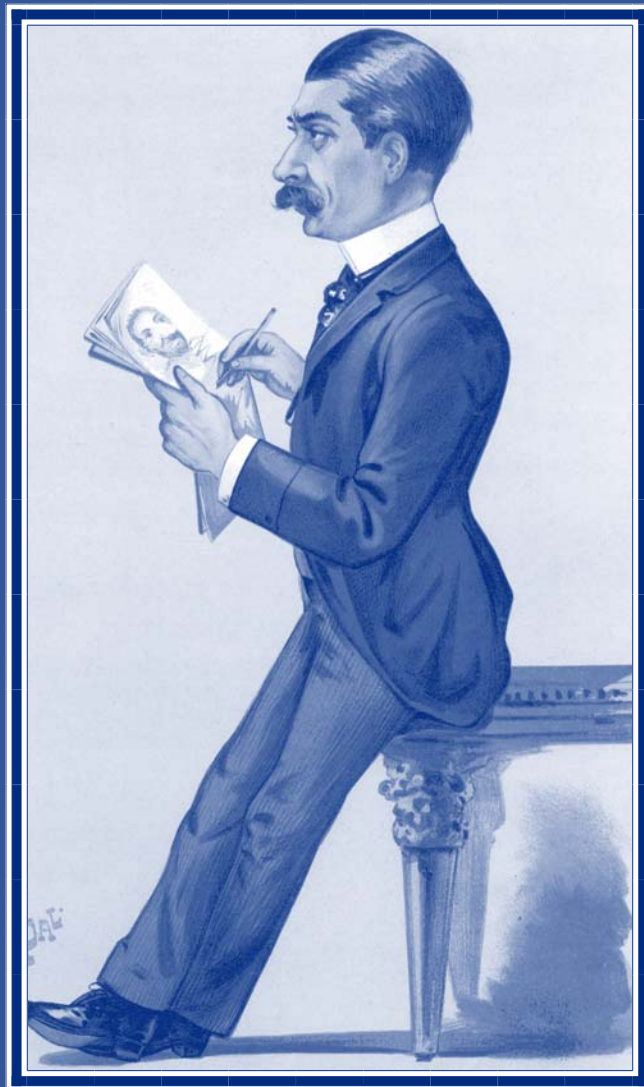


# The Reporter

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# The Reporter

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## FROM THE EDITOR

This issue of *The Reporter* features some new additions to our regular line up along with insightful feature articles you won't find anywhere else. A hearty welcome is in order to our latest addition to the Administrative Law Notebook with the inclusion of the Environmental Law update, which will be a regular feature. We have also added the Trial Notebook, a section devoted to updates and helpful hints from the world of military justice litigation. Major Bruce Cox has penned a compelling article which addresses the often sticky issue of construction contracting in the contingency environment. On the leadership front, this issue features two excellent articles, one geared towards what a good deputy SJA should do, and the other illustrating an example JAG leaders should not follow. Finally, we are privileged to reprint excerpts from the retirement remarks of Col John J. Martinez, Jr., who retired last August after 31 years of service. Cheers!!

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

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## *The Commandant's Corner...*

Colonel Michael D. Murphy

I begin with two notes of thanks. First, to Colonel Tom Strand, who left a great legacy, a superb staff, and a benchmark of excellence. Secondly, Lt Col Walter King kept the school running in a time of unprecedented ops-tempo. I deeply appreciate the leadership of both these officers, and offer my deep and sincere gratitude. The Air Force Judge Advocate General School (AFJAGS) is better for their service. With the enduring support of the JAG School Foundation, Inc (JSF), we'll move our performance and service to the Corps to an even higher level.

My priorities for the school are many, but in a time of war and resource constraints, we can't achieve them all – at least, not immediately. Stating the obvious, the past year has been a time of testing and challenge for the Air Force generally and the JAG Corps specifically. Someday, we will all look back upon these past months and realize that, having conquered the challenges, we are stronger for it.

Our mission here at AFJAGS remains unchanged, yet our methods of meeting the mission will be constantly evolving. Over the coming months, we will take a hard look at our course offerings. While never departing from our fundamental task of training new judge advocates and paralegals, we'll be analyzing every course in great detail. We will specifically ask whether a particular course has a specific tie to a TJAGC mission, policy, or tasking.

After that “bottom to top” relook of our offerings, we'll next ask ourselves how our increasingly scarce resources may best be applied for maximum effect. This will be a comprehensive and cohesive process. At the end of that process, I suspect we will find that many of our emerging requirements may not be met through traditional funding sources. That will further enhance the need for our support from the JSF.

Financial support from the JSF is only part of the equation. Our greatest benefit from the JSF can not be measured. Your moral leadership, sense of perspective, and prudent advice are far greater treasures. As we set the compass heading for new JAGs and paralegals, we need your support in making the calibration.

Consistent with the philosophy I discussed above, we will emphasize – now more than ever – our commitment to molding leaders and training advocates. We will mold leaders who are capable of making sound and prompt decisions upon a bedrock of integrity. They will be prepared to lead the Corps, the Air Force, and our Nation. We will train advocates, capable of representing their commanders and clients in any forum, anywhere. They will be leaders and advocates, irrespective of their rank. They will be leaders and advocates whether they are officer, enlisted, or civilian. That is our pledge to you, as a small measure of thanks for the support you most generously give to us.

*The Reporter* is our primary means of getting practical tips to the field. It is designed for and targeted at the field level practitioner. In this and every issue, we hope you'll find helpful advice and guidance on doing your job better. Tell us if these articles help you. Tell us if they don't. And remember, we're always on the lookout for contributions to the next issue.

*Michael D. Murphy, Commandant*

# Construction in the Contingency Environment: Balancing Military Needs With Congressional Oversight

Major Bruce D. Cox

In the contingency environment, construction is one of the most prevalent fiscal pitfalls. As a rule there are always new construction projects that the command wants completed “yesterday” and they all are “critical to the war effort.” The basic fiscal problem is that Congress wants to keep a tab on military construction and has put stringent statutory restrictions on what the DoD can do in the way of construction. Congress has recognized that military necessity may from time to time require that construction projects be completed without going through the usual Congressional approval project. Unfortunately, the mechanisms that Congress has recently put in place do not work as well in practice as they do in theory.

Those mechanisms, Contingency Construction,<sup>1</sup> and a similar, briefly available, form of “Temporary Authority” Construction,<sup>2</sup> as they currently are used, are not responsive enough to fill the need. Rather than being used as intended, to allow for the construction of time-sensitive projects of great military importance, they tend to be used for projects that are desired but not necessarily “critical to the war effort.” This article will illustrate how different the system is in practice than what Congress intended, and will make suggestions for how the system should be modified to make it responsive to operational military needs, while still meeting the requirements that Congress imposed.

## THE EXISTING CONTINGENCY CONSTRUCTION PROGRAM

To illustrate how Contingency Construction<sup>3</sup> works in practice, I will use an example from the Combined Joint Task Force in Afghanistan.<sup>4</sup> That CJTF and the other major components in the CENTCOM Area of Responsibility (AOR) received a message with a date time group of 1600Z, 26 April 2004. It requested that all the units update and validate the CENTCOM Con-

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tingency Construction Priority List (CCPL) not later than 30 May 2004. An old list to be updated was available for review.

A look at the old list makes it fairly clear that most of the projects were not especially time-critical, and were probably intended to make only incremental improvements to combat capability. Certainly none of the projects were of decisive importance to the success of the immediate combat mission. The top-ranked CENTAF project was a “temporary cantonment area” at Al Udeid Air Base. The top project for CJTF-7 in Iraq was an “Intelligence Fusion Center” and the top ranked project for CJTF-76 in Afghanistan was a “50 bed Hospital at Bagram Air Field.” Other projects that made the list were numerous housing projects, base electrical projects and communications projects. All are no doubt worthy projects, but it is questionable whether any of them really are significant enough that “deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security or national interest.”<sup>5</sup>

The consequences for not funding the new Bagram hospital were listed as “the hospital will deteriorate further and lose its current capability to effectively process coalition casualties.” Another “time-sensitive project critical to national security” listed for Bagram was described as “billeting for 1000 soldiers.” “The project is required in order to replace Bagram’s current dilapidated two year old Force Provider, Harvest Falcon and GP Medium Billeting” and the impact if not funded was “the billeting will continue to deteriorate and will have adverse effects to the personnel operating from the air field.” Neither of these arguments for these projects inspires a sense of urgency. Added to that, the billeting proposal didn’t even mention that the Force Provider and other types of billeting were at that time being replaced by “B-Huts” that had at least a two-year planned life span.

It was quite clear that the engineers who proposed this last project not only didn’t consider it very urgent, but didn’t really expect to get any results from the request until after the B-Huts had outlived their planned

*The basic fiscal problem is that Congress wants to keep a tab on military construction and has put stringent statutory restrictions on what the DoD can do in the way of construction.*

two year life spans. That essentially is the crux of the matter. All of the projects were ones that those proposing them knew were either unlikely to be funded, or if eventually funded, unlikely to be approved or constructed for years.

### CONTINGENCY CONSTRUCTION IN THEORY

On 22 February 2000, the Army Deputy General Counsel (Ethics and Fiscal) issued a policy memorandum stating that the Army should use O&M funds to build structures during combat and contingency operations, if the structures “are clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations.”<sup>6</sup> The effect of this was that it allowed the Army to complete any construction project so long as it met the definition of “temporary” and was done in a “combat zone.” Any other construction project using O&M funds would have to be approved by Congress as “MILCON” if it exceeded the statutory limit, which at the time was \$500,000, or \$1,000,000 if the project was intended solely to correct a deficiency that threatens life, health, or safety. In early 2003, the Under Secretary of Defense (Comptroller) essentially agreed with this interpretation.<sup>7</sup>

Congress however was apparently not happy with the Army’s view. In April of 2003, Congress made it clear in the 2003 Emergency Wartime Supplemental that the DOD could not use O&M funds for a project that exceeded the statutory limit so long as the construction was “temporary.”<sup>8</sup> They instead indicated a mechanism for DOD to use for time-sensitive construction projects that exceeded the cost limits for O&M construction. They accomplished this by specifically setting aside MILCON funds for use by the DOD under its Contingency Construction Authority under 10 U.S.C. § 2804.<sup>9</sup> In the House Committee report, the authors make it clear that they want to maintain congressional oversight and control of military construction projects through the mechanism of Contingency Construction. In one particularly enlightening paragraph they state: “Approximately \$750,000,000 appropriated to operation and maintenance accounts has been obligated for construction activities supporting the global war on terrorism and operations in Iraq. Funds for these projects have been expended without providing notice to Congress despite repeated requests for information by both House and Senate Appropriations Committees and House and Senate Armed Services Committees and as required by law.”<sup>10</sup>

In the process of re-imposing Congressional authority over a class of DOD construction projects, the 2003 Emergency Wartime Supplemental specifically al-

lowed the SECDEF to obligate up to \$150,000,000 of MILCON funds through the Contingency Construction mechanism. While a seemingly large amount of money, it pales in comparison with their own estimate of \$750,000,000 worth of previously obligated construction projects during the first year or so of the Global War on Terrorism.<sup>11</sup> Regrettably, it also pales in comparison to the total costs for Contingency Construction projects proposed by the various CENTCOM commands by Jan 04.<sup>12</sup>

In theory at least, the authority that 10 U.S.C. § 2804 gives the DoD allows for a much faster method for carrying out construction projects than that which is provided by the normal MILCON process, or the Unspecified Minor Military Construction (UMMC) process. However there are clearly more strings attached to Contingency Construction than there are when a unit uses its O&M funds for construction.

10 U.S.C. § 2804 allows the Secretary of Defense to carry out military construction projects using unobligated MILCON funds if he “determines that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security or national interest.”<sup>13</sup> In addition to this determination requirement, § 2804 also requires the Secretary of Defense to “submit a report in writing to the appropriate committees of Congress on that decision.” Additionally, the report is required to include a justification for the project and for the use of § 2804 authority, and an estimate of cost. Finally it imposes a restriction that the project may not be started until 21 days after the committees have been notified.<sup>14</sup>

In addition to the requirements on Contingency Construction actually contained in § 2804, Section 1901 of the 2003 Emergency Wartime Supplemental imposes some additional requirements on DoD if they want to use §2804. It mandates written notice to Congress by SECDEF within 15 days of funds being obligated for a project. The written notice must include an estimate of cost for the project and a Form 1391 containing additional information about the project.

### “TEMPORARY AUTHORITY” CONTINGENCY CONSTRUCTION

Apparently Congress was concerned that, in trying to re-establish oversight of military construction, they might have hobbled the military’s ability to construct legitimate time-sensitive projects during actual wartime conditions. Only months after they legislatively overruled the previous DoD guidance on O&M construction, they created another mechanism for implementing wartime construction projects without having to go through the traditional MILCON process. In doing so, Congress clearly attempted to adopt many of



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the positive aspects of the DoD and earlier Army O&M construction guidance.<sup>15</sup>

In both the 2004 Emergency Supplemental and the 2004 Defense Authorization Act Congress established temporary authority for DoD to use O&M funds for military construction projects. In doing so they put stringent limitations on how and where this authority could be used. In particular, they stated that, unlike Contingency Construction under § 2804, the construction project had to be outside the United States. They also mandated that for DoD to initiate a project under this authority, the Secretary of Defense had to determine that the project met four conditions. These four conditions were very similar to the conditions in the previous DoD and Army guidance. The Secretary of Defense had to determine that:

- (1) The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of Operation Iraqi Freedom or the Global War on Terrorism.
- (2) The construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence.
- (3) The United States has no intention of using the construction after the operational requirements have been satisfied.
- (4) The level of construction is the minimum necessary to meet the temporary operational requirements.

Congress also initially limited the total amount of money that could be used in this manner to \$150,000,000. Later in the 2004 Defense Authorization Act, this limit was raised to \$200,000,000.<sup>16</sup> Section 2810 of the Defense Authorization Act extended this authority, but did not make clear whether an additional \$200,000,000 was authorized, or whether the period for obligation was simply extended; it appears that the later may be the case.

In addition to these restrictions on how and where this authority can be used, Congress also mandates reporting requirements. Section 1301 requires the DoD to notify Congress within 15 days of the date that funds were obligated under 1301 authority. This notification has to include:

- (1) Certification that the conditions specified in subsection (a) are satisfied with regard to the construction project;
- (2) A description of the purpose for which appropriated funds available for operation

- and maintenance are being obligated;
- (3) Relevant documentation detailing the construction project; and
- (4) The total amount obligated for the construction.

## THE WAY FORWARD

Clearly Congress has had a hard time balancing their need for oversight of military construction projects with the recognized need of the military to have the flexibility to quickly construct projects in the operational environment. For that reason, this area of the law remains in a state of flux. The DoD within its own structure however has to accept much of the blame for the situation. Within the framework that Congress has recently attempted to establish, DoD should be able to quickly and efficiently conduct operationally critical construction projects. That however cannot be done without a major change in procedures within the DoD bureaucracy as well as a substantial change in attitudes and basic assumptions.

The first, and probably most important thing that has to be done to streamline the approval process is to push some actual budget authority down to at least the theater level. As the system works now, each sub-unit under CENTCOM submits proposed projects up the chain for approval, if the project exceeds the \$750,000 O&M approval authority limit. This single bureaucratic step, without any certainty for when or if approval will come, makes it appear that trying to gain approval of anything time-sensitive is futile. This system gives the components every incentive to try to maintain approval authority at their own level for critical projects, while flooding the list of proposed projects with low priority junk. While there are certain advantages to having a system that contains a structural incentive to lower costs, a structural incentive to conduct illegal project splitting is at best undesirable.

The second task that needs to be done is that DoD needs to conduct an internal information campaign. A cultural shift has to be imposed. All of the components that make up the affected construction bureaucracy in DoD need to understand the approval process, have some confidence in their ability to effectively use the system, and understand that the rules that define the system boundaries will be strictly enforced.

As soon as DoD has been given authority, they need to quickly budget it. They need to establish up-front what commands should be given some budget authority. The commands that are likely to need the flexibility to conduct short notice construction projects should be given a budget early. Under current world conditions, only the Afghan and Iraq theaters, where ongoing combat operations exist, should actually be given

budgets. A reasonable first cut for this year would be to allocate \$75 million in authority to CJTF-7 in Iraq and \$25 million in authority to CFC-A in Afghanistan. CENTCOM as a whole could keep \$50 million in reserve, and DoD could keep \$50 million in reserve at their level. This would give the theater commander and his staff the knowledge that they could effectively implement projects of a certain value quickly and effectively. Once a project is identified as meeting the prerequisites for use of this authority, the proposed package could then be quickly sent up the DoD chain to provide the appropriate notice to Congress.

Such a system will only be useful if the players understand the system. Many sections of the affected bureaucracy are mired in institutional inertia. Their understanding of the process is that there are two ways to fund construction: O&M, for which they have control, and "MILCON", over which they have no control, and which takes forever. If the Congressionally mandated system is to work, they need to know that for combat-related short notice large projects, there is a third alternative, and they need to know how it works and that it does in fact work.

#### **AN ILLUSTRATION: THE TARIN KOWT ROAD PROJECT**

In May 2004 the Tarin Kowt Road Project was potentially one of the most strategic construction projects proposed in Afghanistan. The road runs from Kandahar to Tarin Kowt, located in the "Ouzgan Bowl," and the provincial capital of Oruzgan Province. Oruzgan Province was the traditional heartland of the Taliban and a major sanctuary for insurgent operations against Kandahar and other parts of southern Afghanistan. As part of Operation Mountain Storm a specific combat force was fielded with the express purpose of going into the Oruzgan Bowl and trying to open the area to control of the central Afghan government, while destroying what Taliban forces could be found in the area. The combat force was the 22<sup>nd</sup> Marine Expeditionary Unit, dubbed Task Force Linebacker. The initial phase of Linebacker's operation was to establish a forward operating base in Tarin Kowt itself. While some of this was done by conducting a vehicle convoy up the existing Tarin Kowt Road, most of this phase was conducted by improving an airfield at Tarin Kowt and flying in troops, equipment, and supplies by C-130 aircraft. Transport aircraft were relied upon in part because the existing roads to Tarin Kowt were so bad that the average speed that a vehicle could go on them was approximately 7 MPH. Additionally, the terrain along the roads included stretches winding through canyons and low mountains.

Almost as an afterthought, or just coincidentally, the

reconstruction of the Tarin Kowt Road was proposed almost simultaneously with the advent of Linebacker operations. The road had been one of many Afghan roads that USAID was planning to improve with some military help. Because of various political pressures and because of the risky security situation which prevented USAID from finding a contractor to reconstruct the road, CJTF-76 was given the job of reconstructing the road.

There were a number of clearly military reasons for reconstructing the road to at least rudimentary standards. A Provincial Reconstruction Team (PRT) was being established at a camp in Tarin Kowt in concert with the Linebacker operations to project influence in the region, and a Special Forces base was also being set up next to the PRT camp. Both could potentially use the Tarin Kowt road as a main supply route, rather than depend on valuable air transport assets.

Probably even more important though, the reconstruction of the road could and should have been an actual combat maneuver. It had the potential to be a decisive component of the campaign to destroy the Taliban and should have been treated as such. In a sense it was a blow aimed at the heart of the Taliban movement and as such would either threaten to destroy the Taliban by making the Oruzgan bowl easily accessible to U.S. and Afghan Government forces and influence, or possibly because of that threat, force the Taliban to come out in the open and fight and in so doing allow coalition forces to destroy their forces directly.

The road project was approximately 150 KM in length and initial estimates for the costs to upgrade it to military and local standards ranged from approximately 15 to as high as 60 million dollars, clearly above the \$750,000 O&M threshold even using troop labor. Time was also a factor in the project. The 22<sup>nd</sup> MEU was initially scheduled to only be in the area for approximately six weeks. Other coalition forces would continue to operate in the area, but the sooner the project was started, the more it could take advantage of the operations of the MEU and the less time the Taliban would have to regroup.

When the CJTF-76 staff was first presented with the task without any guidance on funding, the Author proposed that a concerted effort be made to obtain timely Contingency Construction Funding, by getting the CJTF-76 commander to lobby for it while simultaneously submitting it and a similar road as projects on the nomination list. Despite the clear CFC-A command guidance to construct the road and the clear funding limitations for trying to do it with O&M, Contingency Construction was largely rejected out of hand by the CJ-7 engineering cell because of the legitimate assumption that Contingency Construction would not

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be approved in a timely enough manner to be responsive to the requirements of the program. Such an option might have still been necessary if USAID money had not been available to provide funding for the project, without necessitating a resort to the contingency construction approval process.

If the process were set up properly, this issue should never have arisen. If CFC-A had a budget for Contingency Construction of some sort, the initial order that was issued to CJTF-76 should have included the assumption that Contingency Construction authority up to a certain amount would be allocated to the project. If the command thought the project was significant enough to justify rapid initiation by CJTF-76 forces, funding should have been an integral part of the project rather than the gaping void that it was. All CJTF-76 should have been required to do was to make a rough assessment of the costs of the project, and the associated forces that would be committed and the materials needed. They then could have efficiently forwarded that information up their chain for notification to Congress. Instead, CJTF-76 was forced to spend a substantial amount of time and man hours trying to figure out how to thread the statutory needle.

The DoD needs to view Contingency Construction as a necessary part of its arsenal of weaponry. Rather than viewing construction as just an afterthought of operations, it needs to integrate Contingency Construction and the funding to accomplish it, into its operation plans. In the case of the Tarin Kowt Road project, the project should have been an integral part of the campaign plan instead of an afterthought. As such, the funding for the project should have been readily available as part of an established system rather than a rumored but never used method for exceeding what would otherwise be statutory limits.

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<sup>1</sup>Authorized under 10 U.S.C. § 2804, and affirmed as the appropriate mechanism in the Emergency Wartime Supplemental Appropriation for Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003), henceforth referred to as the "2003 Emergency Wartime Supplemental".

<sup>2</sup>Provided for in the Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, Stat. 1209 (2003), henceforth referred to as the 2004 Emergency Supplemental, and authorized and expanded in the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1723 (2003), henceforth referred to as the 2004 Defense Authorization Act. The 2004 authorization was extended by Section 2810 of the Ronald W. Reagan National Defense Authorization Act for fiscal year 2005, Pub.L.No. 108-375, 118 Stat 1811 (2004).

<sup>3</sup>Here I make no distinction between Contingency Construction under 10 U.S.C. § 2804 or the "Temporary Authority" for construction authorized in section 1301 of the 2004 Emergency Supplemental, in part because CENTCOM made no real distinction when they

tasked their subordinate units to come up with a list of projects.

<sup>4</sup>Originally designated Combined Joint Task Force 180, (CJTF-180) it was re-designated CJTF-76 in May 2004.

<sup>5</sup>10 U.S.C. § 2804(a)

<sup>6</sup>MEMORANDUM FOR ASSISTANT SECRETARY (FINANCIAL MANAGEMENT & COMPTROLLER), Construction of Contingency Facility Requirements, 22 Feb 2000, Matt Reres, Deputy General Counsel (Ethics & Fiscal)

<sup>7</sup>Memorandum, DoD Deputy General Counsel (Fiscal), Subject: Availability of Operation and Maintenance Appropriations for Construction, (Feb 27, 2003).

<sup>8</sup>Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003)

<sup>9</sup>*Ibid* section 1901

<sup>10</sup>108<sup>th</sup> Congress, 1<sup>st</sup> Session House Report 108-76, Chapter 9 of the Joint Explanatory Statement commenting on Chapter 9 Section 1901.

<sup>11</sup>*Ibid*

<sup>12</sup>CENTCOM Contingency Construction Priority List 26 April 2004

<sup>13</sup>10 U.S.C. § 2804(a)

<sup>14</sup>*Ibid*

<sup>15</sup>*Supra* Note 2

<sup>16</sup>*Supra* note 2





## PRACTICUM

On 3 March 2005, Deputy Secretary of Defense Paul Wolfowitz signed the Department of Defense Instruction (DoDI) 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*, effective immediately. DoDI 5525.11 provides guidance to the Armed Forces on 18 U.S.C. 3261-3267, the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).

MEJA extends the reach of US jurisdiction to some individuals living overseas. It was created to catch those people falling through the cracks. For example, a host nation might decline to prosecute a military dependent spouse who abuses his children. The victims are all non-host nation nationals and the spouse can simply be sent out of the country and therefore is not a threat to the host nation. Now, under MEJA, the Department of Justice can prosecute that child abuser.

MEJA was successfully used in a recent homicide case. Latasha Arnt was on active duty until she separated when pregnant. She and her husband had been stationed at Incirlik AB, Turkey. She returned to the US for the birth of the baby and a few months later returned to Turkey as a military dependent spouse. She'd only been in country a few days when her husband returned home intoxicated from a friend's barbeque. She stabbed him in the heart and he died within hours. Because Turkey did not prosecute her, under MEJA she was eligible to be tried in US District Court. Although she claimed the stabbing was in self-defense, a jury believed otherwise and convicted her in October 2004 of voluntary manslaughter. She was sentenced in February 2005 to 8 years in confinement.

There is generally no "original" MEJA jurisdiction, and MEJA jurisdiction would only arise when the host nation declines to prosecute. Recall that under most of our Status of Forces Agreements (SOFAs), the host nation has exclusive jurisdiction over dependents and contractors, and primary right of jurisdiction over civilians accompanying the Force. Therefore, use of MEJA may be very rare. Although MEJA has been available for several years, there has not been much guidance on how to use it. DoDI 5525.11 changes that and details procedures for implementing MEJA. Every military attorney should read the entire instruction but in the meantime, here are the highlights:

### Reporting Requirements

There is an annual report due to the General Counsel, Department of Defense, by the last day of February for the immediately preceding calendar year of all cases under MEJA involving arrests, temporary deten-

tion, requests for Federal prosecution and results of the requests.

### Training

AFOSI agents and Security Forces members are authorized to arrest individuals under MEJA. They must be trained on MEJA and the special requirements of arrest and detention. For example, inquiring about the accused's last U.S. residence is a required step in the routine booking procedure.

### Required Briefings

Employees and persons accompanying the Armed Forces outside the United States, who are not nationals of the United States, must be informed of the jurisdiction of MEJA when they are hired for overseas employment or on sponsorship into the overseas command, whichever comes first. For those already in place, they must be put on notice of MEJA's applicability within 60 days of 3 March 2005. It is also recommended that all members of the Armed Forces, civilian employees of the DoD and civilians accompanying the Armed Forces overseas receive the same notice (but it is not mandatory under DoDI 5525.11). Please note that there is NO MEJA jurisdiction over host nation personnel, regardless of their status. Additionally, MEJA jurisdiction over third country nationals can be tricky. In those cases, be sure to work closely with JAJM as the decision to assert MEJA jurisdiction is considered.

### Defense Representation

Staff Judge Advocates must assemble a list (with appropriate disclaimer of no government endorsement) of local civilian attorneys who are licensed to practice law in the United States. Military attorneys may be required to represent an accused under MEJA during the initial proceedings (while the accused is still overseas) if civilian counsel is not available.

### Communications

Video conferencing is recommended for the initial proceedings, which would involve a Federal Magistrate Judge in the United States. Since initial proceedings must take place without unnecessary delay (within 48 hours for an initial appearance), you should establish procedures for video conferencing as soon as possible so they are in place when needed. Of course, while video conferencing is preferred, there is no bar to simply using a telephone with speakerphone capability.

Air Force specific guidance is in the pipeline. If you have questions before that is published, call AFLSA/JAJM at DSN 297-1539.

## CAVEAT

### MONEY, MONEY, MONEY, MON....NEY!

The accused was sentenced to, and the convening authority approved a sentence of, 15 months in confinement and total forfeitures, *but no kick*. When he was released from confinement, total forfeitures were withheld for four more months. Of course, when he was released from confinement, forfeitures of no more than two-thirds pay should have been withheld. During the fifth month, while a working airman, the error was discovered. All excess forfeitures were returned, and, from the sixth month forward, the appropriate two-thirds forfeitures were withheld. The Air Force Court of Criminal Appeals found no error since the accused ultimately was made whole, but military justice practitioners should be alert to this issue at the time of convening authority action and insure appropriate pay is received. A convening authority may even choose, as the one in this case did, to remit uncollected forfeitures at some point following release from confinement. See *United States v. Stewart*, ACM 35188, unpublished decision, 28 January 2005.

When he entered into his pretrial agreement, the accused wanted only two things; a confinement cap and a waiver of automatic forfeitures in the amount of \$500 to be paid to a guardian of his children, in return for his pleas of guilty at a judge alone trial. His adjudged sentence beat the cap. He expected the money would be going to the guardian during the period of confinement, but the convening authority did not waive the automatic forfeitures. The Air Force Court of Criminal Appeals found that because the convening authority failed to waive the forfeiture of pay during the accused's confinement and his family did not receive the agreed-upon payments, the accused did not receive the benefit of his PTA. While the government was willing to pay the accused the money after confinement to correct the oversight, that, the court held, doesn't cure the error. The PTA was declared a **nullity**. The findings and sentence were set aside.

PTA's do make cases move along quickly and efficiently, but attention needs to be paid to their terms or, as here, a case can go bust. See *United States v. Sheffield*, \_\_ M.J. \_\_, (AFCTCrApps 2004).

### YOU GOTTA GIVE ME CREDIT

A confinement facility erroneously computed an accused's good conduct abatement and he was held five days past his minimum release date. The government argued this was an administrative matter that the accused needed to take elsewhere. *Au contraire*, said

the Air Force court, the accused is entitled to "meaningful relief." In this case that equaled five days of pay. See *United States v. Wright*, ACM 35170, unpublished decision, 28 April 2004.

The accused went into pretrial confinement on 2 May and was released on 10 May. The military judge calculated the number of days of credit the accused should be awarded for pretrial confinement to be 8. In fact, a prisoner is entitled to day-for-day credit for each portion of a day spent in pretrial confinement. In this case, the accused was entitled to another day of pretrial confinement credit, and the court so ordered. See *United States v. McBee*, ACM 35346, unpublished decision, 28 January 2005.

The officer accused was sitting in his cell at the USDB when he learned that the United States Court of Appeals for the Armed Forces had affirmed his conviction of all but one of the offenses of which he had been convicted. The case was remanded to the Air Force Court of Criminal Appeals to either dismiss the one offense and reassess the sentence or order a rehearing. The Air Force court ultimately dismissed the offense and reassessed the sentence. It also rejected a claim of illegal pretrial confinement. The accused had argued that he should have been in a pay status after the CAAF opinion since he had "no sentence." In fact, his sentence had not been set aside. He remained convicted of the affirmed offenses and remained subject to an "inchoate sentence" pending further review. To pay a member in such a circumstance would have been a mistake; to have recovered the money mistakenly awarded would have been a miracle. See *United States v. Dodge*, \_\_ M.J. \_\_ (26 January 2005).

## ADMINISTRATIVE LAW

### ROLE OF CONTRACT SECURITY GUARDS

Since the terrorist attacks of September 11, 2001, Congress has expanded the circumstances under which the military may contract for security guard functions at its installations and facilities, thus prompting questions and concerns from the field about the proper role of contract security guards on military installations and the scope of their authority. To help answer these questions and allay concerns, this article briefly addresses the following issues: (1) the authority of contract security guards to enforce laws on military installations; (2) their authority to carry firearms; and (3) civil liability for their acts or omissions.

By way of background, federal law prohibits the military from contracting for the performance of security-guard functions at its installations and facilities in

the United States.<sup>1</sup> However, there are several statutory exceptions to this general prohibition. For example, contracts that are performed overseas, those that are carried out at Government-owned, but privately operated installations, and those that were in place as of September 24, 1983 are exempt. In addition, Congress created an exception for contracts for the performance of *increased* security-guard functions at military installations as a result of the September 11, 2001 terrorist attacks.<sup>2</sup> The military has relied upon this last exception, in particular, to award new contracts for security guard functions.

Contract security guards have essentially the same authority as military security forces members to enforce laws on military installations.<sup>3</sup> They may apprehend individuals who are subject to the Uniformed Code of Military Justice (UCMJ) for committing offenses against the UCMJ on military installations and “detain” civilian lawbreakers for a reasonable period of time (i.e., long enough to transfer them to civilian authorities). Contract security guards derive their authority to apprehend or detain individuals from the common law right to make a citizen’s arrest, although one could also argue they derive their authority from other sources as well, such as the installation commander’s inherent authority to maintain law and order on the installation.<sup>4</sup> Like their military counterparts, contract security guards may also execute search authorizations and issue notices of violation (DD Forms 1805) for traffic offenses.<sup>5</sup>

Likewise, the limitations that apply to military security forces members in the performance of their duties apply equally to contract security guards in the performance of theirs. This includes, for example, limitations on the use of deadly force as set forth in AFI 31-207, “Arming and Use of Force by Air Force Personnel,” and limitations on the use of military personnel to enforce civilian laws as set forth in the Posse Comitatus Act (PCA).<sup>6</sup> Although the PCA does not apply to enforcement of laws on a military installation nor to civilians as a general matter, installation commanders must consider the implications of the PCA whenever there is a potential for contract security guards to be used off base under direct military supervision. For example, absent a statutory exception, contract security guards would not be permitted to direct or control off-base traffic<sup>7</sup> or enforce speed limits on stretches of highways or roads leading to the installation.<sup>8</sup>

Contract security guards may carry firearms in the performance of their duties. The Air Force policy governing who may carry firearms and under what circumstances is found in AFI 31-207. Under the Instruction, designated Air Force officials may authorize properly trained and qualified contract security guards

to carry firearms, including privately owned firearms when required by contract. However, even though the Air Force has the authority to authorize contract security guards to carry firearms, it is nevertheless prudent to require that the contractor and its personnel also comply with local and State laws for carrying firearms. As a practical matter, this will help avoid confusion if the contract security guards are stopped by law enforcement authorities while carrying their firearms off base. It will also ensure the contract security guards are familiar with local and State laws regarding the use of deadly force. We note that local commanders are required to take into account local laws governing firearms and the use of deadly force by contract security guards when developing arming plans for their installations.<sup>9</sup>

Finally, civil liability for the acts or omissions of the contract security guards is no greater than the liability arising from the acts or omissions of military security forces members. In fact, it might be less. Under the Federal Tort Claims Act (FTCA),<sup>10</sup> the United States may be held liable for the acts or omissions of its employees while acting within the scope of their duties. Thus, as an initial matter, a claimant would have to demonstrate that the contract security guard was an “employee of the government”<sup>11</sup> and not an independent contractor to recover against the United States for injuries arising out of the acts or omissions of the guard.<sup>12</sup> Should the claimant prevail on that matter (or alternatively, establish an independent basis upon which to hold the government liable),<sup>13</sup> the government would be in no worse a position than it would have been had a military security forces member committed the act or omission. Should the claimant fail to establish the contract security guard was an employee of the government, the government would have no liability and the claimant’s cause of action would lie solely against the guard and contractor.

<sup>1</sup>10 U.S.C. § 2465.

<sup>2</sup>Pub. L. 107-315, § 332. *See also*, P.L. 107-56, § 1010 (permitting security contracts with local or State governments during the duration of Operation Enduring Freedom and 180 days thereafter).

<sup>3</sup>*See* OpJAGAF, 1980/65.

<sup>4</sup>*See* Major M.J. Gilligan, *Opening the Gate?: An Analysis of Military Law Enforcement Authority over Civilian Lawbreakers On and Off the Federal Installation*, 161 Mil. L. Rev. 1 (1999).

<sup>5</sup>OpJAGAF, 1980/65.

<sup>6</sup>18 U.S.C. § 1385.

<sup>7</sup>OpJAGAF 1975/105.

<sup>8</sup>OpJAGAF 2002/17; *See also*, DoDD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials* (list of prohibited activities)

<sup>9</sup>AFI 31-207, para 2.2.2.

<sup>10</sup>28 U.S.C. §§ 1346(b), 2671-2680.

<sup>11</sup>28 U.S.C. § 2671.

<sup>12</sup>See e.g., *Brooks v. A.R. & S. Enterprises, Inc.*, 622 F.2d 8 (1<sup>st</sup> Cir. 1980) (holding contract guard not an employee of the government under FTCA)

<sup>13</sup>See e.g., *Macharia v. United States*, 334 F.3d 61 (D.C. App. 2003) (alleging negligent supervision by government official of security guard contract).

## TORT CLAIMS AND HEALTH LAW

### INTERVIEWING WITNESSES

Preparation is the key to any good interview. Before interviewing a witness, you should familiarize yourself with any report of facts that you can, such as a police report, an incident report at the commissary or BX, or any other written information available. From the report(s), you should have a sense of what happened.

After learning as much about the facts as possible, you should do an analysis of the law as it applies to the facts. By looking at the law, as it will apply, you will be able to key in on important questions that otherwise you might miss. For example, if an accident involved a slip and fall, knowing the specific standards of negligence in the jurisdiction can help hone your questions. It may matter in our defense if a spill had been reported, if we can know the exact time between a spill and the accident, or how a facility such as the BX inspects the aisles for safety, how often, by who and if it is documented. All these questions can be very important in some jurisdictions. If an event that gives rise to a claim involves the safety of a facility, knowing the building standards, or the safety record of the facility can help shape your interview. By knowing the law of the state where the accident occurred, particularly looking at similar cases, you will be familiar with the issues the courts will be concerned with, and can shape your inquiry accordingly.

As part of your learning process you should try to go to the scene and examine it as soon as you can, and if it is relatively the same as at the time of your incident, take pictures of it. This will help not only shape your questions, but allow you to understand the answers better. If a case involves a trip, see if you can find the object the claimant tripped over, or one like it. If it helps you clarify matters, you may want to take a witness back to where the accident occurred, and see if they can “run” you through it. Often being in the place where a witness saw the event will help them remember details that otherwise would be left out, including other potential witnesses.

Direct questions may not always get to information that you can get from a witness. A witness may not be able to estimate the time between events directly, how-

ever if they are taken through the events, and each action discussed, you may indirectly get an accurate time line. If you choose to do this however, care must be taken to not be suggestive of your own thoughts as to how long events may have taken; you should be careful not to plant information in the witnesses mind, or make suggestions they can merely agree with.

Be certain to allow the witness free reign at the end of the interview. You should certainly ask them if there is anything you did not cover that the witness remembers, if there is anything you have not covered that the witness thinks is important, or if there is anyone else that might have information you should speak with. If the entire interview is closed questions, you may lose information that would otherwise be available to you.

You should always ascertain if the witness has any records that are pertinent to the incident, either from it, or perhaps records of inspections, or of a previous accident. You may also try to ask negative questions. If a witness tells you they did not notice a dangerous condition prior to the accident, such as a spill on the floor, it may be useful to ask them if the condition had been there earlier, do they believe they would have noticed it? It may be possible to find witnesses that are not readily apparent. For example, if the allegation is a slip on a wet spot, all those that might maintain and mop the floor are potential witnesses, not just to determine if they knew they had cleaned up, but to learn the reporting procedures, what they did if a report was made to them regarding a spill or wet spot, and if such a report was made. Individuals that perform maintenance may also provide good information on their Standard Operating Procedures, any documentation they make regarding inspections and tasks, and other information useful in defending a claim of negligence.

In general, it is best to conduct an interview where the witness is comfortable. Whether to have a witness come to your office, or you go to theirs, is a judgment call based on everything you know at the time. If you want to see the scene, or believe there are records that are more easily available at the place of the accident, it would be better to go to the witness’s place of duty, assuming there is a quiet, private room where you can talk. As you will be doing a summary statement, not a witness statement, we do not recommend taping an interview, however be certain you have a pad and pen to take notes. If there is more than one witness you need to speak with, do not talk to them together, but take each separately. Once you are done with an interview, be certain to explain what you will do with the information, and tell the witness you may need to follow-up with them as the investigation continues.



Be certain to get all the information you need for the witness locator report: full name, social security number (for military and federal civilian employees), current work and home address, duty/work and home phone (commercial and DSN), expected PCS transfer or completion of service date, address for future contact, and a short description of witness' involvement. If there is evidence that may be helpful in the claim, you should take it for the files. If you cannot take the originals, at least be certain to make copies, note where the original is kept and who keeps it, and explain the need to safeguard it to the witness. If you interview an individual but find they do not have useful information, keep a note that they were interviewed, it may save work later.

While you may explain the claims process in general terms if the witness asks, avoid making any statements regarding the potential for litigation, or whether the witness will be needed in the future. Provide them with a contact number at your office, and invite them to call you if they think of additional information or have any questions. Be certain to ask them to contact your office if any of their information changes, such as they will be unavailable for a period of time or they move jobs or homes.

To begin an interview it is probably best if you can first make certain the witness knows the event you are interested in, and allow them to proceed with a narrative, if they are able to. By allowing the witness to speak in narrative form, you are better able to see how well they are able to recall, and how credible a witness they might be if they had to appear in court. You also may obtain information you would otherwise miss in a Q&A format. Once the witness has given you a general account of what they recall, you may begin to focus in on specifics that you have outlined. Your question and answer session may be brief, or may cover a wide range of issues.

Once you have completed the interview, it is best to draw-up your summary as soon after as possible, so the events are fresh in your mind. Once you have a summary completed, you should once more examine the law and the facts you were able to get from the witness to be certain that you have captured the important points the witness made. By reviewing the elements of negligence, as the law provides, and reviewing the information a witness gave you while it is fresh, it is easier to see if you have recorded everything the witness said that will be important to your case. Once you have reviewed the interview and the law, you should know what further investigation must be done to gather the information needed to complete the claims file.

## RES GESTAE

For those not already familiar with this tool, the section on Medical Jurisprudence at the Uniformed Services University of the Health Sciences has an excellent web site for military health law references. The site can be found at:

<http://www.usuhs.mil/ogc/mhln/index.html>. There is a point of contact to receive the password to enter certain reference areas. Also highly beneficial is AFLSA/JACT's web site for questions and answers relating to HIPAA issues. That site is at: <https://aflsa.jag.af.mil/AF/lynx/jact/index.php>.

## VERBA SAPIENTI

Whenever a medical malpractice claim is being adjudicated, it is wise to keep in contact with the significantly involved providers. In many cases, providers separate or retire, and it becomes difficult to contact them if they are needed for litigation or quality assurance purposes. It is to their benefit to know what is going on with the case, and to leave forwarding address information for easier contact. In some instances, cases can languish for years before coming to trial, and it is important to keep track of those who are involved.

## ENVIRONMENTAL LAW

### ENVIRONMENTAL CONTINUING TORTS? SAY IT'S NOT SO!

Recently, several claimants and plaintiffs in environmental Federal Tort Claims Act (FTCA)<sup>1</sup> cases have raised the continuing tort doctrine (CTD) in an effort to defeat a statute of limitations defense. In arguing their position, plaintiffs have cited a recent 10<sup>th</sup> Circuit case involving the Air Force, *Hoery v. United States*, 324 F.3d 1220 (10<sup>th</sup> Cir 2003),<sup>2</sup> for the proposition that the state's CTD applies to a cause of action under the FTCA.<sup>3</sup> If there is a statute of limitations issue in an environmental claim, the seven-point memorandum should address the CTD. The following short discussion is intended to highlight the *Hoery* issue in ground-water contamination cases.

The FTCA is a limited waiver of the United States' sovereign immunity.<sup>4</sup> The requirement for filing a timely administrative claim is a jurisdictional prerequisite for filing an FTCA action, and the FTCA two-year statute of limitations, 28 U.S.C. § 2401(b), provides that a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. It is well settled that the interpretation of accrual is a question of federal law.<sup>5</sup>



In a groundwater contamination case where the United States' negligent or wrongful introduction of contaminants into the groundwater have ceased, an FTCA claim accrues when the claimant knew, or through the exercise of due diligence should have known, of his or her injury and its physical cause. Arguably, the claim accrues at that point for all injuries resulting from the United States' contamination of the groundwater, including those resulting from future migration of contaminated groundwater, because the scope, extent, and duration of the injury of the claimant's property can be ascertained upon discovery of the groundwater contamination, and the claimant can seek in a single suit damages for all past, present, and future injuries caused by the contaminated groundwater.

However, in *Hoery*,<sup>2</sup> the Court drew a distinction between permanent torts and continuing torts. According to the Court, for continuing torts, the FTCA claim continues to accrue as long as the "tortious conduct" continues, although the plaintiff's recovery is limited by the statute of limitation to the two-year period dating back from when the plaintiff's complaint was filed. In this case, the "tortious conduct" was the continued migration and presence of Trichloroethylene (TCE) in the groundwater underneath plaintiff's land.<sup>6</sup> In defending these cases, we have argued that states' CTDs are inapplicable to FTCA cases because the accrual of a claim is a question of federal law. However, it is our position that if a state's CTD is applied over our objections, the continued migration and presence of contaminants does not constitute continued tortious conduct where the wrongful introduction of contaminants has ceased. Therefore, there is not a continuing tort and the state's CTD is irrelevant. Similarly, we have also opposed assertions that the Government's failure to warn, mitigate, or correct the injury caused by the initial release constitutes new and separated claims.<sup>7</sup>

Application of state's continuing tort doctrines to FTCA cases will most likely lead to inconsistent results in different jurisdictions thereby frustrating the Congressional intent of having a single two-year statute of limitations. Compare *Hoery* and *Arcade* (continuing tort predicated on continuing harm) with *Carpenter v. Texaco Inc.*, 646 N.E.2d 398, 399 (Mass. 1995) (continuing tort must be based upon continuing tortious conduct not by the continuation of the harm) and *Forest City Enterprises, Inc. v. Leemon Oil Co.*, 577 N.W.2d 150, 160 n.7 (Mich. App 1998) (same). Regardless, any memorandum addressing a statute of limitations defense in an environmental case should analyze the state's CTD and other related issues.

<sup>1</sup>Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)(1), 2671-80

<sup>2</sup>Plaintiff sued the United States seeking unspecified damages under the FTCA for alleged groundwater contamination. Plaintiff asserted that the alleged contamination was caused by the United States Air Force's negligent and wrongful release of Trichloroethylene at Lowry Air Force Base, and sought damages under theories of negligence, trespass, nuisance, and unjust enrichment.

<sup>3</sup>See also *Arcade Water District v. United States*, 940 F.2d 1265 (9<sup>th</sup> Cir. 1991) (In *Arcade*, the Court took the view that California state law could displace the federal law of accrual.)

<sup>4</sup>*United States v. Idaho*, 508 U.S. 1, 6-7 (1993); *United States v. Orleans*, 425 U.S. 807, 813 (1976)

<sup>5</sup>28 U.S.C. § 2401(b)

<sup>6</sup>The Court seemed to blur the line between continuing harm and continuing conduct to arrive at the final result which was to find a continuing tort under Colorado law and reverse and remand the case back to District Court.

<sup>7</sup>*Heilman v. United States*, 731 F.2d 1104, 1108 (3d Cir. 1984)

## UPCOMING ENVIRONMENTAL LAW COURSES AND WORKSHOP

The Environmental Law Update Course will be held at the Air Force JAG School on 27-29 June 2005. This course is designed to provide military and civilian attorneys who are environmental practitioners with an update on recent developments in the field of environmental law. The updates particularly emphasize developments that have a direct impact on activities within the Department of Defense.

The Advanced Environmental Law Course will be held in Washington D.C. on 25-26 October 2005. This course provides senior military judge advocates and civilian attorneys with comprehension of the current and emerging issues in environmental law facing the Department of Defense and the advanced principles, policies and concepts of federal and state environmental law, as well as the DoD procedures, policy, organization and doctrine for implementing and complying with environmental requirements.

The JACE MAJCOM workshop will be held in Washington D.C. on 27-29 October 2005. This workshop is geared toward Air Force Environmental professionals from MAJCOM and Headquarters level environmental offices.

The next basic Environmental Law Course is scheduled for 23 -27 January 2006.

## TRIAL NOTEBOOK

### Admissibility at Sentencing of *Care* Inquiry Statements

Captain Christopher M. Schumann\*

During the providence inquiry in a case involving a plea of guilty, the accused is warned by the military judge that he waives his right against self-incrimination and that any statements he makes, while under oath, will be used against him by the military judge to determine whether the accused is in fact guilty of the charged offense or offenses. The accused is further informed that anything he tells the military judge may be used against him in the sentencing portion of the trial. The question then becomes, what is the vehicle for admission of these statements at sentencing? The short answer is, it depends.

In a case involving members, there are several methods available to enter statements made by the accused during the *Care*<sup>1</sup> inquiry into evidence during the sentencing phase of the trial. The most instructive case on this issue is *United States v. Holt*.<sup>2</sup> There the Court of Military Appeals found that such testimony is considered an admission by the accused and can be presented to the members either by a properly authenticated transcript or by the testimony of a court reporter or other person who heard what the accused said during the providence inquiry.<sup>3</sup> One common method is for trial counsel to arrange for a paralegal, OSI agent, or other capable person to sit in the courtroom during the inquiry, and then later call this person to testify during the sentencing phase of the trial. These methods are by no means all inclusive, and other options would include allowing the military judge to convey the statements to the members directly<sup>4</sup> or by playing a tape recording of the accused's statements.<sup>5</sup>

But what about a judge alone guilty plea case? Is the trial counsel required to have a court reporter or other witness provide testimony to the military judge on the issue of statements made by the accused during the *Care* inquiry that the military judge has just heard? The answer to that question is no. The Court in *Holt* was clear on this point:

We perceive no reason why it is necessary to have a transcript prepared of the sworn testimony that the military judge had heard during the sentencing proceedings in order for this evidence to be considered by the judge in sentencing or to be mentioned by trial counsel in an argument on sentence.<sup>6</sup>

One question that is less clear is whether or not, in a judge alone case, the military judge *automatically* considers the statements made by the accused during the providence inquiry for purpose of sentencing, or is some action required on the part of the trial counsel to compel the military judge to consider these statements. Here again, the Court in *Holt* provides some guidance on this point:

Therefore, we believe that, *if offered by the Government*, this testimony should be admissible as an admission by the accused to aggravating circumstances. (*italics added*)<sup>7</sup>

The implication seems clear. The trial counsel should first offer **all** statements made by the accused during the providence inquiry into evidence before the judge can consider them. This can be done simply by having trial counsel, at the appropriate time, make an oral motion on the record requesting that the military judge consider all statements made by the accused during the *Care* inquiry for purposes of determining an appropriate sentence. Is this absolutely necessary? Some may not think so. However, taking this conservative approach is the safest way to proceed and will ensure that these often crucial statements are properly before the military judge for consideration during sentencing.

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\*Capt Christopher Schumann (B.A., Arizona State University; J.D., University of Pittsburgh) is a former Circuit Trial Counsel and is currently an instructor in the Military Justice Division of the Air Force JAG School. He is a member of the Pennsylvania Bar.

<sup>1</sup>40 CMR 247 (1969)

<sup>2</sup>27 M.J. 57 (CMA 1988)

<sup>3</sup>*Id.* at 61

<sup>4</sup>*U.S. v. Figura*, 44 M.J. 308 (1996)

<sup>5</sup>*U.S. v. Irwin*, 42 M.J. 479 (1995)

<sup>6</sup>*U.S. v. Holt* at 60

<sup>7</sup>*Id.*

### Charging Conduct As a Crime Under Article 133

Lieutenant Nicholas Doukas\*

Officers can be charged with a crime under Article 133 of the Uniform Code of Military Justice for conduct that is not codified as a crime under any federal or state law. Article 133 states that “[a]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”<sup>1</sup> Article 133

has two enumerated elements. First, “the accused did or omitted to do certain acts.”<sup>2</sup> Second, “[t]hat, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.”<sup>3</sup> Such acts or omissions may be criminal even if they occurred in an “unofficial or private capacity.”<sup>4</sup>

The Manual for Courts-Martial (MCM), United States (2002 ed) provides a certain degree of explanation and a number of examples of conduct that could violate Article 133.<sup>5</sup> The MCM states that Article 133 expressly covers “action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer’s character as a gentleman.”<sup>6</sup> Acts that would constitute a violation of Article 133 include those that involve “dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.”<sup>7</sup> Enumerated examples of such behavior include knowingly making a false official statement; dishonorable statements; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer’s presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer’s family.<sup>8</sup>

The courts have not articulated a clear standard to determine if specific conduct violates Article 133. The seminal case in this area is *Parker v. Levy*, 417 U.S. 733 (1974). In *Parker*, the Court provided the following guidance:

To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.<sup>9</sup>

The courts typically engage in two types of analysis to determine if specific conduct violates Article 133: (1) the courts have analogized that charged behavior at issue to behavior held to have violated Article 133 under case law; or (2) they have simply reviewed the facts of the case to show that the behavior is clearly

“unbecoming” without further legal analysis.

Behavior that has been held to violate Article 133 by the courts may provide the clearest guidelines in charging conduct under Article 133. Examples of such behavior include: (1) not reporting child abuse by a spouse or failing to seek proper medical attention for a child;<sup>10</sup> (2) being found semi-clad with enlisted man’s wife in apartment of TDY enlisted man;<sup>11</sup> (3) nurse catheterizing herself and then injecting saline solution into her bladder to avoid drug urinalysis detection;<sup>12</sup> (4) having an “open, notorious and public” affair with an enlisted woman;<sup>13</sup> (5) sending sexually suggestive letters to a 14-year-old girl;<sup>14</sup> (6) publicly associating with a known drug smuggler;<sup>15</sup> (7) possession of nude photographs of children in unlocked government desk;<sup>16</sup> (8) acts of having an affair with a civilian, deceitfully obtaining divorce by lying to spouse and court, and failing to pay debt discharged in bankruptcy;<sup>17</sup> (9) cheating in a card game with fellow officers;<sup>18</sup> (10) shoplifting;<sup>19</sup> (11) submitting false efficiency report on oneself with rater’s signature forged thereon;<sup>20</sup> (12) lying to supervisor about necessity to take time-off from duties;<sup>21</sup> and (13) requesting another person to commit an offense, even though requester did not entertain any specific intent that the offense be committed by the person to whom the request was made.<sup>22</sup>

In addition to the above statutory requirements, numerous courts have also held that a “military officer must be on notice that the questioned activities constitute conduct unbecoming an officer.”<sup>23</sup> Such notice is usually proven via custom, regulation, admission that the conduct was inappropriate or by reviewing the circumstances surrounding the specific conduct at issue.<sup>24</sup>

An officer can be charged with a crime under Article 133 for conduct that is not set forth as a crime under any state or federal law. It must be shown, however, that the conduct violated the two elements of Article 133. This is normally done by analogizing the conduct at issue with conduct that has been found to violate Article 133 or articulating to the court that the facts in question were of such a nature to constitute “unbecoming conduct” by an officer, as articulated by the Supreme Court in *Parker v. Levy*. Courts have also articulated an “on notice” requirement, which can be proven by custom, regulation, admission by the officer, past practice (conduct has been held to be criminal by courts) or analyzing the egregious nature of the misconduct.

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<sup>1</sup>Manual for Courts-Martial, United States (2002 ed).

<sup>2</sup>*Id.* at para 59.b.1.

<sup>3</sup>*Id.* at para 59.b.2.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at para 59.c.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>417 U.S. at 753-754 (citing *U.S. v. Howe*, 17 U.S.C.M.A. 165, 177-178 (1967), which quotes W. Winthrop, *Military Law and Precedents*, 711-712 (2d ed. 1920)

<sup>10</sup>*U.S. v. Miller*, 37 M.J. 133 (C.M.A 1993)

<sup>11</sup>*U.S. v. Frazier*, 34 M.J. 19 (C.M.A 1992)

<sup>12</sup>*U.S. v. Norvell*, 26 M.J. 477 (C.M.A 1982)

<sup>13</sup>*U.S. v. Cisler*, 33 M.J. 503 (A.F.C.M.R. 1991)

<sup>14</sup>*U.S. v. Hartwig*, 39 M.J. 125 (C.M.A. 1994)

<sup>15</sup>*U.S. v. Maderia*, 38 M.J. 494 (C.M.A. 1994)

<sup>16</sup>*U.S. v. Henley*, 53 M.J. 488 (2000)

<sup>17</sup>*U.S. v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993)

<sup>18</sup>*U.S. v. West*, 16 C.M.R. 587 (A.F.B.R. 1954)

<sup>19</sup>*U.S. v. Coons*, 7 C.M.R. 381 (A.B.R. 1952)

<sup>20</sup>*U.S. v. Middleton*, 12 U.S.C.M.A. 54 (1960)

<sup>21</sup>*U.S. v. Sheehan*, 15 M.J. 724 (A.C.M.R. 1993)

<sup>22</sup>*U.S. v. Taylor*, 23 M.J. 314 (C.M.A. 1987)

<sup>23</sup>*U.S. v. Murchison*, 1997 CCA LEXIS 442, 5 (A.F.CtCrim.App 1997); See *U.S. v. Rogers*, 50 M.J. 805, 808 (A.F.CtCrim.App. 1999) and *U.S. v. Guaglione*, 27 M.J. 268, 272 (C.M.A. 1988)

<sup>24</sup>*U.S. v. Rogers*, 50 M.J. at 809



# Leadership Qualities For Deputy Staff Judge Advocates

## Lieutenant Colonel James R. Cantrall

Being the Deputy is one of the most difficult jobs in any legal office. The Deputy generally has seniority without authority and thus has to do more leading by example than by the nature of the position. As I begin my sixth year as a Deputy Staff Judge Advocate (DSJA) to my fifth SJA, I have distilled my leadership experiences down to a few essential leadership qualities which I have found a Deputy should possess in order to be successful. So, for the sake of Oliver Wendell Holmes,<sup>1</sup> I offer my experiences to my DSJA brethren as topics to consider as they begin, or continue their duties. While I admit this is not an all-inclusive list, I think it covers the most important qualities required in a Deputy. However, as my father always says, this is free advice, so feel free to modify or ignore it as you see fit. With that proviso, here goes.

### LOYALTY

I still remember my first meeting with my first SJA. In this meeting, he told me that loyalty was his number one priority for and from me. If nothing else, so long as I was loyal to him, everything else could be worked through. Of course, he expected more of me, but loyalty was the most important thing to him. And, it wasn't just him. Each of the succeeding SJA's I've worked for consider this the most important leadership quality of a DSJA.

So, what did they mean by loyalty? Well, it wasn't some mindless sycophant, or "yes-man." What they all wanted was someone who was committed to their agenda, doing things their way, and running the office the way they wanted it run. This is a reasonable expectation when you think about it. They are the ones who are responsible for the office. If things go bad, they are the ones who get blamed, not the Deputy, section chief, Law Office Manager, or Superintendent. The SJA is accountable for the office. The least he can expect from the Deputy is commitment to making his job easier and making the organization successful. And, don't forget, they are the ones signing your per-

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formance report. If they are successful, you are successful.

Once I understood this definition of "loyalty," I then had to put it into practice. I can be a pretty independent thinker, and, as officers and lawyers, we are all trained to be "take charge" kind of people. So, following my boss' definition of loyalty at first sounded difficult. But, in reality, it wasn't really all that hard. By utilizing a few simple guidelines, I was able to bring my ideas and experiences to the boss and still be completely loyal to him. Some of the rules I lived by were things like: the boss is always right; support the boss's decisions fully; work to implement his decisions and priorities – it's his agenda that matters; run the office the way the boss wants it run – not the way I would run it; and when given room for your own agenda, work to make sure it fits in with the boss's agenda. Let me break these rules down.

### THE BOSS IS ALWAYS RIGHT

This doesn't mean you have no opinion or that you don't express your thoughts and experiences. Quite the contrary. Any good SJA wants and needs input from you as well as her entire staff. In fact, it would be disloyal to deprive her of this. However, once the boss makes a decision based on all the facts and information her staff has given her, you, as the Deputy and liaison to the rest of the staff, need to make sure that decision is understood to be the right decision.<sup>2</sup> If the staff thinks that you disagree with the final decision, they will begin to lose confidence in their leadership. Once that happens, the office will begin to break down and lose focus. Therefore, it is essential that you make everyone understand that you fully agree with and support the boss's decision – especially if you disagreed with the course of action when it was being discussed. If the staff sees you supporting the decision, they will feel more comfortable with it and then work the boss' agenda.

### SUPPORT THE BOSS'S DECISIONS FULLY

This can almost be a subset of the prior point that the boss is always right, however, I think it is distinct because not only do you need to "talk the talk" (saying the boss is right), you also need to "walk the walk"



(supporting that decision). This means not only telling the staff to do what the boss said, but also taking the time to explain to those who don't understand the decision, why the decision is right and how it will help the overall success of the office. At times staff members may come to you behind closed doors and ask why they have to do something the boss said to do. The Deputy should explain why the decision was taken, what facts they need to know to understand the decision, and why their implementation of the decision is important. As my current commander and my current boss always say, "the best leaders don't lead by fear, but by getting people to buy into their program." It is part of your job to get the staff to buy into the bosses decisions, even if you might have advocated a different course of action before the decision was made. When they see that you have bought into the decision, those opposed to it begin to buy into to as well.

"Walking the walk" also means publicly supporting the bosses' decisions. If the staff sees the senior leadership walking and working as one, they will be much more likely to follow the SJA's leadership and work his agenda. This is not a new concept. In my reading I stumbled across a letter from President Lincoln to General Hooker on General Hooker's appointment to command the Army of the Potomac. In that letter, President Lincoln criticized General Hooker for his actions while a subordinate to General Burnside, namely thwarting General Burnside as much as he could. While President Lincoln had serious concerns about the state of the Army in light of General Hooker's previous conduct, the President hoped that such disloyalty would not come back to haunt General Hooker.<sup>3</sup> The moral of this story is that not only is loyalty essential for the smooth functioning of the unit when you are the subordinate, but also sets the bar for the conduct of others when you are the SJA. Thus, if you want loyalty when you are the boss, it is vital that you show similar loyalty when you are the subordinate.

#### **WORK TO IMPLEMENT THE BOSSES DECISIONS AND PRIORITIES**

Don't just expect things to get done. As the DSJA, it is your job to ensure that things actually get done. This is a two-step process. First, you become involved in what is going on in your office. Engage in what a former SJA of mine used to call, "MBWA – Management by Walking Around." This "theory" calls for leaders to simply go around the office at various times and see

*"Walking the walk" also means publicly supporting the bosses' decisions. If the staff sees the senior leadership walking and working as one, they will be much more likely to follow the SJA's leadership and work his agenda.*

what your folks are up to. While we are leaders not managers, the motivation behind it applies to our good leaders. MBWA allows you to discover the actual tenor of the office – do customers wait an inordinate amount of time for service, is the service competent, does it address our clients needs? It also allows you to find out what your staff is actually doing on a day-to-day basis. Only by finding out what your folks are doing, can you understand what their abilities and limitations are and then find ways to overcome them.

Once you have the tenor of the office, you need to take those steps necessary to get the staff to implement the bosses decisions and programs. Accordingly, you need to stay on top of projects. If they are falling behind, do some of the work yourself. There is no better example of proper officer leadership than the senior officers doing some of the work – from processing paperwork to entering information into AMJAMS or AFCIMS, to manual labor. Remember the big picture – your job is to accomplish the objectives laid out by the SJA. If you don't do all you can do to make that happen, then you have failed – not only the boss, but yourself as well by not making the most of this opportunity to excel.

#### **RUN THE OFFICE THE WAY THE BOSS WANTS IT RUN**

When the boss was on leave or out of the office for some reason, I made the decision to do things the way I thought the boss wanted them done. That decision was not always popular with the staff. Some said, "Well, the boss is gone and you can do things the way you want." I also have several friends and colleagues who served as deputies who always saw the boss being away as a liberating experience – they could now do things their own way. From whatever perspective you view this issue, in my opinion, doing things the way I want is always the wrong answer. If you do things your way, it sets up conflict between your views and those of the boss which can lead to unease in the office as a whole.<sup>4</sup> If your actions are the cause of unease, you have failed. Thus, always do things the bosses way. Not only does this encourage the staff to do things the bosses way as well, it also raises your position in the office because the staff will understand that you are speaking as the SJA and give you the respect they give the SJA himself.

Finally, make sure your agenda fits within the bosses' agenda. Of course, we all want to be promoted – that is our individual number one agenda item. But,

in this context, I am referring to those programs and opportunities to excel that come your way. Whether these are inside or outside of the legal office, you need to ensure that your decisions are in line with the direction the SJA wants the legal office to go. If your programs inside the office have different goals, you can cause complete breakdown in the cohesiveness of the office by driving the staff in different directions. When they don't have clear goals, they don't know where to go and are always upsetting someone in a leadership position. They experience frustration, engage in competition between themselves, and view senior leaders as being in competition. None of these outcomes is good. If your programs outside the office have different goals than your bosses', then you have exposed him to questions from other officers on base regarding his decisions and expose yourself to questions regarding your loyalty to your boss and the Air Force. Again, neither of these results is positive for you or the legal profession as a whole. So, remember to work the SJA's agenda, keep his priorities foremost and you should be well on the way to success as a Deputy.

## **INTEGRITY**

We often hear this term bandied about as a core value of the Air Force, a key personal value, or as part of being a professional officer. I fully agree with all of those. But, in this context, I mean integrity to yourself as well as to others around you.<sup>5</sup> Integrity is really your ticket into everything you do as a deputy. Everyone must believe you when you say something – even if it is unflattering to you personally. Like Benjamin Franklin said, “what you seem to be, be really.”<sup>6</sup> Again, I recall the first meeting with my first SJA and his comment about loyalty. He also talked about integrity. He wanted me to be honest with him about what I knew, what I could do, and why I did what I did. This is difficult. As Air Force officers and attorneys, we are trained to have a certain “can do” attitude and to never admit weakness or lack of ability. However, there are times “can do” is just going to take a little longer.

Personally, I have spent most of my career trying to avoid some fields of practice. I don't like them and don't do them well. However, on those occasions when I had to work in unfamiliar areas, I tried to be upfront with everyone regarding my abilities (or lack thereof). I always found that people were even more willing to work with me when I didn't know something than when I did because they trusted that I was really working with them. It also demonstrated my personal commitment to getting the client the right answer – something that is always appreciated. It

worked the same way with the boss. When I discussed things with him and was honest regarding my abilities, he always worked with me to improve my understanding of that subject area and appreciated that I was making the effort. Plus, rather than wondering where issues were lurking, they knew where potential land mines were located. This allowed them to focus their attention and made their job easier – and anything that makes an SJA's job easier is something they appreciate.

Also, you need to be honest with the staff. Being honest with them instills confidence in you. If they know you are being honest with them – even if it shows potential weakness in your legal skills, they are much more likely to be honest with you and other superiors – even if it shows their weaknesses. It is also important that when staff members are honest with you that you reward them for this. Work with them to improve their knowledge, their comfort level in doing that task, and their ability to do that task in the future. While you may never see the rewards of taking the time to do this, the Air Force will be much better off when all our members are honest with themselves and others.

## **ABILITY**

This leadership quality is not really that different from what you brought to your duties as a staff attorney. The exception is that you usually aren't assigned one specific area of practice. Rather, you are expected to have some understanding of all areas of practice in the office. As such, you need to work to not only hone your skills at those areas you know well, you also need to find ways to expand your knowledge and experience base. You can usually get some of the best training by simply doing the normal daily work in your office and building/improving a training program tailored to the specific needs and abilities in your office. You can also attend one of the many courses offered by one of the JAG schools. Look also at other training opportunities offered by the U.S. Attorney General at the Department of Justice School in Columbia, S. C., or training offered by other professional organizations (National College of District Attorneys, American Bar Association, local bar groups, etc.).

Once you have the training, you then need to do something with it. You set the standard for the staff attorneys in the office. Set your standards high and then strive to meet them. As Thomas Jefferson said, “Whenever you are to do a thing, though it can never be known but to yourself, ask yourself how you would act were all the world looking at you, and act accordingly.”<sup>7</sup> This sounds almost like a “no brainer” concept, but you would be surprised at the number of peo-

ple who are merely willing to settle for satisfactory work rather than strive to accomplish excellent performance. No one expects perfection, they do expect and demand that you constantly strive to attain perfection. You lead by doing as much as by what you say. If you turn out poor quality work and let things slide, then everyone else in the office will do the same because, “if that is good enough for the deputy, it must be good enough for me.”

## **RESPONSIBILITY**

As the Deputy, you usually don’t have direct responsibility for any certain program. You aren’t the Claims Chief, or the Chief of Military Justice. However, as the Deputy, you rise or fall with the overall success of the office. Therefore, you need to be knowledgeable about the status of those programs to ensure that they are working properly. If you can’t read AMJAMS or AFCIMS, you aren’t doing any good for anyone. You don’t need to know them as well as the section chiefs or NCOIC’s, but you better be able to understand the products they produce and how to use them to administer the programs.

I have always viewed my role in the office to be analogous to that of the office “Wild Weasel” (no pun intended). I’m there to clear out all the ground clutter that takes up the SJA’s time with administrivia rather than letting her focus on the big picture issues facing the office. Whether it’s the quarterly award nominations, keeping performance reports/promotion recommendations on track, training programs, office finances, deployment issues, reserve issues, office suspensions, office inventories, leave schedules, higher headquarters recurring administrative suspensions, or recurring reporting requirements, these are all “programs” which SJA’s are usually ebullient to release and let you make them your own. By demonstrating your attention to these details, you make the SJA’s job enormously easier and show all the subordinates in the office that little things do matter. End result, by taking responsibility for these “small” programs, you can lead the office to become better overall – and that is what everyone wants.

## **SERVICE**

Usually, we think of this term as referring to our obligations to our nation and the Air Force. And that is partially correct. However, as I see it, our obligations also extend to our duties as members of the legal profession as well. Let me break these down.

First, as officers we are sworn to defend our country. In order to do that, we have to refer to our Service for guidance. As Air Force members, one of our references is to our core values.<sup>8</sup> As part of this discussion,

we look at the third value – “Service Before Self.” We’ve all heard about “Service Before Self” and how we should make that part of our individual “creeds.” We meet this obligation in several ways. We ensure that all other service members have the highest quality legal services we can provide.<sup>9</sup> We have to ensure that all our clients are prepared for the loss of their loved-ones whether caused by temporary duty, reassignment, deployment, or death. We also ensure that we provide these services at all times and in all places – CONUS, overseas and in deployed locations. It also means preparing ourselves to be the best officers we can be. As anyone who has been deployed can tell you, in that environment you are no longer “the JAG.” You are the Captain, Major, Lieutenant Colonel, or Colonel who must provide leadership. When you are sitting in the bunker with mortar shells going off around you, all the enlisted persons aren’t going to excuse your ignorance as an officer because you are a JAG. They are going to look to you to get them through that situation. If you aren’t prepared now, you need to start getting prepared. That is the least we owe our comrades and fellow citizens – after all they are the ones who pay our salaries.

Additionally, by service, I’m also referring to our sworn obligations as attorneys. Attorneys are a service profession – we serve the needs of our fellow citizens by ensuring that they have access to the legal system to address their needs and concerns. This is one of the first requirements of a civilized community. If we fail in this duty, then we fail not only as attorneys but as officers as well. We need to keep in mind not just our duty to our comrades in arms, but also to our customers (yes, all those nagging legal assistance clients), and our nation as a whole. When you think about it, this is a heady responsibility. However, it is one we all voluntarily accepted when we donned our uniforms. As such, we are honor bound to do our best to live up to this obligation. Any less is a violation of our oaths to our fellow citizens and the All Mighty.

By adopting the leadership qualities I’ve outlined, I don’t certify that you are guaranteed success, either as a judge advocate or an officer. However, I believe that these traits will give you the best chance for success. I also believe these traits will produce positive, long-term effects for the Air Force. Each of these traits is designed to change or refine the culture in your office. Too often we lose focus as an organization and officer corps – focusing on “what is in it for me,” rather than what is in the best interests of the United States. By emphasizing loyalty, we will grow a culture that values loyalty. The same holds true for integrity. When we value integrity, we encourage it in others. The same holds true for ability, responsibility, and service.

I'm not naïve enough to believe that one person alone will single handedly change the Air Force for the better. But, if I don't do my best to make positive changes, I can't expect those changes ever to take place. Like the ancient proverb says, the longest journey starts with the smallest step. I therefore encourage all of you to take the steps and adopt these traits to the best of your ability. Not only will they improve your personal performance, they will improve the Air Force and The Judge Advocate General's Corps as well. Good luck.

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<sup>1</sup>“We learn how to behave as lawyers, soldiers, merchants, or what-not by being them. Life, not the parson, teaches conduct.”

<sup>2</sup>As Billy Mitchell said, “when a decision has been arrived at by [the] number one of the outfit we must conform,” but, “within our own council everyone should have their own ideas and if they have n't we had better get rid of them.” A Question of Loyalty, Waller, Douglas, p. 104, HarperCollins, 2004.

<sup>3</sup>“I much fear that the spirit which you have aided to infuse into the Army, of criticizing their commander, and withholding confidence from him, will now turn upon you. I shall assist you as far as I can, to put it down. Neither you, nor Napoleon, if he were alive gain, could get any good out of an army, while such spirit prevails in it.”

Cohen, Eliot A.; Supreme Command, page 20, Anchor Books, 2002.

<sup>4</sup>Joint Pub 1 lists Unity of Command as one of the fundamentals of Joint Command. See also Matthew 6:24, “No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other.”

<sup>5</sup>“Who has deceiv'd thee so oft as thyself?” Thorpe, Scott, Revolutionary Strategies of the Founding Fathers, quoting Benjamin Franklin, page 145, Source Books, Inc., Naperville, Illinois, 2003.

<sup>6</sup>Thorpe, at p. 52

<sup>7</sup>Thorpe, at p. 109.

<sup>8</sup>AFDD 1-1, Leadership and Force Development, Feb 18, 2004.

<sup>9</sup>See TJAG Vision, and TJAG Policy Memorandum: TJAGD Standards – 1, TJAGD Core Principles and Focus Areas, 15 Oct 02.



# Field Marshal Douglas Haig: A Negative Leadership Lesson in Military History

Major Joshua E. Kastenber

Professional military education course materials contain some analysis on leadership, and in particular military leadership. By the time a student completes Air Command and Staff College, he or she will have read brief passages on Dwight Eisenhower, George Patton, John J. Pershing, Omar Bradley, and - though not a personal favorite of this author - Douglas MacArthur. (Of note, Chester Nimitz is given short shrift). More attention is placed on successful military leaders than on unsuccessful and unpopular ones. Few officers study, in any detail, the failings of George B. McClellan, George A. Custer, Lloyd Fredendall, or even William Westmoreland.

Likewise, there is a dearth of time spent on the leadership qualities of foreign officers. Thus, for example, while Napoleon is generally known to be innovative, hardly any analysis of his charisma, personality, decision making, and innate intelligence occurs. What can military officers, or for that matter the JAG Corps learn from such a study? [A great deal](#). Below is one very brief analysis of leadership, as pertinent to today's military (and JAG Corps), as at any time.

## "Bloody Mindedness"

There is a leadership trait coined by British military scholars describing a commander steeped in his own confidence to the point of inflexibility. "Bloody-mindedness" evokes images of stolid and unflinching British generals, ordering regiments into the fray. In their great military tradition, which includes exceptional commanders such as Horatio Nelson, Arthur Wellsley (the Duke of Wellington), Field Marshal Bernard Montgomery, and Field Marshal William Slim, a common trait of extreme self-confidence and absolute competence is found. However, each of these individuals possessed both an intellect and ego able to

correct initial errors in judgment. (This includes Montgomery who became something of a casualty to the Patton versus Montgomery "battles.")



British military history - and to an extent our own - is also replete with examples of inflexible commanders failing to both recognize errors in judgment, and plans that went awry. Moreover, a common companion to this inflexibility was reluctance in other officers, stationed within the commander's inner circle, to advocate a need for flexibility and change. In some instances a cult of personality developed around a leader by his complimentary subordinates. This was a frequent criticism of the Civil War era Union generals, McClellan in particular, prior to Ulysses Grant assuming overall

command.

Foremost among the examples of bloody-mindedness is Field Marshal Douglas Haig, the commander of the WWI British Expeditionary Force (BEF) from 10 December 1915 through the end of hostilities on 11 November 1918. Nothing in Haig's background suggests he was any more ill-suited to command the BEF than any other senior officer. Born in 1861 to a wealthy aristocratic family - who made their fortune as whiskey distillers - he was educated at both Oxford University and Sandhurst, Britain's premier military academy. He admitted that did not read much, and appeared to be bound by the prejudices of the day. (He viewed French officers as inferior, not only because they were French, but also because many of them had risen through the lower classes).

Haig was described by his contemporaries as distant, cold, and self-assured. Winston Churchill, who worked alongside him as the First Lord of the Admiralty, and later the mister of munitions likened Haig to a 19th century surgeon who was proficient at his job, but unfeeling toward his patients. Pain was not his concern and if a patient died on the operating table, the doctor would simply move on to the next. David Lloyd George, Prime Minister after 1916 described Haig as incompetent, and "refusing to see his own errors in judgment." Haig commanded troops in India, the Sudan, and South Africa, seeing combat in each.

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In these colonial battles, Haig led from the front of cavalry charges. There was never any hint of cowardice.

There were inherent flaws in the British system of commissioning officers. Britain had abolished the purchase system of ranks by the time Haig received his commission in 1885, and as a result, his professional advancement occurred through the contemporary flawed merit based process. However, the British Army remained encumbered by a class-based system, and it was exceedingly rare for an officer to have not come from an aristocratic or wealthy background. Ethnic and religious minorities, including Catholics, were unlikely to advance in rank. A World War II British general, Sir Brian Horrocks commented that, having all come from a similar background, the World War One-era generals "were predictable, unimaginative, and dull, in military matters." In the modern era, we might add that diversity was not a desirable feature of the prewar British officer corps.

The prewar enlisted ranks tended to come from the lower economic echelons of British society. They served lengthy enlistments in what was a strenuous disciplinary system. A number of colonial-era wars afforded the British army its combat experience. In 1914, the small BEF possessed the best trained and disciplined regiments in the world. However, it was unimaginatively lead and very small in comparison to the continental armies. Through the initial two years of the war, the British Army was composed entirely of volunteers, 500,000 of whom enlisted in the first three months. Conscription did not occur until late 1916.

As late as 1914 Haig believed that cavalry retained a place of prominence on the battlefield. He viewed the machine gun as a luxury and aviation as unnecessary. He had little relationship to the individual soldier, and his view of training was antiquated to the needs of modern warfare. Haig believed in frontal assaults with large masses of men instead of using small units to probe for weaknesses in the enemy lines. He felt that small unit actions required too much training with little final benefit. Haig was not alone in these views although other officers voiced opposition to these beliefs late in the war.

### **The Setting: World War One**

World War I was unlike any prior war in its size and scope. On the western front, a continuous line of trenches ran for over 400 miles from Switzerland to the English Channel. A century of imperial growth stemming from the demands of industrialism, smaller wars driven by ethnic nationalism, and a variety of political instabilities made likely the possibility of a Europe-wide war. From 1871 onwards the major

world powers, with the exception of the United States, formed into two alliances with Germany, Austria-Hungary, and Italy on the one side, and the British Empire, France, and Russia - known as the Triple Entente - on the other. When war broke out in July and August 1914, only Italy remained absent from the alliance system. By the following year, the Ottoman Empire and Bulgaria joined Germany, while Italy and Japan joined the Entente.

For the first two years of the war on the western front, a common strategy for each side was to amass large numbers of men and artillery against a section of the enemy's well enforced trench lines. It rarely worked because even when a breakthrough occurred, the opposing forces were able to dig into a secondary line. Additionally, according to the eminent military historian John Keegan, a single machine gun was capable of spitting out 600 rounds per minute - or having the effectiveness of over a platoon of infantry. Even the introduction of new weapons such as aircraft - primarily for reconnaissance, poison gas, and ever larger artillery, such as the 420-millimeter howitzer, could be defensively overcome. Instead of trying to find alternative methods of combat, the French and British chiefs resorted to using even larger numbers of men.

Typically both staff officers and commanding generals had little concept of the conditions of this new type of warfare where the defense retained an advantage. Soldiers lived across this four hundred-mile plus stretch of frontline trenches. They slept in bunkers and even during lull times were exposed to rifle and machine gun fire, artillery strikes, liquid fire, mine warfare, aerial bombardment, and poison gas. They ate poorly, were infested by vermin, and were sent out on night patrols and raids where only a fraction of their number returned. They suffered through the booming sounds of artillery rounds coming from their own guns. They lived in vigilance of enemy raids and patrols, as well as an all out attack. Mostly though, they waited for the sound of a whistle, an unmistakable order to attack.

When the whistle blew, these men went "over the top." This was the most dangerous time of all. As they slogged across "no mans land," often weighted down by forty or more pounds of equipment, they were openly exposed to the enemy's machine gun and rifle fire, artillery, and flamethrowers. If they met their initial objective, the enemy front lines, they had to hold this position against an inevitable counter-attack. In a typical attack, a British company of men, numbering about 100, could expect to lose a quarter of their number just gaining an objective

Haig referred to the daily casualty reports, often numbering in the thousands, as "My daily wastage."

According to his son, Haig visited the front trenches only once because the smell of mass death made him sick, and he felt that he could not effectively command when this occurred.

### **Prelude and Failure: 1 July 1916**

On 21 February 1916, the German High Command launched Operation Gericht (Operation Judgment) against a French stronghold near Verdun. The High Command decided to destroy the French Army before their British ally was able to increase the size of their forces in the Western Front. In five months the French Army suffered 162,308 killed and over 300,000 more wounded. The French barely held on against German attacks, and desperately needed the British to take the offensive.

Since the start of the war, the British Army built itself from a force of roughly 250,000 men into a force of over two million. British imperial forces had engaged in large scale combat operations outside of the western front - notably against Turkey - and medium sized operations in France. In May 1916, Haig decided to amass several divisions numbering 120,000 men for an assault against the German lines in Flanders. He was, however, convinced by the French general in charge, Joseph Joffre, to attack in a combined offensive with available French forces along the Somme River. On 24 June 1916, British artillery began to shell German lines in a continuous bombardment. Very few Germans were killed as a result of the bombardment though survivors later claimed they suffered horrific shell shock. The primary reason for a lack of German deaths was their well-engineered, reinforced dugouts, deep under the chalky Picardy soil.

On the morning of 1 July 1916, the whistles blew and British soldiers went "over the top." Haig expected a complete breakthrough. After all, a week-long artillery barrage, complete air superiority, and the bulk of the German Army fighting at Verdun made a breakthrough seem very likely. But a breakthrough did not occur. British forces suffered astounding casualties: over 19,000 killed and 40,000 wounded, on this first day alone. The day was a complete failure. In fact, 1 July 1916 has been called the worst day in British history. Yet, that very evening, Haig reported to the Chief of the Imperial General Staff that, in his view, the day was a success.

### **The Aftermath**

Despite the first day's failure, the battle continued through November. Tactics changed little throughout the battle, and the allies lost a total 210,000 killed for a gain of less than ten miles. (The German Army lost around 180,000). Throughout the battle he and his

immediate subordinates continued to view the small gains - at incredibly high cost - as evidence of success. Haig and his primary subordinates had no problem reporting these views of success to the military and political leadership in Britain. There was a disconnect, however, between their views and the actual gains of territory. First, no breakthrough in the German lines ever occurred. Second, the gains that did occur throughout the battle were typically objectives Haig had expected to take on 1 July.

Today there is a monument on the battlefield's high ground, Theipval. The monument lists the names of 70,000 British Empire soldiers whose bodies were never recovered in identifiable form. A tourist will find that between the towns of Albert and Peronne to the east and west, and Baupame to the north, the countryside is dotted with well-kept Imperial and Commonwealth War Graves Commission cemeteries. As late as this year, the farmers of the local area have unearthed human remains and, the "iron harvest" - referring to the ongoing finds of shells and other war detritus - continues.

The Somme battle did not produce a decisive result, nor did it change the overall thinking of the BEFs commanding general and his staff. Indeed, in the fall of 1917, utilizing similar tactics and strategic thinking, the BEF attacked the German lines at Ypres in yet another big push. This battle has been alternatively called Third Ypres (the British had already fought two other battles there) or Passchendaele. This time the British suffered 120,000 battle deaths over a four-month period. Despite the huge numbers of men committed, neither the Somme nor Third Ypres was decisive in ending the war. In fact, the German Army was able to launch a series of full-scale offensives in that same area in the spring and summer of 1918.

### **Application to the Air Force Core Values and the JAG Corps**

The likelihood of trench warfare recurring rests somewhere between the categories of "never," and "very remote." Moreover our officer corps largely exists on a merit based promotion and assignment system. Class structures, never popular in the United States, hardly even exist in Britain today. Judge Advocates will not command regiments, divisions, or armies. The mindset of Haig, however, remains a salient leadership lesson for a number of reasons.

Haig presents a poignant reminder that knowledge of the field remains important at all levels of authority. This includes listening to the forces "in the field" where improvements and innovation tend to originate. The oft-repeated statement, "flexibility is the key to airpower," recognizes this tendency. To the JAG

Corps, it may mean nothing more than senior officers seeking process feedback from subordinates, and listening to this feedback with an open mind in such areas as military justice, operations law, and contracting. It also extends to informal climate assessments where leadership can gauge its own effectiveness.

Another application has to do with the nature of command and responsibility. After WWI, several generals and politicians claimed to harbor reservations about Haig's approach to the Somme and Passchedaele operations. Uniformly, none of them sought an active engagement with Haig over his vision for victory. Had Haig's subordinates approached him with their misgivings about his tactical, operational, and strategic plans, the Somme might have had a different result. No leader is flawless, yet the more confident a leader is, the less likely a subordinate is to respectfully approach a leader's plan with suggested alternatives. Axiomatic to this observation is the behavioral trait that the more confident a leader is, the more that leader ought to seek input and feedback. One of Haig's great weaknesses was his reluctance to seek any feedback. Had he listened to the reports and warnings from four brigadier generals on the night of 1 July 1916, he might have ended the battle. Instead, on 2 July 1916, he informed Prime Minister Herbert Asquith that the battle was "an enormous success." His immediate commanders went willingly along with Haig's 2 July assessment. Even as the battle continued, Haig reported exaggerated and excessive gains and German defeats. His immediate army commanders supported these reports. It was not until the conclusion of the war where political recriminations began that these commanders expressed their had inner doubts about the battle, but failed to voice these doubts. Here, there was a failure both in integrity and excellence.

The failure to voice doubts throughout the battle might have not only spared lives, but placed the British forces in a position where they could have ended the war earlier than 1918. To be sure, the BEF would ultimately have to engage in battle, but other factors worked to weaken the German position including the naval blockade surrounding Germany. One of our core Air Force values is "service before self." This value has its roots as an expression against the very type of subordinate conduct found in the British Army of WWI, or for that matter, the Civil War era leadership under McClellan. Every officer wants to achieve a promotion, and there is an inherent risk in opposing a commanding officer's plans. However, the overall cost to a military institution can be devastating. For the BEF, it meant the expenditure of over one million lives between 1914 and 1918. This does not suggest that WWI was not a worthwhile conflict. Indeed, on the

western front it pitted three democracies against a totalitarian regime bent on destroying twentieth century freedoms and creating a new world order based on its belief in Germanic ethnic supremacy. There is a distinct difference between fighting a worthwhile conflict, and fighting an intelligently led worthwhile conflict. This is little different for the JAG corps. For example, there is a difference between prosecuting a case to the desired result, and prosecuting a case smartly, where the image of a fair and professional military justice system is maintained.

Finally, the profession of arms requires adherence to standards of conduct beyond what is expected in civilian communities. These standards of conduct reinforce both external and internal confidence in military leadership. A lack of confidence degrades mission effectiveness. By late 1917 British soldiers could be heard bleating like sheep when they passed high-ranking staff officers. The French Army mutinied in the trenches in that same year. Neither force regained its full effectiveness until the arrival of the American forces in large numbers in the summer of 1918. The mission degradation did not occur because Haig and his French counterparts failed to adhere to our current core values, but a common denominator is the loss of confidence in military leadership. This is why guarding the merit based promotion system, and adherence to core values is so important. Simply put, a widespread lack of confidence in leadership degrades the effectiveness of the JAG corps. Corruption, if it occurs in a merit based promotion and assignment system, has a similar degrading effect. In Haig's time, the BEF possessed an inherent flaw where an officer's "breeding," was still thought to have a relation to the officer's ability. In our current military and JAG Corps, unchecked favoritism means that officers of ability may be deprived of the opportunity to fully contribute to the various important missions of the JAG Corps. Favoritism stemming from unprofessional relationships, a distinct failure in integrity, is a degrading force to effectiveness. Both the core values and high expectations of leadership are directly influential to mission effectiveness. So too is the need to guard against the Haig leadership style.

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Further Suggested Reading:

Phillip Warner, Field Marshal Earl Haig, (1983)  
Lyn MacDonald, Somme, (Michael Joseph, 1983)  
Captain Basil H. Liddell Hart, The Real War 1914-1918, (Little Brown & Co. 1930)  
James Stokesbury, A Short History of World War One, (Harper Collins 1981)  
Brian Farwell, Mr. Kipling's Army, (1972)  
John Keegan, Face of Battle, (Penguin, 1980)

# Retirement Remarks—Colonel John J. Martinez, Jr., 27 August 2004 Bolling Air Force Base, District of Columbia

*On 27 August 2004, after 31 years of honorable service to both the JAG Corps and the United States Air Force, Col John J. Martinez, Jr. was honored by JAGs, friends, and family on the occasion of his retirement from active military service. What follows are excerpts from remarks he made that day.*

It is said that the notion of the military retirement began over 2,000 years ago when a Roman consul was rebuilding Rome's Army. To recruit more volunteers he offered the promise of retirement on a piece of land. Hearing of a soldier's retirement, families would mass together in celebration. That is a tradition we renew here today. To look at it another way, which is what I'm prone to do, I see this event as being much like a funeral, only better. Family and friends gather together, there's food and drink, people say nice things about you, and, you don't even have to be dead yet. In fact, you get to talk at it. So I will.

Many years ago, I learned a great deal about the Air Force and people when I was in the JAG assignments job. One thing that struck me is that to prosper in the military, you have to devote your heart and soul to the institution. But, the institution is incapable of returning that level of commitment back to the individual. You have to serve because you want to, and not because the institution is going to reward you in kind. But you do get something back. We're like a huge mutual benefit organization. When any one of us does his or her job well, or helps out a co-worker, or mentors and protects a subordinate, we are making an investment in that individual's account. And, when I benefit from your job well done, or your help, or your mentoring, I withdraw dividends. And that is the return I receive for what I've given to the institution. And so it goes. You have all made very generous contributions to my account.

Thirty-one years is a long time. But what really hit me is when I realized that it has been 38 years since I first put on an Air Force uniform, as an ROTC cadet at Rutgers College. Interestingly, it was also 38 years ago when my wife Ronnie and I had our first date. Ronnie

and the Air Force have both kept me around for nearly 4 decades and you just have to wonder why. In Ronnie's case, you can figure it out. If you know her you know she has a penchant for taking in rescue dogs and strays. I need not say more. As for the Air Force, I had to give that some serious thought. And little by little it came together. But how should I communicate it? I found inspiration in the Monty Python movie title. And now for something completely different.

**How I served a 31-year career in the United States Air Force**, an essay. Or, how a somewhat unorthodox, somewhat skeptical, slightly rebellious, and almost brash New Yorker, somehow managed to stay in the Air Force for over three decades.

## **Chapter 1 of 2. What I Live**

**By.** In order to survive and prosper in any endeavor you need to rely upon some basic truths. Whether they be credos, maxims, axioms, adages, mottos, aphorisms, or truisms, it helps to have concise statements that guide your every day. First is the maxim that is without question the most influential in my life; it affects every one of my waking minutes, and my non-waking minutes as well. It is: (1) Never stand when you can sit, never sit when you can lie



down. Why is this one so valuable to me? First, it's a demanding world out there and I need to be rested. But on a more fundamental level, we must respect gravity. Do not fight it. (2) Every group has an idiot. If you're in a group and you don't know who it is, it's you. The message? Walk placidly among the throngs; attention is good, but only in moderation. (3) They don't make a pole long enough that I wouldn't touch that with. Stay away from things that smell like trouble. Don't go downtown drinking with guys named "Mad Dog" and "Strange Eddie." Things won't go well. (4) You can lead a horse to water but if you can get him to float on his back you've really got something. (Attributed to the comedian Joe E. Brown.) This has helped me understand a fundamental element of human nature. People just don't make the most of opportunities. You need to coax them there sometimes.



(5) A long marriage, and a long military career, rely on loyalty and mutual respect more than just on passion. But don't get me wrong, that's not to say that there isn't a role for passion. In fact, if you think of passion in terms of loving something deeply, it's a big reason why we stayed in the Air Force. Ronnie and I came to love the Air Force, its mission and its people, especially the people. We're both big sports fans and we feel about the Air Force the way one feels about a favorite team. Life just seems a bit brighter when the Air Force does great, and we're distressed when things don't go well whether it be for the organization or any of its people.

Over its history, the Air Force had fed a lot of hungry people, and stopped a lot of bad guys. It's a shame that the world consistently needs someone to do these things, and it's disappointing that the United States is the only country that is consistently willing to do them – for which we get little praise and noisy criticism. Nevertheless, we, and the other services, step up.

While we're not perfect, we have been remarkably successful, all because of caring, dedicated, well-disciplined people. Of course, not everyone is like that, and that's what has made the job of the legal professional so rewarding. We help commanders prevent Airmen from slipping, and help them deal with those who already have. So we've loved the Air Force, and we've loved JAG, and still do.

As for loyalty, it has its limits. I have a plaque on my desk that says it best. I don't know its origin but I first saw it in, of all things, a Bruce Willis movie called *STRIKING DISTANCE*. In it he plays a policeman whose father is killed because he tried to expose corruption. In the cemetery scene, we see the father's headstone that says, *Loyalty Above All Else, Except Honor*. Enough said.

Now let me play Andy Rooney for a moment here. Have you ever read a passage that literally changed the way you look at life? Well, I have. It was in a book that talked about Rear Admiral James Stockdale, whose image was unfairly tarnished when he ran for Vice President some years ago. He was a Navy pilot who spent seven and a half years as a POW in Vietnam. He survived his captivity by relying on his study of an ancient Stoic philosopher, from whom he derived the following attitude: When faced with misfortune, don't ask "Why me?" Ask "Why not me?" In other words, ask yourself, "What should make me immune from life's bad breaks?" What this taught me was to spend less time whining and more time trying to figure out how to make the best of a situation. I'm not perfect at doing that; but I'm a lot better than I used to be at implementing the concept of "Deal with it and move on!"

**Chapter 2.** I stayed in the Air Force because I have been surrounded by Air Force people, whether they knew they were or not.

**I have had "Air Force" friends.** I normally don't mention names at times like this because you always run the risk of leaving someone out. But here I'll take that risk because I can identify our first Air Force friends, who are here today. We felt pretty remote out there in New Mexico, but not when we were with them. When I reminded them about this not long ago they didn't remember doing anything special. That's just the way they do things. And that's why they are Air Force friends.

**I have had "Air Force" mentors.** Many of my mentors are obvious, some of them are sitting up front here. But as influential as they have been, I have drawn as much or more from those junior to me. There are too many examples and too little time.

**I've worked with "Air Force" people.** As with my mentors, there are simply too many people who've inspired me and contributed to my career to mention.

**I have had an "Air Force" family.** My grandparents' house was like the Norman Rockwell painting of Thanksgiving dinner that is part of the "Four Freedoms" series. They actually looked like the people in the painting. It was a big family, which included my grandparents, two aunts, a great-uncle, and my uncle Bero, who we are grateful to say, has shared our home, and dogs, for eight years this month. I was an only child and my aunts and uncle did not have children so I got a whole lot of attention -- but not without a healthy sense of discipline. They always helped sustain us, and I still draw on that today.

**I have had "Air Force" in-laws.** I couldn't have asked for more from my in-laws in terms of love, support, and friendship. I know that they couldn't have been happy that my career dragged Ronnie around the world for thirty years. But if they felt that way they never let on. That's when I learned that sometimes you show the most support by what you don't say.

**I had "Air Force" parents.** I had a wonderful and stable childhood that prepared me for an Air Force career. My mother was always there. I'll mention just one example of her influence. She treated everybody the same. If you came to our house you were offered food and drink and treated with respect -- whether you were my father's boss or a laborer. My father lived by, and taught me the Air Force Core Values before they were ever written down. Every time I recalled the most vivid examples of how he influenced me I would always come up with the same three stories. It was only when I started to prepare these remarks that I realized how perfectly they meshed with the Air Force core values. Let me run through them.



Integrity. One day he was following his post-grocery shopping routine of checking the cash register receipt line by line, including how much change he had received. (You need to understand this is quite typical of depression-era people.) I think from this you can see where I got some of my obsessiveness, but that's another story. He got up and said he had to go back to the store because the cashier had given him 45 cents too much in change. I said "You're going all the way back there for 45 cents?" He said: "At the end of the day this cashier has to close out and she's going to show up 45 cents short, and who knows, she might get fired over this. And I'm not going to be responsible for anyone losing their job."

Service. He worked his entire career for Merck, the pharmaceutical firm. Time after time I remember him coming home excited about some new drug or development that Merck had come up with. Now he wasn't in R & D, he was in sales. But the satisfaction he got from being part of a team that was making things better for people grew on me.

Excellence. This one I remember like it was yesterday. I was doing homework for my third-grade teacher and he asked me what I was working on. I told him I had to write a poem for Mrs. Alloro's class. He said, "It's late and you don't seem to have much written down; will you be able to finish it?" I said: "I'm just going to throw together a few lines that rhyme and that will be good enough." That was not the best answer I could have come up with. He got a really intense look in his eyes and said: "If you're going to do something, do the best you can and don't ever let me hear you talk like that again." I can't remember the exact words because they were coming out a bit fast and loud, if you get my drift. That lesson stuck with me, too.

**I have "Air Force" children.** Angela and Scott are great examples of making the best of circumstances that were not always what they wanted them to be. I can't recall them ever complaining about my hours or PCS moves, even when we moved both of them between their junior and senior years in high school. They have made the transition that all parents hope for -- from being our children to being our children and our friends. They are remarkably different in almost everything they do except for being good kids and nice people. I have only three regrets about my career and one of them is that they did not have the opportunity to spend as much time with the rest of the family as they might have otherwise. A compensating factor is that they've had experiences and seen places that others haven't...but it would have been nice to do both things.

**I have an "Air Force" wife.** Let me put it this way. Ronnie's baseline and starting point is at a level of

love, support, caring, dedication, and hard work that would make for an ideal wife, mother, friend, and partner by anyone's standards. But she operates on a higher level. As one of many examples, she was awarded the Air Force Angel Pin Volunteer of the Year awards at two successive assignments. I've said this before about her. If you are a family member or friend in need, a child in need of learning, or a hurt animal, the best thing that can happen to you is for Ronnie to walk into your life. On the other hand, if you harm a friend, deprive a child of nurture, or hurt an animal, the worst thing that can happen to you is for Ronnie to walk into your life. I like that in a person.

My second career regret is that if we had had a more stable career geographically I would probably be helping out at her country day school that would have pictures of golden retrievers all over the place. Sure, she's had great experiences she otherwise wouldn't have had...but it would have been nice to do both things. She's a better wife than I deserve, and to repeat something I first said years ago: Ronnie, you're not the wind beneath my wings, you are my wings.

**Finally, I even had an "Air Force" dog.** You may think it odd that I end with a dog. These things always end with the wife or else there's going to be trouble on the way home. But I told you this was going to be different. Besides, Ronnie will understand.

Ronnie rescued King, an oversized Golden Retriever, from a neglectful home and he showed his gratitude with intense loyalty. King grouped people into two categories: those who were Ronnie, and those who were not. No matter what was going on, if he wasn't at Ronnie's side, he would stop about every fifteen minutes and go check on her. He never harmed a soul, but we just knew he would do anything to protect her whether it was going after an attacker or running through fire.

We've had a lot of dogs but our family, friends, the staff at our vet's office, and even visitors to our home often mentioned there was something special about him. He sensed and responded to her every mood. But what I remember most was when Ronnie learned terrible news about her mother's health. She was sitting in the front room on the phone and was very upset. He was sitting next to her at the time, no surprise, but did something he had never done before. He sat up and put both front paws on her arm. For the next two days he didn't leave her side. I mean literally; he would constantly be offering his warmth by pressing against her however he could. So when I was assigned to Ramstein a second time and Ronnie couldn't join me during my two years there, I was consoled by the fact that I knew King would be at home with her. He was an embodiment of one-way devotion, dedication, and

love and at her time of deep need, and he could provide support that I couldn't. So you see, I even had an "Air Force" dog. You can also see how one can accomplish anything when surrounded by Air Force people, and yes, dogs.

In closing, I need to put one thing in perspective. People speak of making sacrifices in my career. Well, I was never in the line of fire, and I wasn't in the Pentagon on 9-11. I was serving in Riyadh Saudi Arabia when the OPM SANG terrorist bombing occurred (that's the first one, the one few remember because of Khobar Towers), but I wasn't really close to it. I didn't seek to avoid risky assignments; it just didn't happen. So sometimes I regret that I never faced the kinds of challenges others have. That's regret number three. But any feeling of regret disappears whenever I go to the Walter Reed Army Medical Center. It only takes a few minutes to see someone who makes me think that maybe I've just been lucky so far. I stand in awe of these people and can only hope that if I did not have the opportunity to stand beside them, that at least my time in uniform helped them in some small way.

While I didn't face extreme challenges, among members of my family there are those who have, and I would like to recognize some of them today. Three are not here today but are represented. My cousin Linda's husband, Joe Esposito, has served his career in the Newark, New Jersey police force and rose to be it's deputy during a thirty-seven year career. He retired but they recalled him. Now he continues to serve the public in a security firm. Linda's brother, Joe, and the son of my uncle's cousin, Africa Busto, is a retired Marine who served three tours in Vietnam and received two Purple Hearts, among many other decorations. Steve's father, Lenny Streitfeld, was a B-17 bombardier in the skies over Europe and flew thirty-one combat missions. He is still active in 8th Air Force veterans organization.

By the way, my father was stationed in the Philippines as part of the force that would have invaded Japan. But the Army Air Corps made that unnecessary. Had there been an invasion, I would never have existed. So I owe Air Power a lot more than a career. Today, I can introduce some special people who were able to be here. I am proud to say that I was talking about the contributions of what is now called the Greatest Generation long before Tom Brokaw gave it that wonderful name. I'm glad he did because doing so gave them recognition they long deserved. Two of them are here today. My uncle, Bero, served in the Aleutians and in Europe as an ambulance driver and medic in the Army. Ronnie's dad, Mickey, served in a communications unit with the Army in Europe and received the Purple Heart. Tomorrow we'll be taking

them to see the World War Two memorial, which is our Nation's way of saying thanks. But in the 60 years since that war, I doubt they've ever been publicly acknowledged and thanked. We can fix that right now and I ask you to join me in thanking them, along with all of those who have served America. (Applause)

One more rule, always set things up so the audience is applauding at the end; even if it's not for you. Thank you all for coming today and for sharing in our lives over a long and wonderful career.

#### *Editor's note:*

Colonel Martinez was born in New York City, N.Y., was commissioned through the Rutgers College ROTC program, and attended the NYU School of Law. He began his career in 1973 and served as a MAJCOM SJA, a wing SJA four times, and an AF/JA director or division chief three times. He deployed to Saudi Arabia as Chief of Staff and SJA, HQ JTF Southwest Asia, and while in Germany was Survival Recovery Center commander and on-scene commander for flight line contingencies. At Headquarters Air Training Command he served as ATC/CC's speechwriter.



## EDITOR'S CORNER

### **“MY OPINION” - *THE REPORTER* WANTS TO KNOW!**

*The Reporter* is seeking inputs from JAG Corps senior leaders on the subject of the future of the JAG Corps. Specifically, we are asking those in the rank of lieutenant colonel and above to compare and contrast their view of the future of the JAG Corps now with their view of the future of the JAG Corp when they were a captain or junior major. Your perspective is important and we would like to share your insight and experience with the rest of the JAG community.

Please e-mail inputs to the Editor, subject: My Opinion, at [chris.schumann@maxwell.af.mil](mailto:chris.schumann@maxwell.af.mil), or you may send in your submission anonymously to the Air Force Judge Advocate General School, c/o *The Reporter*—My Opinion, 150 Chennault Circle, Bldg 694, Maxwell AFB, AL 36112-6418. All entries should be received by 15 Jun 05.

### **SUBMISSIONS REQUESTED FOR *THE REPORTER***

Have you worked an interesting issue in a recent court-martial? Have you found a great technique or approach that could help other base level attorneys or paralegals? Write a short article about it and submit it to *The Reporter*!

Contributions from all readers are invited. Items are welcome on any area of the law, legal practice, or procedure that would be of interest to members of The Air Force Judge Advocate General's Corps. Send your submissions to *The Reporter*, CPD/JA, 150 Chennault Circle, Building 694, Maxwell AFB, AL 36112, or e-mail Capt Christopher Schumann at [chris.schumann@maxwell.af.mil](mailto:chris.schumann@maxwell.af.mil).



