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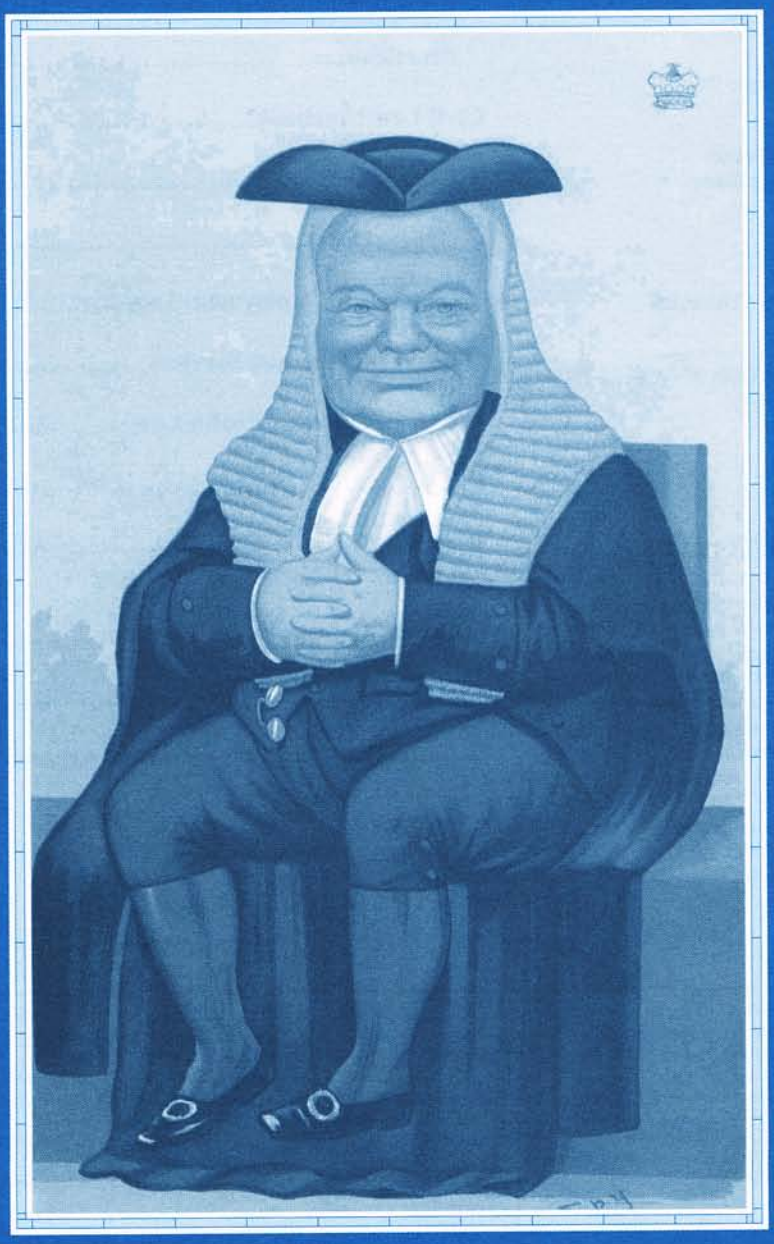

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The Reporter

FROM THE EDITOR

This issue of the Reporter comes to you with informative articles on a variety of subjects. Our lead articles include a practical guide to cross-examining the accused in a court-marital and an article on the Religious Freedom Restoration Act and its application within the DoD community. We are also proud to present a thought provoking article on improving the Air Force accident investigation process. Finally, the article "Why Stay" should be required reading for anyone in the department considering "punching out." As always, you'll find useful articles on a variety of topics. We extend our sincere appreciation to the authors whose submitted the pieces that appear in the following pages.

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

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

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Practice Pointers On Cross-Examining The Accused In A Court-Martial

LIEUTENANT COLONEL BRUCE D. LENNARD

As any judge advocate who has ever prepared the government's case in a fully litigated trial knows, there are a countless number of pretrial tasks that must be accomplished to be successful. From doing a proof analysis, to developing a meaningful theory and theme of the case, to satisfying discovery requirements, to identifying and producing witnesses, to responding to defense motions, to preparing exhibits, to interviewing witnesses for both sides, the list goes on and on. All too often, however, the trial counsel fails to even think about the possibility that he or she may have the opportunity to cross-examine the accused. Perhaps this is because that "opportunity" rarely presents itself and the trial counsel is more worried about those items that are certain to need attention. This article is offered to provide trial counsel a framework for approaching the cross-examination of the accused and to encourage trial counsel to diligently prepare this aspect of the case; even if the accused doesn't take the stand, the prep work is good for the case.

In thinking about how one should go about cross-examining an accused, trial counsel should honor a number of maxims and employ a number of time-honored techniques, including the following: 1) Don't expect that you'll break down the accused into admitting that he is guilty as charged; 2) Always use your cross-examination of the accused to convey the theory and theme of your case to the members; 3) Never ask a question that calls for anything but a "yes" or "no" answer; 4) Don't worry about the accused's denials; 5) Never lose control of the examination; 6) Always fully prepare your questions; 7) Always cover every aspect of the proof of your case, including all of the elements of your specifications; 8) Be sure to mix up your lines of questioning; 9) Confront the accused with your scientific or expert evidence; and 10) Always end strong. In the remainder of this article, I'll discuss each of these items individually. In doing so, I'll make an occasional reference to a case tried at Kadena Air Base where an accused Senior Master Sergeant was convicted of creating false Senior Enlisted Performance Reports, tracing onto these documents the signatures of the wing commander and others, and then causing these fake documents to be placed into his official records.

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Don't expect that you'll break down the accused into admitting that he is guilty as charged.

This is totally unrealistic. An accused who actually takes the stand on the merits is doing so only after having considered his options very carefully. He has likely come to the conclusion that the evidence against him will get him convicted unless he can explain away some aspect of the proof or convincingly deny his guilt. You should expect that the story the accused will tell on the stand is a story he has already told his lawyers, who have counseled him to tell it under oath. Therefore, don't be concerned with achieving a dramatic breakdown of the accused; that happens only in the movies.

Always use your cross-examination of the accused to convey the theory and theme of your case to the members.

One of the most important aspects of preparing any case is, of course, to formulate a theory and theme for that case. The theory of the case is primarily about how the proof in the case shows that the accused is guilty of the offenses with which he is charged. The theme of the case is more about some catchy aspect of the proof or of the accused's makeup. For example, your theory may be that the accused stole his original Senior Enlisted Performance Report staff package from the wing offices, substituted a fake document for the original performance report, and then dropped off the staff package with the fake report at the military personnel flight. Your theme may be that the accused was a narcissistic person who was not going to stand for anything less than the highest level endorsement on

his performance report. Having conceived of a theory and theme, you should then develop evidence that supports this theory and theme. At the end of the day, in closing argument, you get to argue that very theory and theme in persuading the members that the accused is guilty. Cross-examination of the accused is a wonderful opportunity to highlight for the members the theme and theory of the case. Unlike any other witness in the case, the accused knows exactly what happened and how he committed the offenses. In a very real sense he is responsible for all of the evidence in the case. If his fingerprints are on the questioned document, it's because he handled it. If the signatures on the questioned document appear to have been traced or drawn onto the document, it's because he practiced drawing the wing commander's signature. The bottom line is that on cross-examination the accused can be called on to account for every aspect of the proof in the case. But more than being called on to account, the accused can be held responsible for each and every aspect of the proof in the case through carefully worded questions which convey the totality of the theory and theme of your case.

Never ask a question that calls for anything but a "yes" or "no" answer.

In developing these questions never forget that this cross-examination is the government's opportunity to present its theory and theme, not the accused's opportunity to tell his story. He has had that opportunity on direct examination. You should, therefore, style every question in a manner which allows that question to declare a particular aspect of the proof of the government's case and then end with words such as: "isn't that true?" Put another way, you should have a specific question for each and every factual aspect of the overall proof of the case and each of those questions should declare that fact as the predicate of the question. You can accomplish this by sitting down and writing out a complete and detailed exposition of the facts of the case which covers all of the who, what, when, where, how, and why issues. Then, break that factual exposition down into its most basic component parts. Then, form a question. These questions might be thought of as "baby-step" questions because we are taking the facts one tiny step at a time. In any event, never ask a question which allows for anything other than an admission to, or a denial of, the factual assertion contained within the question. Because you already know the who, what, when, where, how, and why's of the case, and have included them in very specific questions, there is no need to ever ask the accused any question which begins with who, what, when, where, how, or why. To do so simply invites the accused to expound on his theory of innocence and that can be disastrous.

Don't worry too much about the accused's denials.

It should come as no surprise that the accused will not readily admit to each and every aspect of the proof of your case. In fact, he can be fully expected to deny your "assertions" (made through carefully crafted questions) that each aspect of the proof against him is true. This is of no real consequence. Oftentimes it's the denial of facts that are obviously true to everyone present that achieves your goals. Therefore, do not be dissuaded or interrupted by the accused's failures to come clean. On the other hand, when the accused does admit to certain critical facts, capitalize on those admissions by highlighting them with another question such as, "so you admit those are your fingerprints?" and by re-emphasizing the admission in closing argument.

Never lose control of the examination.

The accused will often develop a feeling that it is you against him. He will fixate on you as the prosecutor and, in deciding to take the stand, will also be deciding that he is up to the task of taking you on intellectually. He will look for opportunities to provide more information than your questions call for (more than a "yes" or "no"), he may try to argue with you about things that have been handled outside the presence of the members, and he will even ask you questions. None of these behaviors are acceptable or allowable. They are not acceptable because this cross-examination is your cross-examination and the accused is obliged to answer your questions in the form they are asked, and they are not allowable because the accused has no right to take you on. Never argue with an accused during cross-examination, never answer any questions posed by the accused, and never explain any aspect of the accused's version of the facts. Instead, when an accused attempts to wrest control from you, you should very firmly assert who is in control. You can do this by stating very clearly, "Please answer my questions with either a yes or no answer," or even "I'll ask the questions here!" If necessary, resort to asking the military judge to instruct the accused to answer only the questions posed and to say no more than "yes" or "no" as called for by the form of the question.

Always fully prepare your questions.

Because you are using the opportunity to cross-examine the accused as a means to present your case's theory and theme to the members, and because each of your questions must be carefully thought out in advance, it should go without saying that you should sit down and type or write each of your questions in advance. As a practical matter, having written questions will allow you to ensure that you cover everything you want to cover and it will help you to avoid needlessly repeating yourself as you struggle to make a point or to think up the next line of questions. Written questions will also help you to pace the questioning and to control the examination. You should not move on to another question until the accused has answered the precise question asked with either an admission or denial of the factual predicate of the question. Because you will not yet have heard the accused's direct testimony, you will have to be prepared to ask some *ad hoc* questions to test that direct testimony. These questions should focus primarily on things that you have not already prepared questions for. For example, if the accused testifies that he only said what he said to investigators because of a grueling eight-hour interrogation, those "facts" probably are not part of the theory or theme of your case, and hence not part of your factual exposition. Still, you can test the accused's assertions by confronting him with the record of the interview that shows that the interview took only two hours to complete. While you listen to the accused's direct testimony, you should carefully discriminate between assertions that will be addressed in your prepared questions and those that are essentially new matters. As to these new matters, you should also do a running assessment of whether the matter hurts your case and needs to be addressed or whether it's obviously inconsequential. Address those new matters that the accused has testified to first, then move into your prepared questions. A final point: do not fail to stick to your prepared questions.

Always cover every aspect of the proof of your case, including all of the elements of your specifications.

Most cases will have numerous subsets of evidence. You may have evidence that deals with the accused's admissions to investigators and others, false exculpatory statements, post-offense conduct which shows consciousness of guilt, eyewitness testimony about the actual commission of the crimes, evidence of prior uncharged misconduct, forensic evidence of many types, and even expert opinion testimony. Your cross-examination of the accused should cover as much of your case as possible. If you're asking the accused about his prior statements, you can develop just how the interview took place and under what conditions. If you're asking about false exculpatory statements, you can first establish that the statements were made and then that the accused lied to covered his trail. If you're asking about uncharged misconduct, you can show that the accused had similar motives then and now. The bottom line: each item of evidence in your case can lead to a carefully crafted question which establishes the point of putting that item into evidence in the first place. While you have the accused on the stand, you should go right down your list of elements with the accused. Have him admit to everything that he will admit to. This allows you to narrow the issues that the panel must decide; the panel members will appreciate that. If your case involves a false swearing offense, it's very effective to compare the oath the accused took at the time he falsely swore with the oath the accused has just taken on the stand.

Be sure to mix up your lines of questioning.

Just as you will have numerous subsets of evidence in your case, you will have corresponding lines of questioning. Again, these lines of questioning should be baby-stepped in order to lead to the main point of the evidence. Once you've developed your lines of questioning, mix them up to the keep the accused off-balance and confused about what your point is. You do not necessarily need to order all of your questions in such a manner as to present your theory and theme just as you will eventually argue them. Bounce from one subset of evidence to another. You may even be successful in baiting the accused. For example, if the accused has testified that he did not go to the military personnel flight on the day in question, you may ask him, "But you went to military personnel flight building that day, didn't you?" If he says "no," you can hit him with his prior testimony on cross-examination that he was at the orderly room in the same building that day to get emergency leave orders. If he says "yes," you hit him with the fact that the orderly room and the military personnel flight are right down the hall from one another. In thinking about how you will mix up your lines of questioning, look for opportunities to establish damaging predicate facts while talking about one subject and then use those predicate facts against the accused when talking about another subject. Catching the accused in a lie is very devastating to the defense case--members will not forgive an accused's lies when determining whether he is guilty.

Confront the accused with your scientific or expert evidence.

Because the accused is present during all of your case-in-chief, he will have sat through the testimony of your expert witnesses. Hopefully, those experts will have provided the members with a learning experience about an area of forensic science that they previously knew nothing or very little about. In most cases the members will be willing to accept as truthful and valuable the opinion of the expert, as he is a neutral person whose opinion is based in well-grounded scientific analysis. The accused, on the other hand, has every reason to shade his testimony. It can be very effective to present the accused with the expert conclusions he has seen developed in the courtroom and to ask him to acknowledge that those conclusions are entirely valid. For example, if the expert has testified that the accused's fingerprint was on a questioned document based on eight exact matches between features of the known fingerprint of the accused and features of a print taken from the questioned document, you can ask the accused whether he saw each of the exact matches on the expert's slide presentation. The accused can hardly deny that he saw each match. If he does, show them to him again. After the accused has acknowledged that there are eight exact matches, you can ask him the following question: "And it's true, isn't it, that that is your fingerprint on that document?" If the accused denies this, he looks like a fool and a liar. Always look to pit the accused against a neutral and reasonable expert.

Always end strong.

Throughout your cross-examination of the accused you have used the opportunity to effectively present once more the totality of your case and to argue your theme and theory through carefully crafted questions. It just makes sense that you not end with a whimper. Just as you would wrap-up your closing argument with a dramatic final statement of your case, in finishing your cross-examination, you should summarize the key features of your theme and theory. The end result should be that the panel is more convinced than ever that this accused is guilty as charged.

In the final analysis, cross-examination of the accused in a court-martial should be looked upon as a great opportunity. In a certain respect, once the accused has taken the stand he has allowed you to put on your entire case against him one more time. It doesn't matter what his answers to your questions are. It's the questions, and the manner in which they're worded and posed to the accused, that matter most. Moreover, while your questions themselves are not evidence, the factual assertions or predicates contained within your questions will leave lasting impressions on the members which will allow them to decide the case in your favor based on the evidence you have already developed in your case-in-chief. Still, while cross-examination of the accused can be your opportunity to "testify," you should also be prepared to capitalize on every valuable admission made by the accused and to show wherever possible that the accused is lying. In every fully litigated case, trial counsel should take the time to prepare a lengthy and well thought out cross-examination of the accused. Even if the accused does not take the stand, the effort made to develop the cross-examination questions will contribute greatly to your understanding of the facts of the case, to your theory and theme, and to the closing argument that must be made. Included with this article are the actual draft questions used to cross-examine the accused mentioned earlier. I believe these questions led the members to convict this accused on all specifications, despite his ardent denials. His sentence included reduction to E-1 and 12 months confinement. After you have read through these questions, ask yourself whether you think you have some understanding of the evidence in the case. If you think you do, consider that you weren't there and that you didn't hear or see the accused's answers. That's what cross-examination of the accused can do.

CROSS-EXAMINATION - SMSGT ROBERTS

1. Sgt Roberts, I assume you'll agree with me that MSgt Melton is a good man?
2. That he is a truthful person?
3. That his testimony in this proceeding was nothing but the truth?
4. He did, after all, even write you a character letter to use in the event you're convicted in this case, didn't he?
5. MSgt Melton was an efficient and conscientious admin NCO when he worked for you in the command post, wasn't he?
6. In fact, he's the person primarily responsible for the command post's "zero EPRs late" reputation, isn't he?
7. Even though your EPR took 26 days to go from the wing front office to the EPR section at the MPF?
8. We can believe him, can't we, when he says that he wouldn't send forward a disc with an EPR package which has on it anything other than the one single file that corresponds with the EPR inside that particular package?
9. We can believe him, can't we, when he says that that archival disc was often times not

locked up?

10. We can believe him, can't we, when he says that you brought a disc to the session you and Lt Col Ball had on his computer when you two created your genuine EPR?
11. We can believe him, can't we, when he says that you imported the first draft of that genuine EPR onto the disc that went forward with the EPR package?
12. We can believe him, can't we, when he says that he observed you and Lt Col ball working to generate that genuine EPR?
13. And, we can believe him, can't we, when he says that he cannot account for that certain computer file with two iterations which we now have found on his archival disc?
14. But you can account for it, can't you?
15. You had access to that disc, didn't you?
16. You used that disc to print up a copy of the draft file of your prior year EPR, didn't you?
17. Col Ball didn't give you that draft file of your prior year EPR with his signature on it, did he?
18. Your actual prior year EPR didn't even look like that draft when it was finalized, did it?
19. Col Ball wouldn't have just signed a draft and left it with you, would he?
20. The only draft he signed would have gone forward with that year's package, wouldn't it?
21. You used that draft file for your prior year EPR to practice Col Ball's signature, didn't you?
22. You saw Mr. Parker's presentation yesterday, didn't you?
23. You know that's not a genuine "Ted M. Ball" signature on that document, don't you?
24. And you had that document in your work center desk, didn't you?
25. Just like you had a disc with the first draft of your EPR in that work center desk, didn't you?
26. You know nobody put that document or that disc in your desk, don't you?
27. Just like you know nobody planted that disc with the second draft of your EPR in your quarters?
28. And you used MSgt Melton's archival disc to create a file from which you created what are now Prosecution Exhibit 6 and Prosecution Exhibit 7, didn't you?
29. Prosecution Exhibit 6 and Prosecution Exhibit 7 are virtually identical to the file you left on MSgt Melton's disc, aren't they?
30. Isn't it true that the only substantive difference between the first iteration of that file and Prosecution Exhibit 7 is that Prosecution Exhibit 7 says you are the General's "number one SNCO," even ahead of his Senior Enlisted Advisor?
31. And you put that bullet in there to get yourself promoted to Chief, didn't you?
32. You also put in the words "personal concern of subordinates," didn't you?
33. Don't you think the General would have said "personal concern for subordinates" if it were appropriate?
34. But the comment wasn't appropriate, was it?
35. Because you'd had a situation involving your treatment of subordinates, hadn't you?
36. And you weren't going to get the General's endorsement at all, were you?
37. And you knew that, didn't you?
38. You knew that before you went to the IG on 4 June, didn't you?
39. You knew that on 3 Jun when you created the double file on MSgt Melton's disc, didn't you?
40. And you misrepresented yourself to the IG on 4 Jun, didn't you?
41. And on 8 June, he told you he wouldn't take your IG complaint, didn't he?
42. He told you he knew you'd lied to him, didn't he?
43. It made you mad that the General wouldn't sign your EPR, didn't it?
44. It made you mad that Chief Stivers had advised the General not to do so, didn't it?
45. It made you mad that the IG would not take your complaint, didn't it?
46. You told Chief Stivers you weren't going to stand for this, didn't you?
47. And you took that EPR package out of the flow of its processing, didn't you?
48. You knew it left the front office with Col Yount's signature on it on 4 Jun, didn't you?
49. You grabbed that package up and that's why it was missing for 26 days, isn't it?
50. Surely the orderly room personnel wouldn't take 26 days to route the package to Amn Starr, would they?
51. The missing package was in your hands the whole time, wasn't it?
52. Did you see an opportunity to grab it at the orderly room?

53. Or did you just grab it right out of the wing front office?
54. How long did you have it before your mother came to Okinawa, 14 days?
55. Did you use most of those 14 days to practice Col Ball's signature?
56. Did you use most of those 14 days to practice Gen Baker's signature?
57. How much time did you spend practicing to draw Col Yount's signature?
58. You made Prosecution Exhibit 6 first, didn't you?
59. You knew you needed an EPR which had Col Yount's signature on it, didn't you?
60. You knew you'd have to make sure that a copy of your fake Gen Baker EPR did not remain in your local file, didn't you?
61. Because many local people knew he didn't sign your EPR, isn't that right?
62. But you didn't want to just put a copy of the genuine EPR in the records locally, did you?
63. Because you didn't like what it said, did you?
64. It didn't say "personal concern of subordinates," did it?
65. You couldn't sell "unblemished record" to Col Ball, could you?
66. But you didn't have to sell "personal concern of subordinates" to anyone, did you?
67. You wanted to right your own perceived injustice, didn't you?
68. You wanted your record to deny that there had been a situation didn't you?
69. Nobody created the Gen Baker EPR just to hurt you, did they?
70. That subordinate your lawyer implied might have been involved, he PCSed from Kadena in Jan of 98, didn't he?
71. And if someone had wanted to hurt you, he'd have left the copy of the Gen Baker EPR in the local records, wouldn't he?
72. That would have made it look obvious that you had done something wrong, wouldn't it?
73. But he couldn't have gotten your fingerprint on that document, could he?
74. Especially not like that?
75. And no good fairy sought to get you promoted without you knowing it, did they?
76. That was your print on the Gen Baker document, wasn't it?
77. You saw the demonstration; it was an exact match, wasn't it?
78. That print's there because you signed that document, didn't you?
79. When you created the Col Yount EPR you didn't realize that the initials in the Endorser's Comments block were supposed to be the initials of the Rater's Rater, did you?
80. When you copied off of the genuine Col Yount EPR you thought that was just some administrative initial from someone else, didn't you?
81. You put that same initial on the Gen Baker EPR, didn't you?
82. You didn't know that you should have put Gen Baker's initial there, did you?
83. If you did, you'd have tried to draw that distinctive B, wouldn't you?
84. And you marked one too many blocks on the Gen Baker EPR, didn't you?
85. And you whited it out because you'd spent so much time working on it, right?
86. You didn't want to have to start over, did you?
87. When the defense office told you that the lab wanted more prints from you, you panicked, didn't you?
88. You thought that maybe they hadn't been able to lift any of your prints yet, didn't you?
89. You didn't want to give them another chance, did you?
90. You knew they might find your print this time, didn't you?
91. You knew your print might be on that document, didn't you?
92. Because you had handled it, right? You created it?
93. You knew they wouldn't find any print from anyone who was legitimately in the process didn't you?
94. And that's why you obliterated your fingerprints, isn't it?
95. Because you wanted to hide your guilt, right?
96. What did you use on your hands, super glue?
97. You lied to the OSI when you told them you provided only handwritten inputs to Col Ball, didn't you?
98. You wanted to distance yourself from computer media, didn't you?
99. Because you knew you'd used a computer to create these false documents, didn't you?
100. And when they found that disc in your house and your desk, you had to explain that away, didn't you?
101. You weren't tired when you were interviewed by OSI, were you?

102. But you told Rep Engels that you were so jet lagged that you didn't know what you might have told OSI about inputs, didn't you?
103. You told Rep Engels that you had provided a complete draft EPR on disc, didn't you?
104. You were trying to explain away your lie to OSI, weren't you?
105. You read your statement to OSI, didn't you?
106. You initialed next to the oath portion, didn't you?
107. You understood your obligation to tell the truth on that statement, didn't you?
108. You raised your right hand then, didn't you?
109. Just like you raised your hand today in this courtroom, right?
110. And you swore your statement was true, didn't you?
111. Just like you swore you'd tell the complete truth today, right?
112. And you lied in that statement, didn't you?
113. You lied about the nature of your inputs, right?
114. And you lied about not knowing anything about the questioned EPRs in this case?
115. You've lied to us today, haven't you?
116. You know where the EPR section at the MPF is located, don't you?
117. Did you take your mother with you when you went to the EPR section at the MPF on the 29th of June 1998?
118. Did she even know where you were taking her?
119. You did take her to the building where the EPR section is, didn't you?
120. (Did you go to that building by yourself that day?)
121. That's the same building where the orderly room is, isn't it?
122. You didn't expect to have to go on emergency leave on the 30th of June, did you?
123. You applied for your emergency leave orders on the 29th of June, didn't you?
124. You had to make a formal request in writing for those orders, didn't you?
125. You made that request in writing at the orderly on the 29th of June, didn't you?
126. And you'd stewed over that genuine Yount EPR package for nearly 25 days by this time, hadn't you?
127. You'd created your fake documents already, hadn't you?
128. Maybe even before your mother came to Okinawa, am I right?
129. You knew you had to act on the 29th, didn't you?
130. If you flew to New York on the 30th, you'd miss your chance, right?
131. You were gone for 18 days, weren't you?
132. It would have been as long as 43 days since you'd grabbed the genuine EPR package, wouldn't it?
133. Someone would surely start asking questions, wouldn't they?
134. Did it take you so long because you were afraid to act?
135. Were you just mulling it over?
136. And on the 29th, you dropped down to the EPR section and dropped off your faked package, didn't you?
137. That's why Amn Starr is so certain she saw you, isn't it?
138. That's why she can't remember what you and she talked about, isn't it?
139. You didn't ask her to see your EPR, did you?
140. Because you'd just slipped your fake EPR into that office's inbox, hadn't you?
141. Or did you slip it in Amn Starr's box?
142. She really didn't know why you were there, did she?
143. You just appeared, briefly, didn't you?
144. And she saw you, didn't she?
145. And she knew who you were, right?
146. She didn't sign for your fake EPR, did she?
147. That's why she didn't log it in until the next day, right?
148. You didn't switch out your EPR after it came to Amn Starr, you just delivered it on the 29th?
149. It only took you seconds, isn't that true?
150. And then you flew away the next day?
151. You switched out the local records EPR when you got back, didn't you?
152. And that's how you committed these offenses, isn't it?
153. You're guilty, aren't you?

THE RELIGIOUS FREEDOM RESTORATION ACT

MAJOR CALVIN ANDERSON

The Religious Freedom Restoration Act (RFRA), passed in 1993 to restore the compelling interest test established by the federal courts in the 60s and 70s, states that the government may not substantially burden a person's exercise of religion absent a compelling government interest and the use of the least restrictive means.[1] As defined by the statute, the term government includes the Department of Defense (DOD). Although the act was passed in 1993, there is an absence of guidance within the department incorporating the compelling interest test.[2] In fact, as recently as February 2001, guidance available was to follow a 1988 DOD Directive 1300.17, *Accommodation of Religious Practices Within the Military Services,*[3] which uses a rational basis test even though the directive itself is hopelessly outdated.[4]

What regulatory guidance there is does not incorporate the test mandated by Congress in 1993. Examples include AFI 36-2706, *Military Equal Opportunity and Treatment Program*, for general religious accommodation requests, AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, and AFJI 48-110, *Immunizations and Chemoprophylaxis*. Although these are the three commonly referenced AFIs for religious accommodation, it's not hard to imagine other areas where waiver requests could trigger religious accommodation issues—one example being our Conscientious Objector Instruction, AFI 36-3204, *Procedures for Applying as a Conscientious Objector*.[5] Other requests likely processed under functionally specific regulations such as requests for BAS, where religious accommodation could be a factor but is not necessarily determinative, present separate issues. Should one proceed under the specific DOD or Air Force guidance, default to DODD 1300.17, or apply the test under RFRA without regard to other regulations?

This article provides a skeletal framework for legal analysis of religious accommodation requests, suggesting commanders apply existing regulations, and then, if a request is denied, apply the compelling government interest test mandated under RFRA. It also identifies issues for both counsel in criminal proceedings and attorneys advising commanders. In-depth analysis of the legal framework and of specific issues such as Wiccan accommodation and peyote use are for future articles.[6] Likewise, this article will not address the constitutionality of RFRA.[7] Although the act was overturned in relation to the states,[8] defense counsel, in challenging the lawfulness of orders that violate religious conviction have no incentive to raise the issue. Government counsel, likewise, will not raise the issue as the Department of Justice and the Air Force believe the act is constitutional as applied to the federal government.[9]

The first step is to define the standard. RFRA places the burden on the government to prove a compelling government interest and use the least restrictive means before denying a religious accommodation request.[10] One argument supporting a strict construction of the compelling government interest test for the military is that Congress was quite capable of excluding application to the DOD when passing RFRA but chose not to do so. Despite this argument and the judicial test in *Sherbert* and *Yoder*, there is an argument that a different standard should be applied to the military. Courts have often referred to the military as a separate society and have not hesitated in protecting servicemen's constitutional rights with a standard far less generous than that applied to other citizens.[11] Just as valid as a strict construction argument is one that Congress was aware of the Court's historical deference in applying judicial tests much less rigorously to the military and that it counted on this deference in crafting the test by defining it in terms of previous judicial decisions.

Did Congress intend a traditional compelling government interest test for the military, or, by referencing previous judicial standards did they desire a lesser standard? AF/JAG's current guidance does not fully answer this question—it references a compelling government interest, but does not define it. The draft DODD 1300.17 defines the term (very generously for DOD),[12] but may be usurping Congress' express language by defining it differently from the test referenced in the statute. Are the services abusing their

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authority in drafting implementing regulations? This article will assume that a more rigorous, traditional compelling government interest test will be applied, but that the military will be given great deference, at least in a civil or administrative setting, in claiming the standard has been met.[13]

Having defined the standard, religious accommodation requests are best analyzed according to which forum will decide the issue. First, such requests could arise in the civil or administrative forum with issues such as enlisted members' requests for BAS or other requests for specific benefits. If the request is denied, the member can appeal or, as provided under the statute, file suit in federal court.[14] Second, such requests could arise in the criminal forum. These cases could involve an order (or regulation) to do or not do a specific act which order would most likely be disobeyed. As religious convictions are among some of the most deeply held, this is not an altogether unlikely event. Examples could include such acts as immunization refusals. Finally, there are the requests that could go into the criminal forum except that the member's conviction does not outweigh the threat of punishment. Examples could include requests not to work on Saturdays or Sundays[15] or for religious apparel accommodations. As the analysis hinges not on the nature of the request or where it *could* go, but rather on the forum most likely to review a denial, I place these with the first group as civil or administrative.

Although academically more challenging, the criminal forum is the easiest to analyze—or at least to identify contentious issues. As an example, consider a religious based anthrax refusal. To prosecute under Article 92 for failing to obey a lawful order, the government would have to prove the order was lawful.[16] To do so, it would have to prove the existence of a compelling government interest beyond a reasonable doubt and then prove beyond a reasonable doubt that the least restrictive means were used. Traditionally, it's hard enough to meet the compelling interest test—imagine the problems in meeting it beyond a reasonable doubt. Additionally, since doubt generally favors the defense, when defining the proper standard for compelling interest, the most stringent test would be applied. It is far better for the government to have RFRA interpreted further in a civil setting in federal courts before trying to interpret the statute in a criminal setting.

With an almost unattainable "compelling government interest beyond a reasonable doubt" test in an anthrax refusal case, defense could raise the vaccine's much debated effectiveness, the sometimes questioned FDA approval or experimental nature of the vaccine, and any related issues going toward the government's interest in enforcing the order. Defense could follow with a host of "reasonable," or at least persuasive to a reasonable doubt, alternatives to an uncompromising order to violate a deeply held religious belief and take the vaccine.[17] A "compelling government interest beyond a reasonable doubt" test could be a hard burden to meet.

Having identified potential difficulties in a case involving possible life and death decisions where the Air Force has the requisite need to ensure readiness, it's not hard to see how difficult criminal cases could be with lesser issues such as tattoos, body piercing, or other lower threat accommodations.[18] Indeed, after passage of RFRA, it is almost inconceivable that the military could win a case such as *Goldman v. Weinberger*[19] were it to arise in a criminal context.

In advising a commander in a case that could conceivably go to a court-martial, an attorney should not only bear in mind the "reasonable doubt" hurdles of a criminal trial. They should also recognize, as does the Air Force's Chaplain Department[20] that discharge is a form of accommodation. While this won't help deter members whose goal is to get out of the military, it would throw the case into the administrative arena where the government has a much greater chance of winning—a better forum for both defining compelling government interest and in applying it to the case at hand.[21] Even so, in cases where NJP or UCMJ action is most appropriate, commanders may be hamstrung in certain cases by Congress's neglecting to exclude the military from possible strict application of the compelling government interest test as put forth in *Sherbert* and *Yoder*.

Switching to the civil and administrative arena, attorneys need a framework for legal analysis of religious accommodation requests. They also need to realize who represents the requestor, their relationship to the commander, and their view on relevant issues surrounding any religious accommodation request. Only with a complete picture of the players can legal advisors offer competent counsel to their commanders.

In advising a commander, JAGs must be aware of the interests represented by other advisors--in particular, chaplains. Current policy in the chaplain field is that they are an advocate for the requestor, that they will not look into the validity of a particular religious belief (any belief--not just firmly established or mainstream--will do), and they will not question the sincerity of the requestor's belief.[22] Chaplains see accommodation as the ultimate goal. Even so, they recognize discharge as an accommodation as it does not force a member to violate his religious beliefs. [23]

Although chaplains are deeply committed to helping the commander reach a solution, the commander needs

to know they are taught to advocate for the requestor. They may not address legitimate concerns of sincerity of either the existence of the religious belief or the conviction with which it is held. Given the Air Force's laudable track record with handling religious accommodation requests, these are not necessarily bad positions. It would be understandably difficult for chaplains to tell members their particular religion isn't good enough or deeply enough held or that they are dishonest. Both the JAG and the commander must understand the chaplain's position and be prepared to be the ones who evaluate the credibility of the requestor's religious accommodation request.

In the absence of substantial evidence suggesting the accommodation request is a sham or based on a belief not deeply held, JAGs should advise commanders to apply current directives, which, for the most part, recommend approving religious accommodation requests when "accommodation will not have an adverse impact on military readiness, unit cohesion, standards or discipline."[24] If the request is accommodated, the issue is resolved. If the request is denied, JAGs must apply the more stringent test under RFRA regardless of the guidance in the directive or instruction. Where religious accommodation can be a factor, such as BAS requests, it becomes *the* factor—one which requires a compelling government interest to overcome. Although factors in DODD 1300.17[25] and other regulations which guided commanders in evaluating accommodation requests under a rational basis test should still be addressed, the actual balancing will necessarily change.

Having decided to evaluate a request under RFRA, JAGs must address which definition of compelling government interest will apply. Given the lack of judicial guidance to the contrary, JAGs should choose the definition from the draft DODD 1300.17. Even so, they should be prepared to argue both for great deference to military claims of necessity and that a stricter compelling government interest has also been met. A thorough legal analysis should also briefly evaluate the chance of success under the traditionally strict compelling government interest test if little deference is given to military claims. Attorneys should address all possibilities, even if the last possibility is only slight. In the end, an abbreviated version of the full analysis, listing only the most probable standard, will likely suffice for the commander.

Attorneys should not let any threat of eventual federal suit dissuade proper command action regarding religious accommodation requests as there are only two ways to firmly define RFRA's compelling government interest test as it relates to the military: congressional action or federal judicial decisions. Good facts make good law, and a favorable standard could carry over for use in later criminal cases.

Conclusion: Any use of the word religion with a request for accommodation should cause JAGs to consider whether RFRA will apply—regardless of which regulation controls the subject matter of the requested accommodation. Absent more specific regulatory guidance, commanders should continue to apply existing regulations to religious accommodation requests. If the requestor is not adequately accommodated, JAGs should assist commanders in applying the compelling government interest test, using a strict construction of the test with deference to government claims of necessity. In cases where criminal proceedings are likely, JAGs need to thoroughly analyze the issues raised in this article and determine whether command's interests might better be served in the administrative arena by proceeding with a discharge board. Until such time as DODD 1300.17 defines compelling government interest and that definition is upheld in federal court, criminal cases can be an uphill battle. In the interim, JAGs should seek MAJCOM guidance on the tougher religious accommodation request cases and should forward innovative accommodations through the MAJCOM to AF/JAG which can serve as a repository—a resource readily tapped to assist in properly responding to religious accommodation requests.

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[1] 42 U.S.C. § 2000bb(b)(1). The Act was passed to reestablish the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) [hereinafter *Sherbert*] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) [hereinafter *Yoder*] *id*, which had been overturned in 1990 by *Employment Division v. Smith*, 494 U.S. 972.

[2] *But see Religious Accommodation in the Air Force*, THE REPORTER, Sept. 2000, 23 [hereinafter *Religious Accommodation*] (urging contact with MAJCOM for resolving religious accommodation issues). In contrast, this article provides an analytical framework for preparing a legal opinion and identifies potential pitfalls associated with proceeding in a criminal forum when confronted with religious accommodation issues.

[3] *Accommodation of Religious Practices, Air Force General Law Division* (AF/JAG), current version at https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/SOURCE/talker-newreligiousaccom.htm [hereinafter *Accommodation*] (last visited March 5, 2001) (previous version on file with the author). AF/JAG's guidance was recently changed to reflect the test as mandated by RFRA. TJAG On Line News Service Feb. 7, 2001 ¶ 6 at https://ds.jag.af.mil/Get/File-45863/ONS7Feb01.htm.

[4] A draft version exists, but absent resolution of some sensitive issues, there is no foreseeable release date. In 1998, AF/JAG put a reasonable guess for release as early 1999. *Revision to DoD Direction on Religious Accommodation* (Oct

1998) at https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/SOURCE/relaccom.htm (on file with the author). *But see* OpJAGAF 2000/1, *Referral of Complaint - Basic Allowance for Subsistence (BAS)*, 4 Jan 00 and OpJAGAF 2000/12, *Request for Religious Accommodation - Wearing of Uniform*, 1 Feb. 2000 (correctly referencing RFRA as the applicable test).

[5] Under AFI 36-3204 para 1.1 (July 15, 1994), the applicant has the burden of proving the relevant factors by clear and convincing evidence. This standard could be used for all religious accommodation requests if neither congressional action or judicial decisions favor the military. With such a standard for all requests, the requestor would have to prove the sincerity of the belief by clear and convincing evidence before the government would have to support a denial with a compelling government interest. Transferring the initial burden would help prevent abuse of RFRA's compelling government interest test. It is yet undecided whether AFI 36-3204's requirement to oppose "war in any form" would still stand in light of RFRA. *But cf. Gillette v. U.S.*, 401 U.S. 437 (1971) (upholding restrictions limiting approval of conscientious objector applications to only those who opposed war in any form).

[6] *See Religious Accommodation supra* note 2 for a brief discussion of peyote use.

[7] *See* Major Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion in the Army*, ARMY LAW., Nov. 1998, for a brief outline of Establishment Clause concerns.

[8] *Employment Division v. Smith*, 494 U.S. 972 (1990)

[9] *Accommodation supra* note 3; *Religious Accommodation supra* note 2.

[10] *But see Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (holding that the *Sherbert* "compelling interest test" is "inapplicable to an across-the-board criminal prohibition on a particular form of conduct"). Arguably, RFRA, if constitutional, nullifies the *Smith* decision.

[11] *See Parker v. Levy* 417 U.S. 503 (1974) and its progeny. *See also* James M. Hirshorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 177 (1984) (citing eight decisions outlining the Court's standards when applying constitutional safeguards to the military).

[12] "A draft directive sent to the Services for review provides that a compelling government interest exists where a military requirement is directly related to maintaining individual or unit readiness, health, safety, good order and discipline, morale or cohesion." *Accommodation supra* note 3. This definition fails to incorporate any notion of balancing individual requests with marginal military benefits.

[13] *See generally U.S. v. Chevron*, 467 U.S. 837 (1984) (directing courts to give deference to agency claims: "the question for the court is whether the agency's answer is based on a permissible construction of the statute"). *See also Goldberg v. Weinberger*, 475 U.S. 503, 507 (1986) (refusing to second guess the military's professional judgement and claim of military necessity despite their doubts as to the wisdom of the enforcement of the regulation).

[14] 42 U.S.C. 2000bb(c).

[15] *Sherbert* specifically addressed an individual who was denied government unemployment benefits because she refused to work on Saturdays. *Sherbert supra* note 1.

[16] Uniform Code of Military Justice (UCMJ), Article 92, 18 U.S.C. § 892 (2000).

[17] Defending the proposition that a criminal proceeding is the least restrictive means (beyond a reasonable doubt) when discharge is available and has been often used could be difficult.

[18] Although AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, 8 June 1998, can be easily defended if given rational basis review, it could become quite problematic if the government were required to defend all of its restrictions under a compelling government interest and least restrictive means test.

[19] 475 U.S. 503 (1986) (holding that a Jewish rabbi could not wear a yarmulke outside the hospital). A criminal court could not defer to the military in interpreting the lawfulness of its order in relation to rights under the Constitution as Congress has apparently expanded constitutional rights under RFRA—at least one can not argue there is no reasonable doubt that RFRA expands constitutional rights as related to religious accommodation of military members.

[20] Video tape: *Religious Accommodation in the Pluralistic World*, AUTV Maxwell AFB ser-00-007 (20 Oct. 1999) [hereinafter Pluralistic World] (copy on file with the author).

[21] The standard of proof for a discharge board is by a preponderance of the evidence. AFI 36-3208, *Administrative Separation of Airmen*, ¶ 6.12.1 (notification discharges) and ¶ 6.18.1 (Oct. 14 1994); AFI 51-602, *Boards of Officers*, ¶ 2.2 (March 2 1994).

[22] *Pluralistic World supra* note 20. *See generally Revision supra* note 4 (citing adherence to "'well established adherence"' to religious beliefs" as an out for providing DNA samples and for peyote use). "Well established" seems no longer needed under a reading of RFRA and under current chaplain policy. It could be a factor in the sincerity of the belief, but chaplain training is to take the profession of religious belief at face value. *Pluralistic World.*

[23] *Id.*

[24] *DODD 1300.17, Accommodation of Religious Practices in the Military Services*, ¶ 3.1 (Feb. 3, 1988).

[25] *See Accommodation supra* note 3.

AIR FORCE AIRCRAFT ACCIDENT INVESTIGATIONS: IMPROVING AND PROTECTING THE PROCESS

COLONEL GEORGE P. CLARK

The Air Force enjoys a powerful, effective government privilege that enables safety investigations to "quickly obtain accurate mishap information, thereby promoting safety, combat readiness, and mission accomplishment."[1] It is in a separate investigation that the Air Force collects, preserves, and documents the evidence, generating a report to be used for a wide variety of purposes: claims, military justice, other litigation, responding to federal and state agencies, and informing the public what happened and why. This Article proposes the Air Force employ civilian Investigating Officers to head both Safety and Accident Investigation Boards to (1) silence criticisms of improper command influence, and (2) to create a cadre of experienced investigators who could better utilize corporate knowledge in the investigations while freeing potential military board presidents to do their primary job.

The common name for the privilege protecting certain information within a safety report from release outside the Air Force safety community is the "safety" privilege.[2] This privilege helps promote conjecture, speculation, and full and frank discussion by investigators, boards, endorsers and safety investigation reviewers.[3] Privileged safety information includes the findings, evaluations, analyses, opinions, conclusions, recommendations and other indicia of the deliberative processes.[4] Additionally, investigators can offer witnesses and contractors a promise of confidentiality.[5] The Air Force will not use privileged safety information as evidence for punitive, disciplinary, or adverse administrative actions, for determining misconduct or line-of-duty status, in flying evaluation board hearings or reviews, to determine pecuniary liability, or in any other manner in any action by or against the United States.[6] Only those whose duties include relevant mishap prevention responsibilities may use this privileged information.

For decades the Air Force has encouraged aircrew members and manufacturers to participate in safety investigations by offering a promise of confidentiality and thereby instilling confidence that they can admit oversights and omissions without fear of retribution or public exposure. This is because in order to use Air Force aircraft effectively, commanders must quickly learn whether crew error or a faulty manufacturing design or defect caused mishaps. In safety investigations attorneys are not assigned and Article 31 rights advisement is not given. Through the promise of confidentiality, safety investigations can be a cooperative effort to quickly identify and address the causes of aircraft accidents. Contrast this with investigations by the National Transportation Safety Board (NTSB)[7] where "any person interviewed by an authorized representative of the Board . . . regardless of the form of the interview . . . has the right to be accompanied, represented, or advised by an attorney . . . ."[8] This stems from the potentially adversarial nature of their investigations. The focus of their interviews may very well become an attempt to mitigate exposure to potential liability instead of becoming a cooperative effort to determine what happened.

The Air Force's investigative system has come under attack, and the Air Force should act to preserve its ability to quickly and accurately investigate aircraft accidents. Following mishaps, media reports about military aircraft accident investigations include claims that the Air Force cannot investigate itself, that improper command influence is inherent in the investigative process, and that mishap investigators are, by and large, inadequately trained or lack experience for the complex task.[9] Although the military remains one of the most trusted institutions in the United States, Americans have displayed an increasing distrust of other governmental agencies.[10] Following more recent, spectacular mishaps that have drawn intense media attention, some Congressmen have opined that an independent board, similar to the NTSB, should investigate military aircraft accidents.[11] This would be disas-

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trous in quickly obtaining timely, accurate information needed to prevent similar mishaps. During the past decade Congress, for the first time, passed legislation regulating Air Force aircraft accident investigations.[12] Unless the Air Force implements changes to address the criticism and improve the investigative process, there is a risk that Congress will impose unwanted and potentially detrimental changes to the mishap investigation process.

Reviews by the Department of Defense and Headquarters Air Force of the Air Force's two-tiered investigation process did not find any substantial flaws.[13] However, the Air Force implemented changes following the reviews in order to improve the process. The changes included: (1) designating the major command (MAJCOM) commander the convening authority for all Class A[14] safety and accident investigations; (2) assigning a trained safety investigator from the Air Force Safety Center (AFSC) to every Class A safety investigation; and (3) requiring all Safety Investigation Board (SIB) and Accident Investigation Board (AIB) presidents to attend the Board Presidents Course at AFSC before being appointed to investigate a mishap.[15] About the same time, in 1996, Congress passed 10 U.S.C. 2255. This statute applies to AIBs. In relevant part, it requires that at least one AIB member in boards of two or more have expertise in accident investigations.

There are additional changes the Air Force should make to improve the quality of investigations and help insulate its proven investigative process from further criticism. The most important is creating a cadre of civilian investigators to serve as board presidents for SIBs and AIBs.

Focusing first on the SIB, it must include a board president, an AFSC representative, and an investigating officer, in addition to members with other special training.[16] A trained and experienced civilian investigator could fulfill all three roles. Military officers are typically assigned to new jobs every two to three years. Civilian investigators, on the other hand, would offer more continuity, providing the SIB experience and expertise.

Furthermore, using a civilian from the Safety Center as board president would help dispel the appearance of improper command influence and self-investigation. For all on-duty Class A and nuclear mishaps, the MAJCOM commander is the convening authority.[17] The SIB president, a pilot or navigator, is junior to the MAJCOM commander, leading to perceptions of improper command influence and self-investigation. Assigning a civilian investigator who works for the AFSC, an Air Force organization independent from the MAJCOMs, as the SIB president, would diminish any appearance of impropriety.

Another issue is training and continuity. Under the current safety instruction, the SIB president is the decision authority for the findings, causes and recommendations in the SIB report. Other primary members (the AFSC representative, investigating officer, pilot member, maintenance member and medical officer) may submit minority reports if they disagree.[18] The SIB president must be a graduate of the AFSC Board Presidents Course, appointed from outside the wing or equivalent organization experiencing the mishap, a colonel or higher-ranking officer, and rated as either a pilot or navigator.[19]

Although current qualifications for SIB presidents make sense, especially if the Air Force continues to appoint officers who are otherwise untrained and inexperienced as aircraft accident investigators, it would make more sense to appoint trained and experienced civilian investigators as SIB presidents. There is no statutory requirement precluding using civilian investigators as SIB presidents. Experience and training, including rated experience, can be made a condition of employment or contract. The current rank requirement may have arisen from a desire to ensure that no one involved in a mishap outranks the SIB president. However, other than the guidance in the instruction, there is no legal requirement for an investigator to outrank witnesses. If the rank requirement arose from a desire to give SIBs greater visibility and credibility, there have been safety investigations of military aircraft mishaps since Orville Wright and Army First Lieutenant Thomas E. Selfridge crashed in 1908.[20] As such, the process is well established. Visibility and credibility should be the result of sound investigations. Assigning civilian investigators as SIB presidents would not adversely affect the visibility or credibility of SIBs, but should arguably have the opposite effect.

An AFSC representative must now be a primary member of a SIB, to strengthen the investigative experience on the board.[21] The investigating officer now assigned to a SIB must be a graduate of certain Air Force courses and meet other MAJCOM-defined experience criteria.[22] An appropriately trained civilian investigator serving as SIB president could satisfy the requirements.

Using civilian investigators as SIB presidents offers several benefits to the Air Force, including experience, expertise, and continuity, which would improve the investigative process while deflecting criticism of improper command influence in safety investigations. For many of the same reasons, the Air Force should appoint civilian investigators as AIB presidents.

Even so, it would not be practical to select AIB presidents from the civilian investigators assigned to

the Safety Center. There have been separate, releasable investigations conducted on Air Force aircraft accidents since the Army Air Corps regulations began to provide for it in the 1940s.[23] The AIB, ordinarily the second investigation, provides the public a complete report documenting the evidence from the accident and the board president's opinion regarding cause.[24] During their investigation, AIB presidents are not permitted access to privileged information from the safety investigation. It would be difficult to ensure that a civilian investigator assigned to the Safety Center did not have access to that information.[25] It would also be difficult to convince a court, should the issue arise, or the public that the AIB and SIB are separate investigations.

An alternative would be to assign several civilian investigators to an office at the Air Staff. A civilian AIB president, assigned by Air Staff and solely responsible for the report,[26] would counter the appearance of improper command influence. Civilian investigators, for reasons discussed earlier, would generally be better trained and more experienced than many of the military members presently available to serve as AIB presidents. The potential benefits of using civilian investigators include increasing public confidence in the AIB statement of opinion, further improving the quality of the reports, and reducing the time needed to finish and release a report to the public.

Apart from increasing the quality and public confidence in the reports, assigning civilian investigators as AIB presidents would also relieve pilots and navigators from what can be an onerous task. Our two-tiered aircraft mishap investigation process can have a significant impact on senior officers. Not only are two senior officers required to head the boards, but the pool of eligibles is further restricted by rank and training requirements. SIB presidents must be either colonels or general officers[27] while AIB presidents must be lieutenant colonels or higher.[28] In both cases, the officer must have completed the AFSC Board Presidents Course.[29] It is also desirable to appoint officers who are experienced in the mishap aircraft type. These requirements, while reasonable, severely reduce the pool of potential board presidents. Board presidents are tasked for thirty days or longer with very short notice (sometimes only hours). In high interest mishaps (usually those involving fatalities and/or extensive civilian property damage), there may be claims and litigation leading to depositions or court appearances, sometimes years after the mishap. Although board presidents gain valuable insight and experience that can be applied to future assignments, the demand on senior pilots and navigators is great. Given the current shortage of pilots, the strain is magnified. Because these individuals comprise the senior leadership of the Air Force, the strain is felt throughout the tasked units. Using civilian investigators to serve as AIB presidents would help reduce this impact.

Appointing civilian investigators as AIB presidents would admittedly involve some difficulties. Since accidents do not occur according to a predetermined schedule, it would be difficult to determine the appropriate number of investigators needed to meet peak demand. It would also be difficult—if not wasteful—to hire investigators with experience in every aircraft type in the Air Force. However, pilot advisors who are experienced, current and qualified in the mishap aircraft could still be assigned to assist board presidents as needed.

Another difficulty is that that the AIB president typically briefs the results to the next-of-kin following fatal mishaps. It is long-standing practice that the Air Force member delivering the AIB report is of the same rank as, or is senior to, the deceased member and has a similar Air Force "job." In the interests of conveying institutional respect and honor for our downed airmen, this practice should continue. Therefore, if civilian investigators are appointed as AIB presidents, Air Force members should still be selected to deliver the report to the next-of-kin. Although they will need time to become familiar with the report, this should not be too significant burden as most aircraft mishaps do not involve fatalities.[30] Several commands, including Air Combat Command, provide training for AIB presidents before they deliver the report and brief the next-of-kin. Chaplains, flight surgeons, public affairs officers and others on the staff provide the necessary training.

Finally, if the civilian investigators worked out of an Air Staff office, the convening authority and administration of AIBs should change. Currently, AIBs are convened by MAJCOM commanders and administered by their staffs. ACC has been responsible, over the past few years, for administering the majority of AIBs in the Air Force. In some other MAJCOMs, mishaps that require an AIB are relatively rare, and those MAJCOMs lack experience with the process. Under the proposed arrangement, it would make sense for HQ AF/CC or CV to convene AIBs and administer them from one office. While the new office would need an administrative staff, and the process would increase the convening authority's workload, the benefits of centralization would far outweigh the costs.

Administrative expertise and efficiency would develop in the new office, leading to better reports delivered more quickly. The new office could also draw upon the expertise available on the Air Staff. Multi-fatality aircraft accidents involving civilian deaths or

widespread damage to civilian property are the night mare scenario dreaded by every MAJCOM commander and legal office. An experienced and efficient AIB office, with ready access to key Air Staff offices, would help ensure the Air Force is ready to investigate even these tragic accidents with the accuracy, efficiency and sensitivity they demand.

During the past few years members of the public, media and Congress have been critical of the Air Force aircraft accident investigation process. That criticism includes complaints about improper command influence and inexperienced investigators with limited training. At the same time, the Air Force has been coping with a shrinking force and expanding commitments. It makes sense to consider a new approach to the investigation process. Relying on trained, experienced civilian investigators not only promises to increase the quality of investigations, deflect complaints and improve public confidence, but would also relieve senior officers of a significant burden.

[1] AFI 91-204, *Safety Investigations and Reports*, 29 November 1999, para 2.1.2.2.
[2] The safety privilege, also known as the *Machin* privilege, had its genesis in a landmark court decision, *Machin v. Zuckert*, 316 F.2d 336, *cert. denied*, 375 U.S. 896 (1963). Various courts have upheld the privilege for about forty years, and federal statute, 10 U.S.C. 2254, recognizes it. The specific information protected is described in DoDI 6055.7, para E4.4.2. and AFI 91-204, paras 2.1.2.2.1. through 2.1.2.2.5.
[3] DoDI 6055.7, para E4.4.1.
[4] *Id.* at para E4.4.2.
[5] AFI 91-204, para 2.1.2.3.
[6] *Id.* at para 2.1.2.5.
[7] *See* 49 U.S.C. 1133.
[8] 49 C.F.R. 831.7.
[9] Articles and editorials expressing these and similar opinions have appeared in newspapers following highly publicized mishaps, including the fatal King 56 (C-130) crash off the coast of California in 1996.
[10] *Beyond "Bowling Alone"; Are we really a nation of "civic slugs"?*; THE WASHINGTON POST, Dec. 17, 1997; *Confidence in Government at Low – Poll*; USA TODAY, March 26, 1993.
[11] *Reps Seek New Probe of Warplanes*; DAYTON DAILY NEWS, Dec. 11, 1999.
[12] Congress passed 10 U.S.C. 2254 in 1992, and 10 U.S.C. 2255 in 1996. Each statute regulated the aircraft accident investigation process imposing, for example, a training requirement for Class A accident investigators.
[13] CSAF Blue Ribbon Safety Panel Report, 5 September 1995; DoD/IG Report, *Inquiry into Alleged Mismanagement and Systemic Failures Associated with the Air Force Aircraft Safety Investigation Process*, 3 April 1997.
[14] A Class A mishap is defined as a mishap involving one or more of the following: total mishap cost of $1,000,000 or more, a fatality or permanent total disability, or destruction of an Air Force aircraft. AFI 91-204, para 3.2.2.1.
[15] Paul E. Cormier, *The Accident Investigation Board: Where It Came From, How It Came To Be What It Is, And Where It Is Going*, THE REPORTER, June 1999 at 6. *See also* HQ USAF/CV message, 191700Z Sep 95 (stating requirement to attend the course may not be waived).
[16] *Id.* at paras 7.3.4.1. through 7.3.4.4.
[17] *Id.* at para 1.3.2.1.
[18] *Id.* at para 7.3.4.2.
[19] *Id.* at paras 7.3.2.1. through 7.3.2.4.
[20] Accident Report, Office of the Chief Signal Officer, Aeronautical Division, War Department, Washington, D.C., 19 Feb. 1909.
[21] Blue Ribbon Panel, *supra* note 14, recommendingd that the Air Force "require an experienced AFSA representative to serve as a voting member on each Class A SIB." It also stated that "technical support for the SIB should be strengthened further." *Id.*
[22] AFI 91-204, para 7.3.3.3.
[23] Cormier *supra* note 16, at 3-4.
[24] AFI 51-503, *Aircraft, Missile, Nuclear, and Space Accident Investigations*, 5 April 2000, para 1.2.
[25] *Id.* at para 4.1.2.
[26] *Id.* at para 3.3.6.
[27] *Id.* at para 7.3.2.3. Fatal mishaps require a board president (both AIB and SIB) who is a general officer or general officer select.
[28] AFI 51-503, para 4.2.
[29] AFI 91-204, para 7.3.2.1. and AFI 51-503, para 4.2.3.
[30] In FY 2000, of 24 aircraft accident investigations, five involved fatalities. *See* Air Force Legal Services Agency, Tort Claims and Litigation Division (AFLSA/JACT) web page at http://usaf.aib.law.af.mil/indexFY00.html.

PRACTICUM

• SUPPLEMENTARY ACTIONS UNDER ARTICLE 15, UCMJ

Suspension, mitigation, remission, and set aside are four post-nonjudicial punishment actions authorized under the UCMJ. Members may request post-punishment relief or the commander may grant such relief on his or her own initiative. These actions must normally be taken within four months from the imposition of the original punishment and are accomplished on an Air Force Form 3212, *Record of Supplementary Action under Article 15, UCMJ*. When addressing supplementary actions, consult Manual for Courts-Martial (MCM), Part V, paragraph 6, and AFI 51-202. The following additional guidance is provided:

Suspension

Suspension is the postponement of the application of all or part of the punishment for a specific probationary period, until a specified date. If the member

does not violate a condition of the suspension, the punishment will be automatically remitted (canceled) at the end of the suspension period. Unless otherwise stated, an action suspending a punishment includes a condition that the service member not violate any punitive article of the code. However, a commander imposing nonjudicial punishment may also specify additional conditions of the suspension in writing in the punishment indorsement, such as conditioning the suspension on the member paying restitution to a victim within a designated period of time. Additional conditions cannot amount to additional punishment (e.g. extra duties) and must be capable of completion within the suspension period. For further guidance on additional conditions, see AFLSA/JAJM policy letter, dated 17 Mar 95, available on JAJM's webpage.

When suspending punishment, commanders must adhere to strict time limits. A commander may, at any time, suspend any part or amount of the unexecuted punishment imposed (e.g. suspending extra duties, restriction or correctional custody that have not been completed). The commander may also suspend an executed punishment of reduction in grade or forfeitures, provided the suspension is accomplished within a period of 4 months after the date imposed. When reduction in grade is later suspended, the offender's original date of rank, held before the reduction, is reinstated. However, the effective date of rank, is the date of the supplementary action directing the suspension.

Finally, when suspending punishment, the suspension period must not be longer than 6 months from the date of the suspension. For example, a 6 month suspension action taken on 4 May 00 should have a termination date of 3 Nov 00. In addition, the expiration of the member's current enlistment or term of service automatically terminates any period of suspension. Therefore, the suspension termination date should not exceed the member's expiration of term of service (ETS) at the time suspension action is taken, as shown on the member's RIP.

Mitigation

Mitigation is a reduction in either the quantity or quality of a punishment with its general nature remaining the same. For example, a punishment of correctional custody for 20 days can be mitigated to correctional custody for 10 days or to restriction for 20 days. The first action would lessen the quantity while the second action would lessen the quality, with the general nature of either mitigated punishment remaining the same, that being a deprivation of liberty. However, a mitigation of 10 days of correctional custody to 14 days restriction is not permitted because the quantity has been increased. Consult MCM, Part V, paragraph 6(b) for how punishments consisting of deprivation of liberty can be substituted for less severe forms of similar punishment.

Mitigation is appropriate when the offender's later good conduct merits a reduction in the punishment or when it is determined that the punishment imposed was disproportionate. The unexecuted part or amount of a punishment can be mitigated at any time. A reduction in grade, whether executed or not, can be mitigated to forfeitures of pay, provided such action is taken within 4 months after the date of execution.

A reduction in grade should only be mitigated to forfeitures of pay. It should not be mitigated to no reduction or a lesser reduction. First, mitigating a one-grade reduction, whether executed or not, to no reduction is not an authorized mitigation because the general nature of the punishment after the supplementary action would be entirely eliminated instead of remaining the same, a requirement for mitigation. Second, mitigating an executed two-grade reduction to a one-stripe reduction is not authorized since the MCM only permits mitigation of an executed reduction to forfeitures (and not forfeitures or a lesser reduction). Finally, mitigating an unexecuted or suspended two-grade reduction to a lesser one-grade reduction, while technically permissible under the MCM, is inappropriate since other supplementary actions (e.g. remission or set aside) are available, expressly authorized, and more appropriate.

Finally, a forfeiture of pay, to the extent it has not been executed, may be mitigated to a lesser forfeiture of pay. Forfeitures cannot be mitigated to other forms of punishment.

Remission

Remission is the cancellation of any portion of the unexecuted punishment. It is appropriate under the same circumstances as mitigation. However, remission is distinguished from mitigation by the fact that all remaining punishment being remitted is canceled while mitigation requires some punishment to remain after the supplementary action, with the remaining punishment being of the general nature of the punishment being mitigated. Since an unsuspended reduction in grade is executed upon imposition, it cannot be remitted, but under appropriate circumstances, can be suspended, mitigated, or set aside. A suspended reduction in grade can be remitted.

Set Aside

A set aside occurs when the punishment, or any part or amount thereof, whether executed or unexecuted, is removed from the record and any rights, privileges, pay, or property affected by the relevant portion of the

punishment are restored. A set aside of all punishment voids the entire nonjudicial punishment action. This is the reason the AF Form 3212 was amended in May 2000 to authorize the set aside of the entire nonjudicial punishment action or that portion of the nonjudicial punishment which called for a specific quantity of punishment. One cannot set aside all of the nonjudicial punishment and permit an action containing no punishment to remain in the member's record. A commander may not set aside punishment more than 4 months after execution of the punishment, unless unusual circumstances exist and are explained by the commander in an attachment to AF Form 3212.

Commanders should not routinely set aside nonjudicial punishment. Set aside should ordinarily be exercised only when the nonjudicial punishment authority considering the case believes that, under all circumstances of the case, the punishment has resulted in a clear injustice. The commander exercises this discretionary authority only in the unusual case where there is a question concerning the guilt of the offender or in those rare cases where it is in the best interests of the Air Force to clear the member's record.

Set aside is not normally considered a rehabilitation tool, like suspension, remission, and mitigation. However, neither the statute, the MCM, nor AFI 51-202 limits a commander's discretionary authority in this matter. Therefore, in an out-of-the ordinary case, where the conduct and performance of the offender after imposition of punishment is at such a level as to persuasively indicate that the best interest of the Air Force would be served by clearing his or her record of the effect of the punishment, a commander may set aside all or part of the punishment. Such setting aside of nonjudicial punishment must not become a routine reward for a servicemember who merely avoids commission of another punishable offense for the 4 month period after imposition. The commander must be satisfied that the circumstances as a whole and all aspects of the offender's rehabilitation warrant setting aside as an extraordinary act. The staff judge advocate should ensure the commander understands the extraordinary nature of such relief; applicable alternatives such as mitigation, remission, or suspension; and the restoration of rights, privileges, pay or property that set aside will bring. However, the final decision to set aside punishment rests with the commander, not the staff judge advocate. Once the commander is advised on the matter, the staff judge advocate should assist the commander in setting the punishment aside, if that is his decision. Set aside procedures are clearly an asset to the military justice system, but its continuing value depends on its use with good judgment and in accordance with uniform policies.

• DELAYS IN POST-TRIAL PROCESSING

In *United States v. Lewis*, ACM 33502, 21 Dec 2000, the Air Force Court of Criminal Appeals addressed a 195-day delay between the conclusion of the trial and the action of the convening authority. The appellant alleged the delay was unreasonable. He asserted other records of trial for courts-martial tried after his were completed before his record and that the court reporter was directed to work on other matters that should have been of lesser priority. Appellant also asserted his record was given a lower priority in order to improve the base's statistical record of their post-trial processing and provided an affidavit of the court reporter indicating she was instructed to work on another record because "we had already busted our time on [appellant's case]."

With respect to appellant's record not being completed before others tried after him, the court held the law does not impose such a requirement and those responsible for the administration of military justice must be afforded the discretion to prioritize their cases. The court found the staff judge advocate's decisions in this regard did not reflect an abuse of discretion. With respect to the court reporter being assigned to administrative tasks before completion of appellant's record, the court refused to establish a strict rule that any activity by court reporters other than preparing the record constitutes an unreasonable delay. The court held the burden is on the appellant to show that these other administrative activities were unreasonable, which the appellant failed to do. The allegation that the court found "most troubling" involved improving the base's statistical record of their post-trial processing. The court stated "[i]mproving statistical processing times is not a valid reason to delay the post-trial processing of any case." However, the court found it impossible to determine if any delay for this purpose occurred and ultimately ruled that appellant failed to meet his burden of demonstrating the post-trial prioritization of resources was unreasonable. The lesson from the *Lewis* case is to pursue prompt processing of all records of trial and to have sound reasons to support prioritization of cases.

CLAIMS

• Household Goods Shipments Begin under the Full Service Move Program (FSMP)

The latest in a series of household goods reengineer-

ing programs that could potentially affect Air Force claims offices is the Full Service Move Program (FSMP). Household goods (HHG) shipments under this program began 8 January 2001 for personnel at Minot North Dakota, Moody Air Force Base, Georgia, and the National Capital Region (which includes Washington D.C. and military installations and offices in nearby Virginia and Maryland). These HHG shipments will be destined worldwide.

The FSMP will provide military members a single point of contact (called a "Move Manager") for all relocation issues to include counseling entitlements, relocation services (home finding, mortgage assistance, home selling, property management, and employment referral), guaranteed pick up and delivery, and claims processing. Some of the services are optional, and if used may involve an additional fee.

The Move Manager at the participating point of origin will arrange both pickup at origin and delivery at destination, and will be the military member's single point of contact throughout the move. The Move Manager will have 24-hour toll free telephone numbers, which personnel can use to inquire about the status of their shipment or for problem resolution.

The program will offer other significant benefits for participating members. These include:

- A binding estimate before the move occurs of the cost the member to ship household goods in excess of the member's weight entitlement
- A guaranteed pick up and delivery date
- An established amount to be paid member for inconvenience if pick up or delivery date is missed. The military member is entitled to either $150 per day, or the local per diem rate, whichever is greater
- Full replacement value for lost or destroyed property up to $6.00 per pound shipped to a maximum of $75,000.00 per shipment
- Direct claims settlement by either the Move Manager (or the carrier at the carrier's election), who will arrange repair of damaged property to the condition at tender or replacement of lost or destroyed items. This means the member will not be required to obtain repair estimates or replacement costs

The member retains the right to file a claim with the military claims office for all or part of loss or damage for those items for which satisfactory settlement cannot be reached with the carrier

The following Move Managers have been selected to handle the household goods (HHG) shipments originating from the locations listed:

- Suddath Van Lines will handle all shipments out of Minot AFB, ND
- Shipments out of the National Capital Region (Washington D.C. and military installations in nearby Virginia and Maryland) will be primarily handled by Cendant Mobility Services, though members may be able to use Interstate Relocation Services
- Personnel assigned to Moody AFB GA will be services by Parsifal Corporation

The program will not affect all HHG shipments. For example, the FSMP will not affect shipments into or out of nontemporary storage (NTS). Also, the program will not affect local moves procured under the Direct Procurement Method. However, the Move Manager will provide the member counseling as to the member's entitlements for NTS, Do It Yourself (DITY) Moves, and overseas vehicle shipments.

Another feature of the program is that the HHG carriers (called Transportation Providers) were screened for financial stability and to ensure no "paper companies" would participate in the program. The number of shipments that a Transportation Provider gets depends on a "best value" quality evaluation. A significant portion of the "quality evaluation criteria" will be based on customer satisfaction surveys taken within 30 days after delivery and 30 days after settlement of any claim.

AFLSA/JACC has posted specific implementation guidance on its website (http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacc/FSMPimp.doc). The implementation is nearly identical to that distributed to the field in February 1999 with regard to the Military Traffic Management Command (MTMC) personal property reengineering program.

The FSMP does have some significant features. The Move Managers and contracting officer representatives (to handle disputes) will be located back at the origin location. The military members will not have a point of contact at the destination locations.

Secondly, commercial forms developed by each individual Move Manager will replace documents historically used by the military claims services such as the government bill of lading (GBL), DD Form 1840/1840R (Notice of Loss or Damage), DD Form 1842 and 1844 (claims corms). This may make it difficult for claims personnel to recognize a FSMP ship-

ment. If a customer doesn't produce a GBL, then base claims personnel should suspect the claim is either a MTMC Reengineering Claim, or a FSMP depending on origin location.

Claimants coming to the legal office seeking advice or assistance with regard to the FSMP should be encouraged to work any questions or problems directly with the Move Manager. All claims will be filed with the Move Manager. Although some transportation providers have elected to pay their own claims, the move manager will forward the claims to the transportation provider.

Claimants have 90 days after delivery to notify the Move Manager of their loss or damage. Claims must be filed with the Move Manager within nine months of delivery. Claimants will also have the option to waive filing a claim with the Move Manager or transportation provider and file with the military claims office if they are willing to waive full replacement cost coverage. However, the claimants should realize that filing with the claims office will require them to provide their own repair estimates and replacement costs.

Claimants who file with the Move Manager within nine months of delivery can later file a claim with a military claims office for any items for which they could not reach a satisfactory settlement with the Move Manager or transportation provider. Assuming the claimant notified the Move Manager of their loss or damage within 90 days after delivery, the claimant is paid depreciated replacement cost, but the base asserts claim against the Move Manager for full replacement value of lost or destroyed items, and refunds the difference to the member.

AFLSA/JACC also will require monthly reporting of claims activity similar to that used for MTMC reengineering. AFLSA/JACC also will require installation use specified MII codes when processing FSMP claims and issues. Details can be found at http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacc/FSMPimp.doc

GENERAL LAW

• PROMOTION DELAY AND REMOVAL ACTIONS

Commanders have a variety of administrative tools at their disposal when addressing officer misconduct cases. One such tool is a promotion propriety action. The most common promotion propriety actions involve promotion delays or promotion removals. Both of these actions are time sensitive. On more than one occasion, an officer has been promoted because promotion delay requests or delay extension requests were not submitted in a timely manner to permit required action by the Secretary of the Air Force (SAF). Judge advocates can help prevent this problem by understanding the staffing process and alerting commanders to ensure proactive case processing. The following is a brief overview of the promotion delay and removal process. At the outset, it should be noted that much of the promotion propriety process is statutory, not policy. Consequently, failure to follow statutory requirements is fatal to the action.

10 U.S.C. 624 provides the statutory basis for initiating a promotion delay. Section 624(d) provides for two separate bases for delaying a promotion.

Section 624(d)(1) allows the Service Secretary to delay a promotion if:

(A) Sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of;

(B) An investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer;

C) A board of officers has been convened under Chapter 60 of this title to review the record of the officer; or

(D) A criminal proceeding in a Federal or State court is pending against the officer.

Section 624(d)(2) allows the Service Secretary to delay a promotion "in any case in which there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion."

AFI 36-2501, Chapter 5, sets forth the procedural requirements for initiating a promotion delay action. Most promotion delay actions are initiated pursuant to Section 624 (d)(2). Typically, if a commander determines that a promotion delay is warranted, they initiate the action by notifying the officer in writing, **before** the effective date of the promotion. If it is not possible to give timely written notice, the commander can give verbal notice, and follow that up with written notice as soon as possible. The delay is effective when the commander notifies the officer of the delay. A promotion delay cannot be initiated after the effective date of the promotion.

The approval authority for the initial delay is the MAJCOM/CC. The initial delay cannot be longer than

6 months. The MAJCOM/CC notifies the officer of the delay, in writing, and the officer has the right to submit a statement to the SAF.

If the initial delay period needs to be extended, a request for extension can be submitted. The commander provides written notification to the officer that an extension is being requested. The action is forwarded through the MAJCOM, to the SAF, who is the approving authority. The extension period can be no longer than 6 months (so if a delay took effect on 15 January it would expire at the end of the day on 14 July). If necessary, a second extension period of no more than 6 months can be approved by SAF. It is critical for commanders to determine if an extension is necessary well in advance of the expiration date. AFI 36-2501, paragraph 5.6.1. requires the extension request be sent to Air Force Personnel Center (AFPC) at least 45 days before the expiration of the current delay.

A commander can initiate an action to terminate the promotion delay at any time. The approval authority is the MAJCOM/CC, who acts on behalf of the SAF.

10 U.S.C. 629 provides that the President may remove the name of any officer from a list of officers recommended for promotion by a selection board.

Once again, AFI 36-2501 sets forth the process for initiating a promotion removal action. The commander must give written notification to the officer **before** the effective date of the promotion. If it is not possible to give timely written notice, the commander can give verbal notice, and follow that up with written notice as soon as possible. Unlike a promotion delay, once the officer has been properly notified of the removal action, the promotion is automatically delayed until the action is completed. The officer may submit matters for consideration, and the action is forwarded through the MAJCOM to the SAF for decision. The SAF, acting for the President, approves all promotion removal actions.

If the officer was selected for promotion IPZ or APZ and is subsequently removed from that promotion list, the removal is considered to be a non-selection for promotion.

In conclusion, a promotion propriety action can be a very effective administrative tool for commanders. However, much of the process is statutory, and failure to follow the requirements of the law is fatal to the action. Therefore, judge advocates should remain involved throughout the promotion propriety process to ensure proper completion.

• COMPLAINTS UNDER ARTICLE 138

Since the time of the Continental Army, it has been a part of our American military culture to allow military members to seek redress from commanders whom they perceive to have done them wrong. This right was incorporated from the British Articles of War into the American Articles, enacted by the Second Continental Congress, and eventually incorporated into the Uniform Code of Military Justice (UCMJ), under Article 138. However, Article 138 was never intended to address every conceivable wrong. For example, complaints about military discipline under the UCMJ are not recognized, except deferral of post-trial confinement. In general, where no other avenue of relief in the form of appeal or automatic review exists, Article 138 allows a member to question the actions of commanders. This article reviews recent questions raised by the field during the processing of complaints filed under Article 138.

One such recent question was whether Letters of Reprimand (LORs) or other administrative measures should be the subject of Article 138 complaints. It was suggested that because UCMJ actions were not properly the subject of Article 138 complaints, lesser forms of discipline should not be either. Understanding why UCMJ actions are not properly addressed under Article 138 helps to answer that question. UCMJ actions have built-in appellate protections and are reviewed, at a minimum, at the General Court-Martial Convening Authority (GCMCA) level. For example, nonjudicial punishment under Article 15 requires a GCMCA SJA review for legal sufficiency, which could result in set aside of the action. In contrast, administrative actions, such as LORs, do not have an appellate process. Therefore, they are appropriately addressed under Article 138, provided that a commander issued the LOR or otherwise ratified the LOR, for example, by placing it in a UIF. For similar reasons, discharge actions against enlisted members may be the subject of Article 138 complaints, but those against officers may not. The final action on all officer separations is taken by the Secretary of the Air Force or his designee; accordingly, they are not recognized as Article 138 complaints. (See AFI 51-904, *Complaints of Wrongs under Article 138, Uniform Code of Military Justice*, para. 3.3.)

With the advent of the Military Whistleblower Protection Act, 10 U.S.C. §1034, judge advocates assisting commanders in handling Article 138 complaints should be especially sensitive to allegations of reprisal in those complaints. By law, allegations of reprisal are to be investigated through Inspector General (IG) channels. In that light, reprisal allegations made within Article 138 complaints should be handled under paragraph 3.7 of AFI 51-904, as complaints not normally reviewed under Article 138. This is because, by law, established channels to resolve the complaint already exist. The commander's written response should

refer the complainant to IG channels to address any reprisal allegations in his Article 138 complaint.

Increasingly, as Air Force members work in joint units and report to commanders of other services, questions arise about processing complaints by a members of another service against Air Force commanders, or processing Air Force members' complaints against the commanders of other services. Each service has regulatory procedures for submitting and processing Article 138 complaints. In the absence of a regulation governing Article 138 complaints promulgated by the joint command, complaints should be made and processed according to the regulations of the service of the commander in question. In most cases, the GCMCA over that officer will also be of the same service. For civilian-led units, Article 138 complaints are not recognized against civilian superiors. By statute, Article 138 is reserved for complaints against commanders. Accordingly, complaints against other than commanders must be handled through other administrative channels, such as the IG complaints program or commander-directed investigations.

Judge advocates can assist their commanders by ensuring they are aware of how to process Article 138 complaints. Occasionally, commanders ignore these complaints by neglecting to respond to the complainant in writing as required or by letting the complaint sit without action until the complainant raises the issue in other complaint channels. The commander's inaction alerts the SJA that an Article 138 complaint has previously been made. In other cases, complainants who have not been satisfied with their commanders' responses have submitted complaints of wrongs to intermediate commanders who did not forward the complaint to the GCMCA as required. As with any complaint process, the Article 138 process works best when complaints are handled promptly and according to established procedures. The Article 138 process is statutorily based, so there is no discretion in forwarding even what appear to be frivolous complaints through the prescribed reviewing chain.

LABOR AND EMPLOYMENT LAW

• Recent Federal Circuit Decision Upholds Civilian Employee's Removal and Military Employer's Expectations

Discipline of a civilian employee for off duty misconduct is always a sensitive issue, especially if it involves a removal. A recent decision by the U.S. Court of Appeals for the Federal Circuit, however, has strengthened management's authority to take action. The court's opinion provides an excellent discussion of how to establish nexus between off-duty conduct and the efficiency of the service. The Federal Circuit affirmed the removal of a civilian employee for having an adulterous affair with the spouse of a deployed Marine major.

In *Brown v. Department of the Navy*, 229 F.3d 1356 (Fed. Cir. Oct 20, 2000), the Marine Corps at Camp Lejune, North Carolina, removed Mr. Brown from his position as program manager for the Morale, Welfare and Recreation (MWR) Department for "improper personal conduct." Specifically, the removal notice charged that Mr. Brown had engaged in an adulterous affair with the wife of a Marine major assigned to a unit supported by Mr. Brown while the major was deployed overseas. Prior to becoming the program manager, Mr. Brown had been an active duty Marine Corps officer and later joined the reserves.

Following an MSPB hearing, the Administrative Judge (AJ) sustained the Marine Corps removal finding that the affair had occurred and the Corps had established a sufficient nexus between Mr. Brown's misconduct and the efficiency of the service. Particularly, the AJ found that Mr. Brown's misconduct was "antithetical to MWR's mission and that it had adversely affected the Corps' trust and confidence in Mr. Brown's job performance." The AJ also concluded that the penalty of removal was within the bounds of reasonableness. Mr. Brown petitioned the Board for review, but the Board denied the petition over the dissent of Vice Chair Slavet.

In a 2-1 decision, the Federal Circuit affirmed Mr. Brown's removal. Noting that an Agency can only discipline an employee for misconduct that is likely to have an adverse impact on the agency's performance of its functions, the Court rejected Mr. Brown's argument that his job merely "involved planning and facilitating recreation and entertainment." Testimony during the hearing demonstrated that the purpose of Mr. Brown's position was much more critical to the mission of the Marine Corps. The MWR Department was responsible for providing "support for the Marines, and the families of those Marines while they are deployed." As the AJ stated, the Corps "should not have to retain an employee who instead of assisting its deployed Marines, as is the purpose of the MWR and the Program Manager position, has an adulterous affair with the wife of one of those very Marine officers." The court found that Mr. Brown's misconduct "undermined the credibility of MWR among its units" and threatened the program by "putting it in a less than

favorable light."

Acknowledging that the misconduct was private in nature and that it did not affect Mr. Brown's official responsibilities, the court cautioned that such conduct would not justify a removal action in many settings. Nevertheless, the court compared the adulterous misconduct in the military with similar misconduct that directly affected other agencies' missions. For example, the IRS could fire a revenue officer for failing to pay taxes because such conduct would have a "deleterious effect upon the morale of other IRS personnel and upon the respect which other Government agencies and the public had for the IRS."

Along this same line, the court rejected Mr. Brown's complaint that he was held to a military rather than a civilian standard. "Contrary to Mr. Brown's suggestion, the mores of the group he served are not irrelevant to his job performance and the expectations fairly placed upon him. Conduct that may be overlooked in some settings can be the cause for removal in other settings in which the conduct is perceived as more clearly inappropriate or contrary to the mission of the employing agency . . . Mr. Brown's job responsibilities were to serve the Marine community, and his effectiveness depended at least to some extent on his compliance with certain basic standards of conduct shared by that community. Moreover, he chose to serve the Marine community, and because of his long membership in and association with that community, he was well aware of the standards of that community. Because his job was to serve the Marine Community, it is not a sufficient answer for him simply to say that he was a civilian employee and therefore the standards of conduct of the Marine community had no applicability to him."

This case should be a staple for every labor and employment law attorney. The factors of trust, reliability, credibility, effectiveness, service, and impact upon the mission are critical with most disciplinary actions, especially removals.

• Leaving a Decision to the Arbitrator Means Just That, says the U.S. Supreme Court

In *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17*, 121 S.Ct. 462 (November 28, 2000) the U.S. Supreme Court, in a brief opinion authored by Justice Breyer, tersely reminded management and labor unions alike that an agreement to leave the decision of what constitutes "just cause" to an arbitrator leaves both parties at the mercy of the arbitrator. The court held that for an arbitrator's decision to be overturned on the basis of being "against public policy," that decision must be shown to be contrary to an "explicit," "well defined," and "dominant" public policy that is itself found in a statute, regulation, or some law or legal precedent. Justice Scalia, joined by Justice Thomas, concurred in the judgment.

The underlying facts of the case are colorful. A 17-year employee of the Eastern Associated Coal Corp was a member of a road repair crew, and therefore he had to be able to drive heavy equipment. Testing positive for marijuana twice within two years, the employee was fired for a second time and the union grieved his removal. The collective bargaining agreement allowed for dismissals only for "just cause." Citing his years with the company and apparently believing the employee's tale of woe and assurances of good behavior, the Arbitrator ordered his reinstatement. The Arbitrator did impose five conditions on the employee (random drug testing, counseling, etc.) with the understanding that the violation of any of the conditions would result in his dismissal, again. The employer appealed, claiming the decision to reinstate an admitted drug user, who daily operated heavy equipment on roads, was against public policy. The U.S. Court of Appeals for the Fourth Circuit, disagreeing with the First Circuit, upheld the arbitrator's ruling. The U.S. Supreme Court granted certiorari and affirmed the Fourth Circuit.

Justice Breyer's opinion noted that the statute at issue, The Omnibus Transportation Employee Testing Act of 1991, allowed for rehabilitation in its complex remedial scheme. Also, the Department of Transportation, while implementing the Act, expressed respect for management discretion and for management and driver negotiation over the decision whether to provide rehabilitation. The Court then reminded the parties that their collective bargaining agreement provided for arbitration and both had left the definition of the "just cause" standard to be decided by an arbitrator.

This opinion certainly sets a tough standard for any exceptions filed against an arbitrator's decision on the basis of the decision being against public policy. That standard is now nearly as high as arguing the decision violated a statute or regulation itself.

• Official Time for Lobbying Activities by Unions

With a new Congress in Washington, D.C., this is an excellent time to review the subject of official time for lobbying by a union. Last June, the Federal Labor Relations Authority issued a decision in *Association of Civilian Technicians, Razorback Chapter 117 and U.S. Department of Defense, National Guard Bureau, Arkansas National Guard*, 56 FLRA No. 62 (June 6,

2000).

In its holding, the FLRA stood behind the razor-thin distinction between official time for lobbying for *pending* legislation and lobbying for *desired* legislation. While in most cases, proposals for the former are non-negotiable, the latter may be negotiable. The FLRA acknowledged that the 1999 Department of Defense Appropriations Act, as had several of the Appropriation Acts before it, explicitly forbade the use of appropriated funds for official time for union officials to lobby Congress for pending legislation. However, the FLRA noted a distinction between *pending* and *desired*. Specifically, *desired* legislation is legislation the union officials would like to see passed, but has not yet been introduced in either the House or in the Senate. The provisions of the Defense Appropriations Act that barred lobbying only referred to *pending* legislation. Proposals mindful of that distinction may be negotiable.

• Paying For Travel Expenses for Air Force Witnesses in EEO and MSPB Hearings

A perennial issue in litigation at the administrative level is the question of which party pays the travel (TDY) expenses of approved military or civilian witnesses for the hearing. Therefore, the following references should be kept handy for the next time the issue comes up at your base.

For the question of witnesses for an EEO hearing, there are several sources of guidance. When the administrative judge requires *Air Force personnel* to participate in hearings, charge the travel to the Air Force witnesses' (own) unit of assignment. There is no Air Force "central" witness fund or account to pay these expenses. There is also no difference between military personnel or civilian employees. *See* AFI 65-601, Vol 1, 17 Nov 00, *Financial Management, Budget Guidance and Procedures*, para. 10.17.2.3. Therefore, when the complainant lists his former supervisor (who PCS'd two months ago to Osan) as a witness for hearing and that Master Sergeant is approved by the judge to testify, unless the judge also approves testimony via video-teleconference or the telephone, that Master Sergeant's own unit has to fund his TDY to the hearing location. As another example, if the complainant's personal representative is an Air Force civilian employee stationed at another base, that personal representative's own unit funds her TDY when she has to travel to the hearing location. See also AFI 65-601, Vol 1, para 10.2.1. *Saunders v. USPS*, No. 05880018 (EEO Jul 29, 1988)(agency is only obliged to pay travel expenses for personal representative equal to the normal commuting distance from the facility where complaint arose). *See also* AFI 51-301 *Civil Litigation* para 9.15 & 9.16.

Whether the Air Force as an agency must pay for a witness' travel expenses is not determined by which party is calling that witness, but rather by the witness' federal employment status. So long as the approved witness is a current federal employee, military or civilian, then the Air Force is responsible for ensuring that witness appears. *See* 29 CFR 1614.109(e); MD-110, Chapter 7, II.B (1999). If the approved witness, the complainant, or the personal representative, is a current federal employee but employed at another agency (Defense Logistics Agency, DISA, Army, Navy, etc), again, the Air Force, or your base as the agency against which the complaint was brought, must fund his/her travel. AFI 65-601, Vol 1, 10.17.1.1. *See Matter of John Booth,* 69 Comp Gen 310 (No. B-235845 March 12, 1990); *Collins v. Shalala, Sec, HHS*, No. 01941851 (EEO June 22, 1994); *March v. Shalala, Sec, HHS*, No. 01940975 (EEO June 6, 1994); *Holmes v. USPS*, No. 05920896 (EEOC April 22, 1993); *Saunders v. USPS*, No. 05880018 (EEO Jul 29, 1988) (agency is only obliged to pay travel expenses for personal representative equal to the normal commuting distance from the facility where complaint arose); 5 USC Sec 5751 (2000).

Further, MD-110, Chapter 7, II. E. gives the EEO Administrative Judge discretion to determine the hearing site. The AJ is authorized to conduct the hearing in the EEOC district or field office, in an EEOC area or local office, at the agency's organizational component where the complaint arose or at such other location as he/she may determine appropriate. The AJ must consider such factors as the location of the parties, the number and location of witnesses, the location of records, travel distances of the parties, and travel costs. "If the AJ sets a hearing site that is outside the local commuting area of the agency's organizational component where the complaint arose, the agency must bear all reasonable travel expenses of complainants, their authorized representatives, agency representatives, and all witnesses approved by the Administrative Judge, except that an agency does not have the authority to pay the travel expenses of the complainant or the complainant's witnesses or representatives if they are not federal employees."

Neither the Air Force nor the base against which the complaint was made is obliged to fund the travel of a complainant's private attorney, or the recent retiree witness, or the co-worker witness who just resigned to work for a private company, because they are not current, federal employees. See *Matter of: Expenses of Outside Applicant/Complainant to Travel to Agency EEO Hearing*, B-202845, 29 Comp Gen 654 (1982).

Of course, the travel expenses of the private attorney may reappear after the hearing as expenses, if the agency loses.

For MSPB hearings, 5 CFR 1201.33 provides guidance. Every federal agency must make its employees or personnel available for hearing when so ordered by the judge. Therefore, the travel of approved military and civilian employee witnesses (which may include the appellant himself) for either side, must be funded by the agency-appellee. Again, according to Section 10B of AFI 65-601, Vol 1, para. 10.2.1, each Air Force activity must pay for its (own) personnel's TDY expenses using regular administrative or operating funds. *Holliman v. USPS*, 82 MSPR 355 (1999); *Sapp v. USPS*, 73 MSPR 189 (1997).

• CLLO'S ELECTRONIC LIBRARY

For even more information on these topics and others, be sure to tap the "Labor" hotbutton on the FLITE webpage for direct access to the CLLO On-Line Library.

LEGAL INFORMATION SERVICES

• JAS -- We're from the government and we're here to help you!

Having just PCS'd to the Air Force Legal Services Agency (AFLSA/JAS) at Maxwell AFB, I was amazed to find how many people work here and what they all do. Prior to my arrival, my only dealings with JAS had been with "Pamela Paralegal," who always cheerfully changed my password each and every time I forgot it.

So I thought I might take a few minutes to introduce the office and tell you a little bit about what we do. We are located in the second story of the East wing of the JAG School at Maxwell AFB. In a nutshell, JAS is responsible for (1) purchasing most, if not all, of the JAG community's books, subscriptions, computer hardware and commercial off-the-shelf (COTS) software needs and other legal resources; (2) designing and fielding software systems that meet the unique needs of Air Force JAGs (Armed Force's Claims Information Management System (AFCIMS) and Automated Military Justice Analysis and Management System (AMJAMS); and (3) providing, pursuant to DoDD 5160.64 and AFI 51-105, computer assisted legal research assets to DoD attorneys. Because of our heavy emphasis on improving existing software applications and developing new programs, JAS is not your traditional legal office.

Col N. Steven Linder is the boss (Director). He and the Deputy Director, Mr. James Unterspan (civilian attorney), preside over two other JAGs, one communications officer, five paralegals, five civilian attorneys, and approximately 30 other civilian programmers and support staffers that make up five separate divisions: JASD, JASL, JASO, JASR, and JASX.

Not only must Col Linder and Mr. Unterspann lead teams of lawyers and programmers as we continue to refine the existing software applications, they must also be visionaries so that they can discern and develop future legal technology for tomorrow's Air Force. Ms. Angela Summerville, the boss' secretary, and MSgt Frank Turner, our Law Office Manager, round out the command section.

Moving on, JASD is our "Program Development Division." This Division is headed by Capt Elizabeth Graham, a communications officer, who supervises five civilian programmers (Mr. Steve Maxwell, Mr. Frank Garcia, Ms Donna Stoner, Mr. Mark Foster, and Mr. Mike Taylor). These individuals are responsible for the maintenance and continued development of several specially developed programs, to include: the Legal Information Online System (LIONS), the Resource Allocation Management System (NetRAMS), and AFCIMS. They are the authors of the totally new Roster program.

The second division, JASL, is our "Legal Research and Services Division." It is headed by a civilian attorney, Mr. Tim Skinner, and he has four civilian attorneys (Lynn Mokray, Ron Bibby, Wayne Davis, and Don Nolte) working for him. These attorneys help JAGs in the field with legal research and are constantly working to expand the legal database and capabilities of FLITE and make sure the databases are accurate and up-to-date. Recent initiatives include helping design and publish a website for sister service's JAG departments, the creation of "Contract" and "Cyberlaw" websites, as well as publishing an electronic version of *Military Commander and the Law*. Finally, JASL is developinged a bifurcated DoD webpage for "International Negotiations and Agreements Database System" (INADS) that contains both classified and unclassified agreements.

Mr. Skinner is also responsible for the data and web administration branches -- JASLD, the "Legal Services Data Branch" (home of Pamela Paralegal) and JASLW, the "Web Development Branch." These branches maintain WebFLITE, which allows users to conduct full-text Boolean, proximity and relational research in **FLITE**, **LEXIS-NEXIS** ® and **INFO-**

SEEK ® collections containing millions of documents focused on the needs of DoD researchers. Further, JASLD and JASLW are responsible for FliteMail, Hot Notices, People Finder, and a new user interface, the Judge Advocate Management Information System (JAMIS) at https://aflsa.jag.af.mil/fcgi-bin/jamis.fcgi, that provides links to AMJAMS, AFCIMS, Roster, and DocuShare listings by base name. Finally, JASLW is responsible for the newly designed TJAG Home Page and is planning a make-over for FLITE as well.

The next stop is JASO, the "Systems Operations Division," which is manned by five civilian system administrators. These individuals are responsible for the care and feeding of machines that support the JAG programs as well as our internal machines. JASO recently purchased a second Sun/Solaris server that will provide "hot spare" capability. When fully operational, this second machine will provide continued access in the event that the primary server would fail.

JASR, is our "Resource Management Division" and is the office that buys all of those shiny, new books, computers, software, and peripherals that your office receives from time to time. This division is led by Mr. Chuck Busby, a former paralegal. Mr. Busby is assisted by one paralegal (SSgt Todd Butler), and two civilians (Ms. Gloria Frandsen and Mr. Dave Flater).

JAS and JASR, in particular, have also been responsible for several innovative solutions to meet existing mission needs. For example, they developed and purchased several self-contained legal offices (Blue Blocks) for use in deployments or catastrophic events. Each kit contains a notebook computer, modem, Zip® Drive, printer, scanner, digital camera, hand-held copier, paper, office equipment, and assorted relevant legal works on CDs. These offices are enclosed in padded and pressurized containers (Blue Blocks) that are virtually indestructible. While most of these kits are maintained at this location, they are easily transportable and several have already been forwarded to strategic locations for even quicker deployment.

Finally, we have my division, JASX, the "Plans and Requirements Division." Capt Thomas Rogers (also of recent arrival) and I are responsible for running the JAG Help Desk and for supervising the individuals that upgrade, test, and maintain AFCIMS and AMJAMS.

Our Helpdesk technicians are TSgt Carlos Matos (paralegal), TSgt Kelly Zimmerman (paralegal), and Mr. Jerry Shaw and all can be reached at DSN 493-4179. Further, we maintain an on-line Helpdesk located at https://aflsa.jag.af.mil/JAS_HELPDESK/ index.shtml.

In the event that the Helpdesk technicians cannot fully address your questions on AFCIMS or AMJAMS, they will refer you to our resident subject matter experts -- Mr. Bill Emery (former paralegal) for AFCIMS and Mr. Bob Penn (former Air Force paralegal) and SSgt Darren Hall (paralegal) for AMJAMS.

Recently, a great deal of emphasis has been placed on improving AFCIMS. (Most readers may be surprised to learn that AFCIMS is actually a contractor-maintained database. Originally, AFCIMS was developed under a contract with AT&T. In the early 1990's, AT&T elected to terminate the contract and Wang was hired to manage both AFCIMS and AMJAMS.) First, to ensure that AFCIMS' real-time capabilities were being fully realized, the Helpdesk technicians began making calls to remind bases that daily uploads were required. In mid-September, JAS released an upgrade that was designed to correct a previously identified error in the calculation of processing times. This was followed by an October upgrade, which dramatically improved the accuracy of overage claim reports. And still other upgrades are in the works and will be released shortly -- so stay tuned.

At the same time, we were working to improve AMJAMS. Newly developed utilities allowed bases to cut and paste graphs and reports for upcoming Article 6 visits. Further, several new forms, such as confinement and promulgation orders, are being added to cover subsequent actions to Article 15s and courts-martial menus.

In addition to these normal day-to-day responsibilities, JAS continues to offer and/or instruct several classes both on our own and with the JAG School. Among these is the Executive Technology Class that provides hands-on training for our senior (technology challenged) leaders on the use of existing software systems such as AFCIMS and new software packages such as DocuShare. JAS personnel also regularly teach blocks at the Judge Advocate School Orientation Course, the Staff Judge Advocate course, and the Law Office Manager course, just to name a few.

While we, like everyone else, sometimes feel our plate is overflowing, our sole reason in being is to support you. So if your office needs new books, subscriptions, computers, software, training, or other resources, or if you are deploying and need hardware/software, call us. If you have a suggestion for a new legal software application, or if you are having problems with AFCIMS, AMJAMS, FLITE, etc. call our Helpdesk at DSN 493-4179.

And, if you don't receive courteous, prompt, and competent service call me, Major Stan Smith, at DSN 493-4386. After all, we're from the government and we're here to help you!

TORT CLAIMS AND HEALTH LAW

The Final Rules implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) were issued in December 2000, and portend significant changes in the way medical records are maintained, sent, and released. The Department of Defense is currently reviewing the rules and studying how these will affect record processes in the military hospital system. There is a two-year window for the rules to take affect, and, for now, we have been advised to wait for DoD guidance. In the interim, guidance regarding record release may be found in the 31 October 2000 memorandum from the Assistant Secretary of Defense for Health Affairs entitled "Interim Regulations to Improve Privacy Protections for DoD Medical Records." The memorandum can be found on the JACT Medical Law Web Page for reference.

• RES GESTAE

The 2001 Medical Law Consultant's Course will be held from 9 April – 4 May 2001 at Malcolm Grow USAF Medical Center. The attorneys selected for this intensive four-week program of law, health care, quality assurance and ethics will be sent to Air Force Medical Centers in the role of Medical Law Consultant. On 7-9 May 2001, JACT will sponsor the annual Medical Law Consultant's Conference in Rosslyn, Virginia. The conference is attended by incumbent Medical Law Consultants who will meet to discuss topical issues and hear from guest speakers from the Surgeon General's Office and other legal offices.

On 10-11 May 2001, the Uniformed Services University of the Health Sciences (USUHS) will sponsor the 4th Annual Federal Sector Health Law Conference on its campus in Bethesda, MD. Varied health law issues affecting the Department of Defense will be discussed. Information about the conference may be obtained from the General Counsel Office at USUHS.

• VERBA SAPIENTI

It is not uncommon for health care providers to call the local legal office and ask "what the standards of care are" for a given or proposed hospital practice or procedure. Unfortunately, this type of request helps perpetuate the misconception that the lawyer sets standards of care for health care providers and institutions. While certain federal and states laws and regulations may set parameters and requirements, those rules and guides are normally created by health personnel themselves and incorporated into regulation. In truth, it is the health care community itself that should be setting its own standards of practice, and it is the role of the lawyer to assist in ascertaining those standards or incorporating them into facility practice. The lawyer should not be put in the position of creating standards for another profession. That role should be filled by peers within the profession. For example, in adjudicating medical claims under the Federal Tort Claims Act, we follow the standards of care of the host state jurisdiction. Thus, it is wise to have the base medical facility contact local providers or civilian facilities of similar size and staffing to see what standards are used in that environment. It is also prudent to have providers check with higher headquarters and the clinical consultants at those levels for a better understanding of how local standards are adapted in military practice. The lawyer has a pivotal role in seeking out the medical standards of care, but it must be understood that he/she does not create them.

• ARBITRIA ET IUDICIA

A recent medical malpractice case exemplifies the dangers of misdiagnoses in Emergency Rooms. The wife of a retired member drove her husband to the Emergency Room after finding him unconscious. She was not sure how long he had been unconscious but also noted several bottles of liquor near where he was found. Her husband had a history of heavy drinking and she surmised he had gotten drunk and passed out while she was shopping.

Her husband, by now conscious, claimed he was all right. He did not remember what had happened, but did admit to drinking that evening. He also complained of a headache. The Emergency Room staff did a cursory examination and found his vital signs to be within normal limits. No x-rays were taken and he was sent home. The following morning, the gentleman's wife found him dead. An autopsy revealed that he had hit his head on a radiator when he passed out the evening before causing a sub-dural hematoma, or bleeding in the brain. The undiscovered hematoma eventually caused a massive stroke that killed him.

Had the Emergency Room Staff thoroughly examined him for the cause of his headache, possibly they would have seen a bruise on his scalp and followed up with a brain scan. The facility claimed that the care was reasonable based on the patient's history and circumstances. The case was eventually settled.

WHY STAY?

LIEUTENANT COLONEL MARK R. RUPPERT

For the last 18 years, I've heard much discussion on why JAGs separate from the Air Force. And let's face it; there are some good reasons. The salary (if you're talented, that is) is usually better. You don't have to move your family every 2-3 years. The "perks" at law firms, including bonuses, club memberships and secretarial support, are certainly attractive. The prestige, if prestige is your motivation, is probably loftier. These are all good reasons to leave, but when you're thinking about your next JAG assignment, and weighing it against the lucrative offer you have or want to get, ask yourself one question--why stay?

Now you may be wondering why I wrote this article. Was it commissioned by TJAG or JAX as a retention tool? No. Is it to plead with you to stay in the Air Force? Not. Is it to disparage private practice or belittle those who have made the choice to separate? No way. Why then? When I worked officer assignments, I talked to many JAGs who were separating, thinking the "grass was greener," only to later apply for recall (usually unsuccessfully or risking a passover) after realizing their mistake. When I was a base SJA, I did not act as a retention cheerleader for the JAG Department with my staff, but, at the same time, I did not want them making the same mistake these other JAGs had made in the past. So, where's the balance? The key is making an informed decision based on all the reasons to stay (or separate)...there is no right answer for everyone. The process begins with understanding those factors which initially lured you into military to serve as a judge advocate. Failure to understand and appreciate the right reasons you became a JAG and why you should remain a JAG inevitably leads to dissatisfaction, whining, and poor morale. Making the effort to comprehend the right reasons leads to an intelligent choice and, for those who chose to stay, generates motivated, committed officer/attorneys who are a pleasure to be around. Most JAGs I know would much rather associate professionally and personally with this class of people -- thus, my purpose in writing this article. Permit me to touch briefly on some reasons to stay.

Lt Col Ruppert (B.A., University of Cincinnati; J.D., Ohio State University; LL.M., George Washington University) is currently a Military Judge for the USAF Judiciary, Western Circuit.

Purpose

Maybe you went to law school because you loved the law (candidly, I didn't, but I couldn't be a trial lawyer without a law degree). Maybe you practiced law "on the outside" before becoming a JAG. If you have, then you know that private practice has very little to do with the law and everything to do with the bottom line or the billable hour. As a civilian attorney, I had the opportunity to be involved in some interesting pieces of civil litigation, but the cost and profit decisions always trumped legal practice considerations and left me on most days wondering why I went to law school in the first place. JAG practice, without artificial constraints, and with the opportunity to pursue dual professions of military officer and attorney, filled that void for me. Does serving your country and practicing law (as I think it was meant to be practiced) give you a sense of pride and purpose? Can you duplicate that morale elsewhere? Will the extra salary and perks compensate for you for the loss of job satisfaction ? Again, there's no one answer for everyone.

Experience

I don't know anyone who can seriously argue that civilian attorneys' responsibilities match up to JAGs' responsibilities, particularly in the first 10 years or so of practice. Obvious examples include courtroom experience, leadership development, and opportunities to practice in virtually every area of the law. If your only desire is to practice in a certain area (e.g., environmental law), you may chafe at the opportunity/ requirement to practice military justice, civil law, operations law, labor law, medical law, etc. In fact, I would have to wonder why you became a JAG if your focus was that narrow. In my view, the JAG experience exposes you to all these specialties and allows you to develop expertise in a few areas -- of your choosing -- as you become more senior (every JAG career advisor I've known understands that you'll perform better and be happier in a job you want to do). I hear some younger JAGs state they would never want to stay around and become a mere "manager" (e.g., SJA) -- they want to stay "in the courtroom" or "practice law." As for me, one of the most exciting and academically demanding responsibilities I've ever

had was as an SJA of a busy, full service, 32-person legal office, but if that doesn't "float your boat," consider the economic realities. Profitable civilian legal practice dictates that you specialize in one area and stick with it -- "in the courtroom" may well end in a monotonous parade of workers compensation or divorce hearings. Moreover, the "pure practice of law" must yield to rainmaking and billable hours required in the successful *business* of law. Nothing wrong with these realities of private practice...but make your move with your eyes wide open.

Focus

It is related to "purpose" and "experience" explained above, but with an added twist. Very few practicing attorneys outside of the military function as leaders. Some senior partners, general counsel, or senior house counsel have significant supervisory responsibilities. My experience nevertheless tells me that our leadership responsibilities as military officers far exceed the managerial roles of our civilian counterparts. The most junior JAG is in charge of a critical program (by definition critical, since the commander and Air Force wouldn't otherwise dedicate manpower and taxpayer dollars to it), as well as entrusted with the leadership by example responsibility inherent in officership. Many attorneys don't want leadership or supervisory responsibilities -- private practice will likely fulfill this wish. Besides the usual absence of leadership responsibility, few civilian attorneys enjoy a relationship with their clients as trusted advisors. Of course, both JAGs and their civilian counterparts furnish legal advice, but JAGs are more often called on to further advise commanders and senior staff on semi-legal or non-legal matters altogether (particularly true at the base level). Such a role only increases with credibility and seniority. Some are uncomfortable in this role -- others flourish in it. When deciding your future and the scope of your practice, pause to consider whether the traditional modes of civilian practice allow clients to solicit, to afford, or even to value any advice you may offer beyond strictly legal opinions.

Environment

JAG bosses take their subordinates' professional satisfaction, professional growth and work or career desires very seriously. No doubt some of you are now saying, "Not me, you should see my boss." Well, maybe you're just one of the unlucky few. More likely than not your boss would look great stacked up against his senior partner counterpart, who must be more concerned about your billable hours than your professional development or your future. The truth be known, even a poor supervisor has both positives and negatives attributes. In developing your own management and people skills, you can choose to emulate those traits which you believe are effective and discard the rest. In any event, no JAG supervisor is forever, unlike that senior partner you're stuck with unless you quit...or get fired. Further, although the word "mentor" is one of the most overused terms in Air Force parlance, I'm convinced that the great majority of JAG supervisors make every effort to give this concept true meaning. So much for supervisors -- what about ethics and civility? I'm not going to disparage our civilian counterparts at this point, but if you think there's little difference in professional ethics between JAG and civilian practice, then ask anyone who has done both. This difference is easily overlooked in the "taken for granted" category. Finally, what about work hours? Let me preface my comments by saying you've been misinformed or lied to if you've been told JAG practice hours are shorter or the demands less compared to civilian practice. Having said that, JAG practice allows more flexibility to balance your priorities at home (if that's important to you...now or later). Without boring you with the details, the Air Force gave me the time to resolve family crises in the midst of demanding jobs. Some civilian employers may not have the luxury of being so accommodating, particularly if they have to rely on you to generate revenue.

Opportunities

Okay, time for the recruiting brochure (short, I promise). Everyone knows about the opportunities to see and experience countries and cultures all over the world, earn an LL.M, represent clients in courts and hearings, attend no-cost CLE classes or PME in residence, and a host of other unique experiences largely unavailable to our civilian counterparts with the same experience level. JAGs need to individually quantify what these and other opportunities mean to them when deciding whether to remain a JAG. Moreover, some JAGs need to have patience and perseverance in pursuing an opportunity that may have high value to them. For example, if you really want an LL.M and don't get it on your second or third assignment and decide to quit, you haven't given it a realistic chance. Odds are the longer you stay a JAG -- and stay for the right reasons -- the more of the opportunities that you want will come your way. If they're not important or worth waiting for, separation may be the best option...as long as you're comfortable with discarding some unique experiences (probably for good).

What's the bottom line then? A career as a JAG is

simply not for everyone. A JAG career undeniably involves some personal inconvenience and sacrifice. A JAG career could justifiably involve putting us, as line officers, in harm's way in a combat or hostile situation. A JAG career is not for all families -- some marriages cannot withstand the frequent moves and absences (but check out the divorce rate among senior partners sometime). It's easy and understandable to focus on the negatives, lose sight of the good reasons to remain a JAG (I assume you thought there were some good reasons to become a JAG that are still valid), and then want to jump to those "greener pastures." If you thoroughly consider all the reasons to stay and decide that separating is best for you and your family, then no one is in a position to tell you that you're making a mistake. If, however, you decide to stay, I submit to you that you should only do so for the right reasons, which do not include the salary, benefits, continuation pay, or other financial reasons that aren't designed to compete with private practice. Staying in for the wrong reasons causes as much heartache as getting out for the wrong reasons -- it will breed regret and blemish your professional reputation and your personal credibility (and if you've slept through all those JAX briefings, your reputation and your credibility in our small JAG community do mean *everything*).

If you're asking yourself whether you should stay in the Department or how long you should remain a JAG, this article's for you. I can appreciate the financial lure of separating, but I want to prevent you from becoming a "casualty," which I define as (1) someone who punched prematurely or (2) someone who makes their fellow JAGs miserable. I believe most senior JAGs would tell you they hadn't planned a JAG career, at least for their first 4 - 12 years, but that they stayed long enough from one assignment to the next to make it a career -- because they liked the people (I didn't even discuss the special camaraderie among JAGs, but you should know what I mean), the fun jobs and the great opportunities. Most of them had to make the balancing decision at least once, but they fully considered the positive and negative sides of the balance sheet. The balance can change over time -- it may be different for you at the 4-year mark than at the 8-year mark. It's a very individual choice, but one implicating why you went to law school, your career, your family, your future...you know, all the important things in life. Perhaps then Colonel Dwight Eisenhower summarized it best in a letter to his brother: "Only a man that is happy in his work can be happy in his home, and with his friends."

A TALE OF TEAMWORK

By TSgt Selena P. Zuhoski
AFLSA/JACC

Recently, I was reminded of an old folktale, "The Story of Stone Soup," when my ten-year-old son, after having read the story at school, came home heart-set on making "real" stone soup for dinner that evening. We began making the soup, beginning with a well-scrubbed stone, and soon my twelve-year-old daughter dropped what she was doing and started helping us. A short time later, my husband came home from work and gave us his suggestions of what would taste good in the soup. My contribution was keeping the house from burning down and removing the stone before the soup was served. After all was said and done, the soup was truly delicious. As we enjoyed our meal, we debated which ingredient was most responsible for the success of our soup. My son announced that it must be the herbs he added. My daughter was sure that it was the chicken she thought to include, and my husband felt his idea of onions definitely provided most of the flavor. I could not decide the single best ingredient. To me, it was the combination of them all, and the fun we had creating the soup, that made it so wonderful.

Although The Story of The Stone Soup is a tale we tend to share with children, to help them understand the benefits of teamwork, the moral it provides is profound and applies to everyone.

In a department with narrowing resources and ever-broadening responsibility, maintaining success depends on our ability to work together as a team. It is through our combination of ingredients, such as imagination, cooperation, training and leadership, we create our own "stone soup." It is through our combination of ingredients, such as active duty military, reservists, civilians, students and volunteers, we are a team. There is no magic stone or even a single best ingredient—but rather the combination of them all, and the fun of creating a success, that make it so remarkable.

The following is just one version of this medieval folktale. Particulars of the tale change, depending on when and where the story is told, but the message is always the same:

The Story of Stone Soup

Once upon a time, somewhere in post-war Eastern Europe, there was a great famine in which people jealously hoarded whatever food they could find, hiding it even from their friends and neighbors. One day a wandering soldier came into a village and began asking

questions as if he planned to stay for the night:
"There's not a bite to eat in the whole province," he was told. "Better keep moving on."
"Oh, I have everything I need," he said. "In fact, I was thinking of making some stone soup to share with all of you." He pulled an iron cauldron from his wagon, filled it with water, and built a fire under it. Then, with great ceremony, he drew an ordinary-looking stone from a velvet bag and dropped it into the water.
By now, hearing the rumor of food, most of the villagers had come to the square or watched from their windows. As the soldier sniffed the "broth" and licked his lips in anticipation, hunger began to overcome their skepticism.
"Ahh," the soldier said to himself rather loudly, "I do like a tasty stone soup. Of course, stone soup with *cabbage* -- that's hard to beat."
Soon a villager approached hesitantly, holding a cabbage he'd retrieved from its hiding place, and added it to the pot. "Capital!" cried the soldier. "You know, I once had stone soup with cabbage and a bit of salt beef as well, and it was fit for a king."
The village butcher managed to find some salt beef . . . and so it went, through potatoes, onions, carrots, mushrooms, and so on, until there was indeed a delicious meal for all. The villagers offered the soldier a great deal of money for the magic stone, but he refused to sell and traveled on the next day. The moral is that when we hoard our talents and training, we will all go hungry. When, however, we take the time and energy to each contribute what we have to give, the result is much tastier soup in the form of offices that have fun together and produce far better products.

JA Attendance at IG Complaints Workshop

AETC/IG recently hosted an IG Complaints Workshop in the Conference Center at Randolph AFB--AETC's first ever and JA was invited to participate. Twelve JAGs attended with widely varying experience in coordinating and reviewing IG investigations. Numerous IGs "brought" their SJA with them. All involved considered it a worthwhile learning experience.

The three-day workshop was highly successful with lectures from SAF/IGQ staff and a live video feed from the DOD IG. Interaction between IG and JA during roundtable discussions and in answering questions highlighted the need for the two offices to continue the trend of forming tight IG/JA relationships from the wing level to the top of the chain. Additionally, several lessons learned from the conference are worth passing on.

First, Col James Worth, Director, SAF/IGQ, highlighted an area several briefers mentioned: properly framing the allegations during the initial complaint analysis. He noted "it's critical that the 'in violation of what' be properly framed; many IGs and most IOs are dependent on their SJA for assistance in this area." Further emphasizing the importance of properly framed allegations, he noted that proper framing alone would be the biggest factor in bringing Category II investigations back within the Inspector General's (TIG) 120-day metric. As it stands, reworking complaints regularly drives investigations well past the 120-day mark, and, as Col Worth remarked, "rework can be traced directly back to improperly framed allegations."

In framing allegations, IGs don't want JAGs to turn directly to the UCMJ, as UCMJ "specs" and the catch-all "abuse of authority" are the least preferred types of allegations. What they really want is a standard, usually laid out in an AFI, that's been violated. As Col Worth pointed out, properly framed allegations provide a logical framework for interrogatories which, when done correctly, exponentially increase the potential for a correctly written report being completed and reviewed in a timely manner.

Also of note in helping the IG frame allegations is to double check the original complaint to ensure all the issues raised are reduced to individual allegations. An investigation kicked back from SAF/IGQ or DOD/IG because they identified additional allegations from the original complaint adds time to the process and could reflect poorly on the MAJCOM and Wing involved. Finally, in helping frame allegations, IGs need to get JA in the loop earlier in the process, and JAGs, in turn, should ensure they provide prompt assistance in getting IG investigations off to a proper start.

Several other useful suggestions arose during the workshop such as IG and JA giving IOs instruction together instead of separately, as often happens. This would both increase IG/JA interaction and ensure the IO is ready to proceed with the right information. As an added benefit, it would ensure IOs hear the same thing from the two offices.

Another helpful procedure, which came out of Randolph AFB's IG, was to have the Wing Commander appoint the IG as the single POC for responding to Congressionals and other high-level inquires. I recommend supporting your IG if they raise this issue with the commander as the stories shared at the workshop of what can happen from operating otherwise were eye opening to say the least. Randolph's IG sample letters and staff summary sheet with routing instructions are available at their web page at http://

www.randolph.af.mil/12ftw/wing/ig/.

Finally, of great interest, was "The Green Book," a resource widely known in the IG field, and a valuable tool for JAGs to use in reviewing IG investigations. Major Anderson, a JAG with SAF/IGQ, lists this resource's greatest strengths as helping in reprisal complaints. Even though all alleged reprisal actions go through SAF/IGQ to DOD/IG, we can shave countless hours off the process by identifying those cases where there was either no protected communication or no adverse action.

The book helps answer the first two questions in the IG's "acid-test" to determine if a reprisal actually occurred. It gives detailed instruction and numerous examples to help answer whether there was a protected communication and whether an adverse personnel action occurred. If either answer is no, there is no need to determine the other questions in the test: whether a responsible management official (RMO) knew of the communication and whether the action would have been taken anyway (with a five part analysis). As the DOD IG put it, if the communication was to an ADC, its not protected under the statute, and she doesn't need to know anything else about the complaint. Although the preinvestigation report, or complaint analysis, is still forwarded, the underlying issue can stay at the wing for resolution.

Major Anderson noted that the Green Book helps because what constitutes a protected communication can be counterintuitive. Sending a Congressman a Christmas card qualifies, but talking to the ADC does not. Likewise, asking the IG directions to the water fountain is a protected communication whereas conversations with safety officers, chaplains, and doctors generally aren't. He also noted that unless a supervisor is the commander, communications to supervisors are never protected.

Unfortunately, no one knew where to get the Green Book on the web. It should soon be available through the AF/JAG's web page. A final note to remember is that there is no case law on these issues, so don't spend a lot time looking for it, SAF/IGQ already has.

Just as JAGs should learn the operational side of the house to better understand our clients' needs, we should also learn more of the IG process--their strengths, limitations, and concerns so we can better meet their (and commanders') needs. AETC's IG Complaint Workshop went a long way in building bridges between IG and JA. As Col Worth said, "we can't let geographic [office] separation inhibit close coordination [between IG and JA] in the initial stages." The Workshop certainly pointed out that IGs and JAs at the wing need to know each other beyond name recognition on complaint reports and legal reviews. As a general comment, Col Worth noted that JA "attendance at conferences and other forums [is] critical if the two agencies are to effectively support the commander and the Air Force community."

REBUTTAL TO "IMPEACHING A SILENT ACCUSED"

By Colonel James R. Wise
Chief, Appellate Defense Division

I read with great interest the article titled "Impeaching A Silent Witness" written by Major Christopher Mathews and Captain John E. Hartsell published in the September 2000 edition of *The Reporter*. The authors, relying on *United States v. Goldwire*, 52 M.J. 731 (A.F. Ct. Crim. App. 1999), articulate a clever way to impeach an accused during findings without the accused having testified before the court. Unfortunately, at the very least, the article appears to have been premature.

The *Goldwire* case is inchoate and cannot be cited as binding authority. *United States v. Adams*, 52 M.J. 836 (A.F. Ct. Crim. App. 2000). The Air Force Court's opinion in *Goldwire* was appealed to the Court of Appeals for the Armed Forces (CAAF). The CAAF granted on the appeal, briefs were filed, and argument before the Court has been made. We are, at the time of this writing, waiting for the CAAF's decision in the case. We at Appellate Defense are hopeful the CAAF will reverse the Air Force Court's decision.

Those trial counsel who successfully rely on the Air Force Court's *Goldwire* decision in pressing this type of impeachment attack have set *their* cases up for reversal if the CAAF reverses the Air Force Court. We strongly recommend caution in relying on *Goldwire* until the CAAF rules on the case. We have placed our *Goldwire* brief on the JAJA website for those interested in a defense perspective of the issues.


THE JUDGE ADVOCATE GENERAL'S DEPARTMENT
UNITED STATES AIR FORCE