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The Reporter

The Judge Advocate General's Corps

MAKING HISTORY

The Judge Advocate General Is Promoted to Lieutenant General

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Features

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On the Cover:

The Air Force Chief of Staff, General Norton A. Schwartz, administers the oath of service to Lieutenant General Jack L. Rives, The Judge Advocate General, during his promotion ceremony on 28 August 2008.

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The Reporter is published quarterly by The Judge Advocate General's School for the Office of the Judge Advocate General, United States Air Force. 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 Judge Advocate General's Corps. Items or inquiries should be directed to The Judge Advocate General's School, AFLOA/AFJAGS (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802).

Message from the Commandant

Colonel Tonya Hagmaier

This edition of *The Reporter* highlights an extraordinary moment in JAG Corps history. As Major General Jack L. Rives becomes Lieutenant General Jack L. Rives, the first three-star general of The Judge Advocate General's Corps, he leads us into a new era of unprecedented challenge and opportunity for the JAG Corps. This is an exciting time to serve.

Also in this edition, Lieutenant Colonel Theodore Vestal and Colonel Albert Klein provide an overview of how judge advocates might be involved with personnel recovery, a vital capability to our success in the Global War on Terror. Major Stephen McManus highlights the TRIALS program, which provides an excellent training opportunity for new judge advocates to build and enhance crucial advocacy skills.

Major Thomas Dukes reviews privacy expectations in government computers and electronic media, specifically in light of the recent cases *U.S. v. Long* and *U.S. v. Larson*. Major Dukes' article is sure to assist JAGs as they advise security forces investigators and OSI agents on searches of government computers.

Don't miss this issue's other articles and columns, including Developments from the Field, Legal Assistance Notes, Appellate Corner, Military Justice Pointers, Ask the Expert, and Books in Brief. These features will broaden your knowledge base in many fields and provide resources to help you enhance your practice.

Finally, I would be remiss if I didn't mention the recent loss of a dear member of the JAG Corps Family. Major General (Retired) David C. Morehouse passed away in July, leaving a huge hole in the heart of the Corps. We are honored to pay tribute in this edition to General Morehouse's amazing legacy of service and leadership.

Tonya Hagmaier

MAKING HISTORY: TJAG Becomes First Three-Star General of the Air Force Judge Advocate General's Corps

by The Judge Advocate General's Action Group

The 21st century has brought many "firsts" to the JAG Corps. We witnessed a particularly momentous "first" on 28 August 2008, when we celebrated The Judge Advocate General's promotion to the grade of Lieutenant General. The Air Force Chief of Staff, General Schwartz, officiated at the ceremony on Bolling AFB.

General Schwartz opened the afternoon by welcoming Lieutenant General Rives' family and other distinguished guests in attendance. The guests included many active and retired judge advocates, paralegals, civilians, and general officers, along with members of the JAG Family from around the world. General Schwartz traced Lieutenant General Rives' career, highlighting those assignments which specially prepared him for service as the first three-star judge advocate in Air Force history.

General Schwartz observed: "In any country that is a democracy and where the supremacy of civilian leadership is essential, attorneys that serve the senior leadership of the services have a very special role. It is important that we do things right."

The Chief specifically noted the significance of this historic promotion of The Judge Advocate General by stating, "It is a special pleasure for me to have the opportunity to do what has been unprecedented. We have not had across the services any three-star judge advocates, ever. Many people here understand this, but for the youngsters, the 'three-star' is a big deal. And I would argue, sincerely, that the leap from two to three is larger than from three to four. The 'three-stars' are the closers. They are the folks that truly get stuff done. That is important because champions of the law should have that rank, that presence, and that stature. It was the right thing to do, and I think it is a marvelous thing that we recognize our champion of the law with three-star rank."

THE LAW

Title 10 of the United States Code provides the legal basis for the United States Department of Defense, including the roles, missions, and organization of the Armed Forces. Specifically, Section 8037 grants authority to The Judge Advocate General of the Air Force to carry out his duties.

> Title 10 U.S.C. § 8037. Judge Advocate General, Deputy Judge Advocate General: appointment; duties
>
> (a) There is a Judge Advocate General in the Air Force, who is appointed by the President, by and with the advice and consent of the Senate, from officers of the Air Force. The term of office is four years. The Judge Advocate General, while so serving, shall hold a grade not lower than major general.

Section 543 of the National Defense Authorization Act for Fiscal Year 2008, amended this section, as well as the sections pertaining to the Army and Navy Judge Advocate Generals, authorizing the higher grade.

> SEC. 543. MODIFICATION OF AUTHORITIES ON SENIOR MEMBERS OF THE JUDGE ADVOCATE GENERALS' CORPS.
>
> . . .
>
> (c) GRADE OF JUDGE ADVOCATE GENERAL OF THE AIR FORCE—Section 8037(a) of such title is amended by striking the last sentence and inserting the following new sentence: ''The Judge Advocate General, while so serving, has the grade of lieutenant general.''

Lieutenant General Rives Reflects on His Promotion

The following remarks, which have been edited for this publication, were made by Lieutenant General Jack L. Rives at his promotion ceremony on 28 August 2008.

General and Mrs. Schwartz, judges, generals, admirals, distinguished guests all.

I'll begin by thanking General Schwartz for making the time to be with us today. It means so much to my family and me, and to the JAG Corps, General Schwartz, for you to have officiated. Thank you so much for making a special occasion that much more memorable.

To all of you, I am honored and humbled by your attendance. From my college roommate through people who have known me in every military assignment, you're all special to my family and me. I could tell stories about what all of you have meant to me, about how you have done things to help put me in this position, but that would not be the best use of our time today. So, please forgive me for not acknowledging you individually at this time, and know that I look forward to seeing you at the reception and thanking you personally for all you have done.

This is a special occasion for all of the Service JAG Corps. My fellow TJAGs are here today: Vice Admiral McDonald from the Navy, General Black from the Army, and General Walker, Staff Judge Advocate to the Commandant of the Marine Corps. Also, we have about two dozen flag rank Air Force judge advocates here today—retired, active duty, guard and reserve general officers, whose service extends all the way back to World War II. They are certainly the biggest gathering ever of such a senior group from the Air Force JAG Corps. We also have the current and some retired Senior Paralegal Managers to TJAG, and other senior paralegals and civilians. All that indicates what this occasion means to those in the JAG Corps. Friends flew in from California, Utah, Alabama, and all over the country because they wanted to be here. In a real sense, today is about all of you and your contributions to making today reality. We're also joined today by some three dozen lieutenants, who are among our newest judge advocates. They're members of the Judge Advocate Staff Officer Course, Class 08-C.

I would like to thank the Honor Guard and Protocol, and the Bolling Club for the great job

they have done to make today so special. And thanks to the Air Force Band's quintet that has done such a wonderful job. Special thanks to our JAG's Executive Services Branch, who put so much time into this ceremony over the last several weeks to make sure we would have a the right kind of celebration. They do so much work behind the scenes, always perfect in all detail.

People come into the military for different reasons, but if they stay in the military it is because of support from their family. I would not have stayed in the Air Force if I didn't have the support—and inspiration—of my family. General Schwartz and I were talking before the ceremony and we agreed on who wears "five-stars" in each of our families. My wife made me take a blood oath not to say nice things about her this afternoon, so I'll just give Marie these roses to symbolize all the nice things.

All of us in uniform know that in many ways, our families have it much tougher than we do. When we deploy, our days are usually filled with a variety of activities. But the families that stay behind must take care of everything at home, and their days often leave plenty time to worry about the servicemember who deployed. We simply could not serve without the support of our families.

Our son Bobby is here. He went through what a lot of children of military families go through. By the time he was in the 8th grade, he had been in eight different school systems. For some reason, his experience as an Air Force brat inspired him to join the Army. He was a platoon

Mrs. Marie Rives and Lt Gen Rives' son, Mr. Bobby Hall, pin on Lt Gen Rives' third star

leader with the 10th Mountain Division on September 11, 2001. Less than a month later, he was in Uzbekistan, and within a month or so of that he was in Afghanistan. He later was in Kyrgyzstan. We are very proud of what Bobby has done.

Bobby's wife, Karen, and our grandchildren bring us so much joy. Tristan is eight, going on 38. And Brandon is four, going on four. My sister-in-law, Iris, is here. Thanks so much for being here and representing the family and those who can't be here.

Many people called or sent cards or emails in recent days saying they wish they could be with us—and they are here in spirit. Marie's and my parents have passed away, but they're certainly in our hearts and we know they would be so very proud of today's ceremony.

As General Schwartz said, I'm from Rockmart, a small town of 4000 in northwest Georgia. My father served in the Army National Guard during the Korean War period. He made it all the way to corporal. When I entered active duty as a judge advocate, one day I called him and said something about being a JAG. He said, "JAG? What does that mean?" I told him it stood for "judge advocate general." He was really pleased and impressed, and he said, "You've been in such a short time and you're already a general!" I explained to him that I was very far from being a general, but he said: "It's only a matter of time." I can say without any doubt that he was the only person in the world who thought a day like this could happen.

People sometimes ask why I stayed in the military. I was recently reminded me of a story about President Theodore Roosevelt. Roosevelt was a fascinating man, with a big type A personality. He liked to multi-task and to move from one exciting project to another. He liked to host diverse groups in the White House, and he would bounce from conversation to conversation. He would argue with one group and laugh with another. After such a meeting one day, he commented, "Isn't this a fine time to be alive, when so many great things are happening?" That's what being in the Air Force has been for me.

From the time I entered active duty, whether working for commanders at the installation level, or for individual clients as a defense counsel, through all of the jobs I've had, in the Pentagon and all over the world, it's been one exciting opportunity after another. The challenges were opportunities, and every day brought satisfaction for the work I was doing. As Theodore Roosevelt said, what a great time to be alive, with so many stimulating issues to work.

I mentioned the lieutenants who are here today. I would love to change places with any of them. Of course, I suspect that a few of them wouldn't mind changing places with me right about now. It would be great to start all over again as an Air Force judge advocate.

When Congress changed the law to make the Judge Advocates General of the Army, Navy, and Air Force into three-star positions; when I was nominated by the President for this promotion; and when I was confirmed by the Senate and then appointed by the President—through each event, a number of people contacted me with congratulations. The calls and notes ran in certain patterns. For example, I received an email from a judge advocate in Nevada who said, "Congratulations, this means you're now smarter, funnier, and better looking." Well, I'm not sure I'm any *funnier*.

A four-star commander offered quick congratulations, then noted that a three-star TJAG opens a new chapter in how our leaders get effective legal advice. He praised the fact that JAGs tell commanders and others what they need to hear, even if it is not what they may think they want to hear.

I received a lot of notes from members of the JAG Corps—active, reserve, and retired. They typically would congratulate me personally then comment on what this means for the JAG Corps and for the Air Force. Many of those notes were quite poignant. When I see the third star on my

shoulders, I know that in a real sense I'm wearing it because of the service of so many others over the past 60 years. Those who came before us built the foundation on which we stand today, and I salute them. This is their moment.

What led to this promotion? Part of the answer can be found in the very distinctive mission statement of the JAG Corps: "To deliver professional, candid, independent counsel and full-spectrum legal capabilities to command and the warfighter." Let's examine the first portion of that. Each of the words is important.

"Professional" goes without saying; it is what people expect. We are professionals. Judge advocates are members of two professions: the profession of law and the profession of arms. And through the years our people have served both extremely well.

"Candid" comes next. I doubt that word is in any other mission statement, but it is an important part of ours. Candid counsel describes what we provide, and our commanders appreciate it. I saw a promotion performance recommendation from a senior officer who said of his judge advocate, "He's always right, even when I don't want him to be." That's what JAGs do. We have to have the courage of our convictions. Several senior leaders have said that the JAG Corps is the "conscience of the Air Force." So, "candid" is a very important part of our mission statement.

Finally, "independent" may be the most critical descriptive word, because it enables everything else we do. Judge advocates have to be independent. We are non-political. We provide objective, unbiased, timely legal advice and our best military judgment. Our advice must be free of inappropriate influences as we apply the law to the facts.

Congress recognized all of this and acted to insure that professional, candid, independent counsel by judge advocates is always available. This was done when the Uniform Code of Military Justice was enacted in 1950, and more recently was reinforced with two important pieces of legislation. The first was passed four years ago, when Congress expressly prohibited anyone in the Department of Defense from interfering with the ability of any judge advocate—from TJAG to the newest lieutenant—to give independent legal advice. The second new law elevated The Judge Advocates General of the Army, Navy and Air Force to three-star rank.

Does that really matter? Is it important for TJAG to be a three-star? Well, you just heard General Schwartz say, "yes . . . it is a big deal." Three-star rank is important because the rule of law is important. Thomas Payne observed over 200 years ago: "In America, the law is king." People in our military respect the law. One of the things we're trying to accomplish in Iraq and Afghanistan is to help local authorities develop societies where people respect the rule of law. Might does not make right. People need to come together and set up procedures and regulations and laws to govern behavior.

Three stars for TJAG is important because it recognizes the crucial role of the law in virtually everything the Air Force does: The way we fight; the way we treat detainees; the way we buy airplanes; the way we maintain good order and discipline. The rule of law provides the foundation and the structure to help us make good decisions.

Another reason it matters is because it literally helps to ensure a seat at the table. The roots of the Air Force JAG Corps are in the Army JAG Corps. In 1775, General George Washington named the first Judge Advocate General of the Army. By the close of the Civil War, the Army had its first two-star Judge Advocate General. At the beginning of World War II, only the Chief of Staff of the Army on the Army staff outranked The Judge Advocate General. Similarly, in the early days of the Air Force, TJAG was at the elbows of the decision makers. On the Air Staff, only a handful of people outranked The Judge Advocate General. JAGs need to "be there" so we can help to identify legal issues before they become problems and so that we can work problems at the earliest stages, so that we can participate in the discussions and help the leadership work through issues most effectively. We can spot issues, provide advice, and help to shape positions. Through the years, a variety of important new Air Staff positions were created. Others were promoted, and gradually more and more officers on the Air Staff were promoted to higher rank. TJAG was not as prominent as before. He was no longer at the decision-maker's side; sometimes he wasn't in the room. He was left behind. That was not intentional. It was not

because the law became less important to the decision-makers. It just happened.

This promotion changes all that. It reverses the trend and restores the law and legal advice back to the position of prominence it had before. Back where it belongs. Because no matter how good someone's advice may be, it's useless if it is not readily available. And that's especially important in today's world where issues can receive instant and continuous attention from the media, the public, and Congress. We cannot afford to let legal advice lag behind. So, yes, it does matter for TJAG to be a three-star.

Earlier, I talked about my wish to change positions with one of the JAG lieutenants, because I would love to start my career again. I would love to have the challenges and opportunities they are facing.

One reason is because of the second part of the JAG Corps mission statement: "... to provide full-spectrum legal capabilities for command and the warfighter." Several senior leaders have spoken of how members of the JAG Corps enable military operations. Just about anything going on in the Air Force, from helping to give warfighters peace of mind because they've been well counseled on their personal legal problems, to setting up basing and overflight rights, to working with commanders on rules of engagement and rules for the use of force, to contracts, and everything else—in all of these things, JAGs are involved to help attain mission success. Members of the Total Force JAG Corps are making important contributions, every day, all over the world. I'm very proud to serve with them.

Sure, we have challenges in today's Air Force. We need a new tanker, and the right number of F-22s, and a new combat search and rescue helicopter. We need to fix our acquisition process. We need to take care of Airmen and their families. We need to assure our nuclear capabilities, with the right safeguards. Yes, there are plenty of challenges, but we have the people who can take them on. And they will not fail. The members of the Total Force JAG Corps are ready to partner with other Airmen, and with soldiers, sailors, marines, and our coalition partners to work these problems and to come up with the right solutions.

One of my favorite places in the Pentagon is just outside General Schwartz's office. There's a wooden staircase that features a huge painting of a military family in prayer. It includes is a quotation from the Book of Isaiah, Chapter 6, Verse 8. "Then I heard the voice of the Lord saying, 'Whom shall I send? And who will go for us?' And I said, 'Here am I. Send me!'" General Schwartz, I'm very proud to serve with the men and women of the JAG Corps: active duty, reserve component, judge advocates, paralegals, civilian attorneys, and other support personnel, who are committed to do everything they can to meet our challenges. On their behalf, I say, "Here we are, send us!"

A historic photo of the current and retired Total Force JAG Corps general officers who were in attendance at General Rives' promotion ceremony: Front Row, L to R: Maj Gen Perlstein, Maj Gen Dunlap, Maj Gen (ret) Sklute, Lt Gen Rives, Maj Gen (ret) Moorman, Maj Gen (ret) Egeland, and Brig Gen (ret) Danyliw. Back Row, L to R: Maj Gen (ret) Weaver (Former Dir ANG), Brig Gen(s) Burne, Brig Gen Kenny, Brig Gen Creasy, Brig Gen Harding, Brig Gen (ret) Swanson, Brig Gen (ret) Ginsburg, Brig Gen (ret) Waldrop, Brig Gen (ret) Hemingway, Maj Gen (ret) Lynch, Brig Gen Turley, Brig Gen Lepper, Maj Gen (ret) Roth, Brig Gen (ret) Rodriguez, and Brig Gen (ret) Lowry.

ASK THE EXPERT

Does the Inspector General have authority to investigate complaints about commanders' disciplinary actions?

Every inspector general (IG) will eventually be faced with an Airman asking for help to stop a commander's disciplinary action, whether the discipline involves nonjudicial punishment (NJP), a letter of reprimand, or court-martial. While the IG has the authority to investigate complaints related to discipline, every IG should be familiar with restrictions and limitations.

Paragraph 2.14 of AFI 90-301, *Inspector General Complaints Resolution*, provides, "when a member has a complaint or appeal regarding adverse actions for which law and/or regulation provide a specific means of redress or remedy, IGs must refer the complainant to those redress or appeal channels."

In fact, most Air Force processes provide Airmen a "remedy or redress" by giving them an opportunity to dispute, refute, or respond to the action.

In this scenario, the Airman faces potential punishment under Article 15, but he still has the opportunity to elect court-martial or accept NJP proceedings and present evidence and mitigating matters to his commander. If dissatisfied with the outcome of the NJP, he may elect to appeal the decision and punishment to the next-level commander. He may also ask for reconsideration. A commander may suspend, mitigate, remit, or set aside punishment if she determines the punishment has resulted in a clear injustice. IGs should assist such Airmen by advising them to utilize the Article 15 process with the assistance of the area defense counsel.

Does "piling on" charges and specifications apply to IG investigations?

"Piling on," or adding unnecessary or redundant charges to ensure a conviction or increase the maximum possible punishment in a court-martial or NJP, is generally avoided by legal offices, absent good cause, such as presenting alternate theories of a case. As this JAG reviewed an IG investigation in which an allegation of abuse of authority had been framed against multiple paragraphs in an AFI, she recognized what could have been an investigation into one act of misconduct had blossomed into five allegations. The concept of "piling on" or "unreasonable multiplication of charges" is an equitable principle – and in this JAG's eyes, this investigation didn't seem fair or equitable. The IG, drafting the allegations to ensure the conduct matched precisely with every applicable subparagraph of every controlling regulation, may have helped the investigating officer (IO) apply the facts to the law or regulation. But it can also lead to "piling on" or "overframing." IGs may draft multiple allegations for one act because of guidance in AFI 90-301 and supplemental investigation guides. While the AFI and guides may lead IGs to draft multiple allegations, a more equitable approach should be to interpret AFI 90-301 and non-controlling guides to mean drafters of allegations ensure the alleged conduct, if true, is a violation of the standard cited in the allegation. Rather than separate allegations, the IGs should identify the best fit or most encompassing allegation. So, the simple answer to this call: Yes, "piling on" applies to IG investigations. Simply because the IG can draft multiple allegations for the same conduct does not mean it is fair and reasonable to do so. Fairness dictates that sometimes the IG needs to "pick one"—choose the best standard, not every standard.

DO YOU HAVE A QUESTION TO ASK THE EXPERT?

Please e-mail your question to Captain Jodi Velasco, jodi.velasco@maxwell.af.mil.

When a report of investigation "unsubstantiates" an allegation, how much of the report is the complainant entitled to receive when making a request under the Freedom of Information Act?

Exemption 5 (the analysis/opinions of the investigating officer) and Exemption 6 and 7(C) (the "privacy" exemptions) of the Freedom of Information Act (FOIA) may permit withholding information contained in a report of investigation (ROI). But assessing whether an ROI is releasable depends on numerous factors. Some types of allegations have specific rules related to release. For example, when there is an investigation into allegations of reprisal, 10 U.S.C. 1034 states the complainant receives a copy of the ROI (interpreted by the Air Force as the written portion of the report not including exhibits), subject to information properly withheld under FOIA. However, for all types of personnel investigations, the privacy expectation of the subject may impact what a complainant may or may not receive.

Under the privacy exemptions, a person's privacy interest is weighed against public interest in disclosure. "Public interest" is defined as the public's interest in knowing how the Air Force conducts its statutory and regulatory affairs. Many factors, including the rank and responsibility of the subject, the nature and seriousness of the allegation, whether the allegations involve personal or work-related misconduct, and whether there was previous public (media) interest in the investigation, must be considered when determine whether to disclose an ROI on an unsubstantiated allegation. In weighing all factors, if the subject's privacy interest outweighs the public interest and justifies withholding the entire report, that determination would also prevent release of the complainant's statement to the complainant. Keep in mind that releasing any information at all indirectly acknowledges an investigation occurred, which may be the most significant privacy interest at issue.

In addition to the privacy interest of the subject, you must also consider information in the report impacting the privacy interest of others, such as witnesses. Even if the subject does not have a sufficient privacy interest in withholding his name or information about him from the public in an unsubstantiated case, witnesses will have a sufficient privacy interest to withhold their identity. This may or may not require withholding a complete witness statement or portions of the statement. Finally, the fact that an allegation was substantiated is a factor that weighs in favor of release.

For more information, check the AF/JAA website, under the Information and Privacy Law tab.

What are homosexual conducts reports, and what does JAA do with them?

Pursuant to TJAG Special Subject Letter 2005-2, staff judge advocates are required to submit homosexual conduct reports to JAA through their GCM staff judge advocate when they are addressing allegations of homosexual conduct (statements, acts, or marriage or attempted marriage), regardless of the context (i.e. potential inquiry, investigation, administrative separation, or court-martial). Reports are also required if allegations of harassment based on perceived or actual sexual orientation have been made.

Use the Homosexual Conduct Reporting Form (located on JAA's website under Personnel Actions, Homosexual Matters) to file reports. Initial reports must be made as soon as practicable after learning of an allegation. Updates are required at logical and significant points of case progression, including final disposition.

The need for reports stems from the sensitive nature of the Congressional Homosexual Conduct Policy. Upon receiving reports, JAA reviews them to determine if the policy is properly implemented and if the case might warrant forwarding to Air Force senior leaders. Cases forwarded include those where significant publicity is indicated or otherwise deemed probable, and where policy violations are evident. In most cases, those submitting reports will receive nothing more than an acknowledgement from JAA that the report has been received—the proverbial, "No news is good news." When appropriate, JAA will provide pointers or queries on case handling or identify policy violations requiring attention.

Thanks to Lieutenant Colonel Cindy Holt, Air Staff Counsel for Inspector General Investigations, Lieutenant Colonel Mike McIntyre, Air Staff Counsel for Information and Privacy Law, and Lieutenant Colonel Todi Carnes, Air Staff Counsel for Personnel Actions Law, AF/JAA, for these responses.

PERSONNEL RECOVERY: A JAG's Perspective

By Lieutenant Colonel Theodore E. Vestal, USAFR, and Colonel Albert W. Klein, Jr., USAF*

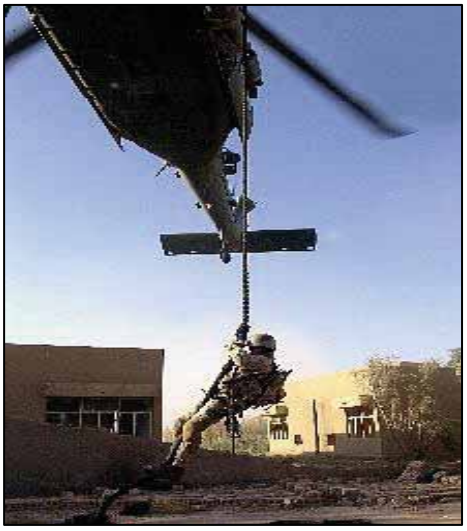
"These things we do … so that others may live." Air Force Pararescue Motto

You are a deployed staff judge advocate and you receive a report that a senior judge advocate visiting your area of operations is two hours overdue for an appointment with a local official. You last saw the senior judge advocate earlier this morning getting into a vehicle with a local driver. What do you do now?

What Exactly is Personnel Recovery?

Before answering the question 'what do you do now,' we need to first understand the personal recovery (PR) system and the environment we are working in. What follows is a primer on the purposes of PR and the overall method of execution; specific JAG roles will be mentioned toward the end.

In recent years, PR has undergone significant revisions and received renewed emphasis due to the nonlinear, noncontiguous nature of the modern battlespace. This renewed emphasis applies to all levels of command, from the national, theater, operational, and down to the tactical level, to prepare the entire force for effective PR. These requirements also extend to all levels of joint and component commands. PR is an extensive operation requiring many trained members for the teams. Previous combat search and rescue concepts have transformed into a system that uses all of our air, ground, and maritime capabilities to rapidly report, locate, support, recover, and return our military members, civilians, contractors, and certain specified others, to friendly control. PR success is far more likely if the people involved are properly organized, trained, equipped, employed--and perhaps most importantly--informed to gain and maintain situational awareness and take appropriate action in a timely manner. In short, preparation and planning are the keys to successful recovery operations.



Pararescueman drops from an HH-60G Pave Hawk helicopter during a combat search and rescue exercise

How is Personnel Recovery defined?

PR is the sum of military, diplomatic, and civil efforts to prepare for and execute the recovery and reintegration of isolated personnel.

How is Isolated Personnel (IP) defined?

U.S. military, DOD civilians, contractor personnel, and others designated by the President or the Secretary of Defense, who are separated from their unit (as an individual or group) while participating in a U.S.-sponsored military activity or mission and are, or may be, in a situation where they must survive, evade, resist, or escape.

Joint force commanders (JFCs) are required to plan in advance for the potential use of recovery forces. JFCs must consider all available PR options and military categories of PR to successfully prepare and plan for recovery operations within their operational areas. By

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*Lieutenant Colonel Theodore Vestal (B.A., Austin College; J.D., University of Oklahoma; LL.M., University of Houston) is an individual mobility augmentee attached to 13th Air Force and recently served in Central Command (CENTCOM). Colonel Albert Klein (B.A., Kent State; J.D., University of Akron; M.S., Troy State University; LL.M., Georgetown University) is Staff Judge Advocate, 13th Air Force and was previously involved with several PR events while deployed to the Combined Air Operations Center (CAOC) in CENTCOM.

carefully considering the options and categories, a coherent integration of capabilities will be developed to assist with recovery efforts. Gone are the days of ad hoc rescue missions.

PR options are varied and are not limited solely to military solutions. PR options may be categorized as follows:

Diplomatic:
Includes the use of government-to-government or government-to-captor negotiations in order to secure the release/recovery of captured or detained personnel. This may include negotiation, armistice, and/or treaty.

Military:
Includes the planning and execution of activities by commanders and staff, forces, and IPs across the range of military operations to report, locate, support, recover, and reintegrate IPs.

Civil:
May include sanctioned or unsanctioned intervention by international organizations, nongovernmental organizations, influential persons, and/or private citizens. Examples include personal appeals by well-known persons such as celebrities or former heads of state.

HH-60G Pave Hawks from the 41st Rescue Squadron, Moody AFB, Georgia, conduct in-flight refueling during a combat search and rescue mission

What assets are available to accomplish PR?

Aircraft, vehicles, maritime craft, and assigned personnel may be designated as either PR dedicated or PR capable. The difference is that the former is designated to possess operational capability (i.e., PR is their primary job), while the latter has other primary duties but is capable of performing PR functions. Either designation of assets may be pre-positioned to a location as precautionary force posturing. In addition, non-U.S. forces, groups, or individual may be involved with PR.

The joint personnel recovery center (JPRC) is the primary joint force organization responsible for planning and coordinating PR for military operations within the assigned operational area. The JPRC should be integrated into the JFC or designated supported commander's appropriate operations center (JOC or JAOC).

A personnel recovery coordination cell (PRCC) is the primary joint force component organization responsible for coordinating and controlling component personnel recovery missions. It should be in place and functioning well before operations begin and a potential isolating event occurs. Service-specific doctrine varies among the Services.

Lack of PR guidance at the national level, coupled with traditional views of PR, tends to reinforce the inaccurate notion that PR is a mission performed exclusively by DOD rescue forces, normally in the context of a hostage recovery situation. The key to accurately determining PR requirements is to actively collaborate with other government organizations' representatives during the preparation and planning phases. There are several agencies that can provide assistance when working in a multi-agency environment. Agencies with formal PR programs include the Department of State, Department of Justice, Drug Enforcement Agency, Federal Bureau of Investigation, and Central Intelligence Agency. Multi-national partners may also bring PR capabilities. Multi-national PR guidance is available through treaties and PR doctrine from multi-national organizations such as NATO.

How is PR Executed?

At the time of an isolating incident, the IP will be executing his or her survival, evasion, resistance, and escape (SERE) tasks, attempting to evade enemy forces and facilitate his or her own recovery. Joint PR doctrine has identified five execution tasks that should be performed for the successful completion of a PR operation: report, locate, support, recover, and reintegrate. The potential for a successful PR operation is enhanced when all individuals involved, including the IP, understand these basic tasks and how they interrelate. JAGs may be involved with each of the tasks.

Report. The report task begins with the recognition of an isolation event, and it ends

when appropriate command and control (C2) authorities are informed. Anyone may report by any means; the sooner a report is made, the sooner location and recovery may begin. Reports can come in through operational channels or administrative channels and will be forwarded by the C2 authority to the JPRC. The C2 authority is normally found in a wing or joint task force command post.

In the scenario involving the missing senior judge advocate, you, a person with knowledge of a possible isolation event, may be the key to getting him back under friendly control. Should you delay your report while running around the installation to determine if he actually went outside the wire? In this case, you saw him getting into a vehicle with a local driver as they prepared to depart for the official's office. It's logical to assume he departed the installation and that you might have been the last person behind the wire to see him go. In this case, the situation calls for erring on the side of caution, and you immediately report the incident.

Other situations may call for a different response. For example, a person living on base who simply fails to show up for work one morning--there's no indication that he has been isolated, and it would be prudent to check his bunk and ask his tent mates if they have seen him. But remember that time is critical when reporting a possible isolating event.

Also, be aware of the difference between administrative reporting of an event versus an isolation report. An administrative duty status determination may take up to twenty-four hours and is concerned with leave, line of duty, and AWOL status; this is far too long to wait before reporting an isolation event.

Locate. The locate task involves the effort taken to precisely find and confirm the identity of isolated personnel. It starts upon recognition or report of an isolation event and continues throughout until the IP is in U.S. forces' control. Locating and authenticating may be accomplished by intelligence assets, aircrews, ground forces, or other friendly assets and is constantly refined as more information is gathered. An accurate location and positive authentication are normally required prior to committing recovery forces.

Previous rehearsals of an evasion plan of action to determine a predetermined evasion route and signals would be extremely useful for locating purposes. Knowing the direction in which the senior JAG intended to move would be among the first clues to finding him.

Authentication is necessary for the protection of recovery forces. Enemy forces have been known to lay ambushes using false authentication information. The single most important piece of authentication data is an individual's isolated personnel report (ISOPREP) form. The ISOPREP contains a series of questions and answers known only to the IP and authenticating forces. Without a current ISOPREP form on file and/or without the serious nature of the form being understood by the individual preparing it, the chances of authentication--and a successful recovery--are diminished.

Support. The support task involves providing support to both the isolated person and to the isolated person's family. Support is implemented when an immediate recovery cannot be accomplished. Support may include, for example, educating and preparing family members to deal with the news media.

Recover. The recover task involves the coordinated actions and efforts of commanders and staffs, military forces, and the IP to bring IP under the physical custody of a friendly organization. The recover task begins with the launch or redirection of forces or the engagement of diplomatic or civil processes. It ends when the recovery element hands off the formerly isolated person to the reintegration team. The recover task is accomplished through PR operation and mission planning and through the individual and synergistic actions of commanders and staffs, forces, and IPs themselves.

Reintegrate. The goal of reintegration is to return the recovered person to duty through a series of medical treatments and debriefs. The reintegrate task employs systematic and controlled methods to process recovered IP from the time they are recovered until they are fully reintegrated with their unit, their family, and society. It begins when the recovery force relinquishes positive control of the recovered IP to a designated member of a reintegration team or organization. Put another way, the goal of this task is to return the person to the life he or she had chosen before the isolating event.

Depending on the individual and the circumstances, reintegration may range from a matter of several days to many months.

An additional task called adaptation, also known as assessment, bears mentioning. This is an ongoing function that assures continuous improvements to the PR system through lessons learned, concept development, war games, and experimentation and enables forces to adapt to new ideas and concepts to accomplish the mission.

Where does the JAG fit into the PR process?

Potentially, JAGs may be involved anywhere and everywhere in the PR process. A JAG's advice and counsel may be invaluable during the planning or preparation phases of any operation or PR process, during actual operations, and with the aftermath. JAGs must ensure their personnel and those in the deployed unit have accomplished required PR training, PR preparation, and otherwise complied with a variety of regulatory requirements and good practices. In all areas of operations, JAGs must be aware that laws of other nations may limit what operations in which their military forces may engage to support PR. JAGs may be asked to locate relevant agreements, international agreements, SOFAs, and other authorities to show what our coalition allies are allowed to do by their own laws. JAGs may be particularly called upon regarding the execution of the five PR tasks.

Report. The JAG may assist with determining whether an isolating event has occurred or may have occurred and ensure a report is made to the proper official with responsibility for PR. Depending on the situation, an individual JAG may be the one who notices a potential isolating event and may be the one to report it.

Locate. Any person may be asked to help ascertain the whereabouts of an individual or determine where the person was last seen and the circumstances of his or her absence. A key aid to location should have occurred long before the isolating event, in the form of the ISOPREP form and planning potential evasion routes. As a means of planning and preparation, a JAG may assist the command with recognizing and fulfilling requirements necessary for a sound PR program, which in turn enhances the locate task.

Support. JAGs advise commanders and public affairs regarding support to families. Families need to be kept informed of the IP's status and the progress of the investigation. In addition, educating and preparing families to deal with news media and its potentially harmful effects on their missing loved one, is paramount.

Recover. During recovery operations, JAGs ensure rules of engagement are applied, consider any treaty implications, and address overflights and other operations or international law implications. Many commanders will want the JAG to be readily available during the recovery phase, to advise on the myriad issues that may arise during the PR mission.

Reintegrate. JAGs may serve on the reintegration team along with debriefers and various support entities. JAGs may be asked for advice or counsel regarding confidentiality versus immunity offered to a former IP. JAGs may address UCMJ issues and may ensure debriefers refrain from asking questions that involve potential UCMJ implications. On the fiscal side, JAGs may address the use of private or corporate funds involved with recovery or offered afterwards as gifts to the former IP. When contractors are involved, either as IPs or assisting in recovery efforts, JAGs may need to consider questions regarding who pays for what. There may be duty status determinations. Legal assistance to the reintegrated person and the family members may be offered. Virtually any issue could arise during this task or anywhere else in the PR process, and it is fair to say that JAGs are generally a force-multiplier when engaged early and often.

PR Training Opportunities

JAG training for PR events is available both on line and via mobile training teams. The following selections are recommended for learning the basics of PR:

PR 102:

Fundamentals of Personnel Recovery: To familiarize all personnel within DOD on PR policies, concepts, roles, responsibilities, planning, and execution.

PR 120:

Joint Personnel Recovery Fundamentals for Commanders and Staffs: To familiarize the joint task force or operational level staff with their

responsibilities to prepare, plan, coordinate, and execute PR.

PR 241:

Joint Personnel Recovery Reintegration Team Responsibilities: To certify personnel to perform duties as reintegration team members, team chief or deputies at the debriefing team chief and phase III team chief (mandatory O-6) levels.

The authors recently attended PR 120 and PR 241 taught by a mobile training team. The instructors were experienced and motivated. The learning experience was enhanced by students who expressed their own experiences as SERE members, while serving on a staff responsible to locate and recover IPs, and as designated members of a reintegration team.

The Joint Personnel Recovery Agency (JPRA; a subdivision of Joint Forces Command), may be contacted as follows:

http://www.jpra.jfcom.mil

e-mail: info@jpra.jfcom.mil

telephone: PR Education and Training Center (703) 664-5200 (DSN 654)

REFERENCES

United States Code

10 U.S.C. 1501-1513, Missing Persons Act

Joint PR Policy and Doctrine

DOD Directives:

DODD 2310.2, *Personnel Recovery*

DODD 1300.7, *Training to Support the Code of Conduct (COC)*

DOD Instructions:

DODI 2310.4, *Repatriation of Prisoners of War (POW)*

DODI 2310.5, *Accounting for Missing in Action (MIA)*

DODI 2310.6, *Non-conventional Assisted Recovery (NAR)*

DODI 3115.10E, *Intelligence Support to PR*

DODI 1300.21, *COC Training*

DODI 1300.23, *COC Training for Civilians and Contractors*

Chairman of the Joint Chiefs of Staff Instructions and Manuals

CJCSI 3270.01A, *Personnel Recovery within the DOD (Classified)* (UNCLASSIFIED if Appendix B is removed).

CJCSI 3122.01B, *Joint Operations Planning and Execution System, Vol II*

CJCSM 3500.04D, *Universal Joint Task List (UJTL)*

CJCSI 3500.05A, *JTF Master Training Guide*

Joint Doctrine

JP 3-50, *Personnel Recovery*

JP 3-33, *Joint Task Force Headquarters*

JP 3-08, *Interagency, Intergovernmental Organization, and Nongovernmental Organization Coordination During Joint Operations*

JIACG Handbook (Joint Interagency Coordination Group)

Combatant Command PR Regulations

CJCSI 3270.01A

Training for Commanders and Staffs

CJCSI 3270.01, *Personnel Recovery in the DOD*

DODD 3115.10E, *Intelligence Support to PR*

CJCSI 3500.05A, *JTF Master Training Guide*

Air Force Directives and Instructions

AFDD2-1.6, *Personnel Recovery Operations*

AFI 13-208, *Personnel Recovery Coordination Cell Recovery Procedures*

AFPD 10-30, *Personnel Recovery*

Legal Assistance Notes

The ABA Military Pro Bono Project

The American Bar Association's Military Pro Bono Project is open for business! The project connects active duty military personnel to free legal assistance for civil legal issues beyond the scope of services provided by a military legal assistance office. Their web portal has been created to allow case-handling military attorneys to refer financially eligible servicemember clients to the Project (E-6 and below are presumed eligible—others on a case by case basis), which will then make every available effort to place the case with a volunteer pro bono attorney qualified to assist the client with the legal issue. Substantive areas include consumer law, tenants in dispute with landlords, family law and guardianship matters involving incompetent servicemembers, probate representation for next-of-kin, creation of special needs trusts, and employment issues involving USERRA. In order to use this referral service, individual legal assistance attorneys must register at the site (http://www.militaryprobono.org).

Once registered, the site contains specific information on how to refer cases and provides answers to frequently asked questions. Informational project guidance documents can also be found on the AFJAGS Field of Practice webpage at https://aflsa.jag.af.mil/AF/lynx/afjags/.

Estate Planning Field Manual

As promised during the Legal Assistance Courses, Lt Col Frederick Davies, NY ANG, has created an estate planning field manual, designed for the use of Air Force judge advocates and paralegals. Whether you are active, Reserve, or Guard, its purpose is to give you a system to use in your legal offices to provide estate planning services to eligible legal assistance clients. The separate chapters are posted in the Wills folder under Legal Assistance on the AFJAGS Field of Practice webpage at https://aflsa.jag.af.mil/AF/lynx/afjags/.

Death Gratuity Elections

As of 1 Jul 08, most Airmen's death gratuity beneficiary designations in the virtual Record of Emergency Data (vRED), accessible through the virtual MPF (vMPF), read as "In accordance with current laws" or "by law." If you are married and/or have children and had previously listed names of your contingent death gratuity beneficiaries on your vRED, the names have been replaced with the "In accordance with current laws" designation. Also, if you are single with no children and your named death gratuity beneficiaries are designated to receive a percentage other than in 10% increments, the names have been replaced with the "In accordance with current laws" designation.

The replacement was prompted by a recent change in the National Defense Authorization Act 2008, enacted 1 April 2008, which amended the death gratuity benefit ($100,000) allowing members to specify any person(s) of their choosing for the death gratuity benefit, effective 1 July 2008. This can be any person(s) regardless of whether they are within your immediate family or not.

"In accordance with current laws" or "by Law" results in payment to the surviving spouse; if no spouse, then surviving children and descendants of deceased children; if no children or grandchildren, then surviving parents; if no surviving parents, then appointed executor/administrator of estate; if no executor, then next-of-kin according to the law of the state of domicile at the time of death.

To name death gratuity beneficiaries by name and designate a percentage of payment, access your vRED through vMPF (linked on the Air Force Portal website at https://www.my.af.mil). We recommend you name beneficiaries and not rely on the "by law" designation.

virtual MPF
Air Force Personnel Center • Randolph AFB, Texas

Thanks to Major Julie Huygen, Chief of Civil Law, 8 AF/JA, for this submission.

CAPSIL
Capturing Wisdom

New as Chief of Legal Assistance?

AFJAGS has developed division chief courses, including a Chief of Legal Assistance Course. This three-hour course provides guidance for leading the base legal assistance program and offers key substantive law pointers on will drafting, consumer law, and Veteran's Administration benefits. By TJAG direction, completion of the course is mandatory before a judge advocate may assume any division chief within the legal office.

Your Legal Assistance Chief

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

If you have specific legal assistance questions, please contact Maj Jeff Green, DSN 493-4527, jeffrey.green@maxwell.af.mil.

TRIALS: Advocacy Training for Courts-Martial

by Major Stephen J. McManus, USAFR*

In the past few years, many legal offices have had a decreasing number of courts-martial, increasing numbers of pretrial agreements, and decreasing budgets. These factors have lead to an overall decrease in litigation experience. So, what are the options available to get additional training for less experienced JAGs? One answer is the TRIALS Team—a total force initiative that brings life-like training to bases world wide.

TRIALS is "Training by Reservists in Advocacy and Litigation Skills." It was started by now-retired Colonel John Odom[1] when he saw a need for an efficient way to bring the art of litigation to newer JAGs. The program is frequently referred to as simulator training for JAGs.

MacDill AFB TRIALS Team and students

TRIALS Training

TRIALS is a two-day intensive training program. It incorporates the "learn by doing" method of instruction developed by the National Institute of Trial Advocacy. The training combines mini-lectures with videotaped student exercises.

A TRIALS student presents the Government's opening statement

The goal of TRIALS is to have eight to ten students for each training session. Students who participate typically include the following:

1. New lieutenants, including JAGs who have not yet attended JASOC.
2. Junior counsel who need more experience.
3. Senior counsel to play the roles of defense counsel in the training.
4. Reservists attached to the office who may assist in litigation.
5. ADCs.
6. Any JAG from our sister services in the area.

Although the actual training is two days, advance preparation is required. Students are provided a mock court-martial file (currently *U.S. v. Simmons*), which involves specifications for assault, assault with a deadly weapon, and possession of cocaine. The students are assigned as either a trial counsel or defense counsel. Each counsel will prepare either a motion or response to a motion to suppress evidence. All students also prepare voir dire questions. As in actual courts-martial, the motion and voir dire questions must be submitted before the training begins. During the training, students argue the motion, question members, make opening statements, conduct direct and cross examinations of witnesses, and make closing and sentencing arguments. The "all object" rule

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* Major Stephen J. McManus (B.A., University of Arizona; J.D., University of Arizona College of Law) is the Reserve Program Director of the TRIALS Team. He is also Staff Judge Advocate, 434 ARW/JA, Grissom ARB, Indiana.

[1] Following Col Odom's retirement, Lt Col Christine Bosau was the Reserve Program Director. She led the team for three years.

applies, so students also need to be prepared to make and respond to objections.

During the training session, students are videotaped during their performances. Following each presentation, two instructors provide a focused, structured critique in the courtroom so the other students can learn. For most of the exercises, each student views their videotape in a separate room with a third instructor who provides additional feedback. Students are provided with their own videotapes as a takeaway from the program.

In addition to practical exercises, instructors also prepare lectures with practice tips for each topic the students will cover, including pretrial preparation. As an additional takeaway, students are provided with the outlines for these lectures.

Updates to the TRIALS Program

After each training session, students critique the program. This is especially important because we continually improve the program based on these critiques. For example, the training program initially did not include sentencing. This year, paralegals have also been included in the training. Not only do paralegals participate in lectures, they also play witnesses and/or court members during the mock court-martial. Having paralegals rather than fellow students play these roles typically generates more realistic answers to questions than those provided by fellow students, and that also improves the training experience. It also allows participants to prepare their witness ahead of time.

Shaw AFB TRIALS Team and students

In response to participant feedback, an active duty military judge was added to each training session beginning in 2007. Different military judges are involved in each session, affording team members a variety of current perspectives from the bench that can be shared with students in different training sessions. In addition, incorporating an active duty military judge into the training provides a great opportunity for newer JAGs to ask the judge questions and obtain direct guidance from the bench.

Captain Peterson argues the Government's case

Besides the military judge, at least three team members conduct each training session. Reserve instructors for the TRIALS team are compromised of Air Reserve Component (ARC) members who were litigators while on active duty and continue to practice litigation in their civilian employment. In FY08, 14 reservists[2], including a captain, majors, lieutenant colonels, and a colonel, filled the ranks of the team. Team members include a former civilian judge and a current military judge. Though each team member's litigation practice area is different, the common denominators for all instructors include a love of litigation and an ability to teach important litigation skills to less experienced JAGs.

[2] Besides Maj McManus, TRIALS team members from the ARC during FY08 included Col Maggie Weatherman, Lt Col Rachel Mercer, Lt Col Michael Brandabur, Lt Col Thomas Monheim, Lt Col James Walker, Lt Col Tony Roberts, Lt Col Sig Peterson, Maj Peter Camp, Maj Elizabeth Shifrin, Maj Michael Schag, Maj Lucy Carrillo, Maj Jill Thomas, and Capt Matthew Blue.

Elmendorf AFB TRIALS Team and students

Realignment of TRIALS under AFJAGS

During FY08, the TRIALS program reorganized under The Judge Advocate General's School (AFJAGS), and now an AFJAGS instructor attends each training session. This provides students vital information on current trends in military litigation, and it ensures the training complements and builds on other litigation training offered by AFJAGS. Major Elizabeth Schuchs-Gopaul, Chief of the Military Justice Division, AFJAGS, currently oversees the program.

The scheduling process for TRIALS sessions also transformed dramatically. TRIALS began as an ad hoc group of reservists who created their own schedule based upon available funding. Once the budget for the year was determined, team members would contact staff judge advocates to arrange training opportunities for individual offices.

This changed in FY08 when the team restructured under AFJAGS[3]. Under the new scheduling process, each summer AFJAGS requests to each major command SJA provide a priority list of bases where they would like for us to hold TRIALS training sessions. The Commandant then determines which bases will host training sessions, when the training will be conducted, and which team members will conduct the training. This process requires coordination to avoid conflicts with the bases' deployments, exercises, projected TDYs, and other taskings. This process also works to avoid conflicts with ARC members' civilian schedules.

Under the new alignment, the team visited ten bases in FY08, a significant increase over training offered in recent years. The TRIALS team trained 79 JAGs this year alone.

If a base is not selected as the host for a TRIALS session, that base can still send JAGs to attend training at another base using local travel funds. For example, when a TRIALS session was held at Barksdale AFB, Louisiana, the legal office from Little Rock AFB, Arkansas, sent two JAGs to the training.

Conclusion

For the ARC members, being on the TRIALS team is an extra duty, because each reservist must continue to fulfill his or her duties at their unit of attachment. The vast majority of the team members are individual manning augmentees, or Category B, reservists. The Reserve program director, however, is a staff judge advocate in a traditional reserve unit, or a Category A, reservist. In FY09, the team may also add at least one Air National Guard JAG.

Wright-Patterson AFB TRIALS Team and students

The TRIALS team has been in existence for ten years, and the program owes its legacy to its founder, Col Odom. However, FY08 saw many changes to the TRIALS program and a chance to improve an excellent program. With the current team comprised of a judge, an AFJAGS instructor, and experienced litigators, the TRIALS team not only provides a great synergy of expertise and an outstanding training opportunity for newer JAGs, it also showcases a total force initiative.

[3] Funding for the program includes MPA days provided by AFRC and travel funds provided by AFJAGS.

Military Justice Pointers

The Summer 2008 edition of The Reporter featured an article on the development of the Victim-Witness Assistance Program (VWAP) and JAG Corps 21's impact on the program. In this edition, Lt Col Eric Dillow, AFLOA/JAJM, explains the particular importance of VWAP in military justice cases involving allegations of sexual assault.

Victim-Witness Program and Justice

As outlined in AFI 51-201, Chapter 7, The Victim-Witness Assistance Program (VWAP) plays a vital role in the military justice system. Not only is VWAP required by statute and regulation, it's also the smart and right thing to do. Successful prosecution of cases involving sexual assault requires the willing cooperation of victims and witnesses. A strong VWAP can make all the difference in fostering greater confidence in the military justice system. With this in mind, it is troubling to note that recent assessments of sexual assault prevention initiatives throughout the military services have indicated that the VWAP may be an underused resource for victims of sexual assault.

With the implementation of the Sexual Assault Prevention and Response (SAPR) policy, DOD's efforts to respond to sexual assault issues have evolved considerably over the past few years. (*See* DOD Directive (DODD) 6495.01 and DOD Instruction (DODI) 6495.02). Providing a victim of sexual assault with the option of making either a restricted or unrestricted report poses challenges and adds a greater level of complexity to an already sensitive situation. In cases where sexual assault victims make unrestricted reports, VWAP personnel continue to play a crucial role in assisting victims in exercising their rights and navigating through the military justice process. These duties properly fall within the VWAP purview, as outlined in DODD 1030.1 and DODI 1030.2. The victim liaison is the appropriate person to assist victims when an unrestricted report is made, as sexual assault response coordinators (SARCs) and victim advocates performing duties pursuant to SAPR policy do not have the authority or training to assist victims as they maneuver through the military justice system. However, keep in mind that VWAP and SAPR are distinct but complimentary programs providing support and services to victims, as required by their respective governing directives. Both programs must work in concert to discharge their individual responsibilities and provide the victim appropriate information on available options and resources, notice of relevant events in the investigative and judicial processes, and support. (*See* AFI 51-201, paragraph 7.14.3).

Early intervention by VWAP representatives during the law enforcement investigative stage is absolutely essential, as it enhances greater cooperation on the victim's part and builds confidence in the military justice process. The best means to achieve early intervention is to develop a robust and collaborative working relationship between the legal office and law enforcement at the installation. Both organizations should assume a proactive stance to secure communication and information. For example, victim liaisons should be ready assist victims as soon as possible during the early stages of the investigative process. Victim liaisons will have an insurmountable task if their first contact with the victim occurs when the legal office receives the report of investigation. Likewise, law enforcement should not delay notification of the victim liaison. Indeed, the victim liaison should be near the top of any notification checklist. Recurring cross-functional training between the various organizations involved is a proven means of building rapport and strengthening communication linkages.

Legal offices should conduct a thorough review of their VWAP programs on a recurring basis. There should be a continual effort to ensure that the right people are serving in VWAP coordinator and victim liaison roles. Make sure these folks know what they are doing. Get these critical professionals involved from the beginning . . . the earlier the better. Make sure they work together with the SARC to assist sexual assault victims. Always keep the goals of the VWAP in mind--to ease the hardships suffered by victims and witnesses and foster cooperation and understanding as victims and witnesses interact with the military justice system. Most importantly, be sure your office is using the powerful resources available through VWAP to help protect the rights of victims of sexual assault.

Appellate Corner

CONFRONTATION CLAUSE: The Way Ahead with Remote Testimony

By now, everyone is intimately familiar with *Crawford v. Washington*, 541 U.S. 36 (2004), and its impact on defining the boundaries of the confrontation clause of the Sixth Amendment. In its wake are cases like *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008), which has changed the way the government must approach urinalysis cases. This article examines confrontation clause as it applies to remote testimony and the possible way of the future.

The Scope of Crawford

To be clear, *Crawford* considered whether and how testimonial hearsay statements made by witnesses who did not testify at trial were admissible in light of the Confrontation Clause. 541 U.S. at 68-69. The issue of face-to-face confrontation at trial was not directly implicated by *Crawford*, although *Crawford* did consider fully the historical context within which the Confrontation Clause was drafted and the evils at which it was aimed. *Id.* at 43-50. That said, while *Crawford* did hold that testimonial hearsay statements were inadmissible absent the right to confrontation, it is important to recognize that *Crawford* did not hold that face-to-face confrontation is required in every case. In that light, the Court of Appeals for the Armed Forces in *United States v. Pack*, 65 M.J. 381 (C.A.A.F. 2007), held that remote testimony, in accordance with *Maryland v. Craig*, 497 U.S. 836 (1990), by a child witness, is constitutional and outside the restrictions enumerated in *Crawford*.

Affirmation of *U.S. v. Pack* through *Maryland v. Craig*

In *Craig*, the Supreme Court reasoned that "[a]lthough face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause,' we have nevertheless recognized that it is not the *sine qua non* of the confrontation right." *Id.* at 847 (citations omitted).

Craig then considered that principle in the context of a child witness testifying remotely against a defendant in a criminal trial. Ultimately, the Supreme Court held that one-way closed-circuit testimony was admissible and consonant with the requirements of the Confrontation Clause when: (1) the court determines that it is necessary "to protect the welfare of the particular child witness;" (2) the court finds "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "the trial court [finds] that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*." *Id.* at 855-56 (citations omitted).

In *Pack*, the servicemember was charged with committing indecent acts with his stepdaughter. The Government asked the military judge because of psychological issues, to let the stepdaughter testify from a remote location via one-way closed-circuit television. The defense counsel objected, arguing that the Government's proposal denied his client the right to confront his accuser. The military judge disagreed with defense counsel and allowed the testimony via one-way closed circuit remote testimony. In the end, CAAF affirmed the case reasoning that *Maryland v. Craig*, had not been overruled by *Crawford* and therefore, remote testimony was constitutional. *Pack*, 65 M.J. at 385.

Remote Testimony

Interestingly enough, scrutinizing the *Pack* decision through *U.S. v. Gigante*, 166 F.3d 75 (2d Cir. 1999), reveals that remote testimony, not only of child witnesses, but adult witnesses may also pass constitutional muster under *Craig*.

In the *Gigante* case, Appellant appealed his RICO statute conviction, arguing that his Sixth Amendment right to confrontation was

violated by the use of a two-way closed circuit television system that permitted a witness to testify from a remote location. The court affirmed the conviction explaining the use of a two-way camera system did not violate defendant's right of confrontation. The witness could see the courtroom, and defendant and the jury could see the witness as he testified. *Gigante*, 166 F.3d at 81.

The Second Circuit reasoned that since the testimony would have been admissible through a deposition under Federal Rules of Criminal Procedure 15, should the government had chosen to take one, certainly it would be admissible via two-way closed circuit television. In fact, the court went on to explain:

> that the closed-circuit presentation of Savino's testimony afforded greater protection of Gigante's confrontation rights than would have been provided by a Rule 15 deposition. It forced Savino to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment; . . . Closed-circuit testimony also allowed Gigante's attorney to weigh the impact of Savino's direct testimony on the jury as he crafted a cross-examination.

Gigante, 166 F.3d at 81. As the *Gigante* Court indicated, while closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness, two-way closed-circuit television testimony does not necessarily violate the Sixth Amendment. *See also United States v. Benson*, 79 Fed. Appx. 813 (6th Cir. 2003)(remote testimony allowed when witness too ill); *State v. Sewell*, 595 N.W.2d 207 (Minn. 1999)(remote testimony permissible where witness was too ill to travel); *Harrell v. Florida*, 709 So. 2d 1364 (Fla. 1998)(remote testimony allowed where foreign nationals were unavailable).

The Way of the Future

With that background, the framework for admitting two-way remote testimony is reasonably simple. Once the unavailability of the witness and the necessity of his testimony have been demonstrated, the focus shifts to the reliability of the testimony. *Sewell*, 595 N.W. 2d at 212; See also *Craig*, 497 U.S. at 850. Reliability is ascertained by examining four features:

> The salutary effects of face-to-face confrontation include 1) the giving of testimony under oath; 2) the opportunity for cross-examination; 3) the ability of the fact-finder to observe demeanor evidence; and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence.

Sewell, at 212-213 (Minn. Ct. App. 1999). Two-way remote testimony, utilizing the framework presented above through the standards of RCM 702, *Depositions*, which is based largely on Rule 15, could be used as it was in *Gigante*, for very ill witnesses or, as in *Harrell*, for unavailable foreign witnesses. Press for remote testimony for witnesses in the AOR, whether they are foreign nationals or military members.

Conclusion

Think outside the box and utilize the available case law to advance the judiciary in utilizing remote testimony. Certainly, eighty years ago it would have been inconceivable for a court to accept electronic filings, but today, it is commonplace. Push for progress.

Thanks to Major Jefferson McBride, Instructor, Military Justice Division, The Judge Advocate General's School, for this submission.

EXPECTATION OF PRIVACY? A Brief History, Including *Long*, *Larson*, and DOD's New Computer Use Policy

by Major Thomas Dukes, USAFR*

In the last few years, the military appeals courts have generated a number of important decisions related to searching and seizing government computers and associated electronic evidence, building upon their relatively modest number of prior decisions in this area. In fact, computer search and seizure law is developing at a rapid pace in the military courts and will likely continue to do so for the foreseeable future. This recent activity by the military appellate courts mirrors a trend in the U.S. District Courts and the U.S. Courts of Appeals, where decisions dealing with computers and electronic evidence are being issued on an increasingly frequent basis.

In courts-martial, trial counsel, defense counsel, and military judges now routinely find themselves dealing with electronic evidence when addressing traditional issues such as authentication, admissibility, hearsay, and confrontation. This means that all court-martial practitioners need to have a solid grounding in search and seizure law as it applies to computers and electronic evidence.

This article will focus on the current state of the law relating to the search and seizure of government computers and related electronic evidence, starting with a brief overview of the core Fourth Amendment authorities that apply before moving on to an examination of the key military appellate decisions that deal with searching and seizing government computers.

As with traditional issues of search and seizure, the Fourth Amendment is the primary legal authority that governs searches and seizures of computers and other electronic devices.[1] In the Manual for Courts-Martial, the Military Rules of Evidence (MRE), specifically MREs 311 and 313-316, implement the core principles of the Fourth Amendment as they relate to military search and seizure law, covering probable cause,[2] exceptions to the warrant requirement,[3] and suppression,[4] as well as uniquely military concepts such as inspections and inventories in the Armed Forces.[5] In addition, the traditional exceptions to the Fourth Amendment's warrant requirement that are spelled out in MRE 314 (e.g., consent, private searches, plain view, exigent circumstances, and searches incident to arrest) apply to situations involving the search and seizure of computers and electronic evidence. Of particular note is MRE 314(d), which specifically addresses searches of government property.

The history of computer search and seizure law in the military courts is relatively brief. The U.S. Court of Appeals for the Armed Forces (CAAF) issued its first cyber decision in 1996, its first case dealing with searching government computers and electronic evidence in 2000, and two of its most important and controversial decisions in just the last two years. To understand how the law reached its present state, however, it is important to examine not only the key military decisions, but also the seminal U.S. Supreme

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[1] U.S. Const. amend. IV. The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

[2] M.R.E 315.

[3] M.R.E. 314.

[4] M.R.E. 311.

[5] M.R.E. 313.

Court case that created the doctrine for conducting all searches within the government workplace and a significant U.S. Court of Appeals case that applied that doctrine to computer searches. What follows is a brief summary of those cases, arranged in chronological fashion to give a sense of how the law in this area has developed over the last twenty years.

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Supreme Court analyzed warrantless searches in the government workplace, establishing a framework that has proved remarkably durable and adaptable to all manner of government workplace searches, whether of offices, desks, computers, or Internet usage. The Court held that government employees can have a reasonable expectation of privacy in their workplace.[6] A government employee's expectation of privacy may, however, be deemed unreasonable in the face of "actual office practices and procedures, or . . . legitimate regulation."[7] The Court further held that government employees and their agents can conduct "reasonable" work-related searches in government workplaces, even if those searches violate an employee's reasonable expectation of privacy under the Fourth Amendment.[8] For a government workplace search to be reasonable under *O'Connor v. Ortega*, the government employer or its agents must conduct the search for a work-related reason (i.e., rather than merely to obtain evidence of a crime, although mixed motive searches are permissible), and the search must be justified at its inception and reasonable in its scope.[9] Although *O'Connor v. Ortega* was decided in a decidedly pre-cyber era and dealt with the warrantless search of a doctor's desk and file cabinets in a state hospital, the legal framework it adopted has proven both flexible and enduring as courts have applied it to numerous scenarios involving computers, e-mail accounts, and Internet usage in government workplaces.

In *U.S. v. Maxwell*, 45 M.J. 406 (1996), the U.S. Court of Appeals for the Armed Forces had its first meaningful opportunity to apply Fourth Amendment search and seizure concepts to computers and electronic evidence, albeit the search of a personal computer and e-mail stored by America Online. The *Maxwell* case involved allegations that Colonel Maxwell had used his personal computer and an electronic mail account at America Online to distribute child pornography and other obscene materials. While the *Maxwell* decision has become something of a legal relic, given the significant changes in law and technology that have taken place since 1996, it still serves as an important historical milestone in the military's computer search and seizure jurisprudence, harkening back to an era when the Internet and e-mail were fascinating new technologies with which courts were just starting to grapple.[10]

In *U.S. v. Simons*, 206 F.3d 392 (4th Cir. 2000), the U.S. Court of Appeals for the Fourth Circuit applied the *O'Connor v. Ortega* legal framework for warrantless searches to the search of a government computer used by a Central Intelligence Agency (CIA) employee suspected of using his government computer to access child pornography via the Internet. The *Simons* court examined the legality of both the warrantless monitoring of Simons' Internet activity from his CIA computer and the warrantless physical search of his CIA office and computer. In examining the monitoring of Simons' internet activities, the Fourth Circuit held that the CIA's policy that it would "audit,

[6] *O'Connor v. Ortega*, 480 U.S. at 711, 721.
[7] *Id*.
[8] *Id*. at 725-26, 732.
[9] *Id*.

[10] The majority opinion in *Maxwell* opens with several passages that now seem almost quaint in their recognition of the dawning of the cyber era, to wit: "This case takes us into the new and developing area of the law addressing the virtual reality of 'cyberspace,' which is the generic term for the loosely connected network of computers that permits users of personal computers worldwide to communicate with each other. . . . New technologies create interesting challenges to long established legal concepts. Thus, just as when the telephone gained nationwide use and acceptance, when automobiles became the established mode of transportation, and when cellular telephones came into widespread use, now personal computers, hooked up to large networks, are so widely used that the scope of Fourth Amendment core concepts of 'privacy' as applied to them must be reexamined. Consequently, this opinion and the ones surely to follow will affect each one of us who has logged onto the 'information superhighway.'" *Maxwell*, 45 M.J. at 410.

inspect and/or monitor" its "employees' use of the Internet, including all file transfers, all websites visited, and all e-mail messages, 'as deemed appropriate,'" eliminated any legitimate expectation of privacy on Simon's part.[11] The Fourth Circuit likewise had "little trouble concluding that the warrantless entry of Simons' office was reasonable under the Fourth Amendment standard announced in O'Connor [v. Ortega]."[12]

Two weeks later, the U.S. Court of Appeals for the Armed Forces decided *U.S. v. Monroe*, 52 M.J. 326 (2000). In that case, CAAF held that a military member had no reasonable expectation of privacy in e-mail sent and received over an Air Force computer network, at least not against the network administrators responsible for maintaining and troubleshooting an installation's e-mail system. Furthermore, the *Monroe* court found there was no bar to the system administrators providing the e-mails to law enforcement, where the e-mails appeared to relate to criminal conduct. In the *Monroe* case, the criminal conduct at issue was Monroe's receipt of child pornography via the official e-mail network at Osan Air Base, Korea. The *Monroe* court limited its holding to the issue of whether Monroe had a reasonable expectation of privacy against an Air Force network administrator. The *Monroe* court did not decide whether it would have reached the same conclusion if the warrantless inspection of Monroe's e-mail had been undertaken in furtherance of a criminal investigation.

Six years later, in *U.S. v. Long*, 64 M.J. 57 (2006), the U.S. Court of Appeals for the Armed Forces addressed the very question left open by *Monroe*, and held that a military member could establish a reasonable expectation of privacy in a government e-mail account. The *Long* case dealt with the investigation of a young female enlisted Marine suspected of using controlled substances with other enlisted Marines.[13] While the *Long* decision did not state that henceforth all military members would enjoy a reasonable expectation of privacy in their official e-mail accounts, it did create confusion regarding the extent to which Department of Defense computer networks could be monitored and searched for law enforcement and counterintelligence purposes. However, that confusion has essentially been cleared up by two recent developments discussed below, namely CAAF's decision in *U.S. v. Larson* on April 25, 2008, and the Department of Defense's new mandatory network system banner and user agreement policy issued on May 9, 2008.

In *U.S. v. Larson*, No. 07-0263/AF (April 25, 2008), the U.S. Court of Appeals for the Armed Forces limited the *Long* decision to its facts and held that there is no presumption that a military member has a reasonable expectation of privacy in his or her use of a government computer or e-mail account. To the contrary, the *Larson* court relied heavily on the authority of Military Rule of Evidence 314(d), which addresses searches of government property and states that "[u]nder normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use."[14] The *Larson* case involved a male Air Force major who used his government work computer and the internet to entice a fourteen year old girl named "Kristin" to meet him for sex.[15] Unfortunately for Larson, "Kristin" was actually an undercover police officer, a fact that Larson learned when he was arrested at a shopping mall where he had gone to rendezvous with "Kristin."[16] In reaching its decision that Larson had no reasonable expectation of privacy in his government computer and internet activities, CAAF cited a number of factors, including (1) that Larson's computer was government property, (2) that the computer required Larson to acknowledge a "consent to monitoring" banner each time he logged on, and (3) that the system administrator could access Larson's computer.[17] The bottom-line effect of the *Larson* decision would appear to be that military members will have great difficulty establishing a reasonable expectation of privacy in information

[11] *U.S. v. Simons*, 206 F.3d at 398.
[12] *Id.* at 401.
[13] *U.S. v. Long*, 64 M.J. at 59. It is worth noting that *Long* is the rare case in this area that doesn't deal with a male officer or NCO accused of some type of child pornography or child enticement offense.
[14] *U.S. v. Larson* at 8.
[15] *Id.* at 4.
[16] *Id.*
[17] *Id.* 5-6.

stored on their government computers or contained in their official e-mail accounts.

On May 9, 2008, the Department of Defense Chief Information Officer significantly reinforced the notion that military members have no reasonable expectation of privacy in their activities on DOD computer networks when he mandated that within 60 days all Department of Defense computer networks display a new "Notice and Consent Banner" and all DOD computer user agreements implement a new "mandatory notice and consent provision."[18] The clear effect of these new policies, particularly when considered along with CAAF's *Larson* decision, is that the Department of Defense can and will monitor and search its computer networks for any and all purposes and that any criminal activity discovered during those activities will be presumed admissible in courts-martial or other disciplinary proceedings.[19]

As stated at the beginning of this article, the law related to searching and seizing government computers and related electronic evidence is dynamic and continues to evolve at a rapid pace. While this area of the law and its frequent new developments may seem complicated, the questions you are likely to encounter in court-martial practice can almost always be answered through the application of traditional search and seizure concepts. For that, we can thank the Framers of the Constitution for their wisdom and foresight in crafting a flexible and durable Fourth Amendment.

[18] Memorandum from the Department of Defense Chief Information Officer, For Secretaries of the Military Departments, et al., Subject: Policy on Use of Department of Defense (DOD) Information Systems – Standard Consent Banner and User Agreement (May 9, 2008); *available at* http://iase.disa.mil/policy-guidance/dod-banner-9may2008-ocr.pdf.

[19] The new DOD-wide policy guidance does recognize the privileges and confidentiality that are inherent in certain attorney, psychotherapist, and clergy communications and work products.

A CALL FOR SUBMISSIONS

The *Air Force Law Review* will feature a master cyberlaw edition in Volume 64, which is scheduled for publication in summer 2009. Readers are encouraged to submit articles, notes, comments, book reviews, and other submissions on this expanding field of legal practice that may be of interest to judge advocates and military law practitioners. The deadline for submissions is 1 April 2009. All submissions will be reviewed by the *Law Review* Editorial Board for publication consideration. Submission guidance is available on The Judge Advocate General's School FLITE website or by contacting the editors, Maj Kyle Green (kyle.green@maxwell.af.mil) and Maj Joe Dene (joseph.dene@maxwell.af.mil), at 334-953-2802 or DSN 493-2802.

Developments From The Field

Claims and Tort Litigation Division

On 17 September 2007, the Air Force Surgeon General and The Judge Advocate General signed a memorandum of understanding (MOU) that has the purpose of centralizing and enhancing the medical law consultant (MLC) activities. The MOU establishes within AFLOA/JACC a new Medical Law Field Support Center (MLFSC). MLCs now fall under this MLFSC and will be supervised and rated by a newly-designated chief of that support center. MLCs are now part of AFLOA during their assignments.

The function and services rendered by the MLCs to their respective medical centers and regions have not changed, and they remain totally dedicated to their medical law activities and are an integral part of the medical treatment facility to which they are assigned. Having centralized supervision and rating of MLCs provides for better crossfeed of information and dedicated support by medical law experts in AFLOA. TJAG and AFLOA/CC welcomed the MLCs into the new MLFSC and the AFLOA fold during a town hall VTC held on 18 September 2008. JACC continues to be the central office for processing and adjudicating medical malpractice cases and offering subject matter support to the MLFSC.

Thanks to Mr. Joe Procaccino, Legal Advisor to the Air Force Surgeon General, for this submission.

Have an idea for publication?

Contact the editors of *The Reporter* to discuss publishing opportunities, including *The Reporter*, the *Air Force Law Review*, and other publications.

AFI 51-502 Changes

With the creation of the Air Force Claims Service Center (AFCSC) and the Medical Cost Reimbursement Program (MCRP), extraordinary change is on the horizon for the Air Force claims program. Currently, the AFCSC is up and running with the MCRP continuing its push forward to full operational capability. Three of the regional offices are now operational. Once fully operational, the MCRP will have eight regional offices to process Medical Cost Reimbursement (MCR) claims.

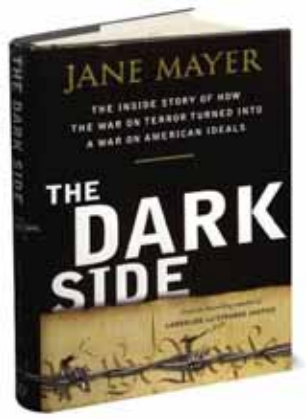
On 31 July 2008, AFI 51-502, *Personnel and Government Recovery Claims*, incorporated some changes to reflect the new movement of the Air Force claims program. These changes focus on the establishment of the AFCSC and the MCRP. Specifically, the changes involve the realignment and centralization of the personnel and recovery claims under the AFCSC and the MCR claims jurisdiction, responsibilities, and authorities. The change also includes the creation of attorney positions for the regional MCRP.

Some of the new provisions in AFI 51-502 warrant highlighting. First, under the new provisions, the AFCSC has assumed responsibility for all personnel and personal transportation claims filed by Air Force personnel pursuant to the Military Personnel and Civilian Employees' Claims Act (the Personnel Claims Act), 31 U.S.C. 3701, 3721. In other words, the AFCSC will process, settle, and make payment on these claims. These claims can be done on line without involvement from the base legal office. However, base offices will still provide basic guidance and direction to members, and offices may even receive claims from members who have no computer access or skills. Base offices may also need to assist members by dispatching DD Form 1840Rs, *Joint Statement of Loss or Damage* (the pink form), uploading documents, and acting as liaison with the AFCSC.

A second notable change involves settlement authority for MCR claims. Within this provision, the staff judge advocate of each Air Force base not serviced by an MCRP regional office has settlement authority for MCR claims of $25,000 or less. Reference AFI 51-502 for more detailed information concerning recent changes to the Air Force claims program.

Thanks to Major Tammie Sledge, Instructor, Civil Law Division, The Judge Advocate General's School, for this submission.

BOOKS IN BRIEF



The Dark Side: The Inside Story of How the War on Terrorism Turned into a War on American Ideals
Jane Mayer (Doubleday, $32)

Review by Major Joseph F. Dene, Instructor, Professional Outreach Division, The Judge Advocate General's School

Perhaps the most dangerous asymmetrical advantage of terrorism is the tendency of governments to overreact to an attack. Terrorism's logic requires inciting a lopsided response to expand an attack's impact, amplify fear, and aggrandize the terrorist's stature from criminal to "freedom fighter." Jane Mayer's recent book, *The Dark Side*, recounts the Bush Administration's development and implementation of detainee policies following the attacks of September 11, 2001. Though she does not explicitly call them an overreaction, Mayer leaves no doubt that she believes the Administration's policies have been both counterproductive to the war on terror and detrimental to fundamental American ideals.

The Dark Side follows the legal foundation and evolution of "enhanced" interrogations, "extraordinary renditions," and other controversial practices. Mayer's account is largely focused on a small group of attorneys at the top of the government, self-styled the "war council," who made these practices a reality. (The group included: David Addington, then the Vice President's counsel; William Haynes, DOD general counsel; John Yoo, DOJ's Office of Legal Counsel (OLC); and, Timothy Flanigan and Alberto Gonzales, then in the White House Counsel's Office.)

Mayer does not impugn the motives of these officials—if anything she goes to lengths to remind us of the fear following 9/11 and their desire to prevent additional attacks. Rather, Mayer's take is captured in her quote of Justice Brandeis (*U.S. v. Olmstead* (277 U.S. 438, 1928)): "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Methodically building her case to establish that lack of understanding, she questions the wisdom of the practices and their common underlying legal justification, the unitary executive theory. The theory posits that statutory limitations of presidential power (i.e., the Torture Act, the Foreign Intelligence Surveillance Act) are unconstitutional when the President is acting under his Commander in Chief constitutional powers. And it's up to the executive to determine constitutionality for itself. Euphemistically named "enhanced" interrogations were not, according to the theory, illegal because of the Commander in Chief's "inherent powers to order any interrogation technique he chose." Moreover, OLC's contorted interpretation of the term "torture" sought to legalize techniques such as stress positions, forced nudity, prolonged exposure to temperature extremes, sleep deprivation, sensory deprivation, and waterboarding. In vivid terms, however, Mayer explains the overwhelming psychological effect of these techniques when used in combination over a period of months. Aside from legal considerations, the book contends the choice to employ these methods was done without any serious thought about their efficacy or concern for collateral consequences. It is not surprising such efforts troubled many in the government.

Some of those critics were judge advocates, and they, along with others, objected to the administration's policies. As Mayer describes:

> The Bush Administration was warned that the short-term benefits of its extralegal approach to fighting terrorism would have tragically destructive long-term consequences both for the rule of law and America's interests in the world. These warnings came not just from political

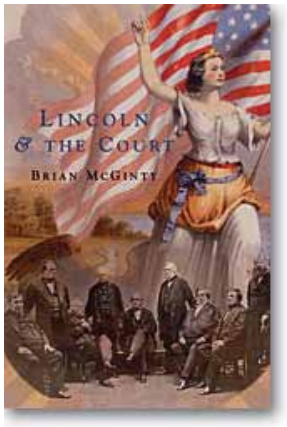
> opponents, but also from experienced allies . . . experts in the traditionally conservative military and the FBI, and perhaps most surprisingly, from a series of loyal Republican lawyers inside the administration itself. The number of patriotic critics . . . who threw themselves into trying to head off what they saw as a terrible departure from America's ideals, often at enormous price to their own careers, is both humbling and reassuring.

Of course, it's hard to know if events unfolded as Mayer describes them. It may be tempting to dismiss her work as a liberal polemic on a conservative administration. Although the genesis of the book is a series of articles she wrote for *The New Yorker,* a cursory glance at the book's endnotes reveals the great extent to which she relied on the work of others. The preliminary chapters are sprinkled with textual references to Bob Woodward's books, Steve Coll's *Ghost Wars*, and others. In a sense, *The Dark Side* is a work of historiography. But, despite the pull to dismiss it as merely political or overly reliant on secondary material, the book's primary sources and gifted integration of other's work make such a dismissal difficult.

Mayer's synthesis of her material is skillful and persuasive. But, *The Dark Side* is also an important read because it confronts us with a stark reality—respect for the rule of law may mean very different things to different people. Mayer's book demonstrates that commanders have an enduring need for independent legal advice at all levels. Ultimately, Mayer makes a compelling case that maintaining respect for the law, even in face of the unparalleled emotion of war, preserves the ability to fight and moves us one step closer to eviscerating the advantage of terrorism.

To see an interview with Jane Mayer discussing her book, follow the link to C-SPAN:
http://www.c-spanarchives.org/library/index.php?main_page=product_video_info&products_id=280288-1

Lincoln and the Court
Brian McGinty, (Harvard University Press, $28)
Review by Major Joshua E. Kastenberg, Staff Judge Advocate, Joint Task Force-Global Network Operations



Our generation has become familiar with prominent Civil War era cases such as *Ex Parte Milligan*, the *Prize Cases*, and *Ex Parte Vallandigham* in large part because the post 9/11 legal landscape has brought comparisons of the wartime conduct of the Lincoln and Bush administrations and commentary on the Supreme Court's reaction to each. *Ex Parte Milligan*, the *Prize Cases*, *Ex Parte Vallandigham*, and a number of other decisions shaped and governed the executive branch's authority to conduct military operations during the United States' greatest national emergency.

Most modern historic treatises address these cases in light of Lincoln's military and political strategy. Moreover, contemporary use of these cases has caused a reexamination of separation of powers and the Constitution's stretch to captured combatants, lawful or otherwise. Few of these cases were ever judicially repudiated (though the legislative branch has certainly modified outcomes over the past century and a half). But, until McGinty's book, no modern study has ever examined Lincoln's relationship to the justices on the Court. McGinty does a superb job of it.

The primary strength of McGinty's book is in its approach to legal history. Lawrence Friedman, the late twentieth century's foremost legal historian, argued that legal history is more than reciting the holdings of decisions or the results of trials. Rather, he claimed it's a study of the interaction of personalities and the formation of law. *Lincoln and the Court* follows this model, lending context to the Court's critical decisions and their effects. McGinty's description of the judges sitting on the Court, their ideologies, and their transition to supporting Lincoln or remaining silent, is successfully woven throughout the book.

Among the book's strengths is its dispassionate presentation of conflicting viewpoints. For instance, historians have long assumed pro-southern Democrats remaining in the Union, "Copperheads," were a nuisance falsely "conflated" as a national threat to serve Lincoln's war aims. To false conflation subscribers, this resulted in unlawful military arrests and trials of such persons as the former congressman, Clement Vallandigham. Without judgment, McGinty incorporates recent credible work refuting the conventional view on the Copperhead threat and addresses the issue even-handedly.

Early on, McGinty makes several points that have been forgotten by critics of Lincoln's expansion of military law during the war. Chief Justice Taney, now mostly known for authoring the repugnant *Dred Scott* decision, unwittingly enabled Lincoln to exert the executive branch's authority toward emancipation, military trials of civilians, and military governance over captured southern geography. McGinty rightly argues that in *Luther v. Borden*, a case arising from an 1841 working class insurrection in Rhode Island, Taney's view of the population's right to a Republican government included the authority of a government to preserve that right through martial law and other undemocratic means. In that case, Taney had, in fact, sided with a conservative governor who had ordered the state militia to crush the rebellion.

McGinty points out that Taney's relationship with Lincoln was not, at first, antagonistic, but Lincoln's conduct in *Ex Parte Merryman* created judicial mistrust. He also successfully argues Taney's personal courage in confronting Lincoln in the case. False rumors abounded that Lincoln intended to imprison Taney, yet Taney travelled alone and was never cowed into submitting to Lincoln's wishes. On the other hand, McGinty's rightly faults Taney as never understanding the gravity of the South's insurrection and what it meant to the Constitution. Wedded to slavery, Taney's judgment was always at odds with any concept of increased executive authority in wartime.

The book uniquely addresses the Supreme Court's brief increase to ten justices. Lincoln's detractors accused him of seeking a tenth justice to ensure the continuance of radical Republican policies. Lincoln's selection, Stephen J. Field, lent some credibility to Democrat criticism, but only because Field's brother was a prominent abolitionist. Yet, McGinty proves the truth of Lincoln's argument that the Court needed an additional judge because of increased workload and a western judge to parse conflicting Mexican and Spanish land claims. Ultimately, Stephen Field did not support all of Lincoln's policies and, indeed, later sided with *Plessy v. Ferguson's* establishment of the "separate but equal doctrine."

Lincoln and the Court does have weaknesses. For example, McGinty's primary source material fails to make extensive use of the personal correspondences of some of his book's subjects, like Associate Justice James Moore Wayne, the author of *Ex Parte Vallandigham*. A Georgian whose son fought for the Confederacy, Wayne remained on the bench as one of Lincoln's allies. The justice's extensive letters are readily available to the public at the Georgia Historical Society, and they provide great insight into Wayne's thought processes. Additionally, McGinty did not make use of the personal correspondences of James Speed, Lincoln's second attorney general, or General Joseph Holt, the Army's Judge Advocate General. Both collections have extensive correspondences related to the subject matter in McGinty's book. But, most historic works contain some shortcomings, and McGinty's are outweighed by the book's strengths.

This book is unique in its approach and topic. Its quality ranks with other recent works on Lincoln and the Civil War such as Doris Kearns Goodwin's *Team of Rivals,* despite its minor shortcomings. The real winner in this book is the reader. Anyone interested in the expansion of military law, particularly in the post-9/11 world, will find great merit in McGinty's work.

Have you read a book recently that is worthy of attention from others in the JAG Corps? Reviews and recommendations may be submitted to the editor, Captain Jodi Velasco, at jodi.velasco@maxwell.af.mil.

AFJAGS Update

New Platform for e-Learning

Last month, the JAG School and JAS rolled out CAPSIL, the next evolutionary step in our Corps' use of information technology. The term "CAPSIL" combines two Latin words, *captivitas*, meaning to capture, and *consilium*, meaning wisdom or knowledge. Together, these terms express CAPSIL's purpose—to provide tools to harness the collective wisdom and knowledge of the JAG Corps.

Designed by Maj Dave Houghland, Chief of Air Reserve Component Training at AFJAGS, CAPSIL provides a user-friendly interface with effective search capabilities and efficient user tracking to give us the ability to access and share information and e-learning resources across the JAG Corps. Here are just a few of CAPSIL's many features:

Centralized training resources: Rather than creating and storing training materials locally at many different offices, CAPSIL offers a "one-stop shop" for standardized, easily structured training materials in a variety of formats to satisfy training needs. In the event legal offices create new, or better, training materials, CAPSIL provides a way to share them across the Corps. Additionally, consumers can quickly give feedback on the quality and usefulness of the material.

User collaboration forums: CAPSIL provides subject-specific forums that will allow members of the JAG Corps to share resources on projects and issues. Whether planning for an air show or natural disaster response, users can work together in CAPSIL to rapidly disseminate information among many people. But, unlike e-mail, information exchanged through CAPSIL is stored and available indefinitely, and other users can access the information by a simple Google-like key word search.

Division chief course registration and tracking: CAPSIL has replaced JADE as the registration and storage location for the AFJAGS division chief courses. Additionally, management and reports functions in CAPSIL allow legal office leadership to register individuals for the appropriate courses, establish dates for completion, and monitor each person's progress.

CAPSIL can be accessed directly from the FLITE home page or under the 'Professional' pull-down menu. CAPSIL has tremendous potential, offering many new capabilities to the JAG Corps, but your feedback is critical to the program's continued development. As you begin to use CAPSIL in the coming months, AFJAGS welcomes your inputs and feedback.

Expand Your Office Training Program

Each month, AFJAGS works with subject experts to deliver webcast training right to your office. No advance registration is required—just follow the link in that week's Online News Service announcement and join the session as a guest. If you miss a webcast, recordings of each session are available on the AFJAGS website.

DCO
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In Memoriam
Major General David C. Morehouse, USAF (Retired)

Major General (Retired) David C. Morehouse, The Judge Advocate General (TJAG) from May 1991 to August 1993, passed away peacefully on 15 July 2008. He was laid to rest on 9 October 2008 at Arlington National Cemetery in Washington, D.C. He is survived by his wife, Sally D. Morehouse, his sons, Dr. Joseph D. Morehouse and his wife, Mary, of Duluth, Minnesota and Mark D. Morehouse and his wife, Tammy of Chicago, Illinois.

General Morehouse was one of the JAG Family's most influential and inspirational leaders, and his service to the Air Force and the United States epitomized the Air Force Core Values of Integrity, Service Before Self, and Excellence in All We Do.

General Morehouse earned a bachelor of science degree from the University of Nebraska in 1957 and a juris doctor degree from Creighton University in 1960. He accepted a direct commission as a first lieutenant in the Department of the Judge Advocate General, United States Air Force, in August 1960. His early assignments included the 9th Combat Support Group, Mountain Home Air Force Base, Idaho; the 3902nd Air Base Wing, Offutt Air Force Base, Nebraska; the 72nd Combat Support Group, Ramey Air Force Base, Puerto Rico; the 3rd Tactical Fighter Wing, Bien Hoa Air Base, South Vietnam; the 60th Military Airlift Wing, Travis Air Force Base, California; and the 22nd Air Force, also at Travis. In 1971, General Morehouse began studies at The George Washington University, where he earned his master of laws degree through the Air Force Institute of Technology program.

Senior Master Sergeant Edwards, Ms. Qui, and then-Major Morehouse at Bien Hoa Air Base, Republic of Vietnam (circa 1968)

Following his graduation in 1972, the general remained in Washington, D.C., and was assigned to the Office of the Judge Advocate General, first as a member of the Litigation Division, and then as Executive to the Assistant Judge Advocate General. He attended the National War College from 1976 to 1977, and then he served as Staff Judge Advocate, 15th Air Base Wing, Hickam Air Force Base, Hawaii. He moved to Randolph Air Force Base, Texas, in June 1980, where he served as Staff Judge Advocate, Air Force Manpower and Personnel Center. General Morehouse was assigned as Staff Judge Advocate, Tactical Air Command, Langley Air Force Base, Virginia, from 1982 to 1985. He next served as Staff Judge Advocate, Strategic Air Command, Offutt Air Force Base, Nebraska. In July 1988, General Morehouse was appointed Deputy Judge Advocate General. The President appointed General Morehouse as TJAG in May 1991, and he served in the position until his retirement in August 1993.

The strength of today's JAG Corps is built in large part on the courageous and principled leadership of General Morehouse. During his tenure as TJAG, he joined with the other service TJAGs and the Staff Judge Advocate to the Marine Corps Commandant to oppose the "Atwood Memorandum." The

memorandum, named for Donald Atwood, who was then the Deputy Secretary of Defense, directed that the General Counsel of each service would serve as the "chief legal officer" with authority over all civilian and military personnel performing legal services, thereby threatening the independence of the Corps. Brigadier General (Retired) James W. Swanson noted that General Morehouse "unhesitatingly put his own career at risk and on the line" to oppose the reorganization, and his zealous advocacy helped ensure the Atwood Memorandum was removed prior to the confirmation of David Addington as General Counsel of the Department of Defense.

General Morehouse viewed the candid, independent advice provided by judge advocates to commanders as a fundamental cornerstone of our practice. Writing about his perspectives last year, General Morehouse noted:

> The JAG must be able to give unfettered and informed legal advice to his commander and staff, regardless of the level, and controlling that advice from the top down in a "stove pipe" organization is the antithesis of that principle. If the commanders I worked for thought for a moment that my advice was driven top-down, I wouldn't have lasted past that moment, and rightly so.

While serving as TJAG, General Morehouse oversaw profound growth in the field of operations law. During Operation DESERT STORM, the Legal Information Services Directorate developed and deployed a portable software system with databases of the most frequently used Air Force regulations and legal manuals. The program was widely praised as the most valuable research tool available in the theater of operations, and General Morehouse subsequently signed a letter jointly with Lieutenant General Michael A. Nelson, Air Force Deputy Chief of Staff for Plans and Operations, to formally establish operations law as a new legal discipline.

General Morehouse also served as a great champion for legal education and training. As the seventh Judge Advocate General, he oversaw the implementation of the new 56,000 square foot Judge Advocate General's School, which allowed all formal training and education for judge advocates and paralegals to be consolidated in one location. General Morehouse joined Congressman William L. Dickenson to dedicate the Dickenson Law Center in 1993. In August 1993, several months after school's dedication, General Morehouse retired.

General Morehouse with Congressman Dickenson during the groundbreaking ceremony for the new school

General Morehouse was a man of great conviction, and he will always be remembered for the remarkable integrity and moral courage he displayed in the face of great challenges. As General Swanson observed, General Morehouse's "dedication to the Air Force and the JAG Corps never wavered, and he remained a tireless and fearless public advocate on JAG issues literally until his passing. The JAG Corps is infinitely stronger for his courageous and extraordinarily principled leadership."

General Morehouse's legacy will endure for generations as members of the JAG Corps pass through the Judge Advocate General's School. He will be greatly missed.

Our Heritage

An Enduring Relationship with Commanders: *The Fifth Chief of Staff of the Air Force, General Curtis E. LeMay, working with his Judge Advocate General, Major General Albert M. Kuhfeld.*

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