Graduation Address—Ninth Court Reporters' Course

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I was very pleased when Colonel Rosen and Master Sergeant Wagner invited me to be the graduation speaker for this Ninth Court Reporters' Course. It's particularly gratifying for me to be here because judges and court reporters are a team. I can't tell you how many times an astute court reporter has kept me from error in the courtroom.

This is an exciting and challenging time to be court reporters. You are acquiring an additional skill identifier with your graduation today, one which is vital to the preservation of good order and discipline in our armed forces, for without reporters, most courts-martial would be exercises in futility. You should be very proud of your achievement, and you should never doubt the value you add to the commands to which you are assigned, the Judge Advocate General's Corps, and the Army.

Why is this an exciting time to be a court reporter? Well, you will rarely be underemployed. After several years of declining caseloads, courts-martial numbers across the Army have increased steadily over the last two years, and in spite of—or perhaps because of—the deployment of many military units, the trend seems to be continuing in the first quarter of 2003. We had our busiest January and February in five years.

There are a number of reasons for the increase in trials: club drug usage, the change in the Army's AWOL/DFR policy, increased Internet misuse, BAH fraud, and many more soldiers called to active duty. These have all led to more trials Army-wide. I think there's another reason for that increase: a realization that Chapter 10s and admin[istrative] discharges are not really a deterrent to misconduct, but confinement is.

It's also an exciting time to be involved in military justice because after some years of being relegated to lesser importance, military justice is clearly high on The Judge Advocate General's radar screen. In some measure, we have judges to thank for this.

Two years or so ago, the Army Court of Criminal Appeals [ACCA] took a long, hard look at the number of cases that had been tried more than six months earlier, but for which no record of trial had yet been received by the Clerk of Court's office. As a judge on that court then, I can tell you we were concerned. We were also concerned about the number of cases we were seeing where it took a very long time—years in some cases—between the end of trial and receipt of the record at our court.

Most of us old colonels on that court had tried cases back in the days when the *Dunlap*[1] decision was in effect. In *Dunlap*, the Court of Military Appeals set a standard for post-trial processing: if the convening authority did not take action within ninety days of the court adjourning, prejudice was presumed, and the accused walked; the findings and sentence were set aside. Talk about pressure on court reporters!

I practiced under the *Dunlap* rule. In fact, I recall serving a post-trial recommendation on a defense counsel in the produce section of the Piggly Wiggly grocery store in Killeen, Texas, on day eighty-five, when I was working in the 1st Cavalry Division's legal office during my funded legal education summers. Day eighty-five was important because the accused had only five days back then to submit his post-trial matters—unlike the month or more he may get today. If he wasn't served by day eighty-five, the convening authority couldn't take action by day ninety. The defense counsel was probably none too happy with his wife at the time because when I couldn't locate him at his office, I'd called her, and she told me he was stopping on the way home for lettuce.

None of us on ACCA wanted to go back to the *Dunlap* rule, but what we were seeing told us that military justice was not most staff judge advocates' highest priority. Although they were dealing with soldiers' lives and liberty, there was no pressure on them to do so expeditiously. As one of my military judges put it, "Somewhere the JAG Corps mission in military justice got lost. Counsel were more impressed by the number of their deployments than by cases well-tried. They did not understand that by standing in front of members and looking foolish, they were harming the reputation of their SJA and the JAG Corps in general."

And so, the *Collazo*[2] and *Bauerbach*[3] opinions were issued. Both stand for the proposition that unexplained post-trial delay may prejudice an accused, and the court may grant sentence relief to mitigate the prejudice. ACCA has granted sentence relief for unexplained post-trial delay in a number of cases since the *Collazo* opinion was issued.

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1. Dunlap v. Convening Authority, 48 C.M.R. 751, 754 (C.M.A. 1974) (citing United States v. Burton, 44 C.M.R. 166, 172 (C.M.A. 1971)) ("[A] presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within [ninety] days of the date of such restraint after completion of trial.").

2. United States v. Collazo, 53 M.J. 721 (Army Ct. Crim. App. 2000).

3. United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001).

While the time off their sentences was no doubt important to the individual soldiers concerned, the real importance of these two opinions was to refocus attention in the JAG Corps on our statutory mission, our core competency, and the real value we add to the Army—military justice. I don't disparage the work that Judge Advocates do in TOCs [tactical operations centers] across the Army, certainly not in view of world events and the role legal personnel are playing now. And, I've been there in a TOC giving advice on targeting, rules of engagement, and law of war, but throughout our history as a corps, our role in military justice is what justifies our existence.

Speaking of history, I'd like to digress for a minute and share with you something I found in the 1908 *Manual for Courts-Martial*[4] about court reporters. That *Manual* states: "The commanding officer will detail, when necessary, a suitable enlisted man as clerk to assist the judge advocate of a general court-martial, or military commission, or the recorder of a court of inquiry."[5] The *1908 Manual* went on to say that civilian stenographic reporters could be employed at the rate of one dollar an hour for time actually spent in court, but would be paid no less than three dollars per day. They would also receive fifteen cents for each one hundred words of transcript, ten cents for each one hundred words for copying papers, and two cents for each one hundred words of carbon copy.[6] Those probably weren't bad rates of pay for those days. But there's a kicker: the court reporter was required to furnish the typewritten record of the proceedings of each session of the court or commission with one carbon copy not later than twenty-four hours after the adjournment of that session. The complete record was required to be finished, indexed, bound, and ready for authentication not later than forty-eight hours after the completion of the court or commission.[7] Don't worry, I promise not to bring the *1908 Manual* to the attention of anyone for whom you will work.

Be prepared, though, when you get to your duty installations for a lot of attention on your work output because everyone, from The Judge Advocate General on down to the Trial Counsel and Chief Legal NCO, is paying a great deal of attention to military justice these days. What you do, in and out of court, is absolutely crucial to the efficient operation of our system of justice.

Ideally, court reporters and military judges are a team. We judges often joke that the reporter, and sometimes the bailiff, are the only people in the courtroom we can talk to without getting into trouble. Think about it—who is the one person who does not have to rise when the military judge walks into the courtroom? The reporter. As judges, we insist upon the respect due our office—not us personally, but that office symbolized by the robes we wear—but we do not want anything to interfere with your ability to faithfully record the testimony. Hence, in most cases, you will stay seated.

The oath you'll take in a few minutes says that you will "faithfully" perform your duties. The oath I took as a judge uses the same word—"faithfully." Although most of you will work, directly or indirectly, for the Trial Counsel and Chief of Justice, your duty is not to the Chief of Justice, but to Lady Justice herself. I don't know if the Court of Appeals for the Armed Forces has ever said directly that court reporters are officers of the court, just like the attorneys, but that's the clear implication from several of the court's decisions. In *United States v. Moeller*,[8] the detailed court reporter had signed the charges as the accuser and prepared the record of trial. The court reversed the conviction without testing the error for prejudice, saying that accusers have been cast into a role that is hostile to that of being a reporter. While other officials have the duty of seeing that a record contains all the testimony developed in the trial of a case, it is impossible for anyone but the reporter to record accurately all of the testimony. The court concluded, "[I]t is contrary to the concept of a fair trial and an adequate review to have an actual . . . accuser assigned as reporter."[9] Twenty years later, in a similar case,[10] the Court of Military Appeals commented that such carelessness displayed a lack of concern for the importance of courts-martial and did not promote respect for military justice.[11]

I know Sergeant Wagner and the other faculty members here at TJAGSA have emphasized the great responsibility that rests on your shoulders as reporters. I will add to that only the statement that you must, without fear or favor, report exactly what happens. If that means the case must be retried, so be it.

But there are things that you may do in the course of a trial that can save a case before it is too late. If you do not understand or cannot hear what is being said, stop the proceedings. If

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. ed. 1908).

5. *Id*. at 26.

6. *Id*. at 26-27.

7. EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF THE COURT-MARTIAL 84 n.3 (1908) (citing U.S. DEP'T OF WAR, ARMY REG. 995 (1908)).

8. 24 C.M.R. 85 (C.M.A. 1957).

9. *Id*. at 86-87.

10. United States v. Yarbrough, 22 M.J. 138 (C.M.A. 1986).

11. *Id*. at 140.

you have to stand up to get the judge's attention, then do so. What is being said doesn't matter if it can't be recorded.

If you are having problems with recording equipment, alert the judge ahead of time. If you find that you need a break more often than the judge regularly takes one, say so. Pass the judge a note, if necessary.

It's a rule in my courtroom that once an exhibit is marked and referred to on the record, it belongs to the court reporter. If you are having problems controlling exhibits because counsel walk off with them, let the judge know. He or she will bring counsel into line. I sometimes tell counsel that the court reporter has my permission to break the fingers of counsel who walk off with exhibits. Fortunately, no reporter has had to resort to physical violence; the threats are enough.

Learn your judge's quirks, and let counsel know what they are. Colonel White, the Chief Circuit Judge in the First Circuit, often uses a court reporter to help him teach the *Gateway to Practice* sessions required before each new trial or defense counsel appears in court. As court reporters, you will see far more trials than any individual attorney does. You will see what works—and doesn't—in the courtroom. Feel free to pass your observations on to the attorneys. While some may not listen, the wise attorney will take the opportunity to learn from you.

Most importantly, do your job well. Faithfully record what is said and done. Yours is an extraordinarily difficult job. Interspersed with the tedium of typing records and xeroxing exhibits, you will have a window into human foibles, misery, greed, and horror. You will be required to mark and maintain photographs of the autopsies of children murdered by their parents and of young people whose sexual abuse was electronically captured and published. *Maintain your objectivity.* If you or the judge begin taking sides, you risk being less than faithful to your oath.

What does the future hold for court reporters? I don't know if we will see regionalization, warrant officer ranks for reporters restored—I note that in the trial of the Japanese general Yamashita by military commission, the lead reporter was a warrant officer—or giving control of court reporters to judges, or something else. I do know that we will continue to harness technology to make your lives easier, but that no machine will replace you, at least not in my lifetime.

It is truly an exciting time to be a court reporter. Whether you find yourselves in a tiny courtroom in Taegu; in a tent in the desert; recording the military commission proceedings in Guantanamo, Cuba; or reporting a case in a media circus like that of the Aberdeen rape trials, recognize that you are fulfilling the JAG Corps's true statutory responsibility to assist commanders in maintaining discipline, law, and order throughout the Army.

I salute you and the job you have trained to do. On behalf of all the judges throughout the Army, I thank you in advance for your service. I look forward to seeing each and every one of you in my courtroom in the coming years. Good luck and good reporting!