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The Reporter

The Judge Advocate General's Corps

IS DEATH DIFFERENT?

Death Penalty Litigation in the Air Force and the Court-Martial of SrA Andrew Witt

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Prosecution Exhibit 27 in the case of United States v. SrA Andrew Witt—the murder weapon. The court-martial was held at the Bibb County Courthouse near Robins AFB, Georgia, in September and October of 2005.

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Message from the **Commandant**

Col David C. Wesley

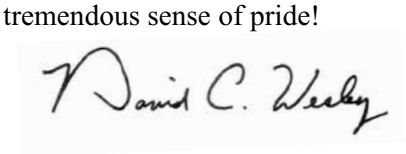
During his opening remarks last fall at the KEYSTONE Leadership Summit, Maj Gen Rives asked participants to think about their proudest moment as a member of the JAG Corps. I thought about this topic long enough to realize the power of his request. Later in the week during my KEYSTONE breakout session on changes underway at the JAG School, I asked participants to select their proudest moment as a JAG Corps member and send it to me. To date, no respondent has been able to narrow it to less than three events.

Think about Maj Gen Rives' question for a moment—whether your career in the JAG Corps is measured in months or decades, what was your proudest moment? We all have had challenging times when it would have been easy to become discouraged, *but what was that one instance when you were overwhelmed with pride*—was it your work, the uniform, your co-workers, the Flag, a client—when was it for you? If you're like me, the longer you really think about it, the more people, places, and events come to mind.

What other profession could give you so much pride? What other undertaking could challenge you in so many ways and give you this sense of accomplishment? During that week at KEYSTONE, I was honored to watch our current JAG Corps TJAG Annual Award winners receive their awards, and I shared a few moments with the JAG Corps' senior mentors. Where else can you practice with such professionals, who care so much about serving the people and the Republic we swore to defend?

These occasions keep me motivated and are tangible evidence of our professionalism. Working at the JAG School allows me to continuously survey what's going on throughout the Corps and the people who carry out a million difficult tasks in this time of war. When I spoke at KEYSTONE, I tried to convey how proud I am of the faculty and staff at the JAG School who bring you publications like *The Reporter*—they also want you to know you're part of something special, something very important—something that truly does make a difference.

I challenge you, our readers, to write and tell us about your proudest moment as a member of the JAG Corps! If you can't narrow it to less than three, that's ok—it ought to tell you something about the quality of the Air Force in which you serve. You can send your proudest moment to me at david.wesley@maxwell.af.mil, or AFJAGS, 150 Chennault Circle, Maxwell AFB, AL 36112. We would like to use your responses in our curriculum and publications, but we won't attribute them to you if you ask to remain anonymous. Whether or not you decide to share your proudest moment, just consider the question for a few moments…that process alone should give you a tremendous sense of pride!



IS DEATH DIFFERENT?
Death Penalty Litigation in the Air Force and the Court-Martial of Senior Airman Andrew Witt

By Lt Col Vance Spath, Maj Rock Rockenbach, and Capt Scott Williams,* USAF

Introduction

In the early morning hours of 5 July 2004, two bodies were discovered in a base house located at 1152A Fort Valley Street, Robins Air Force Base, Warner Robins, Georgia. Senior Airman (SrA) Andy Schliepsiek was found dead, lying on his back in the living room. He had been stabbed in the back and chest. His wife, Jamie Schliepsiek, was also dead, lying in a pool of blood and slumped against the wall behind her bedroom door. She was wearing only a t-shirt and panties; her bloodied skirt lay approximately 10 feet away. There was a large blood stain on the wall behind Jamie's body, and blood was also visible on the door, floor, nightstand, and bedroom lamp. At a nearby hospital, a third victim, SrA Jason King, was fighting for his life, undergoing a surgery for the five knife wound injuries sustained during a violent attack.

Colonel Jeffrey Robb, the Staff Judge Advocate, Warner Robins Air Logistics Center, vividly remembers examining the crime scene that morning and silently promising that the perpetrator would be brought to justice.[1]

On 13 October 2005, a military court-martial announced that SrA Andrew Witt would be sentenced to death for the murders of SrA Schliepsiek and his wife Jamie, and the attempted murder of SrA Jason King.[2]

During the fifteen months between the discovery of the crime and the announcement of sentence, military judge advocates represented the government[3] during a pre-trial confinement hearing, an Article 32 investigation similar to a grand jury or preliminary hearing, motion hearings in April and June 2005, and the actual court-martial.

The court-martial was held from 13 September to 13 October 2005.[4] Over 80 prosecution exhibits, 100 defense exhibits, and 250 appellate exhibits were admitted. The court-martial also heard from over 30 witnesses in findings and over 30 witnesses in sentencing.

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*At the time of the trial, then-Maj Vance Spath was the Chief Circuit Trial Counsel of the Eastern Circuit and he has since become the SJA at the 90th Space Wing, F.E. Warren AFB, Wyoming. Maj Rock Rockenbach was a Circuit Trial Counsel in the Eastern Circuit, and has since become an LL.M. student at George Washington in the area of labor law. Capt Scott Williams was an assistant staff judge advocate at Robins AFB, and he has since become an area defense counsel at Lackland AFB, Texas.

[1] SrA Witt, the accused, was convicted and sentenced by a military court-martial governed by the Rules for Courts-Martial (RCM) and the Military Rules of Evidence, which are similar in many respects to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. Military attorneys, as members of The Judge Advocate General's Corps, serve as judges and trial counsel at trial. The accused has the right to an independent military defense counsel, as well as trial before a "panel" or jury. The accused can also be represented by civilian counsel. While many of the rules apply to all courts-martial, RCM 1004 contains the specific requirements for capital cases.

[2] While SrA Witt has been convicted and sentenced, post-trial processing continues in his case. His military appellate defense counsel may attempt to appeal the case to the Air Force Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and even the U.S. Supreme Court. Nothing in this article is intended to prejudice the rights of the accused in any way.

[3] In addition to representing the government, members of the Judge Advocate General's Corps also served as military judge and two of SrA Witt's defense counsel. The military judge, trial counsel, and defense counsel each report through different chains-of-command, thereby ensuring independence and zealous representation.

[4] The last case resulting in a capital sentence in the Air Force was *United States v. Senior Airman Jose Simoy*, tried in 1992, at Andersen AFB, Guam. The appellate court affirmed the findings and set aside the sentence. The sentence rehearing resulted in a sentence to life. Since that time, the Air Force has had no one on death row at the Leavenworth Disciplinary Barracks in Leavenworth, Kansas.

UNITED STATES v. SRA ANDREW P. WITT

CHARGE I:

Specification 1: In that Senior Airman Andrew P. Witt, 116th Maintenance Squadron, United States Air Force, did, at or near Robins Air Force Base, Georgia, on or about 5 July 2004, with premeditation, murder, by means of stabbing with a knife, Senior Airman Andrew Schliepsiek.

Specification 2: In that Senior Airman Andrew P. Witt, 116th Maintenance Squadron, United States Air Force, did, at or near Robins Air Force Base, Georgia, on or about 5 July 2004, with premeditation, murder, by means of stabbing with a knife, Jamie Schliepsiek.

CHARGE II:

Specification: In that Senior Airman Andrew P. Witt, 116th Maintenance Squadron, United States Air Force, did, at or near Robins Air Force Base, Georgia, on or about 5 July 2004, with premeditation, attempt to murder, by means of stabbing with a knife, Senior Airman Jason D. King.

Throughout the trial process, the prosecution team worked under the theme, "Death is Different." This article focuses on the trial team's efforts to bring this case to trial and highlights significant differences and similarities between preparing and prosecuting a capital and non-capital case.

Building the Prosecution Team

Within days, the first member of the prosecution team was identified. Then-Major Vance Spath was traveling from Schriever Air Force Base, Colorado, to his new assignment as the Chief Circuit Trial Counsel, Eastern Circuit, based in Washington D.C. He received a phone call from the Chief of Appellate Government requesting that he redirect his travel to Robins AFB. After arriving at the base, Major Spath met with the local base counsel assigned to the case, Captain Scott Williams.

Capt Williams proved to be an invaluable member of the prosecution team, although he had only recently joined the JAG Corps and had little formal courtroom experience. When Capt Williams stood up to give the opening statement in *United States v. Witt*, it was the first time he had presented an opening statement in any court proceeding. His participation in the case is but one example of the substantial responsibility and opportunity afforded to members of The Judge Advocate General's Corps.

As the court-martial date approached, the third member of the trial team was selected—Major Rock Rockenbach, a circuit trial counsel from the Eastern Circuit.

Brief Summary of the Crime

On 3 July 2004, the accused was invited to the on-base residence of SrA Jason King and his wife, where he also met up with SrA Andy Schliepsiek and his wife Jamie. The accused was friends with both couples. At approximately 0100 hours, the group returned to the Schliepsiek residence a couple of blocks away. After SrA Schliepsiek went to bed, SrA Witt made a sexual advance towards Jamie Schliepsiek. She refused the advance and went to bed. SrA Witt slept on the couch and left in the morning before the Schliepsieks got out of bed.

The next day, on 4 July 2004, the Schliepsieks celebrated the holiday with SrA King and his wife. After midnight, Jamie Schliepsiek told her husband and SrA King about the accused's sexual advance the night before. Then ensued a number of phone calls between SrA Schliepsiek, SrA King, and the accused. The evidence indicated that during these calls, the accused put on his battle dress uniform, grabbed a combat knife, and drove from his off-base residence onto the base. Arriving on base at approximately 0315 hours, the accused parked a

distance from the Schliepsieks' home and walked through base housing.

At around 0400 hours, the Schliepsieks and SrA King returned to the Schliepsiek residence, and the accused followed them into the house. A struggle began between the accused and SrA Schliepsiek. When SrA King stepped in to break it up, he was immediately stabbed. The accused chased SrA King out of the house and stabbed him repeatedly in the back. SrA King fled to a neighbor's house, where the neighbor called 911. Either SrA Schliepsiek or Jamie called 911 while the accused was outside the house. The 34-second tape of the 911 call captured parts of the accused's attack on SrA Schliepsiek and Jamie after his return to the house. The Schliepsieks were pronounced dead at the scene. SrA King barely survived the attack and was rushed to the hospital.

SrA Andrew Witt was detained in the afternoon hours of 5 July 2004, and was held in pretrial confinement pending the completion of his court-martial.

Securing the Crime Scene

The crime scene contained many items of significant evidentiary value. Blood and blood spatter were found in almost every room. An open cell phone lay just feet from one of the bodies. Jamie's broken eyeglasses were lying in the bedroom hall. The bedroom door was cracked all around the door jamb. Jamie's skirt was on the bedroom floor, carpets were stained with blood, and footprints were visible around the bodies.

The small team of Security Force members that initially entered the residence was not focused on evidence collection, instead preoccupied with clearing the house and saving the victims. After it was determined that the perpetrator was no longer in the house, the civilian paramedics entered the residence and examined Andy and Jamie Schliepsiek. Once the paramedics determined that aid could not be rendered to the couple, Special Agents from the Air Force Office of Special Investigations (AFOSI) immediately took over and undertook steps to preserve the crime scene for investigation.

As investigators arrived and the search for the perpetrator began in earnest, crime scene tape was extended around the house and a controlled entry point was established. Over the coming days, the alert photographer snapped hundreds of photographs of the interior and exterior of the Schliepsiek residence, while investigators collected blood samples from the floors, doors, and walls. Other physical evidence, such as Andy Schliepsiek's cellular phone and Jamie Schliepsiek's bloodied jean skirt, were removed from the house for preservation in AFOSI's evidence locker. After this initial phase of evidence collection was complete, AFOSI locked the house and departed, and the yellow band of crime scene tape ringing the property became the only outwardly visible sign that something had happened inside the house.

Special Agents from the Air Force Office of Special Investigation secured the crime scene.

The decision was made to preserve the crime scene until after the conclusion of the trial, despite the genuine concern that the continued sight of the sealed and deserted house might have a psychological impact on the base housing community. The trace evidence was so extensive, and the ability to accurately reconstruct the crime scene so crucial, it was clear the interior of the house should be preserved for as long as necessary. The Schliepsiek house available to members of both the prosecution and defense in the 14 months between the deadly attack and the beginning of the court-martial of SrA Witt.

The ability of attorneys and experts from both sides to visit the preserved crime scene indeed proved invaluable; the difference between examining photographs of the inside of the house, no matter how numerous and detailed, and personally walking through the rooms simply cannot be overstated. The spatial relationships between the many pieces of physical evidence

became clearer—and the number, location, and pattern of bloodstains became easier to inspect, analyze, and remember. The photographs remained the primary source of reference during the day-to-day trial preparation, but the prosecutors were also able to trade theories and impressions on the exact sequence of events while actually standing inside the house itself and looking over the blood stains.

The prosecution's blood spatter expert was similarly able to view the physical evidence with his own eyes and even select several additional drops of blood for DNA testing in order to match the blood with a particular victim. During his trial testimony, the blood spatter expert used the results from these additional tests to explain the sequence of events inside the house. This additional analysis would not have been possible if the crime scene had been simply photographed, processed, and then cleaned up—as typically happens in a non-capital case.

The forensic psychologists for both sides were also able to view the house for themselves, as was the defense mitigation specialist. The first responders and the surviving victim, SrA Jason King, were also better able to recall and reconstruct the events of that night by virtue of revisiting the home.

While the trial team eventually decided not to request that the panel members view the inside of the house, the preservation of the entire crime scene for over a year before the trial permitted the prosecution team to consider that option and assisted the team in reconstructing the majority of events that occurred within the house that night. Obviously, maintaining a secure crime scene is a significant logistical issue. Such preservation is likely to occur only in the most serious or complex cases; however, when these cases arise, it is something that absolutely must be considered, discussed, and decided. Moreover, ensuring open access not only for the prosecution, but also the accused's counsel and experts, demonstrates the fairness of the process to the public, the accused, and the press.

Location of the Court-Martial

The physical location for the court-martial was among the many logistical issues raised by such a high-profile and emotionally-charged trial. Robins AFB has a relatively modest courtroom, with room for only a handful of spectators in a very narrow space. This space limitation presented a sobering problem: the victims' family members and friends, who would attend the trial in large numbers, would easily fill this limited space. Likewise, the number of seats would have been insufficient for SrA Witt's family and friends. Given the subject matter of the trial and the intense emotion felt by all involved, asking the two groups to sit in such close proximity to each other would have been unreasonable and dangerous. The testimony and images every day of the trial revolved around violence, pain, and loss. Every witness, every turn of events as the trial unfolded, constituted a challenge to the composure and self-restraint of those involved, and the close proximity of the Robins courtroom was sure to invite disaster.

That calculation did not even include the number of interested spectators from around the base and the surrounding community. There was significant media interest in the case. Access to the base for reporters and cameramen would have been a logistical and security problem, not to mention that there would have been no room for them in the cramped courtroom.

Moreover, in order to provide adequate security for the courtroom, it would have been necessary to set up metal detectors and secure areas in at least two areas of the Robins Headquarters building for at least a month. Between the physical constraints and security concerns, holding the trial in the Robins courtroom did not appear to be a realistic option.

The Bibb County Courthouse presented a workable alternative, located approximately fifteen miles north of the base in Macon, Georgia. The senior judge offered up one of his courtrooms for all proceedings in the court-martial, and also granted use of a judge's chamber, deliberation room, and judge's conference room for use during all of the trial proceedings. The District Attorney and Public Defender invited the prosecution and defense teams into their facilities before and during the trial. Additional resources, such as a large LCD monitor, speakers, easels, copier capability, telephone support, fax machines, water pitchers, and general office supplies were generously offered almost as soon as the need for them arose.

The large courtroom provided seating and at least a small measure of separation for the two sets of family and friends, with ample room for interested observers and representatives of the media. In fact, there was seating for more than 200 in the courtroom. The courtroom, with its high ceilings and large balcony, had many attendees remarking on its similarity to the movie set from "To Kill a Mockingbird."

The judge's bench at the Bibb County Courthouse, Georgia.

The security of the building was also reassuring. Before reaching the courtroom, every spectator first passed through metal detectors and ran their belongings through an X-ray machine at the main entrance to the building. In the hallways, bailiffs and security guards always ensured the conduct of all visitors to the courthouse was appropriate.

View of counsel's table and spectator area, Bibb County Courthouse.

The Bibb County Sheriff's Office provided armed officers[5] for an extra level of security inside the courtroom at two pivotal moments: the announcement of the verdict and the sentence. At these two times, the courtroom was packed—truly standing room only—armed officers were near each counsel table and stood in the aisle behind the bar between the two families. Spectators later described the atmosphere during these two times as so thick it was difficult to breathe and they could literally feel the tension in the courtroom.

The time and effort donated by the state employees ensured the environment for this trial was professional. In fact, their assistance truly made this trial possible. Without their support, it would have been impossible to allow access to all interested parties, to utilize the extensive electronic aids relied upon by counsel, and to have the relative feeling of security and safety that the courthouse and its personnel provided.

Proof Analysis/Case Plan

All cases should have a *counsel useful* proof analysis. No matter the format, at a minimum a proof analysis must cover:

- the elements,
- the expected proof,
- the likely witnesses,
- probable defenses,
- potential evidentiary issues,
- foundation requirements for evidence, and
- weaknesses in the case.

The proof analysis in this case ended up being just over 56 pages long. Some briefed on the case were surprised that it was so long given that there were only two charges and three specifications. Moreover, the elements of each specification were fairly straightforward and for some required no more proof than a single document or witness. The lengthy proof analysis was necessary because in order to obtain a death penalty verdict, we needed to prove far more than just the elements of the case. We needed to prove—even during the case in chief—why the accused should be sentenced to death. The sentencing case had its

[5] The regular escorts were from the Robins AFB Security Forces Squadron.

own proof analysis to ensure that we proved the unique elements of a capital sentencing case. The proof analysis included meaningful strategic points, evidentiary rules for each and every element of evidence to be placed in front of the members, potential objections, and the prosecution team's responses.

The proof analysis that was completed was neither unique nor groundbreaking. In fact, it is the type of critical analysis that should be done for every case. Included in the analysis were not only the elements that needed to be proven under the law, but also facts the trial team believed needed to be demonstrated to achieve the desired verdict. For instance, laying in wait for the victims was not a discreet element of the case, but we believed it would be an important fact to prove to the court members.

A proof analysis was only the first step in organizing and preparing the presentation of the evidence to the court members. Alone, it was not sufficient to organize the evidence. While the proof analysis ensured that all evidence was placed in front of the members and that all elements were covered, it did little to order the presentation of evidence and the witnesses. To make sure that we called the witnesses in the best order and that the evidence unfolded in the most dramatic but understandable manner, we created a 108-page case plan. This case plan included entries for each day of trial, and listed which witnesses would be called and in which order. Not only was the expected testimony from each witness listed, but we also listed all evidence that the witness would introduce or comment on. A list of physical evidence was then made for each day so that it could be brought from locked storage into the courtroom. In this way, we always had on hand what was needed and were not buried by the entire mountain of physical and demonstrative evidence.

The case plan allowed the trial team to orchestrate the evidence. The team stayed true to their overarching theme that "Death is Different," and knew that to convince 12 individuals to vote unanimously would require a clear plan that was effectively executed. The trial team's strategic belief was that the court members—each day—needed to be presented with at least one piece of startling, dramatic, or emotional evidence. The team constructed a case presentation that would allow for this each day of trial in both findings and sentencing. This tactic also ensured the members were not overloaded and made numb to the gruesome evidence before them. In tracking the daily as well as the overall trial schedule, the mundane was interspersed with the tragic. The powerful moments in the trial then were able to occur at what the team believed were precisely the right moments.

Together, the case plan and proof analysis allowed the government to present its evidence in an orderly and seamless manner. Some direct examinations were conducted straight off the plan. When one counsel was finished with a direct examination he would consult co-counsel who tracked the case plan. If something had been missed during the questioning, it was immediately identified. While we necessarily maintained flexibility, the basic organization of information in the case plan allowed counsel to respond in a way that preserved our overall theme and theory.

The Four "Gates"

All military prosecutors are prepared for the challenges of convincing two-thirds (2/3) of a panel to vote for a finding of guilty, and then convincing two-thirds (2/3) or three-fourths (3/4) of a panel to vote for an appropriate sentence. Conversely, defense counsel are aiming to convince just more than one-third (1/3) of the court members to vote for a finding of not guilty, and if there is a conviction, convincing just over one-third (1/3) or one-fourth (1/4) to vote against an inappropriate sentence.

In military capital litigation, the prosecution must have a unanimous vote of at least a panel of twelve—at four different points of the trial. The defense counsel in this arena is aiming for a single vote on any one of these four occasions. In concert with the proof analysis and case plan described above, the team focused on a constant theme of unanimity. Unanimity truly sums up how death is different.

The First Gate—Verdict on Findings

In findings, the members must unanimously agree the accused committed a crime for which death is a possible sentence. This finding is frequently referred to as the first gate and is reflected on the

findings worksheet. SrA Witt was charged with two specifications of premeditated murder in violation of Article 118, UCMJ. Premeditated murder does carry death as a possible sentence—but only if the verdict is unanimous.

The members could still find SrA Witt guilty of premeditated murder without a unanimous verdict, which would take the death penalty off of the table. Moreover, the judge instructed the court members on the lesser included offenses of premeditated murder, including: unpremeditated murder, voluntary manslaughter, and involuntary manslaughter, none of which include death as a possible sentence. The alleged attempted murder of SrA King also does not carry death as a possible sentence.

The findings worksheet reflected all of these possibilities, and, as one can imagine, was long and complicated. On findings, the members deliberated in closed session for approximately 17 hours prior to the unanimous finding of guilty on the two premeditated murder charges. The remaining three gates are all reflected on the sentencing worksheet.

The Second Gate—Existence of Aggravating Factors

Gate two involves the existence of statutory aggravating factors. (The specific alleged factors in *Witt* will be discussed shortly.) The list of statutory aggravating factors is found at RCM 1004(c). By rule, notice of which aggravating factors the prosecution intends to pursue must be given to the defense prior to arraignment.

When the members retire to deliberate on the sentence, the first vote taken is on whether any alleged statutory aggravating factor has been proven beyond a reasonable doubt. For death to be an option, the court members must unanimously vote that the prosecution proved at least one beyond a reasonable doubt. See RCM 1004(b)(4). All members must agree on the existence of the same factor. So long as the members unanimously agree to at least one aggravating factor, the death penalty remains an option and the case moves on to the next step.

The Third Gate—Consideration of Extenuation and Mitigation Evidence

Gate three relates to mitigation. For death to remain an option, court members must unanimously agree that all aspects of the extenuation and mitigation case are substantially outweighed by the government's aggravating circumstances. Extenuation and mitigation, like in any case, can include just about anything. Aggravating circumstances, on the other hand, include not only the statutory aggravating factors discussed above but also any other evidence the government introduces as matters in aggravation under RCM 1001(b)(4). Again, unless all members agree, death is removed as a possible sentence. If all of the members agree, the case moves to the last gate.

The Fourth Gate—Vote on Sentence

The final gate is the actual vote on the sentence. After all the discussion, debate, analysis of aggravating factors, review of the evidence in extenuation and mitigation, and the three preceding votes, it comes down to this moment. If any one member does not vote for death, death is no longer an option. There is only a single opportunity for members to vote on death as a potential sentence—and it must be a unanimous vote.[6] If there is a sentence of death, all of the court members are required to sign the worksheet to demonstrate their complete unanimous agreement.

The members deliberated for approximately 18 hours on an appropriate sentence. These deliberations were over the course of three days. The sentencing worksheet contained all the possible options and issues discussed above, making it another lengthy and complex document.

Statutory Aggravating Factors

In the *Witt* case, the defense was given notice of five potential statutory aggravating factors before arraignment. The court members unanimously

[6] The other potential sentences at this point would be life with the possibility of parole and life without the possibility of parole.

found that four aggravating factors were proved beyond a reasonable doubt. Choosing the aggravating factors entailed analyzing all the evidence uncovered by AFOSI and the prosecution team. We also closely reviewed the Article 32 Investigator's Report and discussed the issue with the Air Logistics Center Staff Judge Advocate. We focused on choosing aggravating factors that truly captured the evidence in our case and were careful not to overreach. We completed the list containing the five proposed aggravating factors late in the evening before the first motion hearing.

1. The life of another person was unlawfully and substantially endangered during the commission of the murder. The specific evidence to support this factor involved the injuries sustained by SrA Jason King. Dr. Virgil McEver, SrA King's physician, testified that in his opinion, "it was a miracle that Jason King survived the attack." The members unanimously found that this aggravating factor existed.

2. The accused was engaged in the crime of burglary during the commission of the murders. The military judge instructed the members on the elements of burglary, and the team simply highlighted evidence produced in findings to support this aggravating factor. The members unanimously found this aggravating factor existed.

3. The intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering on the murder victims. In support of this factor, the prosecution team argued evidence including the contents of the 34-second 911 phone call made from inside the Schliepsieks' home, SrA Schliepsiek's paralysis during the attack on his wife, the number of stab wounds on Jamie Schliepsiek, and the fact that her skirt was removed during the attack. The members also unanimously found that this aggravating factor existed.

4. The accused killed more than one person with premeditation during the same crime. The trial team assumed this would be the easiest to prove if there was a unanimous finding of guilty on both premeditated murder specifications. In argument, the members were shown a picture of the bodies of both Andy and Jamie Schliepsiek at the scene of the crime. Again, the members unanimously found that this aggravating factor existed.

The only aggravating factor that the court members did not unanimously agree upon was that, at the time of the murders, the accused was also intentionally obstructing justice. The military judge instructed the members on the elements of obstruction of justice. The evidence included statements the accused made to his friends during his time in pretrial confinement; for example, "I tried to cover it up by killing everyone," and "I did not want to leave any witnesses."

Strategy decision and attention to notification requirements are a key component of any court-martial. While the stakes in the *Witt* case were higher, we still discussed how to put on the best case for our client and to ensure we complied with every discovery and notice requirement. The aggravating factors added a different twist to the sentencing case since the burden on the prosecution was beyond a reasonable doubt to establish these factors.

The trial team spent a significant number of hours tailoring the arguments to the aggravating factors. The team went to great lengths to ensure evidence was offered and later argued in a manner consistent with the instructions and the law. A specific example was our ability to argue the significance of the attack on SrA King. While the attack was violent and destructive, it was not a crime for which a sentence of death could be imposed. In fact, the only relevance in the "capital" part of the argument was the first aggravating factor. Counsel had to carefully segregate the argument and ensure the crime against SrA King was used in the appropriate context—or risk reversal on appeal.

Timing of the Case

A plan for the timing of the case would behoove all the participants confronted with a case that will run weeks rather than days. In this case, counsel were confronted with scheduling approximately 12 experts and consultants, availability of more than 30 findings witnesses, and the scheduling needs of more than 30 sentencing witnesses. An

RCM 802 session, held at the end of the June motion hearing, gave rise to a plan of attack. Again, while not capital-case specific, when counsel are confronted with a lengthy complex trial, they should consider a method to deal with the inherent scheduling issues.

A specific calendar of events was set for the trial. The first week was dedicated to the voir dire (jury selection) and any outstanding evidentiary motions. The second week was set aside for the government's case-in-chief. The third week was dedicated to defense case-in-chief, government rebuttal, and instruction sessions. The fourth week would include closing arguments and findings deliberations. The fifth week was set aside for the sentencing cases of both sides, rebuttal, and sentencing instruction sessions. The sixth week was for sentencing argument and sentencing deliberations.

Setting the calendar up in this manner allowed witnesses to schedule travel for concrete periods of time. It also allowed expert witnesses to be in attendance when they were most needed, and ensured all parties had a clear understanding of what would transpire at a given time. The case progressed almost exactly as planned, with only sentencing spilling over into the next week. Having a plan for prosecuting a lengthy case was one of the key factors to this trial proceeding in an efficient manner.

Seating the Court Members

Seating the court members in the *Witt* case presented a number of challenges. The first was getting potential jurors that were "death qualified." Death qualified is really no different than the requirement in all sentencing cases—the jurors cannot have an inelastic predisposition towards a particular sentence and must be able to "consider" all sentencing options. To be death qualified, a member must not have an inelastic predisposition about the imposition of or the appropriateness of the death penalty. In other words, each member could neither believe that a sentence to death was never an appropriate sentence, nor believe that the death penalty was required in all murder cases.

Given the stakes involved, all parties knew that potential members' answers to questions would require significant time for analysis and reflection. The prosecution and defense used a written juror questionnaire to ask many initial questions prior to the members arriving at the court. The questionnaire consisted of 118 questions. Questions ranged from whether members owned firearms, to their specific views on the death penalty, to what newspapers they read, to news shows they watched and what bumper stickers they had on their cars. It covered religious, political, and personal beliefs in significant detail. The cover sheet to the questionnaire was signed by the military judge, and the questionnaires were due to the court in early July 2005, giving counsel two full months to analyze the responses.

The other issue was the requirement that a death penalty case requires a quorum of *at least* 12 members. The task for the convening authority was how to detail the appropriate number of court members and deal with issues related to quorum. The answer was a unique creation of a primary panel of 15 court members, along with a detailed number of alternate panels of three members. In court member detailing, it is critical that the convening authority is the sole actor, and the staff judge advocate is relegated to an administrative role. The dangers of mistakes in this area are obvious—a case sent back for re-trial.

The convening order designated alternate members named to sit through voir dire on the case using the following method:

> I also **detail** ten groups of alternate court-martial panel members, three per group, based upon the same selection criteria. The ten groups of three alternates each are denoted by "1,2,…10" and will serve as alternates in the event any member is excused from court duty **after convening but prior to the assembling of the court** and the panel falls below a quorum of 12 members. In that event, panels of three are **detailed and** added to the members who have not been excused, in order, until a total of between no less than 15 and no more than 17 members are again available. The following chart is illustrative of my direction in this matter:

Number of members after excusals	Quantity of alternate panels called	Number of non-excused members and alternates
17	0	17
16	0	16
15	0	15
14	0	14
13	0	13
12	0	12
11	2	17
10	2	16
9	2	15
8	3	17
7	3	16
6	3	15
5	4	17
4	4	16
3	4	15
2	5	17
1	5	16

All 15 of the original members and the 30 potential members completed the extensive member questionnaire. The prosecution team then organized the questionnaires into a panel of the original 15, and then in order of the panels outlined above. Based on review by the entire prosecution team, the members were given one of three designations: green, yellow, or red. Green was a member the prosecution team judged as acceptable, yellow was a member who was either somewhat problematic or there were open questions raised by their questionnaire, red was a member the team did not feel was acceptable (i.e., had an inelastic predisposition one way or the other regarding the death penalty). After all the individuals were designated green, yellow, or red, butcher paper went up on the walls for each member and areas for questioning were then written on the paper. This led to the creation of individual voir dire for the potential members.

Maj Rock Rockenbach preparing for another day in court.

The voir dire process was a bit different than other trials. The panel of 15 members was brought into the courtroom and the military judge asked the standard questions in the court-martial script, with a few additional questions about the death penalty. Then all the members were excused and brought back one at a time for voir dire by counsel for both sides. Time varied for this individual questioning, from 30-40 minutes for the "easy" members to almost three hours for questioning of one of the members. The process of scoring the members, analyzing their questionnaires, and highlighting significant areas for questioning allowed voir dire questioning that was direct, targeted, and efficient. Many members indicated an honest struggle concerning whether the death penalty was an appropriate punishment in general and when it should be used. The members showed themselves to be a thoughtful group who would hold the prosecution to the highest of standards and would demand a thorough and well-thought-out explanation as to why the death penalty was appropriate for this accused.

After the initial panel was questioned, members were excused for cause and the panel fell below the 12 necessary for quorum. To everyone's surprise, this was the only time the panel fell below quorum. That panel was excused from the courtroom and additional panels one and

two were brought in and the process started again with the judge's initial instructions. After challenges for cause were granted in this second round of voir dire, the panel numbered 13. The prosecution did not exercise a preemptory challenge, the defense did, and the final panel ended up at exactly 12 members.

Opening Statement

Opening statements are so often based upon a last minute thought delivered with little preparation and less practice. The trial team knew this opening would be different. The opening was the first of three bookends—opening statements, closing argument, and sentencing argument—that would frame the prosecution's case.

Drafting the opening statement presented a number of issues not normally encountered in a non-capital case. After investigating the case for well over a year, the prosecution team had pulled together a vast amount of information that could be placed before the court members. But, it was still necessary to strike the appropriate balance between too much detail and too little. Striking this balance involved all three prosecutors debating their theories on opening, each laying out what they saw as the critical elements of the case, and hours of discussion about the appropriate order of the statement. How to make the statement powerful? How to ensure it grabbed the court members' attention? How to best tell this story in a manner that made sense?

Perhaps most perplexing was the question of how to capture the nature of the case within a single theme. What happened to the Schliepsieks and their friend Jason King on the morning of 5 July 2004 was profoundly disturbing in its senselessness, its brutality, and its suddenness. The task of introducing a 12-person panel to the events of that morning while remaining within the proper tone and content of an opening statement made it difficult to select the right theme.

The prosecution team discussed a myriad of possible themes over the course of several weeks leading up to the trial, and because the attorneys were constantly together working on the case and thinking about the events of the day, new suggestions would be offered for debate at any time. A simple statement such as "this is a case about premeditated murder" sounded too trite or simplistic. More elaborate themes lacked the kind of impact and focus the case demanded. Theme after theme was discarded for any number of reasons. Many times the team would settle on a theme only to seek feedback from someone and be told that it did not work. Not until two days prior to the opening statement, during a 0200 hour discussion, did the answer finally crystallize.

We settled on a theme after stepping back from the details and asking out loud what was most disturbing about the murders themselves. This was not an easy task in itself, because there were so many possible answers: the loss of two young people whose plans for their lives would never be realized, the pain felt by their parents and brothers and sisters, the knowledge that these weren't victims who had irresponsibly put themselves into a dangerous situation and then suffered the consequences, the idea that five minutes before the attack they were celebrating the Fourth of July holiday with no idea what was about to happen to them. All of these aspects were arguably what was most disturbing.

We agreed, however, that the most compelling aspect of the crime could be found in the sequence of the attack itself. Our opening statement began with our theme, captured in the following lines:

"On July 5th, 2004, at shortly after four in the morning, Andy Schliepsiek lay bleeding on his living room floor, paralyzed from the waist down, crying out in horror as he watched Airman Witt stab his wife, Jamie, with a combat knife. Soon Jamie would be dead, sprawled behind her bedroom door in a blood-soaked T-shirt and underwear, her bloody skirt a few feet away. Soon, Andy would be dead too, with Airman Witt's combat knife through his heart and his open cell phone just out of reach, disconnected from 911. Across the street, their friend Jason King lay bleeding in a driveway, and while paramedics raced against time to save his life, he begged anyone who would listen to tell his wife and daughter that he loved them. It was the day Airman Witt decided to end their lives, *and they never saw it coming*."

Jumping right to this one moment, a moment that in many ways captured the very nature of the crime, provided a more effective

way of introducing the panel to the case than any of the previous suggestions. First, this one terrible moment of helplessness and violent death would be conveyed, for it was this moment that captured so much of the horror of what the accused had created. After this image was described, the statement then turned to the events leading up to that moment, the additional aspects of the attack, and the various evidence that would be introduced to prove the allegations of premeditated murder and attempted premeditated murder.

How to Order the Prosecution Case in Chief

The trial team's goal was to provide the members an image at the end of each day of the findings case that was either graphic or dramatic. Once the government's case in chief was scheduled for five days, covering a Monday through Friday, the team began diagramming findings witnesses on butcher paper for each day of the planned case. The order of witnesses was reworked at least a dozen times. Many times a plan was devised, but in the morning, one of the attorneys would start readjusting the order based on thoughts over the course of the short night.

These discussions would lead to renewed debate about the best strategy. The final order came together on a Saturday morning around 0300 hours in the billeting suite after what could be described as a highly-spirited debate. The differences between the first plan and the last were dramatic.

Of note, the case was not presented in a chronological manner. Rather, each day was planned out so there would be a culminating moment and then a recess for the night. Required witnesses, for evidence such as foundation, DNA processing, or scene setting, were spaced throughout the week to help the team present the most effective case possible. The case was planned out roughly as follows.

Day 1, Monday, The Knife: The murder weapon in this case was an imposing knife, with a 6 ½ inch blade and a 6 inch handle. It was serrated and was made out of a composite graphite material. Many witnesses described it as a "combat knife." Monday ended with the alleged murder weapon being passed from court member to court member.

Day 2, Tuesday, The Crime Scene: The focus on Tuesday was to show the court members the crime scene photographs and present testimony to bring them into the Schliepsieks' home after the attack. Through motion practice and agreement, the trial team had limited the number of photographs that included the bodies to just a few. Tuesday culminated with the investigators taking the court members through the crime scene, from the doorway, into the living room where Andy was found, down the hallway, and then behind the back bedroom door where Jamie was found. The final images of the day were photographs of both Andy and Jamie exactly as they were found by the first responders.

Day 3, Wednesday, SrA Witt's Statements: While SrA Witt's statement to AFOSI was considered an important piece of evidence, it also contained aspects of the eventual defense theory. The written statement talked about "waterfall effects," "blurring," and "losing it." Along with SrA Witt's written statement was his oral statement to the investigators. The culminating moment for Wednesday was an aspect of SrA Witt's verbal confession that was not in his written statement. Specifically, according to the Special Agent, "[SrA Witt] said he closed the bedroom door, and he went down the hallway. At that point, Andy was still alive. He said that he stabbed him in the heart." As the agent approached this penultimate moment in his testimony, his voice cracked, and he began to cry. The moment was sincere and completely unexpected.

Day 4, Thursday, The Skirt and Autopsies: On Thursday, the testimony began with the autopsy results on the Schliepsieks. Although we had over a hundred photographs of each autopsy, we narrowed our planned evidence to 15 photographs of Jamie and 10 photographs of Andy. After motion practice, we showed approximately 13 of Jamie and 9 of Andy. Thursday ended with the testimony of a blood spatter expert. His testimony concluded with a discussion of how he could surmise Jamie's skirt was on her at the start of the attack and then removed at some point in the middle. On direct examination, the final questions required him to hold up the actual skirt and discuss patterns of blood flow and the stains on the skirt.

Day 5, Friday, 911 Call: The most disturbing piece of evidence was a 34-second 911 call made from inside the Schliepsiek home during the murders. This powerful 34 seconds in time still haunted the 911 operator. The call concluded with the operator calling the number back over and over, each time the call going to a voicemail that stated, "Hi, this is Andy, I can't get to the phone right now so leave a message, and I'll call you back." The final moment of our case-in-chief was this phone call, and this was the one aspect of the case all counsel had agreed upon from almost day one of the preparation.

In every case, counsel should make an effort to arrange their witnesses and evidence in a manner that cogently gets the facts to the court members and delivers the desired impact. Case plans, proof analysis, and discussion between counsel are the key ingredients to developing the best path. The large amount of time spent in a capital case may be unique, as well as the existence of incredibly powerful evidence, but the basics of trial preparation guided us throughout the process. As no plan survives first contact, the above outline changed a bit throughout the presentation of the case, but the goal of ending on a dramatic moment each day remained the guiding principle of the presentation.

Electronic Evidence And Demonstrative Aids

A simple laptop computer with Microsoft Office and wireless capability was of enormous assistance in presenting the evidence in the case. Since our government equipment lacked wireless capability, the personal computers of the trial counsel were used to store copies of the evidence in an electronic format. Crime scene photos, autopsy photos, maps of the house and base housing, electronic versions of two 911 calls, and the gate camera video of the accused entering the base were all stored and presented electronically.

This capability was important for many reasons. For the crime scene and autopsy photos, it allowed counsel to enlarge certain parts of the images. For example, we were able to highlight the position of the cell phone in relation to Andy Schliepsiek, show hilt mark injuries inflicted by the murder weapon, and demonstrate aspects of the murder weapon that corresponded to the injuries on the victims. Further, it allowed the prosecution to avoid making numerous copies of graphic images of the victims for each court member.

Bibb County courthouse personnel provided a 42-inch LCD screen which was used throughout the presentation of the case. The court members also had the LCD screen during their deliberations. The large screen allowed the members to focus on the images during the testimony and also made it easier for them to not become emotionally overloaded by the horror depicted in the images. We were also able to display maps and other images to be "marked up" without destroying the original, allowing this testimony to flow more smoothly. Finally, the evidence was able to be incorporated into the PowerPoint slide show used by Lt Col Spath in his closing and sentencing arguments.

When they retired to deliberate, the members were provided with a clean laptop with only an operating system and Microsoft Office installed. A single CD-Rom of all the electronic evidence was also provided so that the members could look at the pictures, the maps, and video, as well as listen to the 911 tapes. The same CD-Rom was provided to the court reporter for inclusion in the record, making duplication of the record substantially easier.

While the computer was used extensively, it was not the only manner in which evidence was presented. Clothing, the murder weapon, and body diagrams were presented to the court members both electronically and physically. During testimony concerning the autopsies, the members were not only able to see blow-ups of the murder weapon, but were also able to handle the actual knife. During the blood spatter analysis, members were able to see pictures of the skirt Jamie wore but then were also able to handle the skirt itself as the case progressed.

Finally, PowerPoint presentations were used to facilitate a lengthy closing and sentencing argument. The slides included the elements of the crime with the evidence in photographic, bulleted, and video form under each subheading. Included were maps of the base with markings that represented the victims and the accused. Based on the testimony, these markings were animated to travel across the base and in the house. This permitted for an explanation of the crime scene in

a manner consistent with the prosecution's theory of the case.

Not only did this method provide powerful images to the members, it allowed counsel to deliver literally hours of argument without a single note. Feedback from the members after the trial validated the effectiveness of the presentation. They were impressed by the professionalism of the presentation and were surprised to learn that the counsel had created it using nothing more than software installed on every Air Force computer.

Emotional Impact

The emotional impact of preparing and trying this case was perhaps the most significant and enduring effect of the case, and was the one aspect that truly made it different. The available evidence allowed for a very complete reconstruction of the people and events involved in the tragedy. The victims in this case were real people, and the prosecution was able to meet each of them in one way or another. SrA Jason King, the survivor, was once a powerful man who had been physically devastated by his injuries and emotionally decimated by the guilt of surviving. Meeting him and hearing his account of the events of that evening over a series of interviews was a powerful experience. Meeting his wife and daughter gave dimension to his struggle to survive.

Andy and Jamie were met in death, but the team felt a connection with them nonetheless. The prosecution looked through their photo albums, read their journals and their e-mails. The team watched home movies and spoke with family and friends. We saw them happy, sad, optimistic, hopeful, and young. All heard their laughter, their love for each other and their families. Images of the two dancing, eating, and drinking still haunt the prosecution team. Juxtaposed to those images, the team also had to look again and again and again at their dead bodies in the crime scene photos. There were countless times the 911 call had to be replayed and dozens of times the team walked through the house, untouched since the bodies had been removed; pools of dried blood still on the floor. The team could envision Andy paralyzed, listening to his wife being assaulted and killed. Through these moments, it was believed Jamie may well have heard her husband stabbed through the heart just down the hall as she passed into death. The facts and the evidence were terrible on their face, and made worse as counsel developed a relationship with the victims and their families.

Dealing with the surviving members presented a crucial challenge to the counsel. Understandably, the parents and siblings of the victims were unsure of the military. After all, they knew a military member had killed their kids. They did not initially trust or even understand the military system. It was clear that although they certainly did not get to pick the prosecution team it would make things much easier on all if they trusted and respected the team. This was not a short term effort, but a 14-month relationship that had to be built and nourished. At times did they demand much? Of course, but counsel's marching orders were to understand their perspective and appreciate their demands. Why? It allowed them to open up to the team and facilitated powerful testimony during sentencing. It also allowed the team to keep the families' emotional testimony within the bounds of the law. These results could never have happened without the constant efforts of the entire team to relate with these decent people.

Summary

Ultimately, the case of *United States v. Witt* took 25 trial days. There were also a few days in motion hearings, conducted in April and June of 2005. Additionally, the Article 32 hearing was held in November of 2004. During all of these proceedings, some representation from the victims' and accused's families was present. Some number watched descriptions of unimaginable violence, graphic autopsy photographs, gruesome crime scene photographs, and vivid testimony. Emotions ran high in all those affected by this crime. However, relationships between trial and defense counsel were remarkably civil throughout the entire process.

On 14 October 2005, the day after the sentence was read, trial counsel returned to the Bibb County Courthouse one last time. Every effort was made to leave the courtroom, conference rooms, witness rooms, and deliberation room, as we had found them. The courthouse felt like a second home to the team, and many people who worked at the courthouse came by to wish the team an incredibly warm goodbye. Many of the workers in the courthouse had sat in and observed different portions of the trial. The compliments paid to the military justice system were constant. As the team wandered into the large courtroom that last time, it was hard not to reflect on the remarkable efforts and emotions the room had seen. Images from witnesses flashed through everyone's mind as the team turned off the lights, turned, and left Courtroom A—hopefully forever.

SrA Andy Schliepsiek and his wife, Jamie.

The Record of Trial—22 volumes, 2,586 pages!

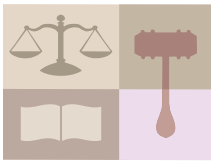
During a highly-publicized case like *Witt*, many observers focus exclusively on the teams of attorneys, experts, and lay witnesses that appear before the court. Many fail to notice, and still fewer fully appreciate, the role of the court reporter—whose job is far from over when the sentence is announced and counsel pack up and go home.

Ms. Harriet Scott, the court reporter at Robins Air Force Base, was the sole court reporter on the *Witt* case. She worked not only the four-week court-martial, but also the Article 32 investigation and both pretrial motions hearings. And during this time period, this was not the only case for which Ms. Scott was responsible!

While Ms. Scott was the only court reporter assigned to the case, she would not recommend this arrangement for significant cases in the future. "A team of at least three court reporters should be assigned to a case of this magnitude. Two court reporters should be in the court room at all times to mark, list, and retrieve exhibits. They can also assist each other in taking notes and monitoring the back up system. A third court reporter should be on stand-by for emergencies, and can also be used to transcribe." Ms. Scott also believes that the team of court reporters should not be assigned to any other case until the record of trial has been sent to the military judge for authentication.

Moving the court-martial to the local courthouse created some unexpected issues for the court reporter. It was not discovered until voir dire that the jury box was not wired for sound. While a microphone was found, the air conditioning had to be turned off in the courtroom for the members to be heard. "Next time, I'll speak with one of my local counterparts!"

Once the court-martial was adjourned, work began on transcribing the proceedings and compiling the record of trial. "It was very important that all the court reporters use the same format. Although there are a variety of different formats that are correct, the court reporter should communicate with lead trial counsel to decide on one format to use and stick with it." Ultimately, a team of 10 court reporters volunteered to assist with the preparation of the record, which comprised 22 volumes and 2,586 pages!



The Case of Divided Loyalties

Facts

Capt Coach* is the on-call JAG at Big Air Base. She receives a call from an agent from the Office of Special Investigations seeking a search authorization from the Base Magistrate. Capt Coach is told by the agent that, based on information received from a confidential source, he believes a search of SSgt Sam Subject's personal computer will reveal child pornography. The agent says the source provided reliable information in a similar case. Capt Coach doesn't ask about the source's background, discipline history or the nature of the previous information provided. In a conference call with the Magistrate, Capt Coach advises that she believes probable cause exists to search SSgt Subject's personal computer. The Magistrate authorizes the search, but does not ask for information about the confidential source's reliability, credibility or background. Later, the Magistrate will testify that he does not recall that the agent provided any such information.

SSgt Subject now faces prosecution for possession of child pornography, largely based on evidence obtained in the computer search. The defense moves to compel production of the name of the confidential source. While trial is pending, Capt Coach becomes the area defense counsel (ADC) at Nearby Air Base, an installation in the area. During a visit to Nearby Air Base for an unrelated case, SSgt Subject's defense counsel (the ADC at Big Air Base) shares his suspicions about the confidential source's identity with Capt Coach. Capt Coach recognizes the name as an individual who had been facing discipline at Big Air Base for related events, and now wonders about the informant's reliability and background.

Believing now that she may have evidence that may help SSgt Subject's case, Capt Coach calls her senior defense counsel (SDC). The SDC recommends Capt Coach notify the Big Air Base staff judge advocate (SJA), and talk to SSgt Subject's ADC. Capt Coach speaks to the area defense counsel and the base trial counsel about her knowledge of the search authorization, and offers both some "helpful hints." Only later does she inform the SJA of her knowledge about the search and communications to defense counsel.

Soon thereafter, the defense moves to suppress the computer evidence based on a lack of probable cause. The prosecution complains that Capt Coach assisted the defense improperly and potentially shared confidential information. The defense claims it developed the motion independently.

Rules of Professional Responsibility at Issue

- Air Force Rule of Professional Conduct 1.6 (a) – Confidentiality of Information
- Air Force Rule of Professional Conduct 1.8 (b) – Conflict of Interest: Prohibited Transactions
- Air Force Rule of Professional Conduct 1.9 – Conflict of Interest: Former Client

  A lawyer who has formerly represented a client in a matter shall not thereafter:
  (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation; or
  (b) use information relating to the representation to the disadvantage of the former client, except as Rule 1.6 or Rule 3.3 would permit with respect to a client or when the information has become generally known.

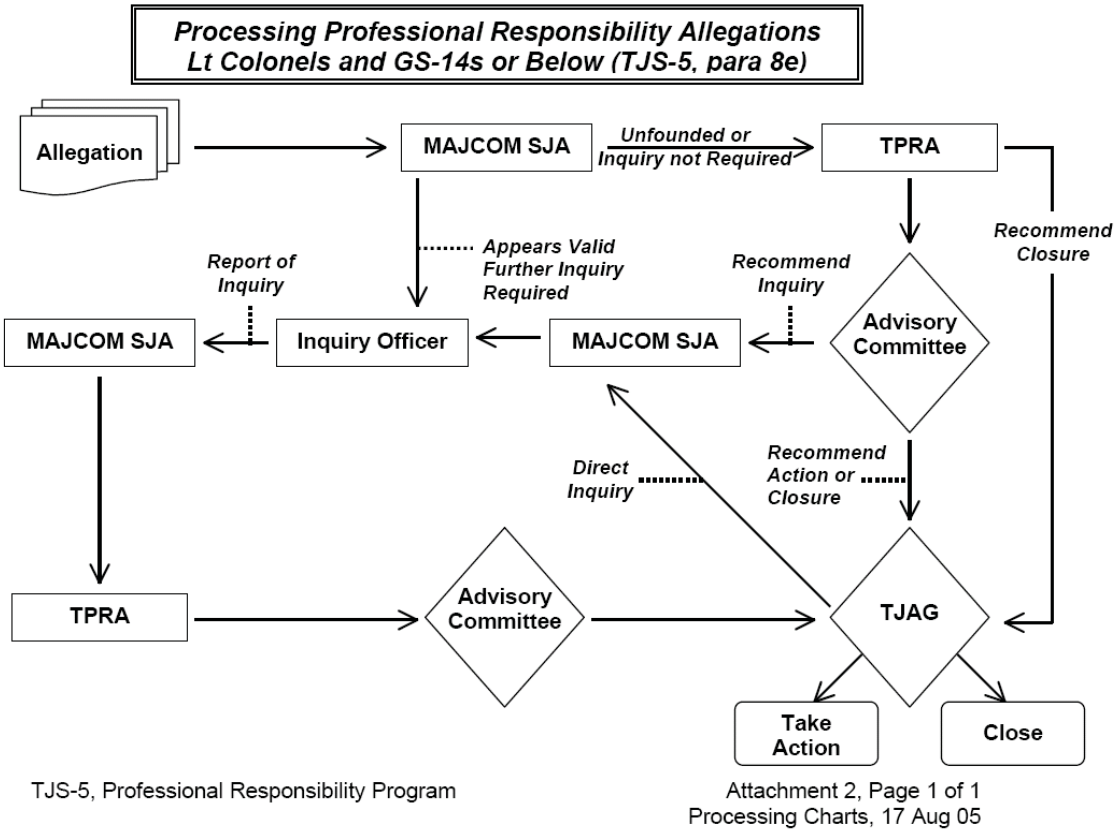
- Air Force Rule of Professional Conduct 1.13 (a) – the Air Force as Client

Take-Aways

In a practice environment with frequent reassignments and an often faceless Air Force client, an attorney's vision may cloud regarding obligations of confidentiality and client loyalty. The Air Force as much as any client deserves absolute loyalty from its attorneys with respect to matters for which the attorney provided counsel. The United States and the accused are parties in the court-martial, but the Department of the Air Force has an interest in the outcome.

The facts surrounding the search authorization in this case are discoverable. But in the absence of a court order, Capt Coach should have sought a release from the Air Force client—through the SJA—before discussing matters related to the investigation. Although there is no evidence she compromised specific confidences, Capt Coach's attempts to "mentor" the defense as she discussed the very search authorization she advised the Air Force to undertake (and that the defense is now attacking) create an appearance of disloyalty in violation of AFRPC 1.9. Neither the absence of specific privileged factual disclosures nor a ruling by the military judge in the defense's favor cure the apparent breach, although they do lessen its seriousness. Air Force officials should have confidence that Air Force lawyers will only discuss sensitive matters and their advice with respect to those matters with proper authority.

Names, locations and some details have been changed throughout the case study



*"TPRA" is "TJAG Professional Responsibility Administrator."

Questions about this scenario or any other issue relating to the Rules of Professional Conduct should be directed to the Professional Responsibility Division, AF/JAU, afjau.workflow@pentagon.af.mil or DSN 426-9029, COMM (703) 696-9029.

Ask the Expert

I am an area defense counsel with a client facing court-martial charges. After thoroughly reviewing his options with me, he has elected to submit a Chapter 4 request for a discharge in lieu of court-martial. Other than the actual request, is there any additional paperwork that I should review with him in case he changes his mind after he is discharged?

This issue has recently been the subject of litigation. In *Metz v. United States*, 2006 U.S. App. LEXIS 23683 (Fed. Cir. Sept. 18, 2006), the Court of Appeals for the Federal Circuit addressed the issue of "ineffective assistance of counsel" (IAC) in the context of an administrative discharge in lieu of court-martial (Chapter 4). In *Metz*, the plaintiff challenged the voluntariness of his under other than honorable conditions (UOTHC) discharge, stating that he relied on his defense counsel's inadequate advice when he opted to accept the UOTHC. He sought money damages under the Tucker Act (28 U.S.C.§ 1491) and Military Pay Act (37 U.S.C. § 204). The court held that where a plaintiff fails to first raise IAC at the Air Force Board for Correction of Military Records (AFBMCR), the issue is waived.

HQ AF/JAA anticipates the AFBCMR will need to address IAC claims more frequently. This decision has potential implications for both trial and defense practitioners. Defense counsel need to be aware that dissatisfied clients may challenge their advice in discharge cases, particularly recommendations to accept discharges in lieu of court-martial. Defense counsel should consider taking preventative measures, such as thorough memorandums for record (MFRs) to document pre-decisional conversations.

Likewise, legal offices should carefully prepare legal reviews that recommend acceptance of such discharges to the convening authority (CA). Many times, in an effort to convince the CA the case should not proceed to court-martial, legal offices highlight significant evidentiary or other flaws in the case. These same legal reviews may become Petitioner Exhibit A at the AFBCMR and result in the undoing of the very discharge they were intended to secure. Nothing prohibits base legal offices from supplementing discharge files with additional MFRs signed by the accused containing language, under oath, such as, "My decision to submit this request is voluntary on my part. I understand that the voluntary nature of this decision may likely preclude any future attempt by me to invalidate any administrative discharge or to upgrade the characterization of any administrative discharge."

We have just received a congressional inquiry on behalf of a constituent for information about the constituent. Do we have to get the permission of the individual prior to responding?

No, you do not. Members of Congress frequently ask for Privacy Act information regarding a constituent based on a request for help from the constituent. You may answer these requests without permission from the subject of the record. The authority for this disclosure is the *routine use* exception. *Routine uses* are defined in each Privacy Act System Notice and establish the proper uses of the records in that system. In addition to the specific uses enumerated in each system notice, the *blanket routine uses* are incorporated. The *routine use* that applies to congressional inquiries is located in the *blanket routine* uses. This section states, "Disclosure from a system of records maintained by this component may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual."

Where can I find the most current and complete guidance for the Freedom of Information Act and the Privacy Act? These issues seem to come up a lot. Can you help?

Every two years, the Department of Justice (DOJ) publishes an updated FOIA Guide and Privacy Act Overview. It is considered the seminal reference source in both areas of the law. The new guide is currently scheduled to be available this December. To obtain a copy of the guide or to check out various FOIA training opportunities offered by DOJ, visit their FOIA website at http://www.usdoj.gov/oip/index.html.

We recently had a commander order a military member into the Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program. Can this be considered a coerced mental health referral?

A superior who coerces an Airman to go to the ADAPT program has not committed a mental health evaluation (MHE) violation under AFI 44-109, *Mental Health, Confidentiality, and Military Law*. These are two different programs with two different sets of rules and purposes.

AFI 44-109, para 4.2, states that while commanders or supervisory personnel may encourage Air Force members to voluntarily seek mental health care, they may not attempt to coerce members to "voluntarily" seek a mental health evaluation. Attachment 1 to the AFI states that a "commander-directed evaluation does not include interviews conducted by the Family Advocacy Program or Service's drug and alcohol abuse rehabilitation program personnel." Thus, a referral to ADAPT is not covered by AFI 44-109. AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, Chapter 3, contains the rules for referring a member to ADAPT. AFI 44-121 indicates that only the commander can "refer" a member to ADAPT. However, AFI 44-121 contains no coercion provision similar to that found in AFI 44-109. Arguably, it is an acceptable practice to convince an Airman to go to ADAPT under situations that could constitute "coercion" in the MHE context, such as when an Airman gets a DUI and agrees to go to ADAPT in return for a lighter punishment under Article 15, non-judicial punishment proceedings.

This does not mean that coercion to enter the ADAPT program is necessarily proper. Situations might arise where a superior's actions constitute abuse of authority or violation of another law, policy, or instruction.

We know that a member can be discharged for use of an "intoxicating substance" under AFI 36-3208, para 5.54.1. How is "intoxicating substance" defined? We have an office bet on this.

When determining what constitutes an "intoxicating substance," JAGs should consider the broad definition of "intoxication" contained in AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, as well as whether or not the substance was intended for human ingestion. The latter consideration helps distinguish abuse of substances that could form the basis for discharge from those substances which may produce intoxicating effects but are intended for ingestion without need of a prescription (e.g., vitamin supplements, nicotine, or caffeine). Evaluation of the substance's toxicological or behavioral effects is also important. In most cases, aerosol products (such as "Dust Off"), glue, or other types of inhalants will produce altered physiological responses and can be considered intoxicating. Herbs (such as salvia) and other substances taken orally will also require scrutiny. Few objective tests exist to confirm the presence of the intoxicating substances referenced in paragraph 5.54.1 in bodily fluids and tissues. JAGs should work closely with experts at the Air Force Drug Testing Laboratory as well as with their higher headquarters when considering administrative discharge based on novel or unique intoxicating substances.

HQ AF/JAA provided our expert answers! If you have a question you would like to pose to our experts, please e-mail your question to Major Brad Mitchell, bradley.mitchell@maxwell.af.mil.

Question to the Field…

Question:
What experience from the 2006 KEYSTONE Leadership Summit have you found most valuable as a leader and as a member of the JAG Corps?

Lt Col Michael Guillory
(FL-ANG)
Staff Judge Advocate
601 AOC/JA
Tyndall AFB, FL

"Effective communication is a prerequisite of good leadership. The discussions at KEYSTONE drove home how each of us processes information differently, even amongst an otherwise homogenous group of attorneys. In the information age we must remember that e-mail is no substitute for important exchanges where effective communication is essential."

Lt Col Perry Peloquin
Staff Judge Advocate
355 WG/JA
Davis-Monthan AFB, AZ

"Getting the perspectives of AF leaders like Lt Gen Howie Chandler and Lt Gen Raymond Johns re-inspires and sharpens one's focus. Their insight and message tie together the numerous functional areas into a one big AF picture, reminding us that we are, first and foremost, officers and NCOs in the this great Air Force."

MSgt Bernadette Garces
Law Office Superintendent
437AW/JA
Charleston AFB, SC

"The Media Relations training by SAF/PAM showed me how quick a conversation or interview can be turned against you. You must be on your guard no matter who you are speaking with!"

Mr. Joseph Kinlin
Air Force Legal Career
Program Administrator
Randolph AFB, TX

"The participation of our senior leadership was the most valuable. Not simply their presentations, but also when they made themselves available to conference attendees in social as well as seminar settings. It was a great two-way dialogue."

USE OF OPERATIONS AND MAINTENANCE FUNDS DURING DEPLOYMENTS

By Mr. W. Darrell Phillips*

The increasing pace of overseas deployments has resulted in numerous, and often novel, issues concerning the proper use of Operation and Maintenance (O&M) funds, since those are the only appropriated funds that a deployed commander easily can access. This article summarizes the process by which the Congress authorizes and appropriates O&M funds, and then examines the proper uses of O&M funds for three common requirements during deployments: construction, training, and humanitarian assistance. Finally, the article examines two specific authorizations that permit "augmentation" of other appropriated funds, the Commanders' Emergency Response Program (currently unique to Iraq and Afghanistan) and the Combatant Commander Initiative Fund.

O&M funds are intended to pay for expenses while in garrison and during exercises, deployments, and military operations. As the Comptroller General explained in opinion B-213137, 63 Comp. Gen. 422 (Jun. 22, 1984), the "necessary expense rule" requires that any expense must be for a particular statutory purpose, or necessary and incident to proper execution of the general purpose of the appropriation; must not be prohibited by law; and must not otherwise be provided for by some other appropriation.

Authorization and Appropriation of O&M Funds

For each fiscal year, the Congress passes two acts that authorize programs funded by O&M and appropriate funds to pay for those operations. Although the formal names of the acts may vary from year to year, they generally are a National Defense Authorization Act (NDAA) and a National Defense Appropriations Act [for fiscal year (FY) 2006 called the Department of Defense Appropriations Act]. The point is often made, but bears repeating, that the Department of Defense (DOD) cannot incur obligations or expend funds until both the requisite authorization act and appropriations act have been enacted; to do so would violate 31 U.S.C. § 1341, a provision of the so-called "Anti-Deficiency Act." Each year, the Office of the Under Secretary of Defense (Comptroller) and the Deputy General Counsel (Fiscal) carefully examine the authorizations and appropriations acts to determine what operations the Congress may have ceased to authorize, what changes may have been made to existing authorizations, or what new operations have been authorized. For example, Section 1206 of the NDAA for FY 2006 authorized the President to direct the Secretary of Defense to expend up to $200 million of O&M funds for each of FYs 2006 and 2007 to conduct or support a program to build the capacity of a country's military forces to conduct counterterrorist operations or to participate in or support military and stability operations in which the U.S. armed forces participate.

Further complicating the military expenditures is the body of law contained in the 50 titles of the United States Code. For DOD fiscal law purposes, the significant titles are Title 10, Armed Forces; Title 31, Money and Finance; and Title 32, National Guard. During deployments, however, U.S. armed forces may run the risk of conducting activities that are authorized to be conducted by the Department of State (DOS) under Title 22, Foreign Relations and Intercourse, and, thereby, might use "Title 10 funds" to unlawfully augment "Title 22 funds." Also, other titles of the U.S. Code may affect operations, such as Title 40, Public Buildings, Property, and Works; which contains the Foreign Excess Property Act (40 U.S.C. §§ 701-705). Under that act, U.S. armed forces may be able to dispose of property that is no longer needed following deployment/redeployment.

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When the Congress enacts an authorization or appropriations act, it thereby may amend or create a provision in one of the titles of the U.S. Code (for example, Section 1201 of the NDAA for FY 2006 amended 10 U.S.C. § 401, Humanitarian and Civic Assistance (HCA), to add surgical care and certain types of education, training, and technical assistance to the HCA activities that can be provided to inhabitants of a foreign country during U.S. military operations). The Congress, however, may use an authorization or appropriations act to create or continue a requirement without ever placing it into the U.S. Code. For example, in each NDAA since 1999, the Congress has imposed a requirement that DOS certify that foreign military personnel or units to be trained by U.S. forces have not committed a gross violation of human rights, but it has never been enacted into Title 10 or Title 22. Consequently, comptrollers and judge advocates at all echelons must be vigilant to determine the current state of the law regarding the proper obligation of O&M funds.

Use of O&M Funds for Construction

The initial determination is whether the proposed construction is authorized to be funded using either O&M funds or military construction ("MILCON") funds that have been provided pursuant to a Military Construction Authorization Act and a Military Construction Appropriations Act. The statutory authority for military construction is contained in 10 U.S.C. §§ 2801-2808 and, in particular, 10 U.S.C. § 2805, Unspecified Minor Construction. "Unspecified" means that the project was not a line item in a military construction authorization act or appropriations act, and "minor" means that it has an approved cost of not more than $1.5 million. At the outset, remember that U.S. forces have to be the primary recipients of any military construction project, and that foreign countries and their forces may receive only a "minor and incidental" benefit from the construction.

Title 10, U.S.C., section 2805 specifically delineates between use of O&M funds and MILCON funds for construction. Specifically, subsection 2805(c) permits the Service Secretary (subject to delegation of authority) to expend up to $1.5 million of O&M funds for an unspecified minor military construction project that is "intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening," or $750,000 for any other unspecified minor military construction project. The latter amount is the normal limit; however, the Congress and the Government Accountability Office (GAO) well may scrutinize any O&M-funded project valued at more than $750,000. Also, 10 U.S.C. § 2805(b) requires that any unspecified minor military construction project costing more than $750,000 (regardless of whether O&M funds or MILCON funds are used) must be approved by the Service Secretary and reported to the Congress at least 14 days before commencing the project.

"Construction" is a highly regulated activity. Whenever "construction" is projected, a number of issues need to be resolved. First and foremost is the "scope" of the project. Title 10, U.S.C., section 2801 specifies that all military construction projects, regardless of type of funds, must include all work necessary to produce a "complete and usable facility" or a "complete and usable improvement to an existing facility." Numerous Comptroller General opinions prohibit the practices of "project splitting" or "project incrementation" (e.g., awarding several smaller contracts, each for less than $750,000, designed to accomplish a unified purpose) or "project phasing" (awarding a project for less than $750,000 in one FY, then another project the subsequent FY, etc., all intended to accomplish a unified purpose). Title 10, U.S.C., section 2801 defines "construction" as "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements." An "installation" is defined as a "base, camp, post, station, yard, center, or other activity under [military jurisdiction] or, in the case of an activity in a foreign country, under [military] operational control, without regard to the duration of operational control."

Comptrollers and judge advocates should be aware of the distinctions among "construction," "maintenance," and "repair." For further guidance, refer to 10 U.S.C. § 2811, Repair of Facilities; 10 U.S.C. § 2854, Restoration or Replacement of Damaged or Destroyed

Facilities; and an Under Secretary of Defense (Comptroller) memorandum titled Definitions for Repair and Maintenance, 2 July 1997. The military service regulations also contain extremely precise rules as to what constitutes "construction," "maintenance," and "repair," and what expenses must be included in the funded cost. See Air Force Instruction (AFI) 32-1021, AFI 32-1032, Army Regulation (AR) 415-15, AR 420-10, Department of the Army (DA) Pamphlet 420-11, and OPNAVINST 11010.20F.

In response to DOD's request for a more efficient and flexible authority to expend O&M funds for "combat and contingency related construction," the Congress enacted section 2808 in the NDAA for FY 2004. That provision authorized the Secretary of Defense to obligate up to $200 million of DOD O&M funds, during FY 2004, for "combat and contingency related construction," when the Secretary determined that it was necessary "to meet urgent military operation requirements" in support of a declaration of war, a Presidential declaration of a national emergency, or a contingency operation. That authority was retained in the NDAA for FY 2005 and in section 2809 of the NDAA for FY 2006, but the latter provision reduced the limit to $100 million for FY 2006. Section 2802 of the NDAA for FY 2007 retained that limit for FY 2007.

"Combat and contingency-related construction" is not subject to the limitations found in 10 U.S.C. § 2805(c); however, any project costing more than $750,000 still must be approved by the Service Secretary and reported to the Congress pursuant to 10 U.S.C. § 2805(b). In addition, the military service regulations may establish certain requirements. For example, Chapter 7 of AFI 32-1032 requires that the project be designed and built as temporary construction that will be abandoned at the termination of operational requirements, that relocatable or semi-permanent construction should be used to the maximum extent possible, and that the facility is not to be turned over to "other organizations" and used by them beyond the original Air Force requirement.

Training of Foreign Forces Using O&M Funds

Unfortunately, the rules over funding for training foreign forces and conducting various conferences and meetings are even more complicated than are those for construction. This is due to the lack of a unified statute. Rather, there exists a series of statutes that differ greatly as to the following:

- The type of funds that can be used (for example, Title 10 O&M funds versus Title 22 Foreign Assistance funds)
- the intended beneficiaries of the activity
- the types of reimbursable expenses
- where the activity can take place (in or outside the United States); and
- whether the funds can be used to reimburse the expenses of participating U.S. personnel.

The previously-cited Comptroller General opinion considered the issue of providing certain types of training to the Honduran armed forces. As an overarching rule, it stated that training of foreign forces generally must be purchased by that country using either its funds or funds appropriated by the Congress for that country's use under the Foreign Military Financing Program. The Comptroller General stated that DOD O&M funds can be expended to provide familiarization (interoperability) and safety training, but not if such training would rise to the level normally provided by U.S. security assistance programs. Obviously, the determination of whether training reaches the "security assistance" level will depend upon the circumstances, but the Comptroller General found that 3 to 5 weeks of combat medic training and 3 to 4 weeks of artillery training were clear violations of the familiarization (interoperability) and safety training standard.

In response to the cited Comptroller General opinion, the Congress enacted a series of statutes that authorize using Title 10 O&M funds to train, or train with, foreign military and security forces, or to conduct conferences with foreign military and security forces. The crucial point to remember is that each statute varies as to the nature of the activity, the intended beneficiaries, and what, if any, expenses of U.S. personnel can be reimbursed. Accordingly, the current wording

of each statute must be closely examined prior to making any commitments.

- 10 U.S.C. § 168, Military-to-Military Contacts and Comparable Activities (generally conducted by combatant commanders to encourage a democratic orientation of defense establishments and military forces of other countries)
- 10 U.S.C. § 1050, Latin American Cooperation (very broad authority - to pay for personal expenses of Latin American officers and students as "necessary for Latin American cooperation")
- 10 U.S.C. § 1051, Bilateral or Regional Cooperation Programs (conferences, seminars, or similar meetings generally conducted by combatant commanders "in the national security interests of the United States")
- 10 U.S.C. § 2010, Participation by Developing Countries in Combined Exercises
- 10 U.S.C. § 2011, Special Operations Forces: Training with Friendly Foreign Forces (uses SOF-unique MFP-11 funds)

Section 8060 of DOD Appropriations Act for FY 2007 continues a requirement first imposed in 1999 that DOD cannot use its funds for training foreign military and defense forces where credible information from the DOS indicates that the foreign unit to be trained has committed "a gross violation of human rights, unless necessary corrective actions have been taken." A message dated 1 December 1999 from the Joint Chiefs of Staff provided guidance as to what types of training or other activities were included within the requirement.

Finally, Section 9006 of the DOD Appropriations Act for FY 2006 authorizes the Secretary of Defense to use up to $500 million of FY 2006 O&M funds to "train, equip, and provide related assistance only to military or security forces of Iraq and Afghanistan to enhance their capability to combat terrorism and to support United States military operations in Iraq and Afghanistan." This authority may include provision of equipment, supplies, services, training, and funding, and is in addition to other authority to provide assistance to foreign nations (that is, it is an authorized augmentation of other available funding, and using the authority will not constitute a violation of the Anti-Deficiency Act).

Humanitarian Assistance Programs Using O&M Funds

The main point of confusion in funding Humanitarian Assistance Programs (HAP) is the distinction as to which authorized activities can be funded with DOD O&M funds appropriated to the Military Services as opposed to those that can be funded with a fenced category of DOD O&M funds referred to as Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) funds. The Congress and the Defense Security Cooperation Agency (DSCA)—which HAP oversees—have carefully delineated which funds must be used for which activities.

In the course of the GAO's 1984 to 1986 inquiry that led to the issuance of the previously-cited Comptroller General opinion, the Comptroller General determined that, at that time, DOD had no statutory authority to provide humanitarian assistance to foreign nations or their people. As a result, the Congress enacted a series of statutes (now codified in Title 10) that collectively became known as OHDACA. They are DOD's sole statutory authority for using O&M funds for HAP. The various OHDACA activities initially were separately funded, but, beginning in 1996, the Congress included a specific OHDACA appropriation in each year's National Defense Appropriations Act. Generally, the amount has ranged between $50 and $60 million each FY [the FY 2007 OHDACA appropriation is $63,204,000]. However, during the years since 1996, it became obvious that the usual OHDACA appropriation was not enough to conduct all the OHDACA activities, which led the Congress and DSCA to delineate just which activities would be funded using service O&M funds and which would be funded using the OHDACA O&M appropriation.

The OHDACA statutes are codified at 10 U.S.C. §§ 401, 402, 404, 2557, and 2561. Some of the activities under 10 U.S.C. § 401 are funded from service O&M funds, and one from OHDACA funds. The activities under the other OHDACA statutes are all funded using OHDACA funds.

Title 10, U.S.C., section 401, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations, permits DOD to carry out a range of HCA assistance. There are a number of statutory conditions that must be met:

- The assistance must promote the national security interests of both the U.S. and the beneficiary country;
- The assistance must promote the specific operational readiness skills of the U.S. forces who participate;
- The Secretary of State must approve all such assistance;
- The assistance shall complement, but may not duplicate, other U.S. assistance to the beneficiary nation;
- The assistance must serve the basic economic and social needs of the beneficiary nation; and
- The assistance must not be provided to any individual, group, or organization engaged in military or paramilitary activity.

The DSCA requires that any labor in conjunction with the assistance be performed by U.S. military personnel. Guidance for obtaining approval for, and conducting, HCA is contained in DOD Directive 2205.2, "Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations," and DOD Instruction 2205.3, "Implementing Procedures for the Humanitarian and Civic Assistance (HCA) Program." DOD Directive 2205.2 also requires the beneficiary country to approve the proposed HCA assistance.

Section 401 assistance that can be funded with service O&M funds includes:

- Medical, surgical, dental, and veterinary care provided in areas of a country that are rural or underserved, including education, training, and technical assistance related to the care provided;
- Construction of rudimentary surface transportation systems;
- Well drilling and construction of basic sanitation systems; and
- Rudimentary construction and repair of public facilities.

Additionally, Section 401(c)(4) authorizes what has become known as "de minimis" HCA. This could arise either during a planned HCA program or during an exercise or deployment with no planned HCA. Per the legislative history for 10 U.S.C. § 401, it's clear that the Congress recognized that it might be appropriate to incur "minimal expenditures" of DOD O&M funds for "incidental costs" of carrying out HCA. The Congress provided examples that have been incorporated into DOD Directive 2205.2 (for example, a unit doctor's examination of local villagers for a few hours with administration of several shots and issuance of some medicine, but not deployment of a medical team to provide mass inoculations to the local populace; opening of an access road through trees and underbrush for several hundred yards, but not the asphalting of such roadway).

Factors to consider when determining whether "de minimis" assistance would incur only "incidental costs" are: the "reasonableness" of the activity (whether a reasonable person would conclude that it was "incidental" to the exercise or deployment); the support cannot be the sort of foreign assistance provided by US Agency for International Development (USAID); and the assistance should not significantly impact the unit's readiness training or funding.

Please note that "de minimis" assistance generally is funded from the unit's O&M account, with little possibility of reimbursement. Consequently, some combatant commands have set maximum limits on "de minimis" expenditures during an exercise or deployment. Therefore, be sure you know the limitation (or contact the appropriate combatant command) before undertaking "de minimis" assistance.

The annual OHDACA appropriation provides reimbursement for unit O&M expenditures incurred pursuant to assistance provided under the following statutes:

- 10 U.S.C. § 401(e)(5), the Humanitarian Demining Program
- 10 U.S.C. § 402, Transportation of Humanitarian Relief Supplies to Foreign Countries (the "Denton Program")
- 10 U.S.C. § 404, Foreign Disaster Assistance (different than 22 U.S.C. § 2292, Foreign Disaster Relief, which is administered by USAID)

- 10 U.S.C. § 2557, Excess Nonlethal Supplies (do not confuse with 22 U.S.C. § 2321j, a form of Presidential drawdown of excess defense articles)
- 10 U.S.C. § 2561, Humanitarian Assistance

It is beyond the scope of this article to examine each of these forms of assistance. A unit's primary concern is to be reimbursed by DSCA for unit O&M expenditures. Therefore, comptroller personnel should note carefully whether the particular deployment order contains an emergency and special program code (ESP Code) and ensure that expenditures refer to the ESP Code in order to obtain reimbursement. For detailed information on OHDACA authorities, and DSCA guidance, access the DSCA website at http://www.dsca.mil/programs/HA/HA.htm.

Commanders' Emergency Response Program (CERP)

When U.S. forces occupied Iraq in 2003, they began to find stashes of money hidden by Saddam Hussein. Under the authority of the law of armed conflict, U.S. commanders were able to use these funds to assist the Iraqi people. Once those funds were expended, the Congress authorized DOD to use O&M funds to conduct what is known as CERP. Section 1202 of the NDAA for FY 2006 continues the authorization of the CERP program, and Section 9006 of the DOD Appropriations Act for FY 2007 authorizes the Secretary of Defense to use up to $500 million of FY 2006 O&M funds for the purpose of "enabling [United States] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the people of Iraq [and Afghanistan]."

Current CERP guidance is contained in a 27 July 2005 memorandum from the Office of the Under Secretary of Defense (Comptroller) and in Chapter 27, Volume 12 of the *DOD Financial Management Regulation* (DOD FMR). A wide range of projects may be conducted using CERP funds; however, CERP funding cannot be used for direct or indirect support of U.S. and coalition allies, or for training or supporting the Iraqi or Afghan military or security forces (since other funding sources are available for those purposes). Also, a series of fragmentary orders (FRAGOs) have been published in both Iraq and Afghanistan that contain detailed local guidance on CERP projects and procedures.

Combatant Commander Initiative Fund (CIF)

The CIF has been authorized by the Congress since FY 1994. That authority now is codified in 10 U.S.C. § 166a. Generally, the Congress annually has appropriated $25 million of O&M funds to the Chairman of the Joint Chiefs of Staff, in order to fund 10 different CIF activities. The CIF statute avoids Anti-Deficiency Act violations by stating that the funds provided "shall be in addition to amounts otherwise available for [each CIF] activity for that fiscal year." The statute does not require that U.S. forces obtain any training or other benefit, and does not prohibit providing assistance to foreign military forces. Guidance is contained in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01B, "Combatant Commander Initiative Fund."

Conclusion

The proper use of O&M funds during an overseas deployment, exercise, or other military operation is a complex area, and changes can occur on a yearly basis as the Congress re-evaluates programs and funding. Nevertheless, there is almost always a legal authority to obligate or expend funds for activities that are necessary and incident to our military operations. The deployed comptroller and judge advocate must work closely to ensure that well-meaning commanders do not violate the law or directives, and that other staff offices are aware of the fiscal implications of their activities. Fortunately, the number of comptrollers and judge advocates who are well-versed in this area has expanded greatly over the last decade. Do not hesitate to inquire up the chain of command, and to use other reachback assets, in order to provide your commander with the best possible advice.

New Developments in the Law

THE NEW ARTICLE 120, UCMJ
Big Changes in Prosecuting Sexual Offenses Committed on and after 1 October 2007

By Lt Col Thomas E. Wand,* USAF

Introduction

The National Defense Authorization Act for Fiscal Year 2006 included a significant expansion of the categories of sexual offenses to be charged under Article 120, Uniform Code of Military Justice (UCMJ). The change is effective 1 October 2007. The new Article 120 looks different than other articles of the UCMJ, including many details that experienced military justice practitioners would normally expect to find in the Manual for Courts-Martial (MCM). The new Article more closely follows Title 18 of the U.S. Code in addressing sexual offenses. It subsumes some offenses formerly set out in the MCM as examples of offenses under the general article, Article 134, UCMJ.

This piece is not intended as an exhaustive treatment of, or an endorsement of, the legislation. Rather, it is an introduction to hopefully aid in understanding the new Article 120 which, like it or not, will soon be effective. Perhaps the best way to use this piece is to first read through the new statute quickly once, then read this piece, then go back and re-read the new statute. The new statute is reprinted following this piece.

The Basic Structure of the New Article

The new Article 120 proscribes a series of 14 graded offenses. They are:

1) rape;

2) rape of a child;

3) aggravated sexual assault;

4) aggravated sexual assault of a child;

5) aggravated sexual contact;

6) aggravated sexual abuse of a child;

7) aggravated sexual contact with a child;

8) abusive sexual contact;

9) abusive sexual contact with a child;

10) indecent liberty with a child;

11) indecent act;

12) forcible pandering;

13) wrongful sexual contact, and

14) indecent exposure.

The new article prescribes special rules regarding proof of, and the effect of:

a) ages of children;

b) threats;

c) marriage; and

d) consent and mistake of fact as to consent.

The new article sets out 16 enumerated definitions:

1) sexual act;

2) sexual contact;

3) grievous bodily harm;

4) dangerous weapon or object;

5) force;

6) "threatening or placing that other person in fear" for certain offenses;

7) "threatening or placing that other person in fear" for certain other offenses;

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8) bodily harm;

9) child;

10) lewd act;

11) indecent liberty;

12) indecent conduct;

13) prostitution;

14) consent;

15) mistake of fact as to consent, and

16) affirmative defense.

Combining Key Factors

A recurring pattern in the new Article 120 is to categorize offenses according to combinations of the nature of the sexual conduct (e.g., "act" versus "contact"), the way the sexual conduct came about (e.g., force, different kinds of "threats," causing bodily harm or "grievous" bodily harm, victim "substantially incapacitated" versus "administering" drug to unknowing victim), and the age of the victim (under 12, at least 12 but under 16, 16 and over). In the statute itself, this is done by several paragraphs referring to other paragraphs, which sometimes refer, in turn, to still other paragraphs. Some examples of this pattern will be discussed a little farther below.

Two of the most significant definitions are "sexual act" and "sexual contact" and will be set out here in some detail. A "sexual act" is contact between the penis and the vulva and occurs upon penetration, however slight; or the penetration, however slight, of the genital opening of another by hand or finger or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. "Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

All terms in the statute, whether or not set out as enumerated definitions, are critical. To not repeat the statute verbatim here, this piece will employ some "shorthand" to describe some of the various ways by which sexual offenses can be committed under the statute. The statute itself, however, should be consulted for precise wording.

Two of the offenses involving a "sexual act" are "rape" and "aggravated sexual assault."

Any person subject to the UCMJ will be guilty of "rape" who causes another person to engage in a sexual act by: 1) using force against that person; 2) causing grievous bodily harm to any person; 3) threatening or placing that person in fear of death, grievous bodily harm, or kidnapping; 4) rendering another person unconscious; or 5) administering a drug, intoxicant, or similar substance to an unknowing victim or by force, and thereby substantially impairing that person's ability to appraise or control conduct.

If, instead, the accused: 1) causes the sexual act by threatening or placing that other person in fear of something other than death, grievous bodily harm or kidnapping, or by causing bodily harm; or 2) engages in the sexual act with another person who is substantially incapacitated, or substantially incapable of appraising the nature of the sexual act, declining participation in the sexual act or communicating unwillingness to engage in the sexual act, then the accused is guilty of "aggravated sexual assault."

As part of the "recurring pattern" referenced earlier, a person subject to the UCMJ who, instead of a sexual act, engages in or causes "sexual contact" under any of the circumstances described for "rape," will be guilty of "aggravated sexual contact." If, however, the "sexual contact" is caused by or engaged in under any of the circumstances described for "aggravated sexual assault," then the offense will be "abusive sexual contact." If the sexual contact is committed without legal justification or lawful authorization, under circumstances not amounting to any of the foregoing, but still without the other person's permission, the offense will be "wrongful sexual contact."

As noted, the age of the victim is another factor that overlays the pattern of combining factors to properly characterize offenses under the new Article 120. As examples, engaging in a

sexual "act" with a child under the age of 12 under any circumstances will be "rape of a child." (Of course, a sexual act with a child of any age under circumstances amounting to rape will also be rape of a child.) Engaging in sexual "contact" with a child who is under 12 will be "aggravated sexual contact with a child." Engaging in or causing a sexual "act" with a child between the ages of 12 to 16 (under circumstances not amounting to rape) will be "aggravated sexual assault of a child." Engaging in or causing sexual "contact" with a child between the ages of 12 to 16 will be "abusive sexual contact with a child."

Some offenses in the new Article 120 are "stand-alone" offenses defined in the statute. These include such offenses as "forcible pandering" and "indecent exposure."

Matters of Proof

In addition to substantive offenses, and as noted above, the statute contains some special rules regarding proof. One of the biggest changes from the current Article 120 is that "without consent" will no longer be an element of rape. Lack of permission will only be an element of the offense of "wrongful sexual contact," according to the new statute. Consent and mistake of fact as to consent are said to be neither an issue nor an affirmative defense for most sexual offenses. Consent and mistake of fact as to consent are listed as an affirmative defense only for "rape," "aggravated sexual assault," "aggravated sexual contact," and "abusive sexual contact."

In defining an "affirmative defense," the new statute provides that the accused has the burden of proving the affirmative defense by a preponderance of the evidence. If the defense meets this burden, the prosecution will then have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. This, and other rules regarding proof and the effect of proof of various factors in the new statute (e.g., marriage, age) could be the subject of an entirely separate piece.

Timing

The Joint Service Committee on Military Justice has drafted MCM provisions, including sample specifications, conforming to the new statute, together with modified maximum punishments. These provisions were published in the Federal Register and opened for public comment. A hearing was announced and held for public comment. After public comments were received and addressed, the draft MCM provisions were again published in the Federal Register on 28 December 2006. As of this writing, the provisions were with the Department of Defense General Counsel's office for editing. It is highly unlikely a new edition of the MCM containing the provisions will be published by 1 October 2007. The chances are still good, however, the President will sign an Executive Order approving new MCM provisions by that date.

Care must be taken, depending upon dates of offenses, to correctly determine maximum punishments; be they the current ones, the interim ones set by Congress if the President does not sign an effecting Executive Order in time, or new maximum punishments prescribed by the President.

Finally, remember that the new Article 120 only applies to offenses committed on and after 1 October 2007.

Conclusion

Given the lengthy statutes of limitations for rape and child abuse, military justice will be operating under two systems in the area of sex offenses for the foreseeable future. This will present many interesting challenges. Learn the new system, but don't throw away those old MCMs just yet.

The relevant section of Public Law 109-163, the National Defense Authorization Act for Fiscal Year 2006, is reproduced on the following pages. The proposed amendments to the Manual for Courts-Martial can be found at 71 Fed. Reg. 78,137 (Dec. 28, 2006), or http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/E6-22107.pdf.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006

SEC. 552. RAPE, SEXUAL ASSAULT, AND OTHER SEXUAL MISCONDUCT UNDER UNIFORM CODE OF MILITARY JUSTICE.

(a) REVISION TO UCMJ.—

(1) IN GENERAL.—Section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), is amended to read as follows:

"§ 920. Art. 120. Rape, sexual assault, and other sexual misconduct

"(a) RAPE.—Any person subject to this chapter who causes another person of any age to engage in a sexual act by—

"(1) using force against that other person;

"(2) causing grievous bodily harm to any person;

"(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnaping;

"(4) rendering another person unconscious; or

"(5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

"(b) RAPE OF A CHILD.—Any person subject to this chapter who—

"(1) engages in a sexual act with a child who has not attained the age of 12 years; or

"(2) engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years;

is guilty of rape of a child and shall be punished as a court-martial may direct.

"(c) AGGRAVATED SEXUAL ASSAULT.—Any person subject to this chapter who—

"(1) causes another person of any age to engage in a sexual act by—

"(A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or

"(B) causing bodily harm; or

"(2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—

"(A) appraising the nature of the sexual act;

"(B) declining participation in the sexual act; or

"(C) communicating unwillingness to engage in the sexual act;

is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.

"(d) AGGRAVATED SEXUAL ASSAULT OF A CHILD.—Any person subject to this chapter who engages in a sexual act with a child who has attained the age of 12 years is guilty of aggravated sexual assault of a child and shall be punished as a court-martial may direct.

"(e) AGGRAVATED SEXUAL CONTACT.—Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the

sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

"(f) AGGRAVATED SEXUAL ABUSE OF A CHILD.—Any person subject to this chapter who engages in a lewd act with a child is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct.

"(g) AGGRAVATED SEXUAL CONTACT WITH A CHILD.—Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (b) (rape of a child) had the sexual contact been a sexual act, is guilty of aggravated sexual contact with a child and shall be punished as a court-martial may direct.

"(h) ABUSIVE SEXUAL CONTACT.—Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

"(i) ABUSIVE SEXUAL CONTACT WITH A CHILD.—Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (d) (aggravated sexual assault of a child) had the sexual contact been a sexual act, is guilty of abusive sexual contact with a child and shall be punished as a court-martial may direct.

"(j) INDECENT LIBERTY WITH A CHILD.—Any person subject to this chapter who engages in indecent liberty in the physical presence of a child—

"(1) with the intent to arouse, appeal to, or gratify the sexual desire of any person; or

"(2) with the intent to abuse, humiliate, or degrade any person;

is guilty of indecent liberty with a child and shall be punished as a court-martial may direct.

"(k) INDECENT ACT.—Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

"(l) FORCIBLE PANDERING.—Any person subject to this chapter who compels another person to engage in an act of prostitution with another person to be directed to said person is guilty of forcible pandering and shall be punished as a court-martial may direct.

"(m) WRONGFUL SEXUAL CONTACT.—Any person subject to this chapter who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

"(n) INDECENT EXPOSURE.—Any person subject to this chapter who intentionally exposes, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall by punished as a court-martial may direct.

"(o) AGE OF CHILD.—

"(1) TWELVE YEARS.—In a prosecution under subsection (b) (rape of a child), subsection (g) (aggravated sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 12 years. It is not an affirmative defense that the accused reasonably believed that the child had attained the age of 12 years.

"(2) SIXTEEN YEARS.—In a prosecution under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 16 years. Unlike in paragraph (1), however, it is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years.

"(p) PROOF OF THREAT.—In a prosecution under this section, in proving that the accused made a threat, it need not be proven that the accused actually intended to carry out the threat.

"(q) MARRIAGE.—

"(1) IN GENERAL.—In a prosecution under paragraph (2) of subsection (c) (aggravated sexual assault), or under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), subsection (j) (indecent liberty with a child), subsection (m) (wrongful sexual contact), or subsection (n) (indecent exposure), it is an affirmative defense that the accused and the other person when they engaged in the sexual act, sexual contact, or sexual conduct are married to each other.

"(2) DEFINITION.—For purposes of this subsection, a marriage is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and the other person as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

"(3) EXCEPTION.—Paragraph (1) shall not apply if the accused's intent at the time of the sexual conduct is to abuse, humiliate, or degrade any person.

"(r) CONSENT AND MISTAKE OF FACT AS TO CONSENT.—Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).

"(s) OTHER AFFIRMATIVE DEFENSES NOT PRECLUDED.—The enumeration in this section of some affirmative defenses shall not be construed as excluding the existence of others.

"(t) DEFINITIONS.—In this section:

"(1) SEXUAL ACT.—The term 'sexual act' means—

"(A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

"(B) the penetration, however slight, of the genital opening of another by a hand or finger or by any object,

with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

"(2) SEXUAL CONTACT.—The term 'sexual contact' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

"(3) GRIEVOUS BODILY HARM.—The term 'grievous bodily harm' means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose. It is the same level of injury as in section 928 (article 128) of this chapter, and a lesser degree of injury than in section 2246(4) of title 18.

"(4) DANGEROUS WEAPON OR OBJECT.—The term 'dangerous weapon or object' means—

"(A) any firearm, loaded or not, and whether operable or not;

"(B) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm; or

"(C) any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.

"(5) FORCE.—The term 'force' means action to compel submission of another or to overcome or prevent another's resistance by—

"(A) the use or display of a dangerous weapon or object;

"(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

"(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

"(6) THREATENING OR PLACING THAT OTHER PERSON IN FEAR.—The term 'threatening or placing that other person in fear' under paragraph (3) of subsection (a) (rape), or under subsection (e) (aggravated sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to death, grievous bodily harm, or kidnapping.

"(7) THREATENING OR PLACING THAT OTHER PERSON IN FEAR.—

"(A) IN GENERAL.—The term 'threatening or placing that other person in fear' under paragraph (1)(A) of subsection (c) (aggravated sexual assault), or under subsection (h) (abusive sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping.

"(B) INCLUSIONS.—Such lesser degree of harm includes—

"(i) physical injury to another person or to another person's property; or

"(ii) a threat—

"(I) to accuse any person of a crime;

"(II) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

"(III) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

"(8) BODILY HARM.—The term 'bodily harm' means any offensive touching of another, however slight.

"(9) CHILD.—The term 'child' means any person who has not attained the age of 16 years.

"(10) LEWD ACT.—The term 'lewd act' means—

"(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

"(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

"(11) INDECENT LIBERTY.—The term 'indecent liberty' means indecent conduct, but physical contact is not required. It includes one who with the requisite intent exposes one's genitalia, anus, buttocks, or female areola or nipple to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct, it is an indecent liberty; the child's consent is not relevant.

"(12) INDECENT CONDUCT.—The term 'indecent conduct' means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person's consent, and contrary to that other person's reasonable expectation of privacy, of—

"(A) that other person's genitalia, anus, or buttocks, or (if that other person is female) that person's areola or nipple; or

"(B) that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125)), or sexual contact.

"(13) ACT OF PROSTITUTION.—The term 'act of prostitution' means a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation.

"(14) CONSENT.—The term 'consent' means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. A person cannot consent to sexual activity if—

"(A) under 16 years of age; or

"(B) substantially incapable of—

"(i) appraising the nature of the sexual conduct at issue due to—

"(I) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or

"(II) mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue;

"(ii) physically declining participation in the sexual conduct at issue; or

"(iii) physically communicating unwillingness to engage in the sexual conduct at issue.

"(15) MISTAKE OF FACT AS TO CONSENT.—The term 'mistake of fact as to consent' means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

"(16) AFFIRMATIVE DEFENSE.—The term 'affirmative defense' means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.".

(2) CLERICAL AMENDMENT.—The item relating to section 920 (article 120) in the table of sections at the beginning of subchapter X of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended to read as follows:

"920. 120. Rape, sexual assault, and other sexual misconduct.".

(b) INTERIM MAXIMUM PUNISHMENTS.—Until the President otherwise provides pursuant to section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), the punishment which a court-martial may direct for an offense under section 920 of such title (article 120 of the Uniform Code of Military Justice), as amended by subsection (a), may not exceed the following limits: 10 USC 920 note.

(1) SUBSECTIONS (a) AND (b).—For an offense under subsection (a) (rape) or subsection (b) (rape of a child), death or such other punishment as a court-martial may direct.

(2) SUBSECTION (c).—For an offense under subsection (c) (aggravated sexual assault), dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) SUBSECTIONS (d) AND (e).—For an offense under subsection (d) (aggravated sexual assault of a child) or subsection (e) (aggravated sexual contact), dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) SUBSECTIONS (f) AND (g).—For an offense under subsection (f) (aggravated sexual abuse of a child) or subsection (g) (aggravated sexual contact with a child), dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(5) SUBSECTIONS (h) THROUGH (j).—For an offense under subsection (h) (abusive sexual contact), subsection (i) (abusive sexual contact with a child), or subsection (j) (indecent liberty with a child), dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(6) SUBSECTIONS (k) AND (l).—For an offense under subsection (k) (indecent act) or subsection (l) (forcible pandering), dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(7) SUBSECTIONS (m) AND (n).—For an offense under subsection (m) (wrongful sexual contact) or subsection (n) (indecent exposure), dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

(c) APPLICABILITY.—Section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), as amended by subsection (a), shall apply with respect to offenses committed on or after the effective date specified in subsection (f). 10 USC 920 note.

(d) AGGRAVATING FACTORS FOR OFFENSE OF MURDER.—Section 918 of title 10, United States Code (article 118 of the Uniform Code of Military Justice), is amended in paragraph (4) by striking "rape," and inserting "rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child,".

(e) STATUTE OF LIMITATIONS.—Section 843(a) of title 10, United States Code (article 843(a) of the Uniform Code of Military Justice), as amended by section 553(a), is amended by striking "or rape," and inserting ", rape, or rape of a child,".

(f) EFFECTIVE DATE.—The amendments made by this section shall take effect on October 1, 2007. 10 USC 843 note.

NOW THAT *MCOMBER* IS DEAD:
When Must the Government Afford Counsel the Reasonable Opportunity to Be Present During Questioning?

By Capt Anthony Bell,* and Capt Jon Stanley,** USAF

Introduction

On 29 September 2006, the Court of Appeals for the Armed Forces (CAAF) released its opinion in *United States v. Finch*,[1] which effectively overturned its prior decision in *United States v. McOmber*.[2] The overturning of *McOmber* had been widely predicted since MRE 305(e)(2) was changed in 1994 to reflect the current Supreme Court decisions regarding the Sixth Amendment right to counsel.[3] Both *Finch* and *McOmber* address the government's duty to honor the attorney-client relationship during a criminal investigation.[4] In *McOmber,* the court held that "once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary…."[5] The rule in *McOmber* applied regardless of the stage of the government's investigation when the contact occurred. The only question that remained before a military member could be contacted/questioned by government agents was whether that person was represented by an attorney. If the military member was represented and had not independently initiated contact with government agents, then contact was barred.[6] This article discusses the Sixth Amendment right to counsel and illustrates the effect the *Finch* decision will have on criminal investigations in the military. Additionally, it will discuss some potential pitfalls for military lawyers when advising government agents to contact[7] a military member who is represented by counsel.

The Sixth Amendment & MRE 305(e)

The Sixth Amendment right to effective assistance of counsel is triggered by the initiation of "adversarial judicial proceedings," and is guaranteed at any critical stage of a prosecution.[8] In the federal system, the Sixth Amendment right to counsel is triggered by way of a formal charge, preliminary hearing, indictment, information, or arraignment.[9] Once formal proceedings begin, police may not deliberately elicit statements from an accused without an express waiver of the right to counsel.[10] This is true whether the questioning is in a custodial setting or not, and effected by persons known to the accused as police.[11] In trials by courts-martial, the trigger begins when charges are preferred.[12] Therefore, after an accused has

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[1] 64 M.J. 118 (2006).
[2] 1 M.J. 380 (1976).
[3] MANUAL FOR COURTS-MARTIAL App. 22, MRE 305(e)
[4] *Id.*
[5] *Id.*
[6] United States v. LeMasters, 39 M.J. 490 (1993).
[7] The words "contact" and "re-interview" are used interchangeably throughout this article. Understand that in both instances an interrogation would occur so that investigators would be required to advise the military member of Article 31(b) and potentially his Miranda/Tempia rights. The word "interrogation" is deliberately not used to avoid a discussion about Art. 31(b) and the 5th Amendment, as that analysis is outside the scope of this article.
[8] McNeil v. Wisconsin, 501 U.S. 171 (1991), Michigan v. Jackson, 475 U.S. 625 (1986), Maine v. Moulton, 474 U.S. 159 (1985), Kirby v. Illinois, 406 U.S. 682, 689 (1972).
[9] Fellers v. United States, 124 S. Ct. 1019 (2004).
[10] MANUAL FOR COURT-MARTIAL, MIL. R. EVID. 305(d)(1)(b).
[11] Brewer v. Williams, 430 U.S. 387 (1977).
[12] United States v. Harvey, 37 M.J. 140 (C.M.A. 1993), United States v. Jordan, 29 M.J. 177 (C.M.A. 1989),

charges preferred against him or her, the accused may not be contacted about the charged offense(s) unless counsel is present or unless the accused initiates the contact.[13] The following examples illustrate the effect that *Finch*, the Sixth Amendment, and MRE 305 have on a government agent who wants to contact an accused who is under investigation and represented by counsel.[14]

EXAMPLE 1: On 13 October 2006, AFOSI receives a letter from the ADC saying that the ADC represents SSgt Smith, and not to talk to SSgt Smith without consulting the ADC. SSgt Smith is not currently under investigation. Two hours later, AFOSI receives an allegation of aggravated assault against SSgt Smith. Even though AFOSI knows that SSgt Smith is represented by the area defense counsel (ADC), they may contact SSgt Smith directly to talk to him about the allegation. It is up to SSgt Smith whether to take the advice of the ADC.

EXAMPLE 2: On 1 November 2006, charges are preferred against A1C Doe for use of cocaine. Agents cannot contact A1C Doe about the charged use of cocaine without first calling her ADC. However, agents could contact A1C Doe to talk to her about a completely unrelated charge of assault providing that she was not in pretrial confinement for the use of cocaine. She must be read her Article 31 rights, as usual, but it is up to her whether or not she wants to speak to AFOSI about the assault charge or talk to her lawyer.

EXAMPLE 3: On 3 April 2006, Capt Berry is put in pretrial confinement. He is then read his rights for rape. He asks for a lawyer. While he is in pretrial confinement, AFOSI receives an allegation that Capt Berry has also committed larceny. Government agents are barred from going to confinement and interviewing Capt Berry about the larceny charge without his attorney being present. On 10 Apr 06, Capt Berry is released from pretrial confinement by the pretrial confinement review officer (PCRO). Charges have not been preferred. AFOSI may interview him (under rights advisement) for the larceny, the rape, or any other offense, without first going through Capt Berry's lawyer.

The above examples show how dramatically the *Finch* decision has changed the way government investigators can conduct criminal investigations. Prior to the decision in *Finch,* investigators would generally get only one bite at the apple when interrogating an accused because it was common for the member to seek assistance from the area defense counsel shortly after an interrogation had occurred. After *Finch,* investigators are free to disregard the frequent and continually issued notice of representation and re-interview a subject who is represented by counsel, provided charges have not been preferred. With this new found freedom, judge advocates need to be cautious when advising government agents to contact/re-interview represented parties and to be on the look out for other "adversarial judicial proceedings" that may trigger the Sixth Amendment right to counsel in the military judicial system.

For instance, in example 3, CAAF has ruled that the seven-day review of the imposition of pretrial confinement is not a triggering event for Sixth Amendment purposes.[15] Therefore, the government agents in example 3 are free to re-interview Capt Berry after his release from pretrial confinement without notifying his counsel. Now that the *McOmber* notice to counsel protections were vitiated, CAAF's ruling in this area of law is ripe for change. This belief stems from existing Supreme Court precedent[16] and the similarities between the initial appearance in the federal judicial system and the pretrial confinement hearing in the military judicial system. In both proceedings, the person is put on notice of the charge(s), has a right to counsel, and pretrial confinement/bail is determined. In the military judicial system, the PCRO goes one step further than the federal magistrate and conducts a probable cause review to determine if an offense triable by courts-martial has been committed by the confined member.[17] The PCRO, when

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United States v. Wattenbarger, 21 M.J. 41 (C.M.A. 1985).

[13] Michigan v. Jackson*,* 475 U.S. 625 (1986).

[14] These examples, with some modifications by this author, were created by Lt Col Diana Berg, HQ AFOSI/JA, after *Finch* was decided and disseminated to AFOSI field offices as guidance.

[15] United States v. Jordan, 29 M.J. 177 (C.M.A. 1989).

[16] Fellers v. United States, 124 S. Ct. 1019 (2004).

[17] MANUAL FOR COURT-MARTIAL R.C.M. 305(i)(2)(A)(iii).

making this determination, will often call witnesses and review evidence. The seven-day review is clearly an "adversarial judicial proceeding," often contested by ADCs, even if CAAF has resisted calling it one. Therefore, a judge advocate should be careful when instructing a government agent to contact a military member who is represented by counsel and released by the PCRO, unless the judge advocate wants to potentially violate the accused's right to counsel under the Sixth Amendment.

Contacting Represented Parties, Air Force Rules of Professional Conduct Rule 4.2

Given the new developments in the law, judge advocates may want to think twice about how to approach the apple on the second bite. Opening an accused to re-interview, where permissible, must be done carefully to avoid the "no contact" prohibition in the Air Force Rules of Professional Conduct. Particularly, Rule 4.2 prevents a lawyer from communicating with a person who the lawyer knows to be represented by another lawyer in the same matter:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[18]

The purpose of Rule 4.2, while multi-leveled, is genuinely concerned with protecting the integrity of the attorney-client relationship. Judge advocates must be careful not to overreach and invade the sanctity of this special relationship.

Those judge advocates that function as a chief prosecutor may find themselves in uncharted territory with regard to professional responsibility. The judge advocate who advises the local AFOSI detachment to conduct a re-interview where an accused is represented by counsel, may have crossed the ethical line between "mere knowledge" and "active encouragement."[19] The re-inquiry is highly fact-specific and will hinge on the level of involvement between those chief prosecutors and the investigators.[20] A chief of military justice who is intimately involved in every directional step of an investigation from searches, seizures, pre-textual phone calls, to informant application, finds himself or herself in that gray area. The greater the involvement the more likely the investigator becomes an agent of the judge advocate. Federal circuits have made clear that when a government agent acts as the alter-ego of the lawyer, the "no contact" rule can reach the conduct of the agent and therefore the lawyer.[21] Thus, judge advocates need to counsel cautiously where an accused in represented by counsel.

Aside from potential ethical violations, federal courts, at least in criminal cases, have been reluctant to suppress statements or exclude evidence, provided all other evidentiary and constitutional requirements have been satisfied.[22] That said, however, there is no guarantee that future courts will be so kind. A false step that is particularly egregious may warrant suppression, undoing a successful prosecution of a case. Where re-interviews under counsel are of concern, judge advocates should restrict their input to avoid any ethical entanglement on the second bite, at least, until there is an opinion issued by the Professional Responsibility Division.

Conclusion

CAAF overturned *McOmber* and changed almost 30 years of standard military justice practice. By withdrawing the notice protections of counsel letters in the early stages of a criminal investigation, CAAF has created more questions than answers for the judge advocates who advise criminal investigators daily. A JAG must know his or her limitations with regard to the law and recognize the Sixth Amendment triggers to avoid ethical entanglements, to protect the accused's rights, and to sustain the integrity of the military justice system. Anything less may embroil that judge advocate in a not-so-pleasant inquiry.

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[18] AIR FORCE RULES OF PROFESSIONAL CONDUCT, Rule 4.2 (2005).
[19] Miano v. AC&R Adver., 148 F.R.D. 68, 83 (S.D. N.Y. 1993); Holdren v. GMC, 13 F.Supp. 2d 1192, 1194 (D. Kan. 1998).
[20] Miano, 148 F.R.D. at 83.
[21] United States v. Jamil, 707 F.2d 638, 645 (2d Cir. 1983).
[22] United States v. Guerrerio, 675 F. Supp. 1430, 1433 (S.D.N.Y. 1987).

Legal Assistance Notes

Year in Review

What a year it's been! The legal assistance mission of the Air Force moved as the first complete impact of JAG Corps 21. It evolved from its decades-long home in the Pentagon to the resource-rich environment of The Judge Advocate General's School.

In just six short months, the potential of the move has already been realized. Questions from the field have been turned into JASOC teaching points. Changes in curriculum have been fielded across the JAG Corps. Guest speakers have been broadcast beyond the school's walls through the internet.

More great things are coming. The various legal assistance websites are being consolidated into a one-stop resource for legal assistance practitioners. Preventive law videos are being created to educate our clients. And the "Legal Assistance Writing Guide" will be fielded, with great input from a recent webcast.

These successes—past and present—are only possible with great input and effort from across the Air Force. Over 252,000 clients were helped in over 123,500 matters—and nearly 450,000 documents were created!

ABA LAMP Distinguished Service Awards

Congratulations go to all nominees for this year's American Bar Association's Legal Assistance to Military Personnel Distinguished Service Awards!

Award winners will be announced in April. Some great ideas from the nominations, though, may be shared immediately.

SJA and Deputy Involvement. The direct involvement of legal office leadership yields many returns. Their participation signals the importance of legal assistance. Their efforts free up staff time. It also keeps the skills of these attorneys up to date; their work in a traditional office full of professionals prepares them for practicing alone while deployed, and other solo settings.

Satellite Office. One office has a significant client community twenty miles from base. They looked at available resources and now offer legal assistance at a family support center in that community. This convenience saves hundreds of hours of travel time for clients. It also reaches clients that might not be have gone to the traditional office.

Crossflow. The new JASOC curriculum invites a legal assistance professional to share thoughts and guidance on his program. During one of these sessions, the professional noted sharing preventive law articles with fellow JASOC grads. This rapidly evolved into the Preventive Law Article and Information Databank on FLITE. PLAID now contains dozens of articles for base newspapers. Many of the articles can be used directly, and all may be adapted for local use.

Webcasts. JACA created the very useful video-teleconference series on legal assistance topics. The series was carried over when the legal assistance mission was moved. The move coincided with JAS' fielding of a new webcast tool. The webcasts allow each session to be viewed conveniently in any legal office. Recorded sessions can be reviewed on any office computer. The series was also expanded to include other subjects taught at the school, including military justice and international law topics.

These innovations are just a few of the ideas that were put into action across the Air Force. Consider how to employ these ideas in your program—and how to use the opportunity to share your great ideas across the Air Force.

Webcasts

As noted in the item on ABA LAMP Distinguished Service Awards, The Judge Advocate General's School now hosts a webcast series. Legal assistance webcasts are presented quarterly. Up to fifty offices may participate in a live session. Each session is also recorded, so that offices and individuals can freely view the material at their convenience. The past sessions, including "Writing the Perfect Legal Assistance Letter" and "USFSPA & SBP," may be accessed at the Distance Learning section of the school website on WebFLITE.

Tax Program Highlights

Tax season is well underway. Despite recent manpower and budget cuts, Air Force bases are still offering tax assistance programs to their active duty, guard, reserve, civilian, and retiree populations. Here are options bases are employing to maximize tax assistance to their communities:

Tax Center Support. Whether at home station, or deployed to Southwest Asia, our Airmen can file their returns with the confidence that they'll receive all the appropriate credits and deductions to which they are entitled. The Air Force, along with our sister services, continues to have one of the lowest e-filing error rates according to the IRS.

Free IRS Programs. For personnel who prefer the *pro se* approach to taxes, the IRS has a Free File Program, available under "Online Tools" at the IRS Website: http://www.irs.gov.

Military OneSource. Another option for filing taxes is through Military OneSource, which offers free tax preparation software called "TaxCut Basic Online." This software is available to active duty, guard, and reserve servicemembers and their families. Military OneSource also offers free tax preparation consultations by phone. The number you provide to clients is 1-800-730-3802 and the website is: www.militaryonesource.com.

To ensure we continue to provide clients with the very best support available, please forward any suggestions or questions to the Air Force Tax Program Manager at lance.mathews@maxwell.af.mil.

Your Legal Assistance Staff

Moving the legal assistance mission to The Judge Advocate General's School carried tremendous potential. One of the immediately realized promises is an even tighter integration between issues in the field and the school's curriculum.

The legal assistance mission has the support of the entire faculty and staff. As a reminder, specific subject areas are managed by faculty within the Civil Law Division. This focuses their interaction with the field, their academic research in the subject area, and their development of curriculum—benefiting the field, the school, and its students.

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CAN OLD PESTICIDES KILL BIG CONSTRUCTION PROJECTS?
Beware of Uncertainties in the Law: CERCLA's Pesticide Exemption

By Mr. Marc Trost* and Maj Patrick Dolan,** USAF

Introduction

Recently, a large family housing privatization project on an active duty Air Force base was nearly derailed because of the presence of pesticides in the soil of the project area. The project site was the former location of a family housing area and the pesticides in the soil were the residue from the routine application of pesticides around the foundations of homes over the course of several decades. The state authorities sought to impose cleanup requirements at the project beyond what Air Force authorities determined were appropriate. The Air Force took the position that pesticide contamination was exempt from regulation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] and that the state had no role in regulating the site because CERCLA's waiver of sovereign immunity did not apply. Yet, the financial surety institution backing the private contractor's development of the site insisted that the contractor obtain a "no further action" letter from the state where the base was located concerning the pesticide contamination. Despite the Air Force's position that it had no role in regulating the site, the state refused to issue a "no further action" letter unless the contractor met its requirements for remediating the site. Ultimately, the project was kept on track when the contractor agreed to assume the risk of negotiating an acceptable cleanup with the state. However, in light of the two trends of increasing regulatory scrutiny of historic pesticide contamination and private party involvement in building projects on military lands, some of the issues raised in the case discussed above are likely to recur.

In order to respond to attempts to regulate areas of pesticide contamination on Air Force property resulting from the routine use of pesticides, it is useful to review CERCLA's liability scheme, the statutory framework of the pesticide exemption, and CERCLA's waiver of sovereign immunity. It is also useful to be aware of uncertainties in the law that lend support to opposing viewpoints about the extent that pesticide contamination on Air Force property can be regulated by various authorities. Finally, it is valuable to survey regulatory trends concerning historic pesticide contamination to be able to anticipate concerns in this regard that may be raised by regulators. Thus equipped, Air Force environmental practitioners can be prepared to help protect the environment and Air Force interests when issues arise concerning historical pesticide contamination.

The Statutory Basis of the Pesticide Exemption

Under CERCLA, the President, acting through the U.S. Environmental Protection Agency (EPA) or another designated federal agency, may take response actions whenever there is a release or threatened release of "hazardous substances" and then sue potentially responsible parties (PRPs) for reimbursement of the cleanup costs ("response costs").[2] Private parties, under certain circumstances, are also entitled to implement remedial action under CERCLA and sue to recover their response costs.[3] To establish liability, a plaintiff, whether the government or a

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[1] 42 U.S.C. § 9601, et seq. (2005).

[2] CERCLA §§ 104, 107, & 115; 42 U.S.C. §§ 9604, 9607, & 9615.

[3] CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). However, there is disagreement within the federal circuit courts of appeal as to whether a PRP can bring a § 107 action. The Supreme Court apparently will resolve this issue in Atl. Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006), *cert. granted,* 2007 U.S. LEXIS 1163 (U.S. 2007) (No. 06-562).

citizen, must demonstrate that (1) there has been a "release" or a "substantial threat of release" of a "hazardous substance" (2) from a "facility" (3) which caused the plaintiff to incur response costs and (4) each of the defendants fits within one of the categories of PRPs identified under CERCLA Section 107(a).[4] The government, but not private parties, can compel a PRP to carry out a cleanup itself under Section 106.[5] Among the four classes of PRPs under CERCLA are the current "owner and operator" of the facility and any person who owned or operated the facility at the time of disposal of the hazardous substances.

Section 101(14) of CERCLA defines "hazardous substances" to include a variety of materials, including pesticides, which are specifically listed in other environmental laws and regulations.[6] However, CERCLA Section 107(i) provides an exception to the general rule of CERCLA liability for contamination resulting from the application of pesticides registered under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Specifically, Section 107(i) states:

> No person (including the United States or any state or Indian tribe) may recover under the authority of this section for any response cost or damages resulting from the application of a pesticide product registered under the Federal Insecticide Fungicide and Rodenticide Act. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

This provision, which is sometimes referred to as the "farmer's exception," was intended to prevent the "typical pesticide user" from incurring liability under CERCLA for purchasing and applying pesticides in the customary manner.[7]

Limitations on the Pesticide Exemption

In contrast to CERCLA's "petroleum exemption," which completely removes "petroleum, including crude oil or any fraction thereof" from coverage under CERCLA by excluding it from the definition of a hazardous substance, the pesticide exemption only removes "the application of a pesticide" from liability under CERCLA in certain circumstances.[8] Thus, it is unclear on the face of the CERCLA pesticide exemption whether it applies to Section 104 response authorities and Section 106 abatement actions as well as Section 107 cost recovery actions. Regardless of the scope of the exemption, the first step in determining whether it can be claimed in a particular case requires applying a two-part test: (1) was the pesticide at issue registered under FIFRA and (2) did the contamination "result ... from the application of a pesticide product?"[9] Although CERCLA does not define "application," FIFRA regulations define "application of a pesticide" as the "placement for effect of a pesticide at or on the site where the pest control or other response is desired. . ."[10] Courts have used this FIFRA definition to make conclusions as to what amounts to an exempt use of pesticides under CERCLA. An exempt "application" includes using the pesticide in "the customary manner."[11] A CERCLA exempt "application" also includes any use of the pesticide in accordance with the manufacturer's instructions,[12] and the "integral acts" necessary to apply the

[4] Carson Harbor Vill. v. Unocal Corp., 227 F.3d 1196, 1202 (9th Cir. 2000).
[5] 42 U.S.C. § 9606.
[6] 42 U.S.C. § 9601(14).
[7] Jordan v. Southern Wood Piedmont Co., 805 F.Supp. 1575, 1581 (S.D. Ga. 1992).
[8] *Compare* 42 U.S.C. § 9601(14), *with* 42 U.S.C. § 9707(i).
[9] Thomas A. Packer and Scott T. Rickman, *Effective Use of the Pesticide Exception to CERCLA*, available at http://www.gordonrees.com/pubs/pesticide.cfm.
[10] 40 C.F.R. 162.3(j).
[11] *Id.*
[12] United States v. Tropical Fruit, S.E., 96 F.Supp. 2d 71, 90 (D.P.R. 2000); United States v. Morrison-Quirk Grain Corp., 1990 U.S. Dist. LEXIS 18921 (D. Neb. 1990).

pesticide.[13] However, spills or other activities which would constitute a "release" under CERCLA and which are not an integral part of the application process are not exempt.[14] Thus, the case law draws a distinction between the lawful and actual use of a pesticide for its intended purpose and consistent with labeling requirements, which will be deemed an exempt "application," from spills, disposal and other uses inconsistent with lawful application, which the courts treat as a "release" under CERCLA.[15]

One unresolved issue is whether a properly applied pesticide will still be considered an exempt "application" once the soil containing the pesticide is disturbed or moved. This issue could arise when old buildings that have had pesticide applied around their foundations are torn down and the site is graded to make room for a new development. On the one hand, it could be argued that once a particular pesticide application is exempted by Section 107(i), it should always be exempt. However, the counterargument is that once the buildings which the pesticides were meant to protect are gone and the soil is disturbed, the pesticide is no longer being used for its intended purpose and the exemption should not apply.

The Relationship between the Pesticide Exemption and CERCLA Section 106

As discussed above, pesticides, unlike petroleum, are not categorically removed from regulation under CERCLA. Accordingly, one unanswered question concerning the scope of the pesticide exemption is whether it applies to all CERCLA response obligations and enforcement actions, including those under Section 106, or whether it only applies to liability for cost recovery actions under Section 107. On its face, the pesticide exemption only applies to cost recovery actions brought under the authority of Section 107, and an area of pesticide contamination could apparently subject a landowner to an abatement order issued under the authority of Section 106 if the contamination amounted to an "imminent and substantial endangerment to the public health or welfare of the environment."[16] However, for private landowners, the risk that EPA would use a Section 106 abatement action to order the cleanup of pesticide contamination is essentially mooted by the fact that Section 106 allows for a recipient of an abatement order to obtain reimbursement from the Superfund if the recipient is not liable for response costs under Section 107.[17] Thus, because the pesticide exemption exempts a party from liability under Section 107, the EPA faces the likelihood of having to use Superfund dollars to reimburse landowners for the costs resulting from any Section 106 orders it issues to clean up pesticide contamination. The practical reality for the private citizen, therefore, is that with regard to issues of pesticide contamination, liability under Section 107 is coextensive with susceptibility of being issued a Section 106 order.

Whether federal facilities can be subject to abatement orders under Section 106 to clean up contamination from lawfully applied pesticides is unclear. Section 120(a)(1) of CERCLA states that federal agencies shall comply with CERCLA "in the same manner and to the same extent" as any nongovernmental entity. However, CERCLA expressly prohibits money from the Superfund to be used to pay for remedial actions at federally owned facilities.[18] Thus, a federal entity could not request Superfund reimbursement to pay for an abatement action for pesticide contamination "in the same manner and to the same extent" as a private party. Because a federal entity would not be on the same footing as a private party in its ability to obtain reimbursement of costs for responding to a Section 106 order, it would arguably be discriminatory for EPA to issue such an order for a federal facility to clean up contamination resulting from an application of pesticides that was otherwise exempt under Section 107. However, the EPA could argue that there is no such discrimination with regard to the Department of Defense because the services receive direct congressional appropriations for

[13] South Fla. Water Mgmt Dist. v. Montalvo, 1989 U.S. Dist. LEXIS 17555 (D. Fla. 1989).
[14] In re Sun Dance Corp., Inc., 149 B. R. 641 (E.D. Wa. 1993).
[15] Douglas A. Henderson, *The Pesticide (or Farmer's) Exclusion Under CERCLA*, 15 J. ENVTL. LAW & LITIG. 109 (2000).
[16] 42 U.S.C. § 9606(a).
[17] 42 U.S.C. § 906(b)(2)(A).
[18] 42 U.S.C. § 9611(e)(3).

environmental cleanups at their facilities as part of the Defense Environmental Restoration Program.[19] Moreover, the EPA could take the position that Department of Defense facilities have an inherent obligation to take response actions to clean up areas of pesticide contamination because the President has delegated authorities under CERCLA Sections 104 and 106 to the Secretary of Defense.[20]

The Relationship between the Pesticide Exemption and CERCLA's Waiver of Sovereign Immunity

A threshold issue in any attempt to regulate or sue a federal facility is whether the federal government has explicitly waived its sovereign immunity with regard to the applicable underlying law. As noted above, Section 120(a) of CERCLA states that:

> Each department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [Section 107] of this title.[21]

While Section 120(a)'s waiver of sovereign immunity is very broad, it does not undercut defenses or exemptions to liability which are found in CERCLA. For example, in one case which is representative of the view of the federal circuit courts of appeals that have addressed the issue, the court held "that CERCLA's waiver of sovereign immunity is coextensive with the scope of liability imposed by 42 U.S.C. 9607."[22] Thus, it could be asserted that the scope of the waiver of sovereign immunity in CERCLA Section 120(a)(1) is limited by the liability exclusions in Section 107. Since Section 107(i) excludes pesticide application from liability, the waiver in 120(a)(1) as to the substantive, procedural and liability provisions of CERCLA arguably does not extend to pesticide application.

On the other hand, the "savings" provision in the second sentence of Section 107(i) makes it clear that the exemption in Section 107(i) only applies to CERCLA liability and does not extend to other federal or state laws which might impose liability related to the use of pesticides. Thus, for example, the pesticide exemption would not impact the ability of a member of the public from suing a federal agency under the Federal Tort Claims Act—or any other law where the federal government had waived its sovereign immunity—for injuries sustained from the application of a pesticide.

State Regulation of Pesticide Contamination at Federal Facilities

While the "savings" provision in Section 107(i) does not preempt the regulation of pesticide application by other federal or state laws, the extent to which state laws apply to areas of pesticide contamination on federal facilities is not clear. CERCLA Section 120(a)(4) provides that state laws concerning remedial and removal actions shall apply at facilities owned or operated by the United States which are not on the National Priorities List (NPL) so long as the standards applied to federal facilities are no more stringent than the standards applied to non-federal facilities.[23] Since Section 120(a)(4) uses the terms "removal" and "remedial action," which are defined terms under CERCLA,[24] it seems reasonable to interpret Section 120(a)(4) as placing some CERCLA-like boundaries on a state's ability to regulate environmental contamination at non-NPL sites. However, one federal court that considered this issue rejected that view. In that case,[25] the United States argued that CERCLA Section 120(a)(4) only waived sovereign immunity for state "mini-CERCLAs" which, like CERCLA, provided specific, predetermined standards for the cleanup of waste. In concluding that the Pennsylvania's general

[19] 10 U.S.C. § 2701, et seq.
[20] Exec. Order No. 12580, 7 C.F.R. 2 (1989), as amended by Exec. Order No. 13,016, 61 Fed. Reg. 45,871 (Aug. 28, 1996).
[21] 42 U.S.C. § 9620(a).
[22] United States v. State of California, 294 F.3d 2002 (9th Cir. 2002).
[23] 42 U.S.C. § 9620(a)(4).
[24] 42 U.S.C. § 9604(23)-(24).
[25] United States v. Pennsylvania Dep't of Envtl. Resources, 778 F. Supp. 1328, 1330 (D. Pa. 1991).

environmental laws did apply to federal facilities, the court held that the terms "removal" and "remedial action" were broad enough to encompass an array of state environmental laws—not just ones that were akin to CERCLA.[26] Likewise, in a state court case that addressed this issue, the court held that, "The only limitation CERCLA's waiver provision seems to contain is that states may not impose more stringent standards on federal facilities than those imposed upon non-federal entities."[27] Thus, some case law seems to support the proposition that state laws concerning the cleanup of pesticides can apply at non-NPL federal facilities regardless of the limitation of liability under CERCLA Section 107(i) so long as the laws don't discriminate against the federal government.

The Resource Conservation and Recovery Act (RCRA) may also give states a role in regulating areas contaminated with pesticides on federal facilities. In fact, RCRA's waiver of sovereign immunity is broader than the one contained in CERCLA and makes all federal, state, and local requirements pertaining to solid and hazardous waste abatement applicable to federal facilities.[28] Moreover, RCRA expressly allows EPA to authorize states to carry out their own programs for permitting the treatment, storage, and disposal of hazardous wastes so long as the state program is at least as stringent as the federal program.[29] Yet, RCRA provides that commercial chemical products are not solid waste if applied to land in their ordinary manner of use.[30] Additionally, EPA has issued interpretative guidance indicating that pesticides, applied to the ground in accordance with their intended use, should not ordinarily be covered under RCRA.[31] However, a state might have a more restrictive law or regulation. Thus, RCRA, similar to CERCLA, is unclear as to whether and when a person or entity can be compelled to clean up contamination from pesticide application.

Developing Trends in Regulation of Pesticide Contamination and the Relationship to Construction Projects on Military Property

Regulatory concern over historic pesticide contamination of soils on residential property is a relatively recent development. New Jersey was the first state to analyze this issue in detail via the final report of its Historic Pesticide Task Force in 1999.[32] Since that time, several states, including Washington, Oregon, and Wisconsin have studied issues concerning pesticide contamination.[33] Because the most intensive historical uses of pesticides have occurred on agricultural land, the primary concern of most of the state studies on historic pesticide contamination has been the development of agricultural land for residential purposes. In fact, several states have now instituted guidance that requires soil sampling on agricultural properties that are being developed for other uses.

The new attention to pesticide contamination has also raised awareness among environmental regulators and the commercial community about the issue. As a result, it has now become common for civilian developers in many states to inquire about historic pesticide contamination as part of the "all appropriate inquiries" process before purchasing or leasing property in order to qualify for a defense to

[26] *Id.*
[27] Commonwealth Dep't of Envtl. Res. v. United States Small Business Admin., 134 Pa. Commw. 468, 477 (Pa. Commw. Ct. 1990).
[28] 42 U.S.C. §6961.
[29] 42 U.S.C. §6926(b).
[30] 40 C.F.R. 261.2(c)(1)(B)(ii).
[31] Letter from Eileen Claussen, EPA, to William Warren, September 29, 1986, available at http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/5886FA010316533A852568E300467F7F/$file/11182.pdf.

[32] Findings and Recommendations for the Remediation of Historical Pesticide Contamination, New Jersey Dep't of Envtl. Prot., March 1999; available at http://www.state.nj.us/dep/special/hpctf/final/hpctf99.pdf.
[33] Area-Wide Soil Contamination Task Force Report for Washington Department of Ecology, June 2003, available at http://www.wafruit.com/TF-Report-final2.pdf. The Wisconsin Department of Agriculture, Trade and Consumer Protection has also set up a task force to study lead arsenic contamination of soils and has published various materials on its web site at http://www.datcp.state.wi.us/arm/agriculture/pestfert/pesticides/accp/lead_arsenate/task_force.jsp.

CERCLA liability under Section 107(b)(3).[34] When such inquires uncover the possibility of contamination, developers are likely to engage in soil or groundwater sampling to fully characterize the extent of any possible contamination before taking an interest in the subject property. If the invasive sampling reveals pesticide contamination above acceptable standards, developers will insist on remediation of the property and the issuance of a "comfort" or "no further action" letter from the state indicating that the proposed development of the property can proceed.

The procedures followed for "all appropriate inquiries" in private developments are relevant to housing privatization projects and enhanced use leasing projects on military property because private developers—and their sources of financing—are likely to follow industry standard practices for large projects before entering into a contract or lease to develop military property.[35] As a result, in situations involving private developers where historic pesticide contamination is a concern, state authorities are likely to give these projects more scrutiny than is typical for the standard military construction project.

As discussed above, state authorities may have good arguments to support the view that they have a role in regulating areas of historic pesticide contamination at non-NPL military installations. However, not every state has laws or regulations which address historic pesticide contamination. In those instances, Air Force practitioners should be prepared to argue why the pesticide exemption under CERCLA applies to the project in question and that project managers should be free to develop a risk-based approach to managing any contaminated soils apart from the requirements of CERCLA or other laws. Yet, regardless of whether state authorities have a valid regulatory role in a particular project, private developers will be accustomed to obtaining a state "no further action letter" before proceeding in developing land where there has been environmental remediation. Accordingly, practitioners involved in negotiating privatization and enhanced use leasing projects should clearly allocate which party will be responsible for meeting any state requirements which arise as the result of remediating historic pesticide contamination.

Conclusions and Observations

Historic pesticide contamination is an emerging topic that implicates a variety of federal and state laws and regulations, and the applicability of these laws and regulations to federal facilities is often unclear. Specifically, the extent to which the waiver and savings provisions in CERCLA Sections 120(a)(1) and 107(i) subject federal facilities to liability for pesticide application under other federal and state laws is an unresolved issue. Likewise, the extent that Section 120(a)(4) subjects pesticide applications on non-NPL federal facilities to state regulation is uncertain. There is also no precedent for determining whether federal facilities are subject to Section 106 abatement orders regarding pesticide contamination. Finally, there has been no definitive resolution to the question of whether an exempt application of pesticides to soil loses its exemption and become a "release" under CERCLA when the soil is moved around a site in a construction project. Despite these uncertainties, the increased involvement of private entities in developing projects on Air Force property at a time when interest in historic pesticide contamination is coming to the forefront will likely result in these types of projects receiving scrutiny from a greater variety of regulatory authorities than is typical for purely military construction projects. Accordingly, Air Force legal practitioners should be aware of the authorities that relate to pesticide contamination so they can foresee and plan to address concerns that may arise in this area.

[34] For a full discussion of CERCLA defenses, *see Standards and Practices for All Appropriate Inquiries; Final Rule*, 70 Fed. Reg. 66,070 (Nov. 1, 2005).
[35] For a discussion of enhanced use leasing, see the Army Corps of Engineers Web Site at http://eul.army.mil/faqs.htm.

Heritage To Horizon

Recently, the Air Force legal assistance mission was transferred to The Judge Advocate General's School. This change is the latest evolution in a program established in 1944 during the closing days of World War II. Created by Army Air Forces Regulation No. 110-1, the legal assistance program has helped millions of very deserving clients across the Air Force and the Department of Defense.

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AAF REGULATION)
NO. 110-1)

HEADQUARTERS, ARMY AIR FORCES
WASHINGTON, 23 DECEMBER 1944

LEGAL

Legal Assistance Program

1. Mission. The AAF legal assistance program discharges the responsibility of the Commanding General, AAF to insure that adequate legal advice and assistance is made available to AAF personnel and their dependents. This Regulation is intended to supplement and implement Cir 74, WD, 1943, as amended by Cir 73, WD, 1944.

2. Scope:

a. Nature of Services. In general, service provided under the legal assistance program will be the same as that normally rendered by lawyers in civilian life. Such service is a privilege incident to military service and is not to be considered as charity. These services will be made available to all military personnel and their dependents, including all members of and persons serving with the armed forces of the United States, and civilian employees actually employed and residing at continental AAF installations and those employed at overseas installations.

b. Specific Limitations. Legal assistance officers as such will not advise or assist military personnel in any matter in which such personnel are or probably will be subject to court martial investigations or charges, including all criminal proceedings. Legal assistance officers will not act as collection agents, nor will they appear as attorneys before civil courts, boards, or commissions. In the latter, and other appropriate cases, military personnel and their dependents will be referred to designated civilian lawyers, bar committees on war work, or established legal-aid organizations and in any proper case, to civilian counsel upon the usual civilian basis. For this purpose the American Bar Association and state and local bar associations have established committees on war work which work closely with legal assistance officers and have rendered invaluable service in furthering the legal assistance program. Full cooperation with such committees and legal-aid organizations is highly desirable and deemed essential. Directories of these committees and legal-aid organizations are published from time to time in War Department Circulars.

c. Confidential Relationship. The usual attorney and client relationship will be maintained between legal assistance officers and persons consulting them on legal matters. All matters and files relating to consultations between legal assistance officers and persons consulting them will be treated as confidential and privileged in the legal sense. Such confidential matters may not be disclosed to anyone, except upon specific permission of the person concerned; and disclosure may not be ordered by military authority. Strict observance of this rule is essential to insure that military personnel may disclose completely and frankly all material facts of their cases without fear that such confidences will be disclosed or used against them in any way.

3. Field Organization:

a. Responsibility. Responsibility for the efficient and proper functioning of the legal assistance program within the AAF extends to all echelons of command.

b. Responsibility of Local Commanders. Commanding officers of AAF installations will establish a legal assistance office within their respective commands and appoint from their commissioned personnel a legal assistance officer and such assistant legal assistance officers as the needs of the command require from time to time. Adequate office space, facilities, and personnel will be furnished by local commanders and the availability of legal assistance will be made known to all military personnel. Where a legal assistance office cannot be established or operated at an

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installation because no lawyer is among its commissioned personnel, such fact will be reported to the area air technical service command within which the installation is located.

c. Supervision. Legal assistance officers at base level will operate under the direction of the post or base judge advocate. Area air technical service command judge advocates will exercise regional supervision over legal assistance offices at all AAF installations within the geographical limits of their respective commands, regardless of the command or air force to which those installations have been assigned. They will make periodic visits to legal assistance offices at such installations to insure that they are functioning efficiently and will take steps necessary to provide required advice and assistance at those installations reporting an absence of legal assistance facilities. The Air Judge Advocate, Headquarters, AAF will exercise general supervision over the legal assistance program within the AAF, subject to the general supervision of the Judge Advocate General.

d. Reports. Form AFAJA-3 (Quarterly Report of Legal Assistance Activities) will be prepared by all legal assistance officers at base level not later than the fifth day of January, April, July, and October, the original to be sent to the Judge Advocate General, Washington 25, D. C., Attention: Legal Assistance Branch, and two copies to the commanding general of the area air technical service command in which the legal assistance office is located. Commanding generals of the respective area air technical service commands will consolidate on Form AFAJA-3 all reports from AAF installations within such commands and forward the original and one copy of same, together with one copy of each report from base legal assistance officers, directly to the Commanding General, Army Air Forces, Washington 25, D. C., Attention: Air Judge Advocate, Legal Assistance Division, not later than the twentieth day of the reporting month. Clearance No. AAF-JA-U2 has been assigned this report. Copies of orders establishing legal assistance offices or effecting changes in the personnel or operation thereof will be forwarded direct to the Judge Advocate General, Washington 25, D. C., Attention: Legal Assistance Branch, and to the staff judge advocate of the area air technical service command within which such office is located.

e. Correspondence. Communications relating to AAF legal assistance policies, directives, special problems, and routine reports will be routed through the respective area air technical service command and from the latter directly to the Commanding General, Army Air Forces, Washington 25, D. C., Attention: Air Judge Advocate, Legal Asistance Division. Direct correspondence between legal assistance offices in connection with specific cases is authorized regardless of the location or command level of such offices.

f. Relationship with Other Agencies. Legal assistance officers will maintain close liaison with personal affairs officers and other agencies, referring to them all non-legal matters pertaining to personal affairs of military personnel and their dependents.

g. Qualifications of Legal Assistance Officers. Legal assistance officers and assistant legal assistance officers appointed under subparagraph b of this paragraph will be licensed attorneys-at-law and will have rank and experience commensurate with their responsibilities. At small installations, where the number of personnel does not warrant a full time legal assistance officer, legal assistance functions may be performed as an additional duty. In such cases, utmost care should be exercised by commanding officers to assure that legal assistance does not occupy a subordinate position in the multiple duties of the officer concerned.

h. Supply of Forms. Form AFAJA-3 (Quarterly Report of Legal Assistance Activities), sample attached, will be reproduced by multilith process without change by the appropriate area air technical service command. Initial distribution of not more than a six-months' supply of forms will be made by the area air technical service commands to the legal assistance officers located at the AAF stations within their re-

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spective geographical area. Subsequent supplies of this form will be furnished on requisition to the appropriate area air technical service command.

By command of General ARNOLD:

HEADQUARTERS ARMY AIR FORCES
OFFICIAL
WAR DEPARTMENT

BARNEY M. GILES
Lieutenant General, United States Army
Deputy Commander, Army Air Forces and
Chief of Air Staff

1 Attachment
Form AFAJA-3

DISTRIBUTION:
"A"

This document is almost three-quarters of a century old, yet consider how many of its concepts continue to guide legal assistance professionals to this day:

- Para 2 (a): legal assistance is "a privilege incident to military service and not to be considered as charity."
- Para 2 (b): ". . . the American Bar Association and state and local bar associations . . . have rendered invaluable service in furthering the legal assistance program. Full cooperation with such . . . organizations is highly desirable and deemed essential."
- Para 3 (b): ". . . the availability of legal assistance will be made known to all personnel."
- Para 3 (e): "Direct correspondence between legal assistance offices in connection with specific cases is authorized . . . ."
- Para 3 (g): ". . . utmost care should be exercised by commanding officers to assure that legal assistance does not occupy a subordinate position in the multiple duties of the officer concerned."

ENDNOTES

Where Are They Now?

Ms. Carol DiBattiste

Having enlisted in 1971, Ms. Carol DiBattiste retired from the Air Force in 1991 after serving as a judge advocate for 10 years. She served in such capacities as Assistant Staff Judge Advocate, Chief Circuit Trial Counsel for the Pacific Region, instructor at the Air Force Judge Advocate General's School, and Chief Recruiting Attorney for the Air Force.

Following retirement, Ms. DiBattiste went on to serve in a number of distinguished positions, including the Principal Deputy General Counsel for the Department of the Navy, Director of the Executive Office for United States Attorneys, Deputy United States Attorney for the Southern District of Florida, Under Secretary of the U.S. Air Force, a partner with the law firm of Holland & Knight, as well as Chief of Staff and later Deputy Administrator at the Transportation Security Administration (TSA). In her capacity as Deputy Administrator, she assisted the Assistant Secretary in developing and executing TSA programs and priorities to secure the transportation sector post 9/11.

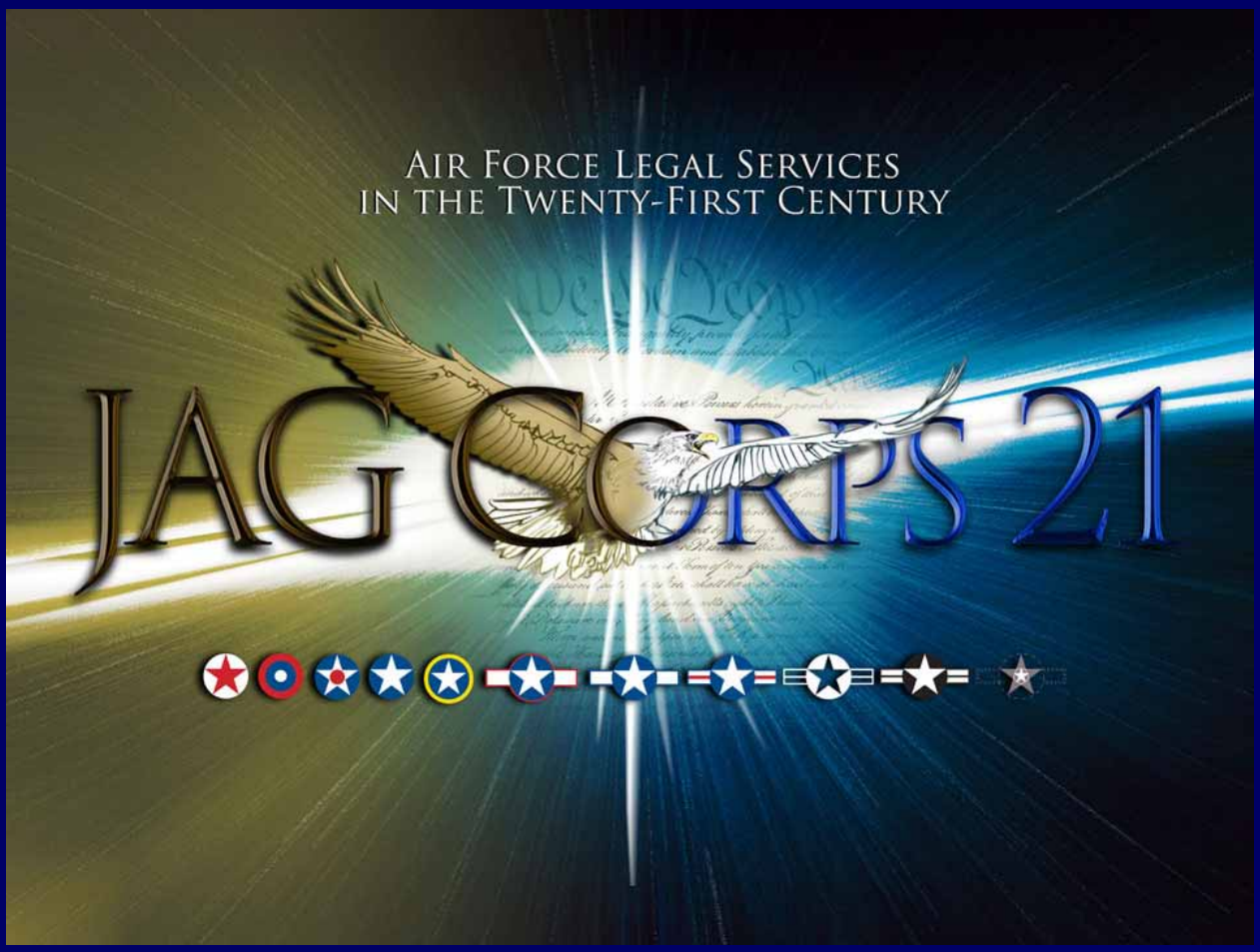
Carol DiBattiste is currently General Counsel and Chief Privacy Officer for ChoicePoint, "a premier provider of decision-making insight to businesses and government." As General Counsel, she directs ChoicePoint's legal activities and provides general legal advice to the company's leadership and Board of Directors. In her capacity as Chief Privacy Officer, she represents the company on all privacy matters, and oversees the company's customer credentialing processes, privacy policies and functions, and the legal and regulatory privacy compliance processes and functions.

Ms. Ellen Rambo

Ms. Ellen M. Rambo retired as a paralegal in 2006 in the rank of technical sergeant having served as a defense paralegal and non-commissioned officer in charge of military justice and claims. Taking advantage of the educational opportunities afforded to the paralegal career field, she received her Community College of the Air Force paralegal degree, a Bachelor of Science degree in Law Enforcement, and a Masters degree in Criminal Justice Administration.

Having also worked as a paralegal in a Washington D.C. law firm, Ms. Rambo began her current duties as a paralegal for the United States Court of Appeals for the Armed Forces in September 2006. As the Court's paralegal, she works directly for Mr. William A. DeCicco, Clerk of the Court. Her duties include researching legal and administrative matters, examining final drafts of opinions for completeness, working as a liaison with WestLaw and LEXIS, handling all aspects of bar membership, preparing case summaries for all public hearings, and serving as a D.C. notary.

"Being in the Air Force JAG Corps was very instrumental in my transition into the civilian world. The education and training I received has enabled me to be presented with many great opportunities. I am certain being a paralegal in the Air Force JAG Corps was one of the reasons I was given this wonderful opportunity to work at the Court of Appeals for the Armed Forces."



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