

Note from the Field

Getting to Court: Trial Practice in a Deployed Environment

Captain A. Jason Nef*

Introduction

Delay is a persistent enemy to the administration of justice in the deployed environment. Failure to recognize this can result in the violation of an accused's right to speedy trial under Rule for Courts-Martial (RCM) 707¹ or the Uniform Code of Military Justice (UCMJ), Article 10.²

Delay comes to us in many forms. Too often it comes to us by invitation, by placing a case on the "back burner" and telling ourselves that we are waiting for the Criminal Investigation Command to conclude some investigatory minutia. Trial counsel can eliminate this inertia-born delay by moving their cases forward, deliberately. But even the most diligent counsel cannot reasonably expect to always avoid delay, or even anticipate it. However, knowing where delay is most likely to ambush your case, and preparing to meet it there, can spare you many unwelcomed distractions from trial preparation.

This article highlights a few causes of trial delay in the deployed environment, and proposes ways to deal with them. First, this article emphasizes how to mitigate delay associated with witness production. Second, this article presents, practical advice on handling the burden of classified information in a case. Finally, this article concludes with a brief introduction to the *Kastigar* challenge and ways to overcome it.

Trial counsel in a deployed environment may find that even a little practical advice can go a long way.

The Impact of Redeployment

One matter in expediting cases that merits consideration is the redeployment schedule of deployed units. The Multinational Divisions (MNDs) of Operation Iraqi Freedom consist of a division headquarters and multiple brigade combat teams (BCTs). The BCTs may not be on the same redeployment schedule as the division headquarters. Consequently witnesses, units, and convening authorities can change between the discovery of misconduct and the imposition of punishment. As units approach their redeployment date, defense counsel may perceive a stronger bargaining position as pressure to dispose of outstanding military justice actions increases. Government counsel must be vigilant in prosecuting cases and avoiding delay so the redeployment timeline does not drive disposition.

Commanders typically want to close all actions before redeployment. The reintegration and block leave period following redeployment routinely creates delay and redeployment often involves losing witnesses due to a change of station or separation. Once a witness leaves a command, recalling him becomes costly in both time and money. These factors work against the swift administration of justice and ultimately compromise a commander's ability to promote justice and maintain good order and discipline. For the accused Soldier, unnecessary delay frustrates his right to a speedy trial. These issues can quickly lead to a speedy trial problem for the Government, particularly when charges are preferred within thirty days of redeployment.

Civilian Witnesses and Interlocutory Matters

Witness availability in the deployed environment is a constant concern, particularly for witnesses outside of the theater of operations. The live testimony of a civilian witness is wholly voluntary in a deployed location.³

* Currently assigned as Administrative Law Attorney, Fort Stewart, Ga. Formerly assigned as Trial Counsel, Office of the Staff Judge Advocate, 3d Infantry Division and Multi-National Division-Center, Iraq, Operation Iraqi Freedom V.

¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 707 (2008) [hereinafter MCM] ("The accused shall be brought to trial within 120 days after . . . preferral of charges.").

² UCMJ art. 10 (2008) (If an accused is placed in pretrial confinement, "immediate steps shall be taken to inform him" of the charges "and to try him").

The amount of time a witness is required to commit for one day of live testimony is considerable. For example, in the U.S. Central Command theater of operations, a witness can reasonably expect to spend a total of eight days (or more) away from work and family to provide one day of live testimony.⁴ This may mean lost income and additional expenses for a civilian witness.

Consider the demands placed on any witness, particularly civilian witnesses, when requesting their presence in a deployed location.⁵ If their testimony is relevant and necessary for interlocutory matters⁶ the parties can agree, or the military judge can order, remote testimony. This option eases the burden placed on an out-of-theater witness.

In April 2007, President Bush authorized testimony by remote means on interlocutory matters over a party's objection.⁷ This does not solve witness production issues on the merits but improves the rate at which interlocutory matters are settled by the court, thus minimizing pretrial delay. Consider also that the military judge has sole discretion to authorize remote testimony on interlocutory matters.⁸ A party petitioning the court to authorize testimony by remote means must present evidence that circumstances warrant this option.⁹ The evidence should show that there is justification beyond mere convenience for one party.

If the military judge authorizes remote testimony, he also determines the procedures used to take testimony via remote means.¹⁰ At a minimum, all parties shall be able to hear each other, those in attendance at the remote site shall be identified, and the accused shall be permitted private, contemporaneous communication with his counsel.¹¹ When utilizing testimony via remote means, military justice practitioners are encouraged to consult¹² the procedure used for the case of *In re San Juan Dupont Plaza Hotel Fire Litigation*¹³ and also to read the case of *United States v. Gigante*.¹⁴ Parties should consult with their

³ MCM, *supra* note 1, R.C.M. 703(e)(2)(A) discussion ("A subpoena may not be used to compel a civilian to travel outside the United States and its territories."). Even when a civilian witness is willing to present live testimony in theater, the process of bringing them is not a simple one. The administrative and fiscal details of such travel are beyond the knowledge and expertise of most trial counsel. Trial counsel must consult with their legal administrators and senior noncommissioned officers when arranging for witness travel. Another key player in bringing witnesses into theater is your unit's liaison noncommissioned officers (LNOs) at the transition point in Kuwait. Good communication and a strong working relationship with these personnel is essential for the smooth administration of witness travel.

⁴ This calculation is based on the author's personal observations and experience. The author was directly involved in bringing fourteen witnesses and two civilian defense counsel into Iraq for courts-martial. Seven of the witnesses were either civilians or demobilized reservist. Five of the military witnesses were stationed outside of the continental United States (OCONUS). In general, one day of travel is required to move a witness from the continental United States to Kuwait, but OCONUS witnesses may require additional travel time. Upon arrival in Kuwait, a witness will spend between twenty-four and forty-eight hours at a transition point before traveling into Iraq or Afghanistan. If the witness must travel in-country to reach their final destination, you can reasonably expect to add another twelve to twenty-four hours of travel time just to get a witness where they need to be. Add a day of witness preparation, at least one day of live testimony, and then reverse the process.

⁵ In addition to any personal or financial burdens, civilian witnesses must possess a valid passport to enter Kuwait for transition into Iraq or Afghanistan. For civilian witnesses who do not already possess a passport, acquiring one on short notice is costly and time consuming. If your witness possesses a U.S. Passport, a visa may also be required to enter Kuwait. The author knows of one instance where Kuwaiti authorities refused entry to a witness who was a citizen of Mexico and possessed an official passport from that country.

⁶ Interlocutory matters are those matters that require the military judge to rule on a question of law before the parties can move forward with a court-martial. The ruling can be revisited during the court-martial or reviewed on appeal. For example, the defense moves to exclude an incriminating pretrial statement on the basis that it was involuntary. The defense presents their evidence and the military judge rules that the pretrial statement was voluntary and not the product of government coercion and allows the statement into evidence. The defense may attack the reliability of the government's evidence at trial, but the question of law (application of the exclusionary rule) is settled. If additional facts supporting the accused's motion arise during the court-martial, the accused may raise their motion again.

⁷ Exec. Order 13,430, 72 Fed. Reg. 20,213 (Apr. 23, 2007) (2007 Amendments to the Manual for Courts-Martial, United States).

⁸ MCM *supra* note 1, R.C.M. 703(b)(1) ("Over a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance . . .").

⁹ *Id.* ("Factors to be considered include, but are not limited to, the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the interlocutory proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training . . .").

¹⁰ *Id.* R.C.M. 703(b)(1).

¹¹ *Id.* R.C.M. 914B.

¹² *Id.* R.C.M. 914B(b) discussion.

¹³ *Dupont*, 129 F.R.D. 424 (D.P.R. 1990). Plaintiffs requested that the court order witnesses employed by the defendants, but beyond the subpoena power of the court, to testify through satellite transmission. *Id.* at 425. The Federal Rules of Civil Procedure neither authorized nor prohibited such procedures. The court found that the benefits of satellite testimony outweighed any disadvantage to the defendants. *Id.* at 426. The court ultimately adopted a set of

legal administrators and court reporters for technical and administrative support when equipping the courtroom with proper video teleconference or conference-call equipment.

When neither live nor remote testimony is a viable option for a particular witness, the parties may stipulate to a witness's expected testimony.¹⁵ Although the decision to stipulate is customarily left to the parties, the military judge may reject a stipulation.¹⁶ If a stipulation is rejected, the parties may be entitled to a continuance.¹⁷

Before submitting a stipulation to the court, both parties should independently verify the content of the witness's testimony.¹⁸ Once a stipulation has been accepted by the court, any withdrawal from it is within the discretion of the military judge.¹⁹

While stipulating saves time and expense, parties should consider what is lost by using stipulated testimony. By stipulating, one party surrenders the opportunity to cross-examine an adversary's witness; the other surrenders the opportunity to have the court see and hear their evidence presented live and in person. However, the contents of a stipulation may be challenged or explained in the same way as if the witness had actually testified.²⁰

Classified Cases

Classified cases present unique administrative challenges to the parties. The Government is faced with invoking the privilege to prevent disclosure of classified information, or seeking an alternative disposition.²¹ Prior to Military Rule of Evidence (MRE) 505, the threat of disclosure was an additional challenge to manage at courts-martial.²²

Government counsel do not possess an inherent right to assert the privilege, but must take specific steps to assert the privilege on behalf of the original classification authority.²³ Trial counsel must submit a written request to assert the

procedures that would permit all members of the court and the remote witness to fully observe each other during testimony as though all parties were in the same courtroom. *Id.* at 429. The court required a 30-inch screen on witness stand (witness screen) facing the podium and jury box that provided a full torso frontal image on witness screen at all times. *Id.* at 429–30. The questioning attorney addressed the screen as if the witness was on the stand. *Id.* at 430. The studio transmitting the remote testimony was staffed with a courtroom clerk. *Id.* at 427. Documents available at the studio were handed to witness by the courtroom clerk in the studio. *Id.* Other documents or evidence was shown to the witness on the screen or sent by telecopier. *Id.*

¹⁴ 166 F.3d 75 (2d Cir. N.Y. 1999). Mr. Gigante appealed a jury verdict convicting him of racketeering and multiple conspiracy charges. *Id.* at 78. The basis of his appeal was that the court violated his right to confrontation by allowing witness testimony by the use of a two-way closed circuit television. *Id.* The Court of Appeals for the Second Circuit found no violation of Gigante's right to confrontation and affirmed the judgment because the witness could see the courtroom, and the defendant and jury could see the witness during testimony. *Id.* at 81–82.

¹⁵ MCM, *supra* note 1, R.C.M. 811(a).

¹⁶ *Id.* R.C.M. 811(b) (“The military judge may, *in the interest of justice*, decline to accept a stipulation.” (emphasis added)). The military judge will inquire into accused's understanding of the stipulation and the consequence of stipulating to that fact, content or expected testimony. *Id.* R.C.M. 811(c) discussion. In addition, the military judge will independently review the stipulation for clarity; an unclear or ambiguous stipulation will be rejected. *Id.*

¹⁷ *Id.* R.C.M. 811(b) discussion.

¹⁸ The parties should also consider stipulations of fact. Although stipulations of fact are different from stipulations of expected testimony, both can serve the same purpose of moving a case forward without a particular witness. When there is no dispute regarding the facts a witness will testify to, parties should consider a stipulation of fact over a stipulation of expected testimony. The court can weigh veracity of and motive behind expected testimony in the same way it weighs the testimony of any other witness. But if a military judge permits parties to stipulate to a particular fact, the court is “bound by the stipulation and the stipulated matters are facts in evidence to be considered . . . with all the other evidence in the case.” U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-4-1 (15 Sept. 2002) (C2, 1 July 2003).

¹⁹ MCM, *supra* note 1, R.C.M. 811(d).

²⁰ *Id.* R.C.M. 811(e).

²¹ *Id.* MIL. R. EVID. 505(a) (“Classified information is privileged from disclosure if disclosure would be detrimental to national security. As with other rules of privilege this rule applies to all stages of the proceedings.”).

²² *Id.* MIL. R. EVID. 505 analysis, at A22-41.

Rule 505 . . . was . . . a response to what is known as the “graymail” problem in which the defendant in a criminal case seeks disclosure of sensitive national security information, the release of which may force the government to discontinue the prosecution. . . . The rule attempts to balance the interests of an accused who desires classified information for his . . . defense and the interests of the government in protecting that information.

Id.

privilege to the appropriate department or agency head.²⁴ This request should include the facts of the case and how the classified information is at risk of disclosure.²⁵ When the department or agency head grants the request the trial counsel should ensure this in writing, preferably in an affidavit presented to the military judge. The affidavit will provide the trial counsel a means to assert the privilege on behalf of the agency and should state the nature of the classified information and the impact of disclosure. Trial counsel should then submit the affidavit to the military judge for review and move for in camera proceedings to assert the privilege.²⁶

Cases that risk exposing classified information are infrequent. Counsel will save a great deal of time by promptly engaging the original classification authority requesting authorization to assert the privilege on their behalf. The longer counsel waits to take the steps required to assert the privilege, the greater the risk of exposure of classified information or the delay of proceedings.

The *Kastigar* Challenge: Testimonial Immunity and Subsequent Prosecution

When cases involve multiple accused, the Government may be in a position where a grant of testimonial immunity²⁷ for co-accused is necessary to prosecute.²⁸ The current staffing of trial counsel at the BCTs and MNDs²⁹ require deliberate steps prior to granting immunity to co-accused that the Government intends to prosecute at a later date. The Government is subjected to a high level of scrutiny when prosecuting an accused who has provided immunized testimony. This calls for deliberate prophylactic measures to meet legal requirements and prevent delay or dismissal.³⁰ The challenge the Government

²³ *Id.* MIL. R. EVID. 505(c) analysis.

The privilege may be claimed only “by the head of the executive or military department or government agency concerned” and then only upon “a finding that the information is properly classified and that disclosure would be detrimental to the national security.” Although the authority of a witness or trial counsel to claim the privilege is presumed in the absence of evidence to the contrary, neither a witness nor a trial counsel may claim the privilege without prior direction to do so by the appropriate department or agency head. Consequently, expedited coordination with senior headquarters is advised in any situation in which Rule 505 appears to be applicable.

Id.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* MIL. R. EVID. 505(i)(3)

²⁷ *Id.* R.C.M. 704(a)(2) (“A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.”).

²⁸ *Id.* R.C.M. 704(a) discussion.

Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline, and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination. Testimonial immunity is preferred because it does not bar prosecution of the person for the offenses about which testimony or information is given under the grant of immunity.

Id.

²⁹ The BCTs are staffed with one trial counsel and the MNDs typically have one or two trial counsel on staff. When the Government prosecutes an accused who testified under a grant of immunity in a companion case, a heavy burden rests upon government counsel to demonstrate to the court that no new evidence against the accused has been directly or indirectly gained from their immunized testimony. One of the best ways to demonstrate this is to prosecute the accused using government counsel who has not been exposed to the immunized testimony. If the multiple accused number two or three individuals, finding separate counsel for each prosecution is manageable under the current staffing.

³⁰ MCM, *supra* note 1, R.C.M. 704(a) discussion.

In any trial of a person granted testimonial immunity after the testimony or information is given, the Government must meet a heavy burden to show that it has not used in any way for the prosecution of that person the person’s statements, testimony, or information derived from them. In many cases this burden makes difficult a later prosecution of such a person for any offense that was the subject of that person’s testimony or statements. Therefore, if it is intended to prosecute a person to whom testimonial immunity has been or will be granted for offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given.

Id.

invites from defense is based on *Kastigar v. United States*.³¹ In that case, the Court held that the Government must demonstrate that an accused's statements given under a prior grant of immunity are not now being used against him, either directly or indirectly.³²

Surviving a *Kastigar* challenge rests upon the Government's ability to demonstrate appropriate responses to the following questions:

1. Did the accused's immunized statement reveal anything "which was not already known to the Government by virtue of the [accused's] own pretrial statement"?
2. Was the investigation against the accused completed prior to the immunized statement?
3. Was "the decision to prosecute" the accused made prior to the immunized statement? and,
4. Did the trial counsel who had been exposed to the immunized testimony participate in the prosecution?³³

The living and working conditions for most deployed Judge Advocates result in an almost total lack of privacy for counsel. In this environment, one critical step that must be taken is to seal any and all evidence known to the Government before granting immunity. By sealing and securing multiple copies of all known evidence prior to the grant of immunity, the Government eases the burden of demonstrating to the court that the immunized statement revealed nothing "which was not already known to the Government"³⁴ and that "the investigation against the accused [was] completed prior to the immunized statement."³⁵ This is most effective where the Government has conducted a thorough and complete investigation into the alleged misconduct *prior* to making any charging decisions.

A separate copy of the evidence should be prepared for the counsel assigned to prosecute the immunized co-accused. This provides assigned counsel with everything necessary to prepare his case independent of evidence that may come from the immunized testimony. It is important that the assignment of counsel be made prior to the grant of immunity. By assigning counsel and preferring charges prior to the grant of immunity, and banning that counsel from any exposure to the immunized testimony,³⁶ the Government can further demonstrate to the court that no improper advantage was gained from the immunized testimony.

Preparing for, and defending against, a *Kastigar* challenge is complex and the burden is on the Government. Taking deliberate steps in anticipation of a *Kastigar* challenge places the Government in a position to carry that burden and prevent further delay or dismissal.

Conclusion

Moving cases in a timely manner is essential to the fair administration of justice. However, trying cases in a deployed environment presents fresh challenges and complicates old ones.

³¹ 406 U.S. 441 (1972). Petitioners were given a grant of immunity and subpoenaed to testify at federal grand jury but invoked their Fifth Amendment right against compulsory self-incrimination. *Id.* at 442. Petitioners contended that the privilege against self-incrimination was broader than a grant of immunity. *Id.* The court held that the immunity was sufficient to replace the privilege; therefore the petitioners could be compelled to testify. *Id.* But, "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.* at 460 (quoting *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964)).

³² *Id.* at 462.

³³ *United States v. England*, 33 M.J. 37, 38-39 (C.M.A. 1991) (alteration in original). These are the factors a court considers when "deciding whether the Government's evidence against appellant was obtained from a source wholly independent of appellant's immunized testimony." *Id.* at 38.

³⁴ *Id.*

³⁵ *Id.* at 39.

³⁶ Of the factors a court considers, preventing exposure to immunized testimony requires the greatest amount of vigilance and deliberate effort in the deployed environment. Clear guidance should be given to assigned counsel banning all conversations about the case with other counsel who are exposed to the immunized testimony. If the case attracts media attention, assigned counsel must not read, hear or view any news stories related to their case or companion cases. The court should not be left with any doubt as to whether or not the Government has met their burden.

Witness availability and production is a potential cause for trial delay regardless of venue. But the probability of witness related delay increases when multiple units within a jurisdiction have different redeployment schedules. Moving cases to trial in a timely manner does much to avoid this kind of delay. However, when a case requires bringing witnesses into theater, consider alternatives. Witnesses for interlocutory matters can be heard by remote means at the discretion of the court. Parties should also consider stipulating to expected testimony where they can agree. If a out-of-theater witness must be produced, be aware of the forward planning required and the burden on that witness.

The introduction of classified information into your case creates an unusual challenge for trial counsel. Identifying and engaging the original classification authority is essential to asserting the privilege under MRE 505 and limiting exposure of the classified information. Failure to do this correctly at the earliest stages of a case will create many unwelcomed distractions and ultimately delay the Government in bringing their case to trial.

Trial counsel should be able to anticipate a *Kastigar* challenge long before trial. By taking the steps recommended above, the Government will be in a strong position to overcome the challenge. Failure to do so will result in unnecessary delay and the risk of dismissal.

It is not realistic to expect that all delay can be avoided; however, most delay is avoidable with proper coordination and planning. Employing the measures presented above will minimize distractions for trial counsel and facilitate the speedy administration of justice.