, including accusers, prosecution witnesses, investigating officers, counsel, and warrant officers and enlisted persons in cases involving commissioned officers. Concluding that Congress intended "to ensure maximum discretion to the convening authority in the selection process," the court held that the Army regulations "directly conflict with the provisions of Article 25."[2]

Implications for Chaplains

The *Bartlett* decision broadly addressed the career field exemptions in Army regulations, but did not specifically focus on or address exemption of chaplains. Air Force regulations addressing convening authority selection and detailing of court-martial panel members do not exclude chaplains or other career fields, nor do they exclude other categories of personnel beyond those excluded by Article 25, UCMJ, and Rule for Courts-Martial (RCM) 502(a), 503(a) and 912(f).[3] However, Air Force regulations governing the Air Force Chaplain program currently prohibit chaplains from serving as court members.[4] The chaplain regulations emphasize a chaplain's obligation to "hold in confidence any privileged communication received during the conduct of his/her ministry," and the "absolute character of such privileged communication within the context of judicial proceedings and investigations."[5]

Implications Not Limited to Chaplains

The exemptions held inconsistent with Article 25 in *Bartlett* spanned the medical, nurse, dental, veterinary, inspector general, and chaplain career fields. While Air Force regulations do not exempt career fields other than chaplains, as a matter of practice Air Force staff judge advocates would, prior to the *Bartlett* decision, often include in their pretrial advice to their convening authority a list of assigned military personnel which eliminated those personnel "who would most likely be challenged for cause" or "who are not eligible to serve as court members (i.e., JAGs, chaplains, IGs or officers in the accused's unit)."[6] The Air Force Court of Criminal Appeals (AFCCA) has criticized this practice.

In *United States v. Brooks*, the AFCCA stated that it does "not recommend [such] wholesale elimination of potential court members," but concluded that the selection of members in that case did not constitute

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[1] Prior to trial, the garrison staff judge advocate advised the convening authority that no officer could be detailed to the court who was exempted by AR 27-10. 66 M.J. at 427.

[2] *See also United States v. Liriano*, 67 M.J. 12 (2008) (citing *Bartlett*) (holding medical officer not subject to removal for cause despite provision of AR 27-10 prohibiting medical officers from serving as members).

[3] AFI 51-201, *Administration of Military Justice*, Section 5C. RCM 502(a)(1) mirrors the first sentence of Article 25(d)(2), UCMJ, while R.C.M. 503(a)(1) states that convening authorities must detail "qualified" persons (cross-referencing those persons subject to challenge for cause under RCM 912(f), such as any person who is an accuser, witness, investigating officer, or counsel in the same case).

[4] AFI 52-101, *Chaplain Planning and Organizing*, para 2.1.7.

[5] *Id*., at para 4.1.1.1.

[6] *See United States v. Brooks*, 2005 WL 2129856 (A.F. Ct. Crim. App. 2005), *rev'd on other grounds*, 64 M.J. 325 (2007) (addressing "human lie detector testimony"); *United States v. Carr*, 2005 WL 2130080 (A.F. Ct. Crim. App. 2005).

unlawful command influence.[7] In *Carr*, the AFCCA went a step farther, finding that the SJA was incorrect and committed error when he advised the convening authority that "JAGs, chaplains, IGs or officers in the accused's unit" are not eligible to serve.[8] Noting RCM 912(f)(1) (removal of member for cause) and AFI 52-101, the court concluded that "with arguably the exception of chaplains … none of these officials are *per se* excluded from court member service." The court stated that it does "not endorse such language," and that "the convening authority should give appropriate consideration to all categories of members who may legitimately be assigned court-martial duty," but held that the error did not result in prejudice to the appellant. Finally, in *United States v. Liriano*, CAAF reinforced *Bartlett* by holding that a medical officer is not subject to removal for cause despite the provision of AR 27-10 prohibiting medical officers from serving as members. Against this backdrop, the *Bartlett* decision demonstrates the importance of avoiding categorical elimination of potentially eligible court members for consideration by the convening authority, including officers (but not enlisted members)[9] in the accused's unit, persons assigned inspector general duties, and judge advocates. The box on the following page provides pointers and further guidance on these issues.

Current Initiatives

The Air Force Legal Operations Agency is currently working with the Air Force Chaplain Corps to amend AFI 52-101, in response to *United States v. Bartlett*, to remove the prohibition against chaplains serving on court-martial panels. In addition, AFLOA/JAJM is currently working with its counterparts on the Joint Service Committee on Military Justice to consider a potential amendment of Article 25, UCMJ, which would allow the services to exempt, by regulation, chaplains and other career fields from service on court-martial panels.

Conclusion

Chaplains and other potentially eligible court members may not be categorically eliminated from consideration for court-martial duty, and they should be included in the pool of potential court members. But chaplains are not required to be detailed to court-martial panels. Rather, convening authorities must adhere to the Article 25 requirement to detail members "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

[7] 2005 WL 2129856 at *8.
[8] 2005 WL 2130080 at *9.
[9] *See* Article 25(c)(1), UCMJ, 10 U.S.C. § 825(c)(1).

PRACTICE POINTERS FOR CHAPLAIN SERVICE ON COURTS-MARTIAL

What is Required

- Ensure chaplains and other potential court members (*i.e.*, JAGs, IGs) are included in the pool of potential court members.
- Ensure chaplains and other potential court members are not excluded from consideration for membership on a court-martial panel.
- Advise convening authorities on the requirements of Article 25.

What is Not Required

- Chaplains are not required to be detailed to court-martial panels, nor are personnel from any other career field (*i.e.*, JAGs, IGs) required to be detailed.
- Chaplains are not required to be included on a particular list of member nominees presented to a convening authority, nor are personnel from any other career field required to be included. But, legal offices must ensure the list is prepared in a manner that does not categorically exclude members who may be eligible for court-martial duty.

Best Practices

- Emphasize to convening authorities the Article 25 requirement to detail members "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."
- Do not advise convening authorities that career fields are categorically excluded.
- Emphasize lawful discretion in the selection process to the convening authority.

Bottom Line

- No Sixth Amendment right to a trial by a representative jury exists in a court-martial, but an accused does have a right to members who are fair and impartial.
- Court members are hand-picked by convening authorities, as intended and directed by Congress in Article 25.
- The convening authority can and must detail members consistent with Article 25 requirements while avoiding "court packing" or undue command influence. Striking this balance is the essence of the discretion afforded by Congress and recognized by the courts.
- If a chaplain, JAG, or other potential court member is detailed, this does not mean that the member will remain on the court following *voir dire*.

Lt Col Eric Mejia, USAF, and Maj Andrew Turner, USAFR, currently serve at AFLOA/JAJM. The holding and implications of the Bartlett decision are further addressed by Captain Michael Rakowski, AFLOA/JAJG, in The Judge Advocate General's Corps Online News Service (ONS) Volume VIII, Issues 48 and 50, a point paper by Captain Rakowski linked to those ONS entries, and a featured article by Captain Rakowski in Volume III, Issue 5, of JAJG Perspective (October-December 2008) (available at https://aflsa.jag.af.mil/AF/lynx/jajg/).

An Open Letter to Defense Counsel:
Protecting Yourself Against IAC Claims

by Captain Ryan N. Hoback, USAF

Ineffective assistance of counsel (IAC) is a phrase that strikes fear into the hearts of new trial defense counsel across the Air Force. Serving as a defense counsel before becoming an appellate government counsel, I recall the good advice received from my former defense boss: "Don't worry about it. Just defend your clients as best you can." Honoring this advice, it is not my intent to tell you what you "must" do to protect yourself against IAC claims or how you "should" zealously represent your clients. You will have to make the tough tactical and strategic calls. Seasoned senior defense counsel will be there to provide you with support, mentorship, and guidance. Rather, my goal is to shed light on what IAC actually is and share the lessons learned while defending trial defense counsel against IAC claims on appeal.

The Law

The seminal IAC case is *Strickland v. Washington*.[1] In *Strickland*, the U.S. Supreme Court set out a two-pronged test, requiring an appellant to demonstrate, first, that his counsel's performance was so deficient that he was not functioning as counsel within the meaning of the Sixth Amendment, and second, that counsel's deficient performance prejudiced the appellant. Consequently, any judicial scrutiny of counsel's performance is highly deferential. Counsel are strongly presumed to have given adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The Supreme Court recognized that it is all too tempting for an accused to second-guess counsel's assistance after conviction or adverse sentence. Appellate courts therefore aim to avoid the distorting effects of hindsight, reconstructing the circumstances of counsel's challenged conduct and evaluating the conduct from the counsel's perspective at the time. As such, strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. Strategic choices made after a less than complete investigation will be found reasonable to the extent that the sound professional judgments of counsel support the limitations on investigation.

In *United States v. Polk*, a three-part analysis was established to review IAC claims.[2] First, are the allegations made by an appellant true? If they are true, is there a reasonable explanation for the actions of defense counsel? Second, did the level of advocacy fall measurably below the

[1] 466 U.S. 668 (1984).

[2] *United States v. Polk* , 32 M.J. 150, 153 (C.M.A. 1991).

performance ordinarily expected of fallible lawyers? Third, if IAC is found to exist, is there a reasonable probability that absent the errors, the fact-finder would have had a reasonable doubt respecting guilt? In other words, it is not what trial defense counsel could or may have done that would have affected the outcome of an appellant's trial, but what was constitutionally required to ensure that the trial was reliable and not fundamentally unfair.[3] While an accused is entitled to effective assistance of counsel, it is equally well established that the Sixth Amendment does not guarantee a perfect trial.[4]

Nor should tactical decisions be second-guessed upon appeal.[5] Recently, in *United States v. Mazza*, a case where the appellant alleged multiple instances of ineffective assistance of counsel, CAAF noted that "hard cases may make otherwise questionable trial tactics reasonable."[6] In particular, the trial defense counsel had the difficult assignment of defending an accused whose daughter testified to repeated instances of sexual abuse performed upon her, and whose wife testified to his admission to such abuse. Admittedly, the trial defense counsel made a number of tactical decisions that another defense counsel may have avoided. Regardless, CAAF acknowledged that, while a different defense counsel may have chosen different tactical steps, the tactics used were among the few options the defense counsel had and were part of a trial strategy. Consequently, the accused failed to show that this strategy was unreasonable under the circumstances and prevailing professional norms.

The IAC Appellate Process

If you have been a defense counsel long enough, the question is not "if" an IAC claim will be filed against you but rather "when." So what should you expect in the appellate process? Assuming the case qualifies for review

by the Air Force Court of Criminal Appeals (AFCCA), the process starts with the appellant filing his or her "Assignment of Error(s)." Typically, an appellant will also personally submit a sworn declaration specifying the particular claim(s) against you. Once received, an appellate government counsel from AFLOA/JAJG will contact you to inform you of the complaint, provide you the applicable portions of the brief and any matters submitted in support of it, and request that you provide a responsive declaration to the claim.

On rare occasions, defense counsel will refuse to answer the responsive declaration request. While Rule 1.6(b)(2) of the Air Force Rules of Professional Conduct expressly releases a defense counsel from his or her client confidentiality requirements to the extent the lawyer reasonably believes it necessary to respond to allegations in any proceeding concerning the lawyer's representation of the client, it is understood that individual state bar rules may be more stringent. In these rare circumstances, AFLOA/JAJG will file a motion for appropriate relief from AFCCA seeking a court order compelling a response by the trial defense counsel. Recently, CAAF commended these response practices by stating: "[w]hen colorable claims of [IAC] are raised on appeal, in those cases where the government can obtain an affidavit from trial defense counsel, the government should continue to endeavor to complete the appellate record promptly and avoid any undue delay."[7]

[3] *United States v. Thompson*, 51 M.J. 431, 435 (1999).
[4] *United States v. Owens*, 21 M.J. 117, 126 (C.M.A. 1985) (*citing United States v. Hasting*, 461 U.S. 499, 508 (1983)).
[5] *See United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).
[6] No. 09-0032/NA (2009).
[7] *United States v. Melson*, 66 M.J. 346, 350 (2008).

Once a trial defense counsel is ready to respond, AFLOA/JAJG will assist the counsel in placing the responsive declaration in the proper format for a timely submission to the appellate court. Each trial defense counsel is called upon to submit a truthful and accurate response for the appellate courts' consideration. Appellate government counsel will ensure case file documents that support statements made in the responsive declaration are attached to the response. This coordination ultimately creates a more comprehensive and effective responsive declaration on behalf of the trial defense counsel.

Practice Pointers

At this point, you may be asking yourself: "What proactive steps can I take as a trial defense counsel to prepare for an IAC claim?" Many months may pass from the time you complete representation of a client to the time his or her case is ready for consideration on an initial appeal to AFCCA. You may have moved from your defense job, and your files may be boxed up and gathering dust in a safe place in your new home. By the time you hear about a complaint, your recollection of what happened leading up to and during trial may be fuzzy at best. However, all of these challenges to effectively defending yourself against an IAC claim are easily overcome if you thoroughly documented your work during your representation of the client.

While an accused is entitled to effective assistance of counsel, it is equally well established that the Sixth Amendment does not guarantee a perfect trial.

Readily available to all defense counsel is a "Defense Counsel Trial Preparation Checklist." This document is an excellent tool even for the most seasoned defense counsel. It is also good practice not only to refer to the trial preparation checklist, but also to document when you have completed each step in the checklist. A checklist will provide organization as you juggle a large court-martial caseload with the other competing interests that are inherent in running your own office. Keep all checklists in the respective client files.

Most defense offices provide court-martial clients a court-martial preparation package. This package often includes an initial in-briefing handout that educates a client about the defense office and an accused's rights, including the "big four" decisions only the client can make (choice of counsel, plea, forum, and whether to testify). Good practice calls for the attorney to initial the document as they brief the client. Better practice calls for for both the attorney and client to initial the document as the client is briefed. The best practice calls for the attorney and client to initial the document *and for the attorney to brief the client on more than one occasion* (i.e., at initial intake, one week prior to trial, and the day before trial commences). Many defense offices also use separate memoranda to document the client's decisions on the big four client decisions. This is an excellent practice for further documenting client choices, while simultaneously ensuring a client understands his or her rights.

Beyond completing these relatively standard documents, additional documentation can be critically important. Simply maintaining good notes, completing memoranda for record (which, depending on the subject you may consider having the client counter-sign), and retaining relevant e-mails in a personal folder on your computer are all smart practices. There is no standard method to document a case, and each trial defense counsel must find what works best for him or her. The key is that documentation, in whatever form, should be a routine practice. Also, do not overlook the value of your defense paralegal in the documentation process. Besides completing numerous important defense preparation duties, a defense paralegal can be invaluable in observing client consultations and documenting them with contemporaneous notes or memoranda for record that you can place in your client file.

Documentation of key moments or unusual circumstances can be helpful as you try, months later, to reconstruct what happened and why it happened as it did. For instance, consider

documenting strategic and tactical decisions in the case, such as why you did not call a particular witness that your client wanted you to call, or why the defense elected not to put on a case after the government rested. Your own reasoned judgment, along with the assistance and advice of your experienced mentors and colleagues, should be your guide in determining what to document.

A Good "Deskside" Manner

Among these many competing interests of the trial defense counsel is the need to shepherd multiple clients through the difficult and stressful court-martial process. Building a good professional rapport with a client can help the client differentiate between a bad trial outcome that results from his or her own misconduct versus a bad trial outcome that results from his or her attorney not doing a good job. Timely and responsive communications with the client, along with honest and realistic assessments, can help build the client trust that is needed to effectively defend the case at trial and avoid unnecessary claims of IAC later on appeal.

In many ways, avoiding IAC claims can be analogized to doctors avoiding malpractice claims. In Malcolm Gladwell's book, *Blink: The Power of Thinking Without Thinking,* the author studied medical malpractice lawsuits and ascertained the general qualities of physicians who were sued the least versus those who were sued the most.[8] At the outset, Mr. Gladwell recognized that there were "highly skilled doctors who get sued a lot and doctors who make lots of mistakes and never get sued." In fact, he found that "the overwhelming number of people who suffer[ed] an injury due to the negligence of a doctor never file a malpractice suit at all." Instead, Mr. Gladwell identified that there was "something else" besides "shoddy medical care" that drives patients to file malpractice claims.

The other factor Mr. Gladwell discovered was how a patient was treated by the doctor on a personal level. Gladwell deterimined there was a direct correlation between a doctor's bedside manner and the likelihood of being sued. Gladwell's book also referenced another study of malpractice lawsuits conducted by medical researcher Wendy Levinson.[9] Ms. Levinson studied a group of doctors, half of whom had never been sued and the other half who had been sued at least twice. This study discovered that the doctors who had never been sued spent three minutes longer with each patient (averaging 18.3 minutes), were more likely to orient patients about how the visit would go, were more likely to actively listen to the patient, and were far more likely to use humor during the visit. Of note, the amount or quality of information given to the patients by doctors who had been sued was no different than doctors who had not been sued. Following Ms. Levinson's study, a psychologist, Nalini Ambady, reviewed Ms. Levinson's raw study materials and discovered that, based solely upon the warmth, hostility, dominance, and anxiousness in the doctor's tone of voice, she could predict which doctors had been sued. Ms. Ambady determined that the less dominant and more concerned a doctor's voice was, the more likely it was that he or she had not been sued.

So, does this mean that as a trial defense counsel you should always speak to your clients with a warm voice lacking in assertiveness? Certainly not. Each trial defense counsel must determine what client control issues (if any) each client brings to the table. However, the only way to determine what those issues may be and what approach you must take as counselor to an individual who is likely facing the most difficult experience in his or her life, is to invest the time with the client at the earliest opportunity. Benjamin Franklin knew what he was talking about when he said, "An ounce of prevention is worth a pound of cure."

I suggest that trial defense counsel play to the law of averages until you have gotten to know your client's unique needs. Without abandoning adherence to the military rank structure, speak to your new clients with warmth and empathy until circumstances require you to do otherwise. Your clients should also feel they are an integral part of the defense team. This by no means

[8] Malcolm Gladwell, Blink: The Power Of Thinking Without Thinking (2005).

[9] *Id.* at 41-42.

requires a trial defense counsel to abdicate control of the attorney-client relationship. Rather, the more inclusive you are of the client in the process, the more ownership he or she will have of the ultimate outcome—for better or for worse. Honesty is imperative. This includes timely admission of an occasional mistake to your client, should one occur, with a corresponding explanation of how the defense "team" will move forward.

Post-Trial

Representation responsibilities do not end when the trial is over. Military appellate courts frequently state that "the convening authority is an accused's best hope for sentence relief."[10] Each trial defense counsel probably has his or her own opinion on the accuracy of this statement based upon their personal experiences. Nevertheless, the work that trial defense counsel perform for their clients during the clemency process should be emphasized. Before simply resubmitting sentencing exhibits used at trial, trial defense counsel should strongly consider obtaining additional clemency submissions to provide the best advocacy possible. Additionally, it is not uncommon for a client to be unhappy about the outcome of a case, and sometimes this unhappiness is directed at the trial defense attorney. Should such a situation arise, trial defense counsel must confirm whether the client still desires their representation. If not, a release should be promptly executed and another trial defense counsel should be assigned to provide clemency representation. So, when a trial concludes and you begin to look at the next case on the horizon, which could be coming all too soon, set aside some time to put together an effective clemency package and ensure that your client's choice of representation remains unchanged.

Once a client has been passed on to his appellate counsel and you are preparing your files for storage, it is imperative that you retain your checklists and relevant hard-copy and electronic case documents, including all of your documentation. While the space required to maintain hard copy documents can be inconvenient, once stored in a safe place you can forget about them until disposal is permitted by your state bar rules—unless, of course, an unlikely IAC claim requires you to delve back into them sooner. When such a claim arises many months and cases after your representation, your ability to recover your case files will prove invaluable.

Appellate Government Counsel

Final Takeaways

Trial defense counsel must understand the world of IAC, but they should not live in fear. IAC is not a concern that should dominate your actions in defending a particular client. But maintaining good communication with the client and documenting each case thoroughly will ensure you provide appropriate representation and assist you should you be forced to defend yourself against an IAC claim by a former client. Appellate government attorneys consider themselves the ultimate defenders of the military justice system, and they will defend the hard work and zealous representation you perform on behalf of our Airmen. In the end, when a charge of IAC is raised, the appellate government counsel on the other end of the telephone will be the best friend you could ask for under the circumstances.

Captain Ryan N. Hoback (B.S., University of Delaware; J.D., University of Baltimore School of Law) serves as Deputy Staff Judge Advocate, 87th Air Base Wing, McGuire Air Force Base, New Jersey. Previously, he served as Appellate Government Counsel for the Air Force Government Trial and Appellate Counsel Division. *The author is grateful to Major Brendon K. Tukey, Captain Naomi N. Porterfield, and Colonel (Ret.) G. Roger Bruce for offering suggestions to earlier drafts of this article.*

[10] *See United States v. Davis*, 58 M.J. 100 (2003).

The Trial Script

*Everything You Didn't Even Know You Didn't Know**

by Lieutenant Colonel Le T. Zimmerman, USAF

**Inspired by Daniel J. Bourstin's "Education is learning what you didn't even know you didn't know."*

When I tell counsel the "script reader" is one of the most important roles in a court-martial, I usually get a blank stare back. "What's so important about the script?" they think. "The only purpose it serves is to get my vocal cords warmed up for my opening statement." Many litigators are of the mindset that the mark of a good advocate is a strong opening statement and closing argument. SJAs reinforce this belief by requiring trial counsel to "murder board" only their opening and closing remarks. But the reality is the quality of the performance you give when reading the script is the first impression you make on the trial judge and court members. If you ruin this first impression, it can be difficult to regain credibility. Consequently, counsel must recognize that the seemingly mundane language of the trial script is legally significant, making the conscientious script reader absolutely indispensable.

Referral and Service of Charges

TC: The charges have been properly referred to this court for trial and were served on the accused on day/month/year.

All too often, trial counsel state the wrong date on which the accused was served. This mistake is both embarrassing to the counsel and makes a bad impression on the judge. The correct service date counsel should announce is the date referred charges were served on the accused, not the date on which the accused received the preferred charges. In other words, it is the date in block 15 of the charge sheet (DD Form 458), and not in block 11 or 12.

Also, the accused must be served personally. Substitute service upon defense counsel is insufficient and will not suffice for the service date per RCM 602. Therefore, the date you sent a copy of the charge sheet to defense counsel is not the service date. The date of service of referred charges is important, because generally, if an accused objects, (s)he cannot be brought to trial by a general court-martial within five days after service of charges and cannot be tried in a special court-martial within three days after service of charges. When calculating the five-day or three-day statutory waiting period, the date of service of referred charges and the date

of trial are excluded. Holidays and Sundays are included. If trial begins within the statutory waiting period and the accused has waived the waiting period, you should make sure the military judge conducts an inquiry with the accused before you jump to your next line in the script.

Announcing the Presence or Absence of the Parties and Court Members

TC: The accused and the following persons detailed to this court are present: Lt Col Sara Jones, military judge; Capt Brian Parker, trial counsel; and Capt Paul Mason, defense counsel. The members (and the following persons detailed to this court) are absent.

Furthermore, throughout the trial TC announces*:* ***The parties present before the recess are again present. The members are present/absent.***

The Uniform Code of Military Justice (UCMJ) requires the presence of certain trial participants during the trial. In the past, it was a simple matter of looking around to determine which seats were occupied when the judge enters the courtroom. However, with the potential for the judge, counsel and the accused to appear via audio visual technology, the criteria for determining who is present will change along with the language announcing the presence of the participants.

Generally, after a military judge is detailed, no in-court proceeding will take place when the military judge is absent. [1] Neither the UCMJ nor the Rules for Courts-Martial define the terms "presence" or "present." Prior to the 2007 Manual for Courts-Martial amendments, most litigators understood the term "presence" to be synonymous with "physical presence." The 2007 amendments did not include a definition of the terms, but have helped to distinguish them by allowing presence by telephone or video teleconferencing for certain hearings, and requiring actual physical presence during certain portions of the trial.

After the 2007 RCM amendment, Service Secretaries could authorize by regulation, for purposes of Article 39(a) sessions solely, the presence of the military judge at Article 39(a) sessions via audio-visual technology, such as videoteleconferencing (VTC) technology. The December 2007 update to AFI 51-201[2] followed the RCM amendment with an authorization from the Secretary of the Air Force to use such audiovisual technology in Air Force trials. However, the field has been slow to embrace remote participation by a military judge, counsel and the accused. Even though it is now permitted and most legal offices are equipped to hold VTCs, there may be good reason why Air Force litigators are not requesting, and trial judges are not conducting, Article 39(a) sessions remotely. In most cases, it is simply unnecessary because all parties can travel to the accused's duty station to try the case. However, there are instances where the parties agree to conduct only the preliminary Article 39(a) session to arraign the accused and to conduct a motions hearing, yet the parties do not agree to presence of the parties via VTC. One reason the parties may be uncomfortable with this technology is because of cases such as *U.S. v. Reynolds.*[3]

In *Reynolds*, the Court held that the military judge erred when he conducted the initial session of the trial by speaker telephone, but the accused suffered no material prejudice because he agreed to it. The *Reynolds* court was greatly concerned that by communicating by telephone, the military judge was not able to observe the most elemental aspects of the court-martial process, including the accused's presence in court, the accused's capability, by reason of intelligence and sobriety, to participate in the proceedings, the accused's body language, and

[1] *See* R.C.M. 805, Presence of military judge, members, and counsel; *see also* Article 39(b), UCMJ.

[2] AFI 51-201, *Administration of Military Justice*, Section 8H, provides: [t]he use of audiovisual and teleconferencing technology is authorized by SECAF to the extent and under the conditions allowed for in R.C.M. 804(b), 805(a), 805(c), and 914B.

[3] 44 M.J. 726 (A.C.C.A. 1996), *affirmed*, 49 M.J. 260 (1998).

whether the responses the accused gave were his own. The court opined that in order for the military judge to participate in a full and meaningful way, the military judge must be able to see and hear all that happens in a court room. The court, however, stopped short of defining or limiting the permissible scope of the term "presence" during a "time of rapidly evolving technology." Although not explicitly stated in the discussion or analysis of the Rule, the amendment to RCM 805 appears to address the *Reynolds* court's concern that the trial judge could not observe the most elemental aspects of the court-martial process. The amended Rule provides for a military judge's remote participation by "use of audiovisual technology, such as videoteleconferencing technology," but does not list telephonic means.

Also, Article 39(a) requires the military judge to hold the preliminary proceedings of a court-martial in the "presence" of the accused, the defense counsel, and the trial counsel. If at least one defense counsel is physically in the presence of the accused, then the presence required by Article 39(a) and R.C.M. 805 may otherwise be established by audiovisual technology. In other words, to meet the new "presence" requirement for Article 39(a) sessions, when an accused has one qualified[4] defense counsel physically sitting next to him, the other trial participants may take part by VTC.

As a litigator, have you ever wondered whether the court members are required for certain sessions, or do you simply leave it up the judge to determine when she wants the members to be present in the courtroom? Under the Rules[5], when an accused elects to be tried by members, no proceeding can take place in the absence of any detailed member.[6] Court members are not required to be present during Article 39(a) sessions, individual voir dire, and when the member has been excused. Post-trial sessions may also be held pursuant to RCM 1102 in the absence of detailed court-members.

If you, opposing counsel, and the judge agree to use VTC technology for arraignment and motions hearing, you may find yourself facing video monitors and announcing the presence of the participants in a slightly different manner. I recommend the following deviation from the language in the trial script:

TC: The accused, detailed defense counsel, Captain Mason, and detailed trial counsel, Captain Parker, are present in the courtroom. We are all physically present at Moody Air Force Base. The military judge, Lt Col Jones, is present, connected via videoteleconferencing. She is currently located at Bolling Air Force Base. The Senior Trial Counsel, Major Martin is present, connected via videoteleconferencing. He is currently located at Travis Air Force Base.

Then, each participant should state what they can see at their respective locations and that they can hear the other participants loud and clear.

Detailing and Qualifications of Counsel

TC: (I) (All members of the prosecution) have been detailed to this court-martial by _____. (I am) (All members of the prosecution are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner which might tend to disqualify (me) (us) in this court-martial.

DC: (I) (All detailed members of the defense) have been detailed to this court-martial by _____. (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform

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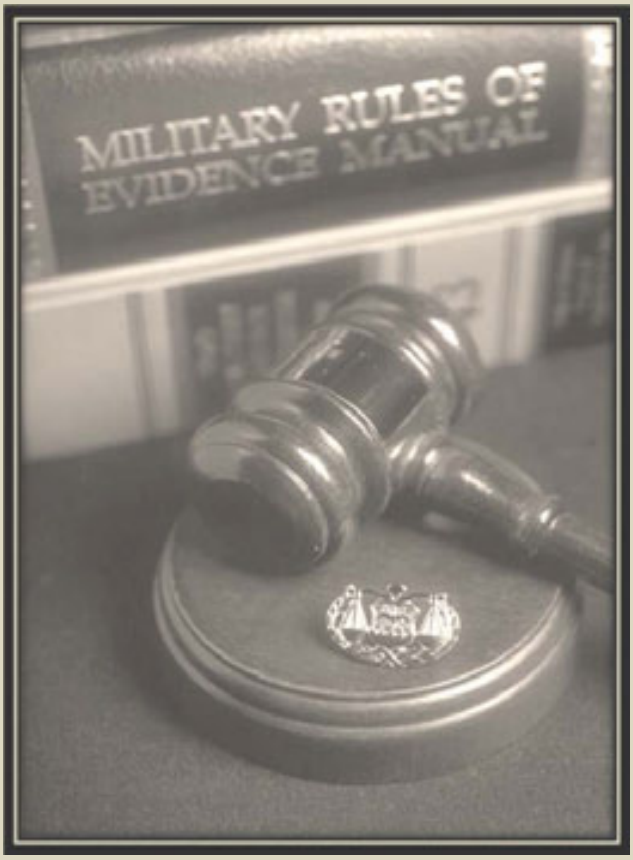
[4] With regard to counsel, at least one qualified counsel per side has to be present. An unqualified assistant counsel may not act at a session in the absence of qualified counsel. For purposes of Article 39(a) sessions solely, the presence of counsel may be satisfied by the use of audiovisual technology, such as VTC technology. At least one qualified defense counsel shall be physically present with the accused. R.C.M. 805(c) and Article 39(b), UCMJ.

[5] R.C.M. 805(b), Members.

[6] See AFI 51-201, Section 5C, *Detailing and Excusing Members (R.C.M. 501, 502(a), 503(a) and 505); Convening Orders (R.C.M. 504),* for guidance on detailing and excusing members.

Code of Military Justice. (I have not) (No member of the defense has) acted in any manner which might tend to disqualify (me) (us) in this court-martial.

Earlier, I mentioned that at least one qualified defense counsel must be present with an accused during hearings conducted via VTC. So, how do you qualify? Authority to detail trial counsel, defense counsel, and assistant counsel is governed by service regulations.[7] Once counsel is detailed, the detailing memorandum is included in the record of trial[8], or it must be announced orally on the record at the trial.[9] To perform duties in a general court-martial, military trial counsel and defense counsel must be certified under Article 27(b), UCMJ. However, assistant trial counsel and assistant defense counsel are required only to be designated as judge advocates.[10] For special courts-martial, only the defense counsel is required to be certified under Article 27(b). Trial counsel, assistant trial counsel, and assistant defense counsel are not required to be certified under Article 27(b) for special courts-martial—they are merely required to be designated as judge advocates. These same rules apply to Reserve component judge advocates. An issue that often arises is the erroneous detailing of a more experienced reservist as the trial counsel in a general court-martial when the reservist does not have current certification under Article 27(b). A simple solution is for the SJA is to detail the reservist to the trial as the assistant trial counsel, provided the SJA can detail the less experienced, but certified, judge advocate to serve as the trial counsel.



The Right to Counsel

MJ: You have the right to be represented by Capt Mason, your detailed military defense counsel. By whom do you wish to be represented? And by him alone?

An accused has the right to be represented by detailed military counsel, civilian counsel, or military counsel of the accused's own choosing, if reasonably available.[11] An accused may also elect *pro se* representation.[12] Unless the parties inform the judge, the military judge usually will

[7] See R.C.M. 503, Detailing members, military judge, and counsel, subsection (c)(1). AFI 51-201, paragraph 5.3, specifies who can detail counsel. Paragraph 5.3.2 states specific requirements for counsel detailed to general courts-martial, special courts-martial, and summary courts-martial

[8] Military trial and defense counsel provide the Central Docketing Office written notice of detailing, and civilian defense counsel provide the CDO a written notice of representation. *See* TJS-3, *Air Force Standards for Criminal Justice*, Attachment 2, *Air Force Rules of Court*, 1 Feb. 2009, Rule 2.3. If counsel withdraws from a case after referral, notice must be provided to the military judge. Military and civilian defense counsel must obtain approval from the military judge. *Id.*, Rule 2.4.

[9] R.C.M. 503(c)(2), Record of detail.

[10] 10 U.S.C. § 8067(g) and AFI 51-103, *Designation and Certification of Judge Advocates.*

[11] R.C.M. 506, Accused's rights to counsel.

[12] See R.C.M. 506(d), Waiver. An accused may expressly waive the right to be represented by counsel. The waiver shall be accepted by the military judge only if the judge finds the accused understands the disadvantages of self-representation, and the waiver is voluntary and knowing.

not know that another defense counsel was previously detailed and released due to the detailing of individual military defense counsel. Therefore, if counsel are aware that the accused was previously represented, you should inform the military judge of the nature of the prior representation in order for the judge to conduct the appropriate inquiry with the accused. Any issue concerning conflict of interest or disqualification of counsel should also be brought to the judge's attention during a pre-trial R.C.M. 802 session, so these matters can be addressed on the record.

The Arraignment

MJ: The accused will now be arraigned.

MJ: Accused and defense counsel please rise. SrA Clark, how do you plead?

Arraignment is the reading of the charges and specifications to the accused and calling on the accused to plead.[13] The entry of the pleas is not part of the arraignment and the accused can ask to defer entry of pleas; therefore, arraignment is complete when the military judge utters the words "Accused, how do you plead?"

The arraignment triggers certain legally significant events; therefore, as counsel, you should listen for the judge to ask the accused to plead and should be aware of the consequences when requesting an arraignment, especially if you don't plan to immediately proceed to trial. Once an accused is arraigned, no additional charges may be referred against the accused to that court-martial.

Prior to arraignment, the convening authority has the discretion to refer multiple charges against an accused to a single court-martial for trial, and the government can continue to add charges to that single trial if they wish to prosecute multiple offenses in one trial. However, once the accused is arraigned, no additional charges can be referred to that same trial without consent of the accused. If you anticipate a significant lapse of time between arraignment and the trial date, or in cases where you believe the accused committed more crimes, it may be disadvantageous to both parties to arraign the accused.[14]

The convening authority loses the ability to add charges to be tried on one court date, thus adding to the time and expense of multiple trials.[15] If an accused objects to joinder of charges, he may be exposing himself to the maximum punishment in multiple trials. For example, he may risk exposure to the jurisdictional maximum of two separate special courts-martial (for example, risking potentially two years of confinement instead of one).

You should also be aware that prior to arraignment, the government may make minor changes to charges or specifications without approval from a military judge. However, after an accused is arraigned, the government must make a motion to the judge to make minor changes, and the judge must consider whether a substantial right of the accused would be prejudiced before approving a minor change.[16] Therefore, the better practice is to inform the judge and opposing counsel of any proposed minor changes, then make the minor changes prior to arraignment of the accused.

The accused's ability to make certain motions is also affected when he enters a plea. Thus, at arraignment defense counsel should always make certain motions before pleas are entered. If not made prior to entry of pleas, these motions are waived.[17]

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[13] *See* R.C.M. 904, Arraignment.

[14] Be cognizant of Article 10 and R.C.M. 707 speedy trial issues when deciding whether to request an arraignment hearing.

[15] When the prosecution believes the accused may voluntarily absent himself, but he is not placed in pre-trial confinement, one advantage to the prosecution is the potential to proceed to trial in the accused's absence after he is arraigned.

[16] R.C.M. 603(b) and (c).

[17] See R.C.M. 905 for a list of motions that must be raised before a plea is entered to avoid waiver. Motions to dismiss for lack of jurisdiction and failure to allege an offense are not waived.

Entering Pleas

DC: The accused, SrA Clark, pleads as follows—

All counsel should make sure pleas are entered correctly. See RCM 910 for the various ways in which an accused may plead. The Discussion section of the RCM states that "[w]hen a plea is to a named lesser included offense without the use of exceptions and substitutions, the defense counsel should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit." Rarely, if ever, is this done, but when the defense submits a written revised specification, it helps all trial participants to ensure the judge's guilty plea inquiry with the accused is focused on the facts of the lesser included offense and ensures the judge makes findings of guilt to the specific lesser included offense to which the accused is pleading. It also allows the government an opportunity to review the language of the plea before deciding whether to proceed on the offense charged.

Assembling the Court

MJ: The court is assembled.

RCM 911 requires the military judge to announce the assembly of the court-martial, and as you guard the script, you should make sure the judge says these words at the correct time.[18] Assembly of the court is significant because it marks the point after which substitution of the members and military judge may no longer take place without good cause. Remember, the convening authority can replace members prior to assembly without showing cause, but after assembly, no member may be excused except for good cause shown on the record or as a result of a challenge.[19] After assembly, the accused may no longer, as a matter of right, request trial by military judge alone or by enlisted members, or

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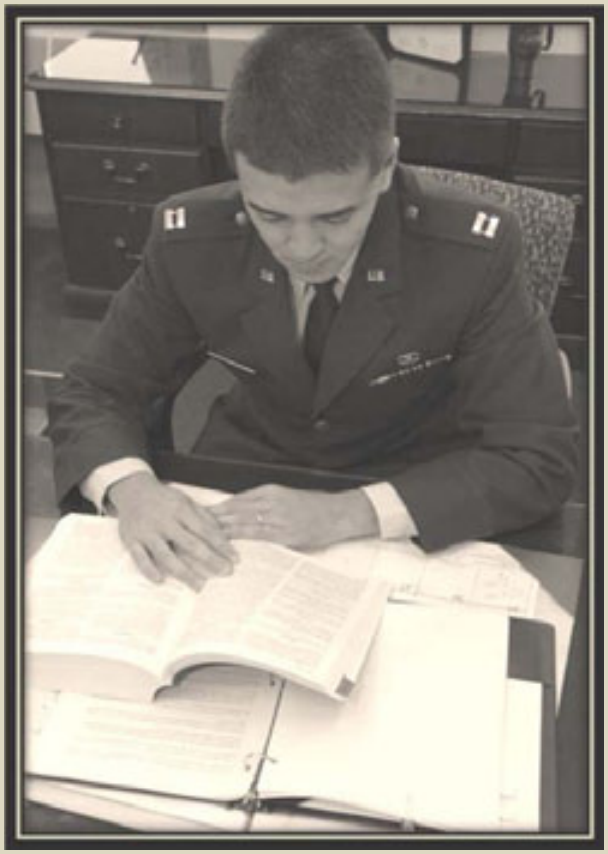
[18] In trial by members, the court is assembled after the court members are sworn by trial counsel. In military judge alone cases, the court is assembled after the military judge approves the accused's request for trial before military judge alone. Make sure the judge assembles the court at either of these two junctures in the trial.

[19] R.C.M. 505(c).

withdraw a previously approved request. If the accused changes his mind on forum selection after assembly, the military judge can exercise her discretion whether to approve an untimely request or withdrawal of a request, balancing the request against any delay, expense, or inconvenience which would result from granting the request.

Final Takeaways

The court-martial script may appear at first blush to be a simple fill-in-the-blank exercise, but there is much more at stake. Counsel must ensure correct case information is presented in order to protect the record of trial. Before trial, you should put effort into preparing and reciting out loud the script and members' oath to ensure the first impression you make on the military judge and the court members is a good one. Through careful preparation, attention to detail, and understanding the legal reasons why certain information is announced at the beginning of trial, it will be that much easier for you to fill in the blanks correctly.



Lieutenant Colonel Le T. Zimmerman (B.S., University of Florida; J.D., Florida State University) is a trial judge in the Atlantic Region, United States Air Force Trial Judiciary, stationed at Bolling Air Force Base, Washington, D.C.

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Mountains or Molehills?

Certifying Digitally-Signed Documents

by Lieutenant Colonel Kenneth R. Sibley, USAF

How many times have you heard that the paperless office has arrived? While the Air Force is clearly not yet completely paper-free, a growing number of documents are now processed in an entirely electronic format. Such records rely on digital signatures rather than traditional "wet ink" and are filed in an electronic format as permanent records in themselves without the requirement of a paper trail. Traditionally, records custodians have been able to make minor pen and ink corrections to paper forms without invalidating the original form, and producing a certified copy of a corrected record simply by having making the correction, initialing it, and adding a certification statement to a photocopy of the original. However, a fundamental feature of digitally signed documents is that they cannot be changed without invalidating the digital signature itself. This begs the question: what is the legal significance of making clerical corrections to electronic documents that have already been digitally signed? While a fully paperless office may still be some years away, there are various methods for JAGs to identify, analyze, and resolve issues related to the certification of digitally signed documents.

What is the legal significance of making clerical corrections to electronic documents that have already been digitally signed?

Standards of Admissibility

How can a records custodian make clerical corrections to an electronic record, much less certify a copy of that changed record, when the digital signature element will not survive the change? At the outset, "[u]nless stated otherwise in the applicable statute or official directive, copies of a record bearing an official signature have the same authority as the original."[1] However, when a document has been digitally signed, making even minor corrections to the electronic original invalidates the private and public encryption keys associated with the digital signature. One way to approach this challenge is by considering how the changed electronic record is going to be used. In turn, this use or intended purpose can help sort out the standards of proof and admissibility required of a record copy. To make sure to account for the largest number of cases, it is necessary to consider the standards of proof and admissibility required in the highest forum in which any Air Force document would ever appear. For example, many personnel records will have to satisfy the formalities of a promotion board. Copies of such records also could go before an administrative discharge board, the Air Force Board for Correction of Military Records, or other such non-judicial forums. Of course, court-martial litigants might

[1] AFI 33-321, *Authentication of Air Force Records*, paragraph 4.3.

seek to have them entered into evidence, though often such records are not introduced until the sentencing phase of a trial when the rules of admissibility are commonly relaxed.

AUTHENTICATION

Air Force records may also be at the heart of litigation in federal court. No other forum can justify a degree of formality higher than that of federal court (if only due to jurisdictional reach). Thus, authentication considered adequate for federal court will therefore satisfy any lesser forum. Fortunately, the federal judiciary has come to grips with the foundation requirements for admitting into evidence documents signed with digital signatures. To begin with, the requirement that a document be authenticated is found in Rule 901 of the Federal Rules of Evidence (FRE): "(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This is a flexible requirement. Indeed, it is so elastic that the consensus has been against changing the Federal Rules of Evidence to account for digital or electronic signatures:

> Amendment of the federal rules to address the authenticity of an electronic signature has been considered but not pursued because the existing rules have been adequate to handle problems. Although many hypothetical scenarios can be imagined, it is unlikely that a fraudulent signature or the repudiation of an authentic signature will go unnoticed by both parties and the court. If challenged, the authenticity of a signature is subject to the same methods of proof that are used in determining the authenticity of disputed hard-copy signatures.[2]

If a document does not match the handwriting of the person who supposedly signed it, it can be challenged as a forgery. Likewise, when the encryption keys of a digital signature are invalidated, that signature too can be disputed. A judge may permit a handwriting expert to testify about a clever ink forgery and also can allow a computer expert to testify about an invalid digital signature. But in either case, the testimony of a witness can overcome doubts about authenticity. [3]

Clearly, the methods by which a document can be authenticated will vary depending on the circumstances. Returning briefly to Rule 901, there are 10 sample methods by which a document can be authenticated.[4] This list is

[2] JACK B. WEINSTEIN & JOSEPH M. MCLAUGHLIN, WEINSTEIN'S FEDERAL EVIDENCE § 900.08 [1] (1997).

[3] *See, e.g., id*., § 900.08 [2][a]

[4] FED. R. EVID. 901 provides ten methods for authentication:

(1) Testimony of witness with knowledge; testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting; nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness; comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like; appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification; identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations; telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports; evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation; evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system; evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule; any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

A judge may permit a handwriting expert to testify about a clever ink forgery and also can allow a computer expert to testify about an invalid digital signature. In either case, the testimony of a witness can overcome doubts about authenticity...

illustrative only, but example 9 (process or system) is particularly relevant to digital signatures. Making minor changes to record documents is not a new issue. Indeed, in the age of facsimile machines and photocopiers, the Federal Rules of Evidence have adopted a pragmatic flexibility in this area. Consider the traditional Best Evidence Rule: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress."[5] At first it might appear that the actual paper original of a document, with the actual ink signature, would be required for admitting a document into federal court. However, FRE 1003 immediately opens up the restrictions of FRE 1002: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."[6]

Dealing with Photocopies

Under FRE 1003, a photocopy of an original document (to include a photocopy of a computer printout of an electronic record) may be admissible in court unless the party opponent offers some reason for challenging the photocopy. Thus, under normal circumstances, the law will treat a photocopy of a signed performance report just like the original document signed in ink. But the Federal Rules go even further. In the actual definition of what constitutes an "original" document, we find the flexibility that may help resolve our central question. "For purposes of this article the following definitions are applicable . . . [i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'"[7] Thus, a printout of a performance report can qualify as an original of the record report, and the printout of the digitally produced signature elements is an acceptable authentication.

Just how far does this flexibility go? Even under the Best Evidence Rule, it has been accepted practice to combine facsimile and original signatures to compile a single "original" document. Consider the following scenario: Jack and Jill are both supposed to sign a document. Unfortunately, they are located in different cities. To solve this problem, each person signs an original copy and then faxes it to the other person. Both parties then sign the facsimile from the other person. So, the "original ink" version of the document is actually the combination of the two sets of faxes. Accordingly, Jack's original signature, combined with Jill's original signature on the facsimile page from Jack, equals a complete original. In the case of a digitally signed electronic original, if a records custodian printed out a file directly from the computer, that printout constitutes an "original" document. Subsequently, any pen-and-ink changes made to the printout could be then certified ("in ink"), by the person authorized under current regulation to make such corrections, and scanned back into the applicable database. If someone were to challenge the authenticity of the document (or of the signatures), for instance as part of an appeal to the Board for Correction of Military Records, both the corrected printout and the re-scanned electronic file would satisfy all requirements for authentication. This method is just one way around the problem of correcting digitally signed electronic records. Depending on available data storage, an all-surely be devised. One possibility would be to create an administrator password for the official

[5] Fed. R. Evid. 1002.
[6] Fed. R. Evid. 1003.
[7] Fed. R. Evid. 1001(3).

electronic record. Another would be to authorize that same official to certify any changes made to the document and then digitally sign for (i.e., certify) the changes. While the original digital signatures would be invalidated, the software could be modified to let authorized officials enter "original digitally signed."[8]

Summary

In conclusion, it must be recognized that digital signatures are subject to the same standards of challenge and proof as wet ink signatures. Consequently, the means by which wet ink signatures have been traditionally authenticated also apply to certifying digital signatures. As a result, the records custodian who is normally empowered to make clerical corrections to performance reports may continue to do so. Furthermore, that person may mix digital and ink certification, as necessary, to preserve a complete version of the record report. The corrected document will satisfy exactly the same standards of authenticity as the certified correction of any document traditionally signed or sealed with ink. Therefore, as we continue to move closer towards a paperless Air Force, JAGs can lead the way in resolving certification issues that arise, ensuring that impassable mountains are not made out of molehills.

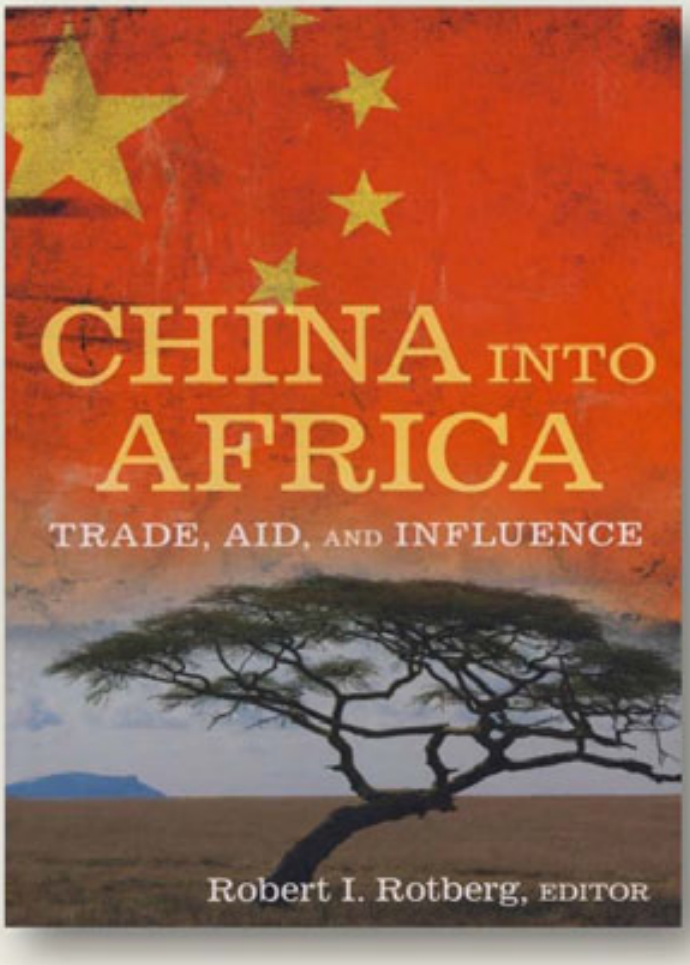
Lieutenant Colonel Kenneth R. Sibley (B.A., Ohio State University; J.D., University of Virginia) is currently assigned as the Chief of Military Personnel Law, Headquarters Air Force Personnel Center, Randolph Air Force Base, Texas.

[8] This is similar to a procedure already approved in AFI 36-2401, *Correcting Officer and Enlisted Evaluation Reports*, Table 4, Note 3 ("For reports being reaccomplished, you can annotate the signature blocks of evaluators not reasonably available ORIGINAL SIGNED.").

Books in Brief

China Into Africa: Trade, Aid, and Influence
Robert I. Rotberg, Editor (Brookings Institute Press, 2008)

Reviewed by Major Don D. Davis, Instructor, Operations and International Division, The Judge Advocate General's School



Africa is a land of contradictions. Although many countries on the continent are overflowing with natural resources, millions of Africans continue to face crushing poverty and struggle to survive on a daily basis. Diversity abounds, yet tensions flare in many regions, with deep ethnic hostility fueling extreme hatred and violence. Deadly illnesses plague the continent, with HIV, AIDS, and malaria continuing to reap their grim toll while crime and corruption stifle substantive reform. Yet Africa possesses a strategic location as a natural bridge between East and West, just a stone's throw across the Mediterranean from Europe, with a population of over one billion people. Indeed, our National Security Strategy states succinctly:

> Africa holds growing geo-strategic importance and . . . is a place of promise and opportunity, linked to the United States by history, culture, commerce, and strategic significance. Our goal is an African continent that knows liberty, peace, stability, and increasing prosperity . . . The United States recognizes that our security depends upon partnering with Africans to strengthen fragile and failing states and bring ungoverned areas under the control of effective democracies.[1]

The United States is of course not alone in its appreciation for the significance of Africa. China, with a hearty appetite for the natural resources Africa can provide, grows ever more interested and some might argue dependent upon the continent as its own economy evolves. Given its status as arguably the most significant geopolitical rival to the United States, an understanding of Chinese interests in Africa is thus vital to ensuring that American interests on the continent are not compromised.

[1] Office of the President of the United States, *The National Security Strategy of the United States of America* (Washington, D.C., Mar. 2006).

Zǒu chūqū (translation: "Go Global")

To promote a greater understanding of China's interests on the continent, a collection of essays written by various subject-matter experts titled *China Into Africa, Trade, Aid, and Influence* was assembled by Robert I. Rotberg, director of the Program on Intrastate Conflict and Conflict Resolution at Harvard University's Kennedy School of Government and president of the World Peace Foundation. Mr. Rotberg, the author of various other publications including *Worst of the Worst: Dealing with Repressive and Rogue Nations; Building a New Afghanistan;* and *Battling Terrorism in the Horn of Africa,* also contributed to the collection and served as its principal editor.

With a population numbering in the billions and an economy that grows more significant by the day, regardless of the current global economic crises, China is fast on the move towards ultimately sharing the spotlight with the US as a global superpower. However, one of the more significant obstacles that the Chinese face in their rise to power is the lack of essential natural resources within their own borders needed to fuel this evolution. In the introductory essay, "China's Quest for Resources, Opportunities, and Influence in Africa," Mr. Rotberg sets the stage for the collection and explores this principal guiding force in China's relationship with Africa. Accompanying articles such as those by Henry Lee, lecturer in public policy, the Jassim M. Jaidah Family Director of the Environment and Natural Resources Program at the Belfer Center for Science and International Affairs, Dan Shalmon, a senior analyst in the Future Concepts and Analysis Division of Lincoln Group, LLC, and Martyn J. Davies, executive director of the Centre for Chinese Studies at the University of Stellenbosch, flesh out the details beyond these simple statistics, providing the reader with a wealth of information from which to assess the progression of Chinese economic interests in Africa.

The casual observer may not be aware that Chinese businesses have sprung up in virtually every country in Africa, and an increasingly large number of Chinese citizens have emigrated to the continent. And where the Chinese are currently employed on the continent, particularly in those areas where they are engaged in the utilization of Africa's natural resources, they also have begun to invest in the infrastructure, such as building roads, telecommunications hubs, bridges, and other essential elements necessary to modern civilization.

In fact, trade between China's export driven economy and Africa has risen dramatically since 1990, as has China's foreign direct investment (FDI) in the continent. Specifically, though the exact numbers are difficult, if not impossible, to put together, analysts have estimated that in 1991 Chinese FDI in Africa was just under $5 million a year. In 2006, depending on who is telling the story, that number was somewhere between $1.2 and $6 billion. Looking as far back as the 1980s, trade with China was only about $12 million a year. During the 1990s, trade between China and Africa grew by an enormous 700 percent, reaching $10 billion in 2000. In 2006, trade between China and Africa skyrocketed to $55.5 billion. In that same year, Chinese officials set a target of $100 billion in trade between Africa and China by 2010. It appears that the target was conservative, as trade between China and Africa was just under $120 billion in 2008. To put this in perspective, United States-Africa trade for 2008 was estimated to be roughly $161 billion. Indeed, since 2006, China has become Africa's second largest trade partner after the United States.

Another component of China's interest in the continent involves China's status as an exporter of military hardware. China sells weapons to

First train arrives in Kindu, Democratic Republic of Congo, on a U.S. Agency for International Development rehabilitated railway (USAID photo).

many African nations and is involved militarily in various peacekeeping and security missions. An article by Mr. David H. Shinn, a veteran of over 37 years in the U.S. Foreign Service, titled "Military and Security Relations: China, Africa, and the Rest of the World," chronicles China's military history in Africa and provides a summary of China's modern military connection to several African nations. Conversely, China is also engaged in various humanitarian endeavors on the continent. In her article, "China's Foreign Aid in Africa: What Do We Know?" Deborah Brautigam, author of multiple works on Chinese aid and African development and professor in the International Development Program at American University's School of International Service, discusses the realities of Chinese foreign aid in Africa and charts the evolution of Taiwan's aid program, finding that, like other powerful nations, China uses foreign aid to complement their "soft power," though she readily admits that many questions remain unanswered regarding China's aid program and Africa.

Given that Africa is a vast continent of more than 60 territories blessed with richly diverse people, languages, culture, climates, geography, governments, and religion, this collection ultimately highlights the cold truth that many complex questions regarding China's interests in Africa continue to remain unanswered. Nevertheless, the essays in *China Into Africa, Trade, Aid, and Influence*, provide the reader with a solid background from which to conduct additional research or to hold a meaningful dialogue on the subject. The book thus serves as both an invaluable introduction to the uninitiated and a comprehensive distillation of the issues from which those familiar with China's surge in Africa can expand their appreciation and understanding.

Perry-Castañeda Collection, Univ. of Texas (public domain)

Have you read a book recently that is worthy of attention from others in the JAG Corps? Reviews and recommendations may be submitted to the editor, Major Ryan Oakley, at ryan.oakley@maxwell.af.mil.

The Combined Joint Paralegal in Afghanistan

by Master Sergeant Lisa Swenson, USAF

Camp Eggers – Snow falling in Kabul

The combined joint paralegal concept is alive in Afghanistan. After my recent deployment to Camp Eggers, Office of the Staff Judge Advocate, Combined Security Transition Command—Afghanistan (CSTC-A), I am energized about the direction of the paralegal field, specifically in regard to the joint, interagency, and multinational collaboration taking place in Afghanistan to build a military justice system, allowing the rule of law to take root. While deployed, I had the opportunity to support the first legal professionals in the Afghan National Army (ANA). Soon we will witness the first-ever training course for ANA paralegals.

The Mission

The mission at CSTC-A is to plan, program and implement structural, organizational, institutional and management reforms of the Afghanistan National Security Forces nation, strengthen the rule of law and deter/defeat terrorism within its borders. Presently, as counterinsurgency and defensive forces secure the nation, establishing the rule of law is vitally important to long-term success. With their Afghan counterparts, the United States Army, Air Force, Navy and Coalition forces are providing foundational guidance for developing a legal framework for the ANA to rely upon. In 2007, ANA paralegals were first identified on the *Tashkil*, an organizational document which dictates the ANA's force structure, personnel end strength, command relationships, unit/staff functions, and mission descriptions. That same year the U.S. Army broke ground on five courthouses spread throughout Afghanistan's designated regions called Afghan Regional Security Integration Commands (ARSICs). By 2009, the initial construction was completed. My part of the process was then to purchase $200,000 of furniture and supplies for the courtrooms. Still another $200,000 is being used to purchase new law books, court reporter equipment, and additional furniture to support all five ARSICs. These developments also coincided with the combined effort of training attorneys and paralegals in the

ANA using information gleaned from all branches of the U.S. armed forces and Canadian military.

The Training

On March 28, 2009, 57 students graduated from the inaugural four-week Basic Law Officer Course (BLOC). This was the first course offered to ANA attorneys, and I was surprised to learn that there were five enlisted personnel who graduated from this class, including one female. BLOC was a year in the making and encompassed familiar course materials including trial advocacy, criminal investigation, SJA responsibilities, as well as general Afghan legal principles.

Historically, Afghan communities have relied on a mixture of Shari'a law (based on sacred Islamic principles) and civil law. Therefore, to ensure success, it was crucial that Afghan citizens design and approve the BLOC curriculum in consultation with their North American CSTC-A mentors. Next, interpreters translated the coursework from English into the nation's primary languages, Dari and Pashtu. Even the smallest details, like writing from right to left and back to front, had to be considered when designing this course.

The Inaugural BLOC Graduating Class

THE WAY AHEAD

Less than forty years ago, the United States Air Force's professional training for paralegals came to fruition when CMSgt (Ret.) Steve Swigonski created the criteria for the Air Force Legal Service Specialist Course in 1972 (the term paralegal was not assigned until 1988). Today, combined joint paralegals, such as my teammate, Army Master Sergeant Osvaldo Martinez, are leading the charge to develop formal training programs for ANA paralegals.

CSTC-A staff meet the Honorable Jeh C. Johnson, DOD General Counsel (pictured top right)

BLOC was a historical first step for all ANA legal professionals. Now the foundational materials, feedback, and the lessons learned will be used to create the first ANA Paralegal Apprentice Course scheduled to begin on 7 November 2009. This course is designed to teach ANA paralegals how to support attorneys in the practice of military law in Afghanistan. Colonel Karim, the ANA's TJAG, is presently reviewing additional paralegal course material which may include areas such as literacy, computer training, leadership, professional responsibility, good order and discipline. Further, instructors will teach fundamental legal concepts for ANA nonjudicial punishment and courts-martial.

Looking back, I am proud of the work our team accomplished during my six months in Afghanistan and even more excited about the way forward. Day by day, combined joint paralegals are doing their part to make a difference the lives of Afghan citizens. Brick by brick and student by student, the path to a better future is being built.

Master Sergeant Lisa Swenson currently serves as Noncommissioned Officer in Charge, Professional Outreach Division, The Judge Advocate General's School, Maxwell Air Force Base, Alabama.

Do you have a Paralegal Perspective to submit to The Reporter? E-mail the editor at ryan.oakley@maxwell.af.mil

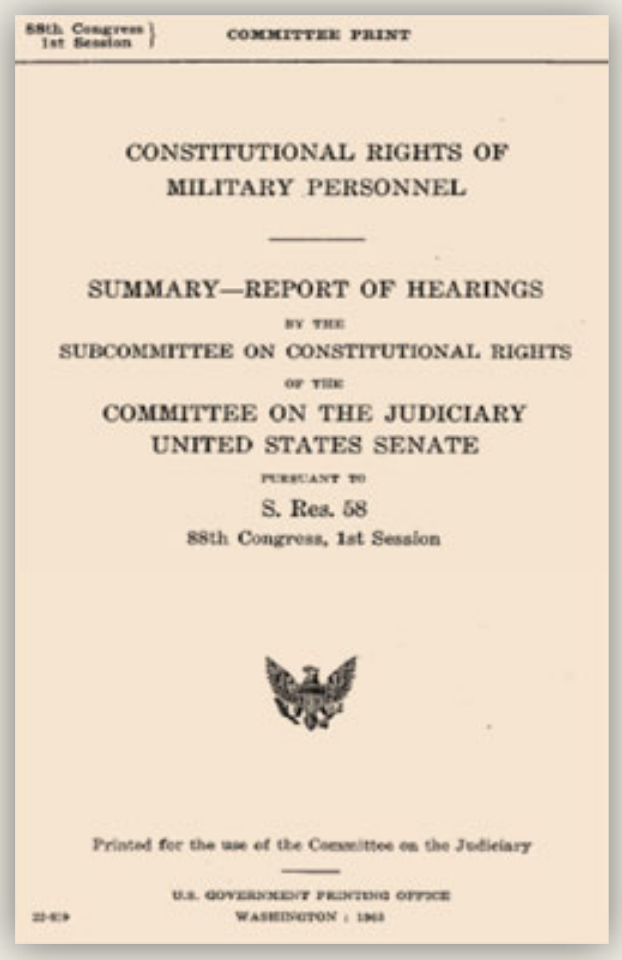
The Military Justice Act of 1968

No one is more entitled to protection of their constitutional rights than the servicemen engaged in protecting the sovereignty of the United States.

--Preface to U.S. Senate Subcommittee on Constitutional Rights Report of Hearings (1963)

Until August 1, 1969…I was part of a system, where in Special Courts-Martial, we had people incarcerated for 6 months, forfeiting two-thirds of the pay and being reduced to the lowest enlisted grade without the presence of a law trained person in the courtroom. It's difficult for me to now fathom what was going on as late as 1969. As a result of the Military Justice Act of 1968, there was a need for more military judges.[1]

--Chief Judge H.F. "Sparky" Gierke
United States Court of Appeals
for the Armed Forces


88th Congress, 1st Session } COMMITTEE PRINT

CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

SUMMARY—REPORT OF HEARINGS
BY THE
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
PURSUANT TO
S. Res. 58
88th Congress, 1st Session

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1963

The Year was 1962: Hundreds of service members and their families were writing their Congressmen about perceived inequities in the Uniform Code of Military Justice, enacted just twelve years before.[2] Despite the revolutionary reforms of 1950, an accused still lacked the right to qualified legal counsel outside of general courts-martial. Law officers advised court members on legal issues, performing limited judicial functions without significant stature, authority or independence. The modern military judge did not exist. Consequently, the Senate Subcommittee on Constitutional Rights began an intensive investigation calling upon a broad range of experts in military law that very year, in the midst of the Cold War.

[1] *Embracing Change: Looking Back and Moving Forward*, Speech to American Bar Association Mid-Year Meeting, Chicago, (10 February 2006).
[2] Senator Sam J. Ervin Jr., *The Military Justice Act of 1968*, 45 Mil. L. Rev, 78 (1969).

Six years and a thousand pages of testimony later, these landmark Congressional hearings culminated in the enactment of the Military Justice Act of 1968, making several major changes to the UCMJ. Specifically, the Act required for the first time that the accused in special courts-martial (SPCM), be represented by qualified defense counsel and further mandated that a military judge preside over any SPCM that could potentially adjudge a bad conduct discharge (although as a matter of policy, Major General Robert W. Manss, The Judge Advocate General, required certified counsel for all Air Force SPCMs despite no statutory requirement to do so, and had a similar policy for summary courts-martial).[3]

Moreover, the Act established an independent trial judiciary, providing an enhanced shield against unlawful command influence. Newly-minted "military judges" were given approximate powers of their federal civilian counterparts, and no longer could be overruled by panel members on matters before the court, as could law officers under the existing UCMJ.[4] Accused were permitted to waive trial by officer members in non-capital cases and be tried by a military judge alone.

STATEMENT OF MAJ. GEN. R. W. MANSS, JUDGE ADVOCATE GENERAL OF THE AIR FORCE

General MANSS. I do not have anything particularly to add to what has already been said as far as the jurisdiction and the operation of the summary court are concerned.

I might point out, however, that it has been our experience in the Air Force that the amendment to article 15 resulted in not only a dramatic decrease in the number of cases in 1963 after that amendment became effective, but we have continued to have a substantial decrease each year in the number of summary court cases.

For example, in 1961 we had 14,624, and in calendar year 1964 we had 2,973. We do not have complete figures for 1965, but the first 6 months were 916.

Testimony of Major General Robert W. Manss, the third TJAG (1964-1969). Major General Manss detailed certified counsel to all special courts-martial, even though not yet required to do so.

[3] LT COL PATRICIA A. KERNS, THE FIRST 50 YEARS OF THE U.S. AIR FORCE JUDGE ADVOCATE GENERAL'S DEPARTMENT (1999), p. 66.
[4] *Id.*

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II

In 1963, the late Judge Robinson O. Everett served as part-time counsel to the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, and from 1964 to 1966 as a consultant for the Subcommittee.

Several years prior to Congress taking action, the Army presciently established an independent judiciary to provide law officers for all general courts-martial. The Air Force considered adopting the concept, but ultimately determined it could not be efficiently implemented within the service. However, after the enactment of 1968 reforms, the Air Force "no longer had a choice about implementing the independent judiciary."[5]

Appellate rights were also expanded with the creation of Courts of Military Review composed of independent military judges. Additionally, accused were given an extended time period to petition for new trial and other post-trial rights, including release from confinement pending appeal.[6]

In retrospect, the Military Justice Act of 1968 transformed the court-martial to more closely resemble a civilian trial, while also enhancing the procedural rights of accused, and establishing an independent trial and appellate judiciary. While ground-breaking in scope, the Air Force would adapt well in quickly adopting the reforms of the Act, as noted in *The First Fifty Years*:

> *A process of evolution had occurred. No longer was the [JAG Corps] being dragged into the future in the area of military justice. It was now leading the way.*

[5] *Id.* at 67.
[6] Ervin, *supra* note 2, at 83-84.

CAPSIL 2.0 NOW ONLINE

The latest version of CAPSIL, the JAG Corps' evolutionary learning management system, was recently released to the field. In Version 2.0, users will find a number of helpful enhancements to the system:

• Improved User Interface: Navigating directly from the new front page of CAPSIL, users will find a wealth of personalized information and records, along with one-click links to reach the most popular resources on the system.

• Social Networking Enhancements: Users are now able to see who else is currently on CAPSIL and specific learning centers, while forums and instant messaging offer real-time, collaborative communication opportunities within the site.

• Learning Center Management Reports: Usage reports for all CAPSIL learning centers now allow content managers to focus resources on the centers and materials that are most important to the field. Other management reports added will verify that content on CAPSIL is regularly reviewed and maintained by learning center managers.

To learn more about how to use common features in CAPSIL, users can access short, 2-5 minute tutorial videos via CAPSIL's front page. More than 4,000 members of the JAG Corps are now registered users of CAPSIL, and the JAG School welcomes your comments and feedback to help continue development of this revolutionary collaborative training resource. The link to CAPSIL is accessible directly from the FLITE home page.

FY 10 WEBCAST SCHEDULE

DCO DEFENSE CONNECT ONLINE

The Fiscal Year 2010 schedule for JAG School webcasts is now available on CAPSIL. With multiple sessions scheduled each month, JAG School webcasts are a great way to enhance your office training program. Topics to be covered this year include intelligence oversight, immigration, forensic computer issues in courts-martial, contracting in the CENTCOM AOR, and professional responsibility. Remember – most live JAG School webcasts offer CLE credit. If you miss a session or want to view a previous webcast, recordings of all sessions are posted on CAPSIL. Visit the Webcast Learning Center on CAPSIL via the link below for more details, and watch each week's Online News Service for announcements about upcoming sessions.

https://aflsa.jag.af.mil/apps/jade/collaborate/course/category.php?id=198

Where in the World?

"Observing Flight Operations Aboard the USS Ronald Reagan,"
by Major Joe Dene, USAF, while recently deployed to the Combined Air Operations Center, Al Udeid Air Base, Qatar. Major Dene took this photo for his children who have a duplicate stuffed "action figure" at home in Alabama, both of which were provided prior to his deployment by his colleagues at The Judge Advocate General's School, Maxwell Air Force Base, Alabama.

If you have a unique, funny, or poignant photograph of your travels in the JAG Corps for inclusion in "Where In The World?" please e-mail the editor at ryan.oakley@maxwell.af.mil.

AFJAGS PRESS
THE JUDGE ADVOCATE GENERAL'S SCHOOL
150 CHENNAULT CIRCLE
MAXWELL AFB, AL 36112-6418