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# The Reporter

THE JUDGE ADVOCATE GENERAL'S CORPS

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DJAG  
ON REASONS TO WRITE



# The Reporter

Fall 2009  
Volume 36, Number 3

*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).

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## MESSAGE FROM THE Commandant

Colonel Tonya Hagmaier

"WRITING IS AN EXPLORATION," award-winning author E.L. Doctorow once said. "You start with nothing and learn as you go." In this edition of *The Reporter*, Major General Charles J. Dunlap, Jr., one of the JAG Corps' most thought-provoking and prolific writers, provides an invaluable primer on the personal and professional benefits of writing and outlines his method for getting written works published. Additionally, in "A JAG in La La Land," General Dunlap tells the amazing true story of how a paper he wrote for National War College led to an opportunity to work as a military consultant on a Hollywood motion picture.

Also in this edition of *The Reporter*, Lieutenant Colonel Graham Todd discusses the legal implications of the DoD notice and consent banner, and Major Brian Thompson, drawing from his tour as a legislative fellow, provides a behind-the-scenes account of the how the Military Spouses Residency Relief Act became law. Meanwhile, Major R. Aubrey Davis tackles the thorny issues associated with computer searches in the AOR, and our JAG Corps historian Mr. Wade Scroggsham shares the hidden history of the building of the Judge Advocate General's School.

In our second *Paralegal Perspective*, Master Sergeant (Ret.) Philip Boehm reflects on his 30 years of service, providing invaluable lessons for today's paralegals. Additionally, Master Sergeant Lisa Swenson chronicles the 2009 USAF Paralegal Association Reunion, a tradition which brings together those who have worn the badge, and the devoted families who support them.

As always, we are very proud to share these remarkable contributions from across the JAG Corps family. As General Dunlap wrote, "The more you write...the more people will know the quality of people we have in the JAG Corps and the fact that we can speak to many different issues." Take General Dunlap's words to heart and share your ideas with others. Once you start to write, you may be surprised where the journey takes you.

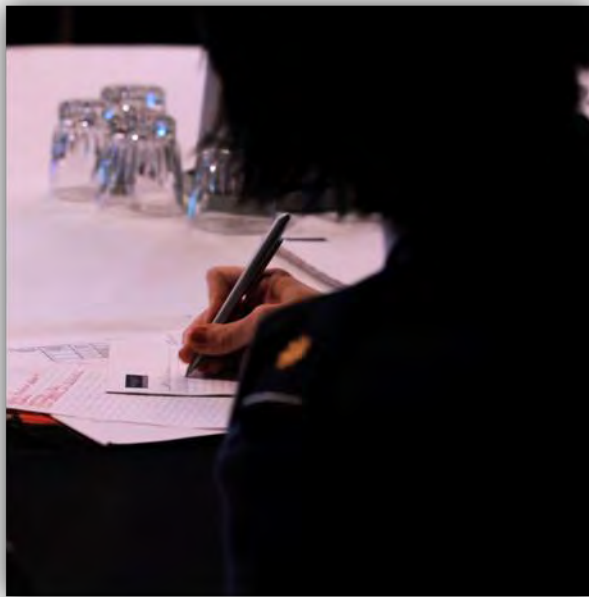
*Tonya Hagmaier*





# Reasons to Write

*At a past KEYSTONE Leadership Summit, Major General Dunlap presented an information-packed elective on professional writing. In this edited transcript of his remarks, the Deputy Judge Advocate General shares his experiences as one of the JAG Corps' most widely published authors, and provides an inspirational "how-to" guide on how legal professionals can become better writers and publish their work.*



**T**HERE ARE MANY GOOD REASONS FOR writing. In our business it is a professional imperative. Writing and developing your writing skills will help you professionally. You can make yourself the most valuable player on the commander's team by being a good writer. It also enhances the JAG Corps' image, both in and out of the Air Force. The more you write, especially for general interest publications, the more people will know the quality of people we have in the JAG Corps and the fact that we can speak to many different issues.

## BENEFITS OF PROFESSIONAL WRITING

Writing has opened doors for me to many forums where I would not otherwise have been invited to speak. Recently, I spoke on counter-

insurgency at the Council on Foreign Relations, which was a great opportunity. Often, the reason you may be invited to speak somewhere is because of something you have written which becomes known in the community. Writing expands your opportunity to make an impact. When ideas are on paper, they are more likely to have a long-term impact on policy makers. Colonel John Boyd was one of the great Air Force strategists of the 20th Century. He developed the *OODA Loop*,<sup>1</sup> a decision-making theory that is highly influential in both military and business. Colonel Boyd, however, never wrote an article or book about any of his strategies. The 200-slide presentation he developed is the only real record of his thinking<sup>2</sup> Colonel Boyd could have had a lot more impact beyond just the *OODA Loop* had he captured his ideas and put them down on paper.

Writing can also be a lot of fun, and it can take you in unexpected directions. The article I wrote while in National War College, *The Origins of the American Military Coup of 2012*,<sup>3</sup> is now over 15 years old. Today, at least once a month, I get something from somebody about this article. Also, I received an award for the article, which led to an opportunity to work on a movie. But there was another more practical

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<sup>1</sup> Colonel Boyd's OODA loop consists of interacting actions: Observe, Orient, Decide and Act. Colonel Boyd advocated cycling through the loop faster than an adversary to "get inside" their OODA loop, generating confusion and disorder.

<sup>2</sup> The Internet has given Colonel Boyd's presentation a continued presence, including at <http://www.d-n-j.net/boyd/pdf/poc.pdf>.

<sup>3</sup> Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, PARAMETERS, Winter 1992-1993, 2.

effect: in April of 2006, *Harper's* did a big article on civil-military relations. I was asked to participate, not because I'm the smartest person on this subject, but because of the article I wrote 15 years ago. So many years later, it remains relevant.

## BUILDING WRITING SKILLS

### *Learn by Reading*

How do you learn to write for publication? Dunlap's theory is that the key to good writing is actually good reading. There are two different kinds of reading in my view. One kind is strategic reading. Strategic reading is where you read to learn how to write and to see how others write. How do others express themselves? In my humble opinion, some of the best writing can be found in the *New Yorker*, *Harper's*, the *New York Times*, and *Foreign Affairs*. When I read through these magazines, journals, and newspapers, I look for words or phrases that I don't use. When you use the thesaurus feature in word processing software, you end up using the same words all the time because the thesaurus is limited. But other publications offer fresh ideas. And you don't just have to read heavy duty kinds of publications to get familiar with good writing. *Sports Illustrated*, for example, has some terrific writing.

The other kind of reading is tactical reading, which is reading those publications where you might want to get published. You can kind of see the style, the format, and the phraseology, or the ROE, so to speak, of the particular publication. Study the sentence structure, the phrasing, and the imagery. What is the ROE for those particular publications?

## SELECTING A TOPIC

What to write about? I actually get asked this a lot: "How do you get your ideas?"

### *Personal Knowledge*

To be effective, you have to write about what you know, and often times this will be a legal issue, but not all the time. I think that things that you personally experienced or personally worked on are fertile grounds for writing. That isn't to say that you can't educate yourself about another subject. Some subject that you've never worked on nor experienced,

can you write about it? Yes. But you really do have to educate yourself about the subject. And you have to research it and examine the leading works. I frequently see authors not looking at the classic treatise or the leading work on the subject. For example, John Yoo has a law review article out criticizing JAGs on civil-military relations. Among the many things I don't like about the article is it's very slovenly researched. It does not cite the classic works in civil-military relations in a comprehensible way. He may be given leeway because he's a law professor, and someone will publish whatever he puts out. But if you do not take into account the classic works, especially for a peer-reviewed journal, then you're going to have problems.

### *Passion*

This is the most important thing about writing. You must be passionate about your subject because if you're not passionate about it, it will reflect in your writing. I feel it in myself when I am writing about something that I have to write about versus what I want to write about. If I am not passionate about it, I am not a good enough writer. I am not smart enough to write in an acceptable, publishable way unless I feel passionate about it on some level.

### *Popular Issues*

So one of the things that I do is scan popular literature like the *Early Bird*, newspapers, and magazines. I look for things that I disagree with or don't think they have quite right, and I make notes of it. And believe me, that's a lot of stuff. Almost everything written about the military, there's going to be something that you're not going to agree with. Even in *Air Force* magazine and places like that, they don't quite have it right. So I start making notes.

## RESEARCH

Making notes dovetails into how I research. After I start making these notes, I start identifying areas that I'm interested in. Then I begin assembling materials. I have recently been doing more of this on the computer. Those of you who have seen my office, you always see stacks of items. It looks like I have a completely messy desk, which it is, but there is a rationale to it. Now I try to store things electronically. The *Early Bird* is a good clipping service. I look

through it, and if there is an article that I find of interest or it has something in there that I might want to cite, I put into an electronic file.

With the *Early Bird*, it is not always clear what their source is. Sometimes they will say it's on page one of the *New York Times*, sometimes they will just say *Miami Herald*. I will go and find the original and keep that hyperlink so that I will have a good basis for a citation later on. Sometimes if you let it go and you do not nail it right away, you will never find that darned thing again. It becomes a problem because you don't want to cite the *Early Bird*. It is much better to cite the primary source.

#### *Base Resources*

One of the things that we don't always realize is how many free things you can get your legal offices. Like *Defense News*, they'll pretty much send any military office a subscription, if you want it. Plus, some of these journals, like *Defense News*, are not available electronically except to subscribers. So sometimes there's still a place for those scissors to cut out articles. When you cut out the articles, make sure you put the page and full title and date of publication. With so much practice, I flip through publications and I can almost make an instant judgment now. If there is something in there, I will tear it out. I usually like to get the publications last in our office so that I can freely cut and save articles of interest.

The other thing to do is to check out the base library and see what all that is available there. You might be surprised at how good many of our base libraries are when you go through and see what they have in your interest areas. Many also have excellent electronic collections, which you may be able to access from home.

#### *Building Your Library*

I am a big believer in building your personal library. If you want some ideas, there is a reading list. It's a little bit dated now, but it was in *The Reporter* in March 2006. My mother was a librarian, so it took me about 30 years to get to the point where I could actually mark a book, even one I owned. But when I read now, I mark, highlight, and everything else, otherwise I will never find it again. If there is something of interest, I make a note in the book. That's the

great value of owning books. Building a library is expensive. I know not everyone can do it. But many books offer paperback editions now. And there are a lot of used bookstores, especially when you come to D.C. If you go to a used bookstore in D.C., you will find great military material.<sup>4</sup> Used books offer a way to build your personal library inexpensively.

How do you keep creativity? I have an asymmetrical reading project. So, for example, every now and then I'll read or more likely listen to a non-military book on CD. I listen when I go running. For example, I'm listening to Alan Greenspan's autobiography. It's about something that I don't deal with. As you listen to the themes, you'd be surprised; you just get a snap of an idea related to something maybe in the military. The author may not have meant it, but it will just give you that little bit of creativity. And don't forget about JAG Corps resources. FLITE collects many research resources on legal topics. It is something that I continue to exploit more.

#### *Building Your Contacts*

Another key is to contact the expert in the subject matter area. How do you find out who they are? Well, there are many free lectures downtown at universities or conferences. It's wonderful in Washington. When you go to these conferences, go up and introduce yourself to the expert. They like people who are interested in what they're interested in. You'd be amazed. A great example of this is Dick Kohn, an expert in the civil-military relations area. He's a professor at the University of North Carolina. I didn't meet him at a conference. I was writing in this area, and I just sent him a letter. (I prefer letters, though some people might send an email.) Dr. Kohn sent me books. He would vet my manuscripts and give me feedback. It's really amazing -- they really do want to help. This happened long before I held this rank, so it was not a case of, "Oh, you're a general, of course they're going to pay attention."

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<sup>4</sup> For example, I found the new edition of the History of the U.S. Air Force from 1947. The old edition spanned 50 years, bringing us up to 1997. The new edition goes to 2007. I found a brand new copy in a used bookstore for \$8.00.

Before you talk to an expert, you have to do your homework. It may be that you could contact someone and say, "I don't know anything about this area. Can you give me a list of books?" Be careful about that; they think in terms of 20 books or 30 books. So do your homework because you have to make sure that your idea or perspective is fresh, and that it's going to be publishable. In other words, your work has to take into account what's already been said. You might have a different perspective on it, but know what is out there. You can also use these experts for quotes. It may be surprising at first, but they will almost always give you a quote. When people are speaking in your article, it makes it that much more powerful, and it looks more interesting to people.

## TIME MANAGEMENT

The key to professional writing is time management and multi-tasking. There are people who can sit down and do 2,000 words. That's not me. I tend to think of a phrase or word or concept. So what I do is capture that one idea when I get it. It may only be a line, it may only be a word, it may only be a concept, but I write it down or put it into my PDA. As time goes on, I capture all of these disparate ideas.

You know how sometimes you go to meetings because they just want to have a lawyer there? Well, one advantage of going to law school, and our paralegals have picked up on this as well, is learning to listen with one ear. A lot of times, people see me writing at meetings. In fact, General Hornburg, the commander of Air Combat Command when I was the SJA, once asked me, "Charlie, you were writing so much at that meeting, I'm a little bit concerned. Do we have some legal problem here?" I replied, "No, I was writing something completely different."

Look for other opportunities to multi-task. You may be able to capture snippets when you are in the stands watching your child play soccer. Or there may be certain parts of articles that are somewhat boilerplate that I do while I'm watching TV. You have to capture these snippets whenever they arrive. I'm often just capturing a phrase. When I go running, there's

no phone or paper when I think of that one phrase, so I have to get back quickly and write it down immediately.

Technology can help save time. I use voice recognition software. Earlier versions weren't that great, but now the technology really does work.<sup>5</sup> The funny thing about it is that your spoken word really is different than how you write. Sometimes it's better to go with kind of how you speak and sometimes it's better to go with how you write. Nevertheless, it's a good way of getting a lot of things down on paper.

## *Organizing Ideas*

I have around a dozen articles that I call "under construction." When I get a snippet, I'll put it into the file for that article. I have one article I've been working on for about six years; it's more organized than some of the others. Some articles are currently just jumbles of quotes or ideas. I've come up with my own system, so I know a quote from my own idea. Every now and then I get nervous about that and I want to make sure it's my idea, so I'll "Google" those words before I mark them as my idea.

Another thing to be careful about is plagiarizing yourself. For example, one of the things I do is "article spoking" where I use the same core research to write articles on different aspects of the same subject. I note previous uses of the research in the file and in the publication if the cross-reference will benefit the reader.

## *Editing for Publication*

Another key to good writing is good editing. There are many guides to this with tips on using the active voice and proper grammar, plus checking all of your data.<sup>6</sup>

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<sup>5</sup> Speech recognition software can lead to interesting results. For example, if you get a phone call in the middle of speaking and forget to turn it off, suddenly you look at the screen and you see it picked up things you did not intend to record.

<sup>6</sup> Checking your data is fundamental to establishing your credibility as an author. I just read a very important article, and it said 30% of the Army recruits don't have a high school degree. That's simply wrong: I "Googled" it, and it is high but not 30%.



You really must be ruthless in cutting your own writing. Some quick tips that I use:

- Rewrite. There are people who get it exactly correct the first time. David McCullough, who wrote *1776*, writes one time and in longhand. That is his style; most of the rest of us need to write and rewrite. Rewriting is hard because you get so tired of looking at the same article, but it is important.
- When I cut something I often save it. And sometimes what I cut out becomes its own separate freestanding article. But nevertheless, when you edit, less is always more.
- Read your work aloud. Simply reading aloud has helped me realize a particular article still needed work. Your work may look great when you are reading it to yourself, but reading it aloud really does make a difference.
- Use a very talented editor.
- Get a sanity check from a substantively knowledgeable person. You may not agree with her critique, but you need to give it to somebody who really knows the subject matter.

#### *Look the Part*

Many writers simply do not know to ask, "How is this going to look in print?"

If I am targeting a particular publication, I study it and try to fit the style for that publication. This can be as basic as using footnotes. If you put footnotes in an article, it may be un-publishable in certain magazines. Conversely, not using footnotes may make it un-publishable in other publications.

A key to readability is white space. We have all received an email with a very long paragraph. No one reads the whole thing. We start working through it, then we go to the end, and then maybe check the middle for our own name. If you are writing, especially an op-ed, short, declarative sentences help. Most paragraphs should be no more than two or three sentences. This is in Dunlap's view of the world:

**A key to readability is white space. We have all received an email with a very long paragraph. No one reads the whole thing.**

how an article looks visually is one of the most underrated factors in professional writing.

#### WHERE TO PUBLISH

##### *The Art of the Op-Ed*

How do you get an op-ed published? I have gone through this a lot in the past year, publishing nine or ten recently. The opinion piece is a useful way of getting something published without writing 3,000 words. These pieces are between 500 and 700 words. The op-ed can also put your ideas before a very broad audience.

It is also extremely difficult to get an op-ed published. So you might want to look at smaller newspapers, but understand even they receive hundreds of submissions each week. The *New York Times* receives over a thousand each week, and they will publish just 20 or so.

You need to find their author guidelines. Newspapers usually place this somewhere on their website. Follow their guidelines to the letter. If they say the limit is 500 words, they do not mean 501. Unless you are Henry Kissinger, they will dismiss you just for not following the rules.

The *New York Times* has an essay on their website, which talks about how to write an op-ed.<sup>7</sup> Here are a few of the highlights:

- "Move quickly; the news does." This really is true. When something happens and if you want to write an op-ed about it, you need to have it done within 24 hours because of the lead time. You must be able to write very quickly. If you are thinking about an op-ed, my recommendation is to anticipate what may happen. For example, you might think that there will be some kind of natural disaster and the military may be involved. You might have some ideas of what the appropriate role of the military should be.

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<sup>7</sup> David Shipley, *And Now a Word From Op-Ed*, N.Y. TIMES, Feb. 1, 2004, at A11.

You can prepare 80% of the article, then fill in the specific triggering event -- say, "Southern California Wildfires," or "What the Role of the Guard Should Be."

- "Make one argument thoroughly." One of the challenges we have in the Air Force is trying to cover the whole waterfront about airspace and cyberspace in every message. It is better to pick one idea. That is all you can cover in an op-ed. The more detail the better.
- Be original. The *New York Times* recently published some additional insight on the op-ed process, responding to the question of how to have an op-ed published.<sup>8</sup> They mentioned "a soft spot for opinions that run counter to those expressed by the editorial page."<sup>9</sup> They are not going to publish press releases. They want something edgy. Editors like being surprised. They like originality. If everybody is saying it, they can have recognized experts say it. You must be provocative, it has to be about a current issue, and you need some kind of solution. If you are military, they want you to be in some way vaguely self-critical. It is hard to explain in a particular context, but you must be edgy in an op-ed.

Give some thought to where your op-ed should be published. You can "Google" "Top Hundred Newspapers for Circulation" to see a list of the top 100 newspapers.<sup>10</sup> They are not the ones you might think. For example, if you live in Washington D.C., you think the *Washington Times* is one of the top newspapers, but it is not even in the top 50. There are lots of interesting

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<sup>8</sup> Andrew Rosenthal, *Cracking the Op-Ed Page*, N.Y. TIMES (online edition), Sept. 17, 2007, at <http://www.nytimes.com/2007/09/17/business/media/24askthetimes.html>.

<sup>9</sup> *Id.*

<sup>10</sup> One such listing may be found at <http://www.cmc.org/oped.html>. It also provides basic submission guidelines and contact information for each listed paper. Another listing focuses on the criteria in 21 top publications, including their guidelines for Op-Eds and letters to the editor, at <http://www.pomona.edu/communications/media/opedguidelines.html>.

newspapers that you might want to look at on that list.

I send op-eds out to all kinds of papers. A secret: many publications want military officer authors. It gives them credibility. Also, military people usually don't write, making you the exception.

### *Other Publications*

You would be surprised, but you will find some place to publish your work. I have only had one article that I ever really worked on that was never published.

*Writer's Market*,<sup>11</sup> published each year, is the basic source for all kinds of publications, mainly magazines. It tells you how many freelance articles they take, along with contact information.

Here are some specific ideas from my experience. On legal topics, *The Reporter* is a good place to start. *The Army Lawyer* just came out with a joint issue, a purple issue with representation from the different services. *Air and Space Power Journal* is not as competitive as the other ones. *Military Review* is an Army publication, aimed generally at company grade officers and senior NCOs. It is getting tougher to publish in *Joint Force Quarterly*, but it is a military publication looking for military authors. Organizational publications also offer opportunities. Do not overlook your base newspaper. It is a good place to get your first clipping; save your clippings, then start building your curriculum vitae. Also, the American Bar Association's *National Security Law Report* is always looking for articles on legal topics, and it doesn't require a lot of footnotes. The Judge Advocates Association is going to begin publishing *The Military Advocate* again. The Foreign Policy Research Institute provides an example of an e-publication. I don't generally like e-publications, meaning electronic-only publications, but it is a way to get published, particularly as you start out.<sup>12</sup>

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<sup>11</sup> ROBERT BREWER (ed.), *WRITER'S MARKET* (2007).

<sup>12</sup> I distinguish e-publications from blogs. A blog can be a waste of your time because you put in all this effort to write this thing up, and what do you have?



The most friendly military publication to new authors is *Proceedings*. They have a column called, "Nobody Asked Me But." They publish pieces from E-1's through general officers. They look for about six or seven hundred words, and they usually like a specific topic. Also, they have an enlisted publication contest. Many of their contests are limited to the Naval Services, but the enlisted publication contest is open to all services.

Remember alumni publications. One of my earliest publications was in my college alumni magazine, and it was about my experiences deploying for the Somalia operation. They usually like first-person accounts, along with several photos.

The *Air Force Times* will publish an op-ed. You will get feedback, trust me. *Armed Forces Journal* was totally revised about a year and a half ago. They are very open to articles by military authors.

Consider small local papers, especially your hometown. I used to be a lifeguard on a beach community called "Wildwood Crest" in New Jersey, which has a free newspaper. I wanted to write an article about the leadership my original boss, the Captain of the guards, gave me. So I wrote a little guest column about him and my experience being a lifeguard, being on the very bottom of a quasi-military chain. Your hometown paper may love to see an op-ed from you. The key thing here is to get something in print.

Another easy thing to get published is a book report. We discuss clearing publications through Public Affairs in more depth, but note that you do not have to get them cleared through Public Affairs. It is one of the exceptions in the instruction.

Air University has a web-available listing of every DOD publication, for example, a list of safety magazines. I published an article about DWIs in *Torch*, AETC's safety magazine.

Sometimes when I am at Air University, I simply wander through the publications section

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An e-publication is a little different, benefiting from the editing and publicity efforts of the publishing organization.

of their library. I find obscure, hungry-looking publications. This is part of Dunlap's theory, the more you get published, the easier it becomes to get published. The more you have that CV built, the better off you're going to be. You shouldn't hesitate to swing for the fence.

One of the first places I was published was in *The Weekly Standard*. You may not have heard of it, but it is an influential within the Beltway. I sent an article to them, and they put it on the cover. That article -- *How We Lost the High-Tech War of 2007*<sup>13</sup> -- is set in the Middle East against an Iranian backdrop. This was published because I met one of the editors at a conference and just struck up a conversation with him. He said, "Well, you know, why don't you send me something that you wrote?" He knew about the *Coup in 2012* piece.<sup>14</sup> So I sent this to him, and it was that simple.

*Newsweek* has its "My Turn" column. Keep in mind, they get 15,000 essays for that, but if you are published in My Turn, you are on your way.

## PITCHING YOUR ARTICLE

The traditional way is the query letter. I almost never do these. I usually email it. I do not do a query; I do a finished product and I send it.

I try to find the editor's name because that makes a difference. Put your article in the body of the e-mail because they have screening software that will strip off all of the attachments. Tell the editor about yourself. They all want to know if this is being submitted someplace else because they are not going to look at it if it is. Of course, provide them with your contact information.

Be prepared to be rejected. I get rejected all the time, but I usually have a Plan B. I already know the top five places I'm going to submit something. So when I get a rejection, it doesn't even bother me. I cut and paste that same letter to the next publication on the list.

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<sup>13</sup> Charles J. Dunlap, Jr., *How We Lost the High-Tech War of 2007*, THE WEEKLY STANDARD, Jan. 29, 1996.

<sup>14</sup> *supra*, note 3.

### *The Editorial Process*

The editorial process varies by publication. The process will usually improve your article. Most of the time, they are trying to conform your writing to the style of the publication.

Try to see the page proofs. Consider what quotes are set out; sometimes it is not exactly what you want. Sometimes an editor has picked a quote capturing the essence of the whole article. Nevertheless, be sensitive to it. It is important to see the pictures, too. I was burned on this. My article was about how we should not do this "touchy feely" type of counter-insurgency. The editors picked a picture showing a military person teaching kids, as if "Dunlap's saying, 'This is a bad thing.'" They had their own editorial comment through that picture.

Do not spend a lot of time on your title because editors rewrite titles all of the time. They have a whole staff dedicated to headlines and titles. If the editors do pass it back to you, you have literally hours to look at it and get it back. Twenty-four hours would be a long time.

### *Security and Policy Review*

You need to follow AFI 35-101.<sup>15</sup> Your article is supposed to be cleared before it is sent to the publisher. Build in lead time for this review. A tip from my experience: even if I am not going to include footnotes in what I send to the publisher, I usually footnote my articles for the Public Affairs review process. If there are choices of where to get the facts, I usually select a DOD press release. You would be amazed at what can be found in DOD press releases, so I try to have that as my footnote citation.

Include the disclaimer.<sup>16</sup> It is right out of the JER. I do that all the time because it is easier to

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<sup>15</sup> U.S. DEPT OF AIR FORCE, INSTR. 35-101, PUBLIC AFFAIRS POLICIES AND PROCEDURES (29 Nov. 2005).

<sup>16</sup> *Id.*, at para. 15.5: "Originators must ensure disclaimers accompany all publications they authorize in a private capacity. An appropriate disclaimer is: The views expressed in this article are

get yourself cleared if you are giving your own opinion. If you are speaking for the Air Force, there is a much more complicated policy review that you may not want to have. Save a copy of the clearance document.

### *Copyright & Conflict Issues*

The details are spelled out in an Op JAG AF.<sup>17</sup> It says that you can use government resources, if you meet the standards. Basically, you can use your government computer and government time, if your supervisor approves. I have chosen against this because it is just too complicated. I am moving more towards just using my own time and my own equipment.

Editors will want you to sign a publication agreement. Some people shy away from signing these for a variety of reasons. For example, the agreement may state you are being paid. If I see a clause I disagree with, I just change it. I have never received any negative feedback.

One of the things I never sign up to is agreeing to indemnify the publication if someone sues me. I do not have insurance for that, so I do not agree to it. I take that out or I line through it.

### POST-PUBLICATION

After publication, always send a thank you letter. Keep in mind; we're about talking personal relationships here. Even if you are rejected, if you have had a discussion with the editor, send him a thank you note.<sup>18</sup> You're prepping the battlefield.

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those of the author and do not necessarily reflect the official policy or position of the Air Force, the Department of Defense or the U.S. Government."

<sup>17</sup> *Guidance for Writer's Guide*, Op JAG, Air Force, No. 1995/27, (29 Mar. 1995).

<sup>18</sup> When I finally do get a rejected work published, I send a note that says, "Bob, thanks for the input. Sorry it didn't work for you at *USA Today*. I did get it published in the *Washington Post*. Here it is -- thought you might want to see a copy."



## Your work will generate feedback...be prepared, not all of it is going to be nice.

Sometimes e-mail will work, but a handwritten note is best. I think it is best to have your own stationary. I have my own stationary printed up, with 50 note cards for \$8.00. Touting your own work makes some people uncomfortable, but you need to do it. I do it all the time. We are trying to get an idea out there. You must be your own publicist. Every time you have something published, notify your alumni network. They love seeing this. They will publish it in your alumni magazine--guaranteed. A hyperlink will bring readers to your work. Is it self-aggrandizing? Yes, but the fact of the matter is, if you want your ideas to become part of the conversation on a topic, you must do this. Even John Grisham goes on publication tours. He goes on book-signing tours.

I have e-mail lists for certain kinds of publications. If I have something published, I will send it out to people. I simply say, "You may find this of interest." It helps your ideas get out there. Keep a hard copy for your records and keep building your CV. It may seem easy to remember, but the list can quickly grow.

On occasion, people come up to me and say, "General Dunlap, I read your..." and I think, "Oh, did I write that? That doesn't sound like me." I look it up, and find that I did indeed say that. Your work will generate feedback. And be prepared, not all of it is going to be nice. There are people who may write whole articles not just rebutting your ideas, but coming after you personally.

### CONCLUSION

About 10 years ago, I wrote an article on writing. It is in *The Reporter*, in the September 1997 issue. It discusses some of the same ideas that we talked about today. Some ideas are timeless—including my thought that the hard part is getting started. Quoting myself with the added experience of a decade, "In any event, the most important step is the first one. Unless you flick on that computer or open your notebook, you will forever wonder about what might have been."



The image shows the Hollywood sign on a hillside in Los Angeles. The sign is made of large white letters and is set against a backdrop of dry, brownish vegetation and a clear blue sky. The sign is slightly tilted and appears to be on a hillside that slopes downwards from right to left.

HOLLYWOOD

# A JAG IN LA LA LAND

BY MAJOR GENERAL CHARLES J. DUNLAP JR., USAF

LOS ANGELES, CALIFORNIA, 1994  
1000 HOURS (PST)

“COLONEL, THEY’RE READY FOR YOU,” the receptionist said smoothly. I was about to “take” my first Hollywood meeting. *How hard could this be? After all, I had made it out of Somalia in one piece.* But as my eyes surveyed the meeting room I felt a panic rising as people began filing in. No, an armed madman hadn’t penetrated HBO’s lush forty-first floor Century City offices. *That* I might have been able to handle. The truth was scarier: *where the heck was I supposed to sit?* JASOC prepares you for a lot of things, but the protocol of a Tinseltown meeting was not part of the curriculum when I graduated. Even if it was, I doubt I would have paid much attention. I had a four-year military obligation to fulfill and moviemaking was the furthest thing from my mind. All that changed in the summer of 1994, but I’m getting ahead of myself.

The road to La La Land was a long one. With a draft-motivated ROTC commission and a freshly minted law degree, I entered the Air Force in early 1976. Frankly, I only intended to fulfill my four-year ROTC commission and head directly back to Philadelphia, dreaming of rejoining my Wildwood Crest lifeguard buddies. Of course, the Air Force had other ideas. The military is a beguiling institution,

especially for lawyers. Freed from the tyranny of billable hours and the pressure of finding clients, even the greenest attorney gets to practice what most laymen would recognize as the real “law” — plenty of courtroom time! And much of that is done in unusual, if not exotic locations around the world. The notion of new places, new people and new issues every few years is seductive. Suddenly, it was fifteen years later and I was headed to National War College in the fall of 1991. War College provides wonderful opportunities to do some serious writing. Some struggle for topics, but a prior tour in the Pentagon gave me lots of ideas. I was concerned about the long term effect of the growing proliferation of what was then considered the “nontraditional” mission, e.g. peacekeeping, disaster relief, drug interdiction and so forth. The problem was devising a vehicle to talk about these seemingly diverse topics. My first attempt was an academic paper that charitably could be described as “turgid” — I couldn’t even stand to read it! So I asked myself, what would people read? A brief glance at the bestsellers list showed techno-thrillers filling the top spots. Fine, but what would be the storyline?

I think it was Faulkner who said something to the effect that a contrary view well expressed will reward a writer. Applied to my project it struck me that the antithesis of the American

military culture was a military coup. By extrapolating current trends twenty years into the future I conjured up a world where the U.S. armed forces, distracted by a proliferation of nontraditional missions, had lost its ability to fight authentic military opponents. Though defeated in what I called the “Second Gulf War,” the highly politicized military escaped culpability by blaming the already discredited civilian leadership. Following the mysterious death of the President and the “retirement” of the Vice President, the Chairman of the Joint Chiefs of Staff (who I unimaginatively called “General Brutus”) seized power. As one more twist, I had the coup approved in a national referendum by a public fed up with traditional politicians. The narrator in my tale was a War College graduate two decades hence who was about to be executed for opposing the coup. Identified only by a number, the prisoner argued in a letter smuggled to a classmate that the origins of the coup should have been evident in 1992, the same year they graduated from war college. This, in turn, generated the title of the story: “The Origins of the American Military Coup of 2012.” I entered the paper in an essay contest that included offerings from all the war colleges (in addition to the National War College, each service has its own). To my great surprise, it was named co-winner. Besides a plaque, a gold coin, and a set of books, the award ceremony brought a memorable photo opportunity with then Chairman of the Joint Chiefs of Staff, General Colin Powell.

Naïveté can be a great advantage in the publishing world. Not knowing any better, I sent a copy of my paper to James Fallows, the Washington editor of *Atlantic* magazine. As a longtime *Atlantic* subscriber, I knew that Fallows had written on defense issues and I greatly admired his work. A few weeks later, I received the “bad/good” news from Cullen Murphy, the editor: *Atlantic* would not publish the essay but had hired a writer – Tom Ricks of the *Wall Street*

*Journal*—to do a piece about it. Ricks produced an extremely flattering article with the somewhat disquieting title of “Colonel Dunlap’s Coup.” By the time that Ricks’ essay appeared in the January 1993 issue, my paper was receiving some notice elsewhere in the media including comment in the *Washington Post* and a short piece on NBC Nightly News. Unfortunately, I wasn’t around to enjoy my “fame”—I had been deployed to Africa in support of relief operations in Somalia.

When I returned to the States that spring I was approached by a number of people who said they were Hollywood producers. One such contact was a letter from Pierce Gardner of Jacobs/Gardner Productions. Pierce (in Hollywood everyone is on a first-name basis!) and his partner had seen the *Atlantic* piece and wanted me to team with a professional writer to produce a script that he, in turn, would “shop” around L.A. Eventually, we linked up with HBO who had launched a project to remake the 1964 movie *Seven Days in May*. The HBO project—called *The Enemy Within*—already had a script by Ron Bass (a former entertainment lawyer who won an Oscar for *Rain Man*) and Darryl Ponicsan. However, HBO—who very much wanted the film to be authentic—hired me as a consultant (yes, I did get permission for off-duty employment!).

Work began in earnest in March of 1994 with a long phone call with the director, a brilliant young Englishman named Jonathan Darby. Darby was full of great ideas for the film and had remarkable grasp of the American political scene and the U.S. military. We would have many phone calls over the next months. In addition, I worked with another writer, Jon Maas, who HBO hired to provide what is called “production polish.” One of my initial tasks was to review the script and make suggestions to Jon. Later, I would answer specific questions from Darby, Maas, and others connected with the “project.” Typically, I would follow-up with

a faxed or express-mailed response to Jonathan's most helpful assistant, Candace Geggenberg. Sometimes I even wrote a little dialogue for parts of scenes. I'd like to tell you that everything I suggested was adopted. Of course, it wasn't. But in retrospect, I was pleased by how seriously my suggestions were taken—considering that so many were naïve. Nevertheless, bits and pieces were incorporated here and there. I learned, as every writer does, that Hollywood is, after all, a commercial enterprise and not every idea from an amateur like me is going to be embraced. These people are pros and know their business.

The filming itself took little more than a month and was in post-production when my wife and I flew to Hollywood for the Television Critics' Association convention. The TCA gathering is where all the networks showcase their fall lineup for TV reporters across the country. Nancy Lesser, HBO's VP for media affairs, arranged for a limo to meet us at the airport, and HBO put us up in a beautiful suite in University City.

My "Hollywood meeting" was to plot strategy for discussing the film with the critics. I would be on a panel with Peter Douglas (son of the legendary Kirk Douglas, star of the original *Seven Days in May*), Jonathan, and actor Forest Whitaker—the hero of *The Enemy Within* (Jason Robards, Dana Delaney, and Sam Waterson) also starred. Additionally, attending the meeting were HBO film executives including Richard Walzer who headed this particular project. As typical military practice, I had prepared some talking points based on my analysis of the film. Bob Cooper, the top HBO person at the meeting, quickly spied the notes and had copies made. Somehow, these notes became the starting point for discussion—I would not only survive the meeting, but actually made a small contribution.

I really shouldn't have worried. I had envisioned my contact with Hollywood to be a scene out of Robert Altman's sardonic 1992 film *The Player*. Though people in La La Land do lapse into a weird "let's do lunch" language from time to time, contrary to the film I found virtually everyone to be very bright, extremely hard working, and quite friendly. For instance, Forest Whitaker turned out to be the antithesis of the Hollywood movie star; he could not have been more gracious, patiently posing for photos with my wife and I. I also thought I might run into a chilly, anti-military bias from the Hollywood crowd. Actually, my experience proved to be the opposite: many of the people I

*Though people in La La Land do lapse into a weird "let's do lunch" language from time to time...I found virtually everyone to be very bright, extremely hard working, and quite friendly.*

came into contact with were fascinated to meet someone actually in the military. Peter and Forest had worked with military people before, but few others had. I was amused when HBO officials became extremely embarrassed when a young assistant used some salty language while telling a joke in earshot of me, an "officer and a gentleman." As you might imagine, in nearly twenty years in the military, I had heard a few salty words from time to time. Hey, maybe I even used a few. Anyway...the TCA panel went well. The reporters' questions were surprisingly pertinent and no one tried to dominate in the discussion. I also did a couple of newspaper interviews both in L.A. and by telephone from Tampa. Again, much to my surprise I was treated very kindly in the write-ups. In particular, the *Los Angeles Times* and the Associated Press did complimentary pieces on my tiny part of what was a huge effort involving many people.

My wife and I did get to see a little of Hollywood as well. Yes, we took a mini-van tour of the movie star homes, Sunset Boulevard, the whole enchilada. One evening, HBO took us





Director Jonathan Darby, producer Peter Douglas, the author, and Oscar-winning actor Forest Whitaker, star of *The Enemy Within*.

to a party for the television critics at a Beverly Hills mansion. A catered dinner was held in a huge tent set up near the swimming pool. We sat with director Darby as well as some actors from another HBO movie, *Fatherland*. This truly was my idea of how the “other half” lives! At the party, I met Michael Fuchs, then HBO’s chairman (and also head of Time Warner’s music division). Mr. Fuchs—this is one guy I call “Mr.”—was exceptionally hospitable, partly because I think he sensed we were sort of out of our element. I was amazed to learn he had served in the Army as a draftee (Fuchs doesn’t appear to be old enough—the draft ended in 1973). He obviously valued the experience with the kind of nostalgia best enhanced by a healthy dollop of time. After an animated and rather private conversation about all things military, we parted ways—him to a gaggle of people anxious for a few moments of his time, and me to the stares of the Hollywood *glitterati* puzzled as to the identity of this new person on the scene who somehow knew *the* power broker.

*The Enemy Within* was scheduled to premiere in mid-August, but a lot of very intense work transpired between July’s TCA and the debut. I would only learn later that producing a full-length feature film from script to screen in just five months is an incredible feat. I got a copy of the director’s cut and provided several

recommendations. In addition, HBO arranged for several focus groups to view the film and this generated more changes. Dialogue was added and subtracted and new film was shot. Once again, the fax lines buzzed. How Jonathan finished on time I’ll never understand. Seeing the actual airing was a little tricky—we didn’t have cable in our home, so we had to rent a room in a HBO-equipped motel. It was a thrill to hear a few scraps of what I had written actually spoken in the film and to see my name in the credits. In the following months I was astonished at how many people called to tell me they saw my name in the credits—I didn’t think anyone watched them! Most of the reviews gave the movie two or three stars, just above average. Given the relatively short time involved in the film’s making, I was extremely happy and proud of what I saw on the screen. I was pleased when Delta Airlines showed the film on their transatlantic flights in the spring of 1995.

My whole experience in La La Land was a lot of fun, and in a way, intoxicating. According to Andy Warhol, everyone is famous for fifteen minutes. What Mr. Warhol—or “Andy” as we Hollywood types say—forgot to add is that fifteen minutes is not quite enough, especially if you think you have another great idea. So far, I’ve managed to keep my day job; but—and please don’t tell anybody—I have been dabbling in what some people might call, ah, a *script*. It’s about...well, let’s do lunch and I’ll pitch it to you.



Major General Charles J. Dunlap, Jr. (B.A. St. Joseph’s University, J.D. Villanova) is the Deputy Judge Advocate General, Headquarters U.S. Air Force, Washington, D.C.



# ASK <sup>the</sup> EXPERT

## QUESTION

*In light of USC Title 18, Chap 33, Sec 701, is it permissible for any non-DOD entity to obtain a copy of military identification (ID) for accounting of actions taken by a military member? For example, can you (1) Photocopy a military ID to obtain a home mortgage (taken as proof of identity at the start of the loan application process); (2) Photocopy ID to obtain services that only apply to personnel serving in the military (example, Oakley sunglasses affiliate "US Standard ISSUE" requires proof of service in form of the Mil ID); and (3) Photocopy ID to obtain a birth certificate?*

## ANSWER

You correctly note that 18 USC 701, prohibits the unauthorized photocopying, reproduction or possession of Uniformed Services ID cards, under penalty of fine or imprisonment. Unauthorized or fraudulent use exists if the cardholder uses the ID in a manner to obtain benefits and privileges to which he or she is not entitled. However, routine photocopying of ID to facilitate medical care processing, check cashing, or administering other military-related benefits to eligible beneficiaries are examples of authorized photocopying.

Recently, there has been a misperception that ANY photocopying is prohibited, even photocopying of ID cards for verification of TRICARE eligibility. A since-rescinded U.S. Army North Force Protection Advisory (FPA) entitled "Photocopying of Military Identification Cards," dated August 10, 2009 (0050-09-FPA), contained incomplete information on this subject and may have created this confusion. Per Department of Defense Instruction 1000.13, paragraph 6.1.7, and the TRICARE Provider Handbook, it is both allowable and advisable for health care providers to copy a beneficiary's ID card to facilitate eligibility verification and for the purpose of rendering needed services. The DOD recommends that providers copy both sides of the ID card and retain copies for future reference. Furthermore, DODI 1000.13, paragraph 6.1.7, states in part that photocopying is authorized "to facilitate medical care processing, check cashing, or administering other military-related benefits to eligible beneficiaries." Further, photocopying to other DOD entities and other official purposes is clearly permissible. See also AFI 36-3026, (17 June 2009). To address your specific questions below, photocopying of your military ID in the home mortgage process would be authorized, if it is being used for a DOD-related benefit such as obtaining a VA Loan or to comply with appropriate Patriot Act provisions at closing (of course the member will also be providing alternative proof of identity, so photocopying of DOD ID may be unnecessary).

Regardless, the member should first request whether the loan officer may simply document that he or she reviewed the card, vice making a photocopy. As to your two remaining questions, without further information, it does not appear that photocopying of military ID would be related to further DOD benefits. With increasing identify theft, members should be cautious about having their ID card photocopied and practice good common sense. If a hotel, car dealer, or similar commercial establishment wants to offer a military discount and request a photocopy, the military member should permit review of the card only. There are no safeguards in place to ensure a government ID card won't be counterfeited based on a photocopy provided to a commercial establishment. Consequently, absent express legal authorization, the member should decline to permit photocopying in such instances. Instead, have the vendor document that the ID card was shown, or simply provide alternate proof of identification.

In summary, both federal law and DOD regulation prohibit the unauthorized photocopying of military ID, with the key word being "unauthorized." Members may allow photocopying of their ID card to facilitate DOD benefits. Photocopying is unauthorized in all other instances. It also should be recognized that this law is intended to prevent the wrongful misuse of military identification and creation of counterfeit ID, badges and official insignia. Practicing common sense, members should think first before handing their ID cards over, making sure there is a valid reason related to official duty or military-related benefits, and avoid providing to non-DOD entities when alternate forms of verification exist.



# LEGAL ASSISTANCE NOTES

## AIR FORCE LEGAL ASSISTANCE WEBSITE NOW OPERATIONAL

In development since September 2008, the Air Force Legal Assistance Website became operational on 31 October 2009. The website is designed to increase efficiency and customer satisfaction with the Air Force legal assistance program. Because it is a public site, active duty and Reserve component members, retirees, and dependents have access to the site from the comfort of their homes without a CAC card, and are able to perform three primary functions: (1) access basic legal information on common legal assistance topics; (2) complete online legal worksheets for wills, advance medical directives (AMDs), and powers of attorney (POAs) prior to their legal office visit; and (3) complete a client feedback survey following the client's visit to the legal office. Base legal offices have the capability to access clients' online worksheets from the password-protected "admin side" of the website, and all levels of command (base-level, numbered air force, and major command) may access client survey reports.

To facilitate client awareness and use of the website, a "phased roll-out" approach is currently underway. Phase I began on 30 Nov 09 at Kadena AB, Ramstein AB, Dover AFB, Langley AFB, and Warner-Robins ALC. Phase II will begin on 4 Jan 10 at Spangdahlem AB, MacDill AFB, Davis-Monthan AFB, Nellis AFB, and Bolling AFB. Throughout Phases I and II, AFJAGS and JAS will monitor the website and determine whether any changes to the website, training efforts, or advertisements are necessary based on feedback from the field. The phased approach should help ensure the website is problem-free prior to worldwide advertisement of the site, currently scheduled for not later than 1 Feb 10.

While not all legal offices are participating in Phase I or II, it is important to remember that the website is public – while advertising and use will be focused at certain bases during the first two phases, it is very possible that the website will be accessed by clients worldwide. For this reason, it is important for all legal offices to become familiar with the website, and be prepared to assist a client who has completed an online worksheet via the website. To assist in this training effort, AFJAGS and JAS have made a number of training measures available. Please make time to review the "Website Guidelines" contained on the admin side of the website. The "Guidelines" contain basic information concerning how a legal office may incorporate the website into its legal assistance program. In addition, please visit the Air Force Legal Assistance Website learning center in CAPSIL highlighted below. Thank you to everyone who participated in testing the website over the last year. Your past feedback was critical in finalizing the site, and everyone's future feedback will be important as we move forward.

## NEW CAPSIL LEARNING CENTERS

CAPSIL learning centers contain online forums where registered participants may post questions or information that the learning center manager or other participants may reply to. Also, some learning centers allow participants to contribute documents or other information to leverage the combined experience of the field. The following legal assistance learning centers have been released:

[Air Force Legal Assistance Website](#). This learning center contains many features to assist in educating base legal offices about the website. The learning center contains a "Technical Problems Tracker," allowing legal personnel to post any technical problems they may encounter. Posted problems are monitored by both AFJAGS and JAS.

[DL Wills Software and Licensing Issues](#). The DL Wills Software and Licenses Issues learning center is maintained by the Air Force Chief of Legal Assistance. The learning center contains a number of features including: (1) information on requesting and tracking the number of DL Wills licenses authorized for your legal office; (2) information and a link for updating your DL Wills software; and (3) a "Problem Tracker" designed to allow legal professionals to post problems encountered in DL Wills and any suggested fixes. If you have questions about the number of licenses you are authorized or whether you have the most recent updates to DL Wills, or continue to encounter specific problems with DL Wills, please visit the learning center.



## PASSAGE OF THE MILITARY SPOUSES RESIDENCY RELIEF ACT

On Veteran's Day, President Obama signed the Military Spouses Residency Relief Act (MSRRA), into law, amending the 2003 Servicemembers Civil Relief Act. Prior to its passage, a military member's spouse had to change his or her legal residence with every permanent change of station, creating voting and state tax challenges. The MSRRA will now allow military spouses to claim residency in the same state as their sponsor and retain that residency as long as the servicemember is in the military. Judges advocates should be aware there is a DOD working group participating with multiple states to develop common guidelines for implementing this new law. Legal assistance clients must also understand that a member's spouse cannot simply claim the same domicile as the service member without actually having established the same domicile through his or her presence and evidences of intent, which could result in state tax penalties. Another issue currently being clarified is whether the spouse can reach back to a previous domicile (and stop paying taxes in their current state of residence), and if so, whether the spouse had to have maintained their domicile in the previous state since leaving. Judge advocates should stay tuned for further developments and advise clients to proceed carefully before attempting to claim a refund of state taxes or making changes to a W-4.



U.S. AIR FORCE PHOTO (TSgt ERIK GUNDMUNDSON)

## WEBCAST HIGHLIGHTS

In November 2009, Maj Jeff Green (AFLOA/AFJAGS) and Mr. Dan O'Connor (AFLOA/JAS) conducted a webcast on the new Air Force Legal Assistance Website. The webcast was designed to provide initial training to base legal offices on how to incorporate the website into the base level legal assistance program. The webcast contains many screenshots of both the public "client side" of the website, as well as the password-protected "admin side" of the website with step-by-step instruction on how to assist a client that has completed an online worksheet. The webcast also covered how to obtain client survey reports at all levels of command (base level, numbered air force, and major command). If you missed the webcast, you will find the recorded session on CAPSIL at <https://aflsa.jag.af.mil/apps/jade/collaborate/course/view.php?id=747>.

If there are specific areas you would like to see covered in a webcast in the future, please notify Major Jeff Green, DSN 493-3428, [jeffrey.green@maxwell.af.mil](mailto:jeffrey.green@maxwell.af.mil).



### NEW AS CHIEF OF LEGAL ASSISTANCE?

The Judge Advocate General's School 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 division chief responsibilities within the legal office.

### YOUR LEGAL ASSISTANCE CHIEF

Thank you for all of the hard work you are performing for our legal assistance clients. The current economy, and other factors in the past year, have presented a challenging environment for legal assistance attorneys. If your office is successful in assisting clients with issues related to the economy, or any other unique area, please let The Judge Advocate General's School know so that we can better assist legal assistance attorneys in the field.

If you have any questions, please contact Major Jeff Green at DSN 493-3428, [jeffrey.green@maxwell.af.mil](mailto:jeffrey.green@maxwell.af.mil).

# PROTECTING PRIVILEGED COMMUNICATIONS

IN THE AGE OF THE NEW DOD NOTICE AND CONSENT BANNER

BY LIEUTENANT COLONEL GRAHAM H. TODD, USAF

SINCE THE SUMMER OF 2008, A NEW banner has greeted Department of Defense (DOD) computer users when they attempt to log on to a DOD Information System (IS), such as a desktop computer or a Blackberry-type device. The new banner was developed in response to the Court of Appeals of the Armed Forces (CAAF) decision in *U.S. v. Long*, 64 M.J. 57 (2006). The case involved the use of e-mails obtained from a DOD network server to help prove the accused knowingly used illegal drugs. The court suppressed the e-mails and noted that the previous version of the DOD banner “described access to ‘monitor’ the computer system, not to engage in law enforcement intrusions . . . unrelated to maintenance of the e-mail system.”<sup>1</sup>

Following the *Long* case, there was a two-year process to develop the new banner users see today. While the new banner, as discussed below, clarifies the ability of the United States Government (USG) to monitor and search communications and files, it also includes some increased protection for certain types of

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<sup>1</sup> For an excellent overview of case law affecting expectations of privacy on computers, See Major Thomas Dukes, *EXPECTATION OF PRIVACY? A Brief History, Including Long, Larson, and DOD’s New Computer Use Policy*, The Reporter, Vol 35, No. 3, at 22. In *Long*, the court found that the testimony of the network administrator was “the most compelling evidence supporting the notion that Appellee had a subjective expectation of privacy.” The *Long* court also noted that having a password known only to the Appellee supported the lower court’s finding of a reasonable expectation of privacy. 64 M.J. 63. In *U.S. v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000), the court concluded that the accused did not have an expectation of privacy regarding personnel who maintain the e-mail system.



U.S. AIR FORCE PHOTO (MR. JASON MINTO)

privileged communications. Unfortunately, it does not appear users are changing the network behaviors to take advantage of this increased protection. Furthermore, there has been little movement in developing practical policy to protect privileged communications. This brief article will provide a set of solutions judge advocates can implement today to better protect their privileged communications, and



they can share these steps with their fellow mental health and chapel professionals until DOD and the Air Force implement additional policy.

## THE NEW BANNER

First, it is helpful to briefly examine key language in the new DOD banner. The banner states, in pertinent part, that users consent to the following terms:

The USG routinely intercepts and monitors communications on this IS for purposes including, but not limited to, penetration testing, COMSEC monitoring, network operations and defense, personnel misconduct (PM), law enforcement (LE), and counterintelligence (CI) investigations. At any time, the USG may inspect and seize data stored on this IS. Communications using, or data stored on, this IS are not private, are subject to routine monitoring, interception, and search, and may be disclosed or used for any USG authorized purpose.<sup>2</sup>

The preceding language clearly informs Government IS users that they are consenting to monitoring and searching for a number of lawful Government purposes, and that information on the IS—is not private.<sup>3</sup> The new

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<sup>2</sup> Quotes for the new banner language are from the Memorandum from the DOD Chief Information Officer, subject: Policy on Use of Department of Defense (DOD) Information Systems – Standard Consent Banner and User Agreement (9 May 2008).

<sup>3</sup> The United States Code authorizes network personnel to monitor communications or search the network under limited circumstances. However, the reality is that network personnel are not routinely engaged in particularized searches or monitoring of communications. Instead, automated systems that rely on definition sets are used to scan network data to protect against malicious code, such as viruses or worms. Moreover, criminal investigators must follow detailed procedures and obtain high level approval prior to monitoring communications, as outlined in U.S. DEP’T OF DEF., O-5505.9-M, INTERCEPTION OF WIRE, ELECTRONIC, AND ORAL COMMUNICATIONS FOR LAW ENFORCEMENT (20 Apr. 1995) and U.S. DEP’T OF AIR FORCE, INSTR. 71-101, SPECIAL INVESTIGATIONS (interim change 1 Mar. 2009). Lastly, investigators routinely discuss any potential searches involving electronic communications with their servicing staff judge advocate.

banner addresses another issue from the *Long* decision by clarifying that the network’s “security measures,” i.e. passwords, are not for “personal benefit or privacy.” The drafters of the new banner addressed issues identified in the *Long* decision and used clear, concise language to inform all users that Government computers are not for personal benefit and any information stored or transmitted on them could be searched or monitored. To date there has not been a military appeals case ruling on the new banner.<sup>4</sup>

## THE BANNER AND PRIVILEGED COMMUNICATIONS

Meanwhile, some network users may not realize that e-mail conversations between Area Defense Counsel (ADC), legal assistance attorneys, psychotherapists, chaplains and their clients/patients fall within the range of communications that could be monitored by network security systems or personnel. Some users may think that such privileged communications are exempt from monitoring. However, this is inconsistent with the authorities provided in both the United States Code and the new banner. Looking first at the banner, the last paragraph specifically identifies the types of protected privileged

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<sup>4</sup> Just two weeks before the new DOD banner policy memo was signed, CAAF published the case, *U.S. v. Larson*, 66 M.J. 212 (2008). In the *Larson* case, CAAF stated that they “made clear in *Long* that our decision was rooted in the „particular facts of that case . . . *Long* rested in large part on the testimony of the command’s network administrator . . . [as to the agency practice of recognizing the privacy interests of users in their e-mail] . . . supporting the notion that Appellee had a subjective expectation of privacy.”” *Larson* at 216, quoting *Long* at 63. The court in *Larson* ruled that the judge did not abuse his discretion in finding that the accused “had no expectation of privacy in the government computer” in his office. *Larson* at 216. Thus, while CAAF was apparently limiting *Long*’s reach to its facts, especially the testimony of the network administrator, DOD had already moved forward with improving the banner’s language to address concerns identified in the *Long* case. It is important to note that while CAAF did uphold a finding of no expectation of privacy in a government computer, the *Larson* case is “factually distinguishable” from *Long*. *Id.* Moreover, CAAF concluded by noting: “Appellant presented no evidence that he enjoyed an expectation of privacy in materials on his government computer. And, unlike in *Long*, the testimony of Appellant’s commander and the military judge’s findings of fact established both monitoring of and command access to the government computer.” *Id.*



communications and who cannot have access to them:

Notwithstanding the above, using this IS does not constitute consent to PM, LE or CI [personnel misconduct, law enforcement, or counterintelligence] investigative searching or monitoring of the content of privileged communications, or work product, related to personal representation or services by attorneys, psychotherapists, or clergy, and their assistants. Such communications and work product are private and confidential.

Essentially, investigators cannot have access to privileged communications relating to the provision of legal, religious or mental health services.<sup>5</sup> However, the new banner language leaves room for the types of monitoring and searching activities conducted by system administrators to protect network systems, capabilities, and data. While the banner states that privileged communications are “private and confidential,” the banner concludes with the caveat: “See User Agreement for details.” The user agreement referred to by the banner is the new Air Force Form 4394, *Air Force User Agreement Statement – Notice and Consent Provision*, that all network users are required to sign.<sup>6</sup> The Air Force Form 4394 contains the exact same language as the user agreement in the DOD memorandum dated 9 May 2008. The new user agreement provides the following pertinent language to further explain the

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<sup>5</sup> It is important for all practitioners who engage in privileged communications with clients/patients to remember two qualifications regarding “privileged communications.” First, a communication is confidential if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services or reasonably necessary for the transmission of the communication. See M.R.E. 502(b)(4), 503(b)(3) and 513(b)(4). Second, if the person holding the privilege voluntarily discloses the privileged communication to a third party, then the person waives the privilege. See M.R.E. 510. Thus, practitioners should warn their clients/patients to not forward any communications without first consulting with the practitioner.

<sup>6</sup> The Air Force Form 4394 is available at <http://www.publishing.af.mil/shared/media/epubs/AF4394.xfdl>.

interaction between system administrators and privileged communications:

Nothing in this User Agreement shall be interpreted to limit the user's consent to, or in any other way restrict or affect, any U.S. Government actions for purposes of network administration, operation, protection, or defense, or for communications security. This includes all communications and data on an information system, regardless of any applicable privilege or confidentiality.

Thus, the user agreement expressly states that system administrators can monitor or search e-mails or data containing privileged communications when they are taking steps to: improve the administration of the network and its efficiency; protect or defend the network systems, data, or capabilities; improve communications security; and operate the network and its capabilities. This broad language is consistent with the federal statutes which address computer networks. Both Title 18 United States Code Sections 2511 and 2701 contain provisions allowing system administrators broad authority to monitor or access communications or data to protect the network and its capabilities, and they provide no exceptions regarding privileged communications.<sup>7</sup>

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<sup>7</sup> When monitoring communications, the primary federal law is found in the Wiretap Act, also known as “Title III,” located in Title 18 United States Code Sections 2510 – 2520. Title 18 United States Code Section 2511(2)(a) and the case law interpreting that section require that there is a “substantial nexus” between the monitoring of an account and the need to protect the property and rights of the service provider in question. See *United States v. McLaren*, 957 F. Supp. 215, 219 (M.D. Fla. 1997). Therefore, a service provider must be able to show why it is monitoring a specific user’s communications. Broad monitoring of all users can be permissible when the scope is limited, such as when a program scans all incoming and outgoing e-mail for malicious code, like viruses. With regard to examining stored communications, the primary federal law is found in the Stored Communications Act (SCA) located in Title 18 United States Code Sections 2701 – 2712, which was part of the broader Electronic Communications Privacy Act (ECPA) of 1986. It is important to note that the limits found in 18 U.S.C. Section 2702 only apply to providers of services to the public. Therefore, since DOD is not a public e-mail service provider, only Section 2701 limits system

While some may be concerned that the language in the banner gives too much authority and access to privileged communications, the opposite is actually true. Since there is no federal law providing specific protection to privileged communications in e-mail, the only protection normally afforded such communications is found in the rules of evidence. In most situations, application of the rules of evidence will not occur until a lawyer contemplates using the privileged information. However, DOD, through the new banner's language, takes a proactive approach to provide more active protection than the Military Rules of Evidence (M.R.E.). The new banner requires system administrators to examine data or communications and ascertain whether they are privileged before turning them over to LE/CI or personnel misconduct (read CDI) investigators.<sup>8</sup> This balanced approach in the new banner preserves the statutory authority of system administrators to protect the DOD network while taking the first step in reducing the likelihood that privileged communications are accessed by investigative personnel.

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administrator access to e-mails stored on the DOD network, and Section 2701 applies only to e-mails which have not yet been opened by the recipient, i.e. in "electronic storage." See Sec. 2701(c)(1). Section 2701 does not have a "substantial nexus" test and only requires that the e-mail in question be accessed by authorized system administrator personnel. Still, system administrators cannot do as they please. A "nosy" system administrator could face disciplinary action for dereliction of duty or possibly a violation of Title 18 of the U.S. Code. For example, if a system administrator was bored one evening and decided to browse through the e-mail messages located on the mail server or a user's desktop computer, perhaps looking for information about his commander or first sergeant, such an action could be a criminal violation of 18 U.S.C. Sec. 2701, which could result in disciplinary action under the U.C.M.J.<sup>8</sup> Unfortunately, the DOD memorandum provides no specific guidance on how system administrators are supposed to "filter" privileged communications from standard communications. This lack of policy and guidance causes confusion for system administrators and fails to provide procedural assurances that privileged communications will be protected, as required by the DOD memorandum. Current guidance from the Air Force Judge Advocate General only addresses investigative searches of defense counsel property/offices/systems, and is not mandatory outside judge advocate channels. See Policy Memorandum from The Judge Advocate General, U.S. Air Force, subject: Searches and seizures Involving Air Force Defense Personnel (17 Aug. 2005).

## PROTECTING THE PRIVILEGE

Even though the new banner goes further than the federal law requires, some may still be uncomfortable with system administrators having access to privileged communications and system administrators acting as a sort of gatekeeper between the privileged communications and investigators. Although lacking useful policy and guidance regarding how system administrators will "filter" e-mails, the new user agreement does contain some recommendations regarding protecting privileged communications. The user agreement "strongly" encourages users to seek legal counsel before using the IS if they intend to "rely on the protections of a privilege." The user agreement also advises users to "take reasonable steps" to identify communications or data the user believes are protected by the privilege. The user agreement notes that a failure to identify privileged communications does not waive the privilege, but the USG can take "reasonable actions" to determine whether the data or communication is privileged. Again, the lack of established procedures/guidance regarding what constitutes "reasonable actions" is a procedural vacuum that should be filled sooner than later. One possible source document for the development of future guidance would be The Judge Advocate General's Policy Memorandum regarding searches and seizures involving defense personnel.<sup>9</sup>

In the meantime, how should the privileged nature of an e-mail be identified when transmitting the message? Is there anything that a user engaged in privileged communications should do to protect their communications? The answers are remarkably simple. It involves three steps. The first two steps involve the marking and encrypting of the message and are the responsibility of the user. The third step

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<sup>9</sup> *Id.* The policy memorandum provides three suggestions which could be incorporated into future DOD network policy guidance. First, consider using network personnel from another base to examine the potentially privileged communications and provide a reserve judge advocate or a judge advocate from an unrelated command. Second, those involved in such reviews are prohibited from disclosing what they observed except upon judicial order. Third, consider involving a reserve military judge to provide guidance to the review team.

involves the staff judge advocate, chaplain, lead psychotherapist, and communications squadron at each installation. Using all three steps will still allow users to engage in privileged communications, promote network security, and dramatically reduce the chance that a privileged communication or data will be accessed by unintended persons.

#### STEP 1: MARKING MESSAGES

The first step is consistent with the recommendation found in the user agreement to mark privileged communications and data so others can identify them in advance. The sender of an e-mail they believe contains privileged communications should insert clear language in the "subject" line and at the beginning of the body of any such e-mails. The Air Force should make this a mandatory policy, as we would be going one step further than the "suggestion" in the DOD user agreement. An example could be as simple as the following language in the "subject" line and at the beginning of the text: "Privileged Communication - For Addressee Only." This would be similar to how we all must label e-mail messages with the appropriate classification marking when using the Secret Internet Protocol Router Network (SIPRNET). It is understandable that defense clients, patients or those seeking help from clergy may not be as knowledgeable about determining when they should claim the privilege and insert such language in their e-mails. However, even if only the providers of such services properly identify their privileged communications that will be a step forward in differentiating privileged communications.

#### STEP 2: ENCRYPTING MESSAGES

The second suggestion is based on the technology we now have available on our DOD network. Encryption technology is a powerful tool that ensures only the intended recipients can read the e-mail while also helping promote the security of the network. Because encryption increases the bandwidth being used, paragraph 6.1.2 of AFI 33-119, *Air Force Messaging*, 24 Jan.

2005, Incorporating Through Change 3, 18 May 2007, only permits the use of encryption for e-mail messages which include certain types of information, such as: Privacy Act information, Personally Identifiable Information (PII), individual health information, and personnel management information.<sup>10</sup> Thus, Air Force policy permits the use of encryption for the types of information routinely discussed in privileged communications.

Many network users may not understand the benefits of encryption. Encryption protects the network by ensuring the e-mail is sent from a trusted sender to a trusted recipient, both of whom are using a trusted network. When an e-mail is encrypted, system administrators can feel confident that there is no malicious code in the e-mail, since it is being transmitted to and from an IS that is properly configured to protect against viruses and hackers. Because encrypted e-mail is so trustworthy, system administrators do not need to worry about scanning or searching the contents of the e-mail for network threats.

Encrypting an e-mail on the DOD network securely locks the e-mail until the intended recipient enters the PIN associated with their individual CAC card. Encrypting privileged communications is the strongest, most advanced way to protect e-mail against anyone inadvertently or intentionally accessing the privileged communications and is consistent with the recommendation of the American Bar Association.<sup>11</sup>

*Encrypting privileged communications is the strongest, most advanced way to protect e-mail against anyone inadvertently or intentionally accessing privileged communications and is consistent with the recommendation of the American Bar Association.*

<sup>10</sup> Paragraph 6.1.2 lists other types of information which can be encrypted. However, the list above was abbreviated to those types of information relevant to this article's focus on privileged communications.

<sup>11</sup> ABA Formal Opinion 99-413 stated: "The denial of external access ordinarily is ensured by the use of . . . encryption." ABA Comm. on Ethics and Professional responsibility, Formal Op. 99-413 (1999) (Protecting the Confidentiality of Unencrypted E-Mail).





### STEP 3: PRIVILEGE USERS LIST

Unfortunately, there is no way to encrypt e-mail sent from a DOD computer to a private account, such as Hotmail or Yahoo, or vice versa. In addition to the actions listed above, base legal offices should work with their network control centers, installation leadership, and chaplain and mental health staffs to implement a third suggestion, privileged user lists. Legal offices, chapels, and mental health clinics can identify and create a user list of those personnel who are likely to transmit and receive potentially privileged communications, such as chaplains and their assistants, psychotherapists and their assistants, and of course, attorneys and paralegals. The installation network control center (NCC) can use the list as a reference when they are required to examine a user's e-mail or profile. If the NCC identifies the user in question as a person listed on one of the provided lists, the NCC can contact the legal office at 24th Air Force for further assistance.<sup>12</sup> Depending on the facts and the circumstances, such as what type of access the NCC requires and the person's exact duties, the 24th Air Force legal office may advise that it is necessary to create a review team to examine the communications or data, as discussed in footnote 9.<sup>13</sup> A review team

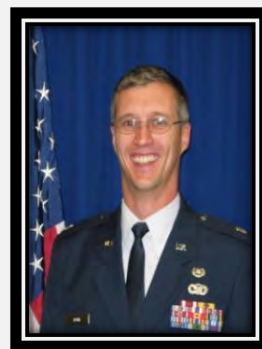
<sup>12</sup> Seeking advice from the 24th Air Force legal office is merely a suggestion of the author. The Air Force could choose another legal office. However, the 24th Air Force legal office is responsible for providing advice to AFNetOps, which includes base NCCs.

<sup>13</sup> Again, this would require new policy that authorizes the attorneys and staff officers at 24th Air Force to appoint personnel to a review team as described in footnote 9.

composed of an attorney and system administrator would "filter" the e-mails to determine if any actually contain privileged communications before providing the unprivileged communications to authorized network personnel or investigators. The use of provider lists and developing a process in advance will help system administrators, judge advocates (JAGs), and other professionals effectively protect the network as well as privileged communications.

### CONCLUSION

Although the Air Force has not developed practical guidance on how to protect privileged communications, JAGs at each installation can lean forward. Legal offices and area defense counsel can implement the above suggestions at their locations, and legal offices can also train local chapel and mental health staffs to implement the suggested protocols. If we step out as legal professionals with policies and processes of the type discussed in this article, JAGs will not only be helping their clients but will be leading the way in DOD and for attorneys across America.<sup>14</sup>



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<sup>14</sup> The ABA noted that concerns regarding system administrators accessing e-mail to protect the network can be "overcome by the adoption of a formal policy that narrowly restricts the bases on which system administrators" access e-mail. Id.



# MILITARY JUSTICE POINTERS

## “WHAT CAN YOU TELL ME?”

### *Disclosure of Adverse Actions to Victims and Witnesses*

BY LIEUTENANT COLONEL ERIC MEJIA, USAF

**THE CASE IS CLOSED.** *After months of methodical inquiry, multiple interviews, and an extensive Article 32 investigation, the evidence does not support going to trial. Clearly, the offender, a doctor, had sexual intercourse with the victim, his patient, during their deployment. However, it cannot be established that the sex act was without consent. After consulting with the victim, the offender is offered and accepts nonjudicial punishment for violating General Order 1 by his presence in the victim’s room, for making false statements to AFOSI, and for unrelated misuse of his government travel card uncovered during the investigation. Following his appeal, the punishment, consisting of forfeitures and a reprimand, is imposed. As required by AFI 36-2907, the NJP creates a mandatory Unfavorable Information File (UIF) entry. Additionally, the misconduct is reported to the hospital commander, as the provider’s medical treatment facility may use such information in taking adverse action on his clinical privileges, and then report his misconduct and privileging action to state licensing agencies. Now, the victim has contacted your victim liaison and wants to know exactly what was done to the offender to punish him. How much information can you share?*

#### THE RIGHT TO KNOW

Victims and witnesses often want to know, and generally have the right to know, the disposition of the case against an offender. The Department of Defense and Air Force implementing regulations provide policy and guidance for the release of information. Although DoDD 1030.1, *Victim and Witness Assistance*, discusses the release of information

primarily in the context of courts-martial, both DoDI 1030.2 and AFI 51-201 clearly contemplate disclosing additional information. For example, both require consultation with the victim concerning the disposition of a case if other than by court martial, including the possibility of discharge in lieu of court-martial.<sup>1</sup>

If disposition is by court-martial, the analysis is straightforward. AFI 51-201, paragraphs 7.10 through 7.14, as well as Figure 7.1 and Figure 7.4 provide an extensive list of notifications to victims, witnesses and other individuals. Among the more basic notifications are the pleas by the accused, findings, and the sentence imposed, including the date on which the accused becomes eligible for release from confinement or parole if applicable. Many of these standard notifications are accomplished through the use of DoD forms created specifically for that purpose.<sup>2</sup> However, if the case is disposed of by NJP or by Quality Force

<sup>1</sup> DODI 1030.2, *Victim and Witness Assistance Procedures*, para. 6.3.1.2. requires consultation with victims and witnesses concerning “the disposition of the offense if other than by court-martial.” AFI 51-201, *Administration of Military Justice*, para. 7.12.12. establishes a requirement to consult with the victim and obtain their view concerning, among other things, a decision not to prefer or dismiss charges as well as “discharge or resignation in lieu of trial by court-martial.”

<sup>2</sup> See for example DD Form 2701, *Initial Information for Victims and Witnesses of Crime*; DD Form 2702, *Court-Martial Information for Victims and Witnesses of Crime*; and DD Form 2703 *Post-Trial Information for Victims and Witnesses of Crime*.

Management (QFM) tools, such as a Letter of Reprimand, the analysis is more complex.

Previously, information relating to nonjudicial punishment was generally not releasable to victims or witnesses due to Privacy Act protections absent special circumstances. DOD “blanket routine uses”<sup>3</sup> did not permit release, statutory requirements did not impose a *de facto* routine use, and there was no specific Air Force routine use exception for such records. Further, previous Air Force Instructions did not contemplate disclosure of NJP or QFM actions. For example, the 2003 version of AFI 51-201, para. 7.15, stated: “As a general rule, a victim may not be told an individual received punishment under Article 15, UCMJ, or the individual received some form of adverse administrative action (e.g., reprimand).”<sup>4</sup> However, the current version of AFI 51-201 deleted this provision and is silent regarding the disclosure of adverse administrative action in the context of the VWAP.<sup>5</sup>

#### WHAT CAN YOU DISCLOSE?

In 2008, the Privacy Act System of Records Notice (SORN) for courts-martial and Article 15 records was changed to acknowledge the “routine use” of providing disclosure “to victims and witnesses of a crime for the purposes of providing information consistent with the requirements of the Victim and Witness Assistance Program and the Victims’ Rights and Restitution Act of 1990.”<sup>6</sup> The VWAP statutes and the DOD/AF implementing regulations, such as DODI 1030.2, *Victim and Witness Assistance Procedures*, make clear that victims and witnesses are to be provided as much relevant information as possible, consistent with the privacy rights of the accused. The updated routine use disclosure of the SORN allows

dissemination of information from the offender’s records of such information without obtaining his consent. Accordingly, VWAP representatives, consistent with the law, may disclose to the victim: (1) the fact that the offender received and accepted NJP; (2) the finding of the commander; (3) the general nature of the punishment (i.e., a fine and a reprimand); and, (4) any collateral consequences that follow by operation of regulation or are documented on the AF 3070, including UIF entry, officer/SNCO selection record entry, and appeal results.

Providing unnecessary details, such as the language of the reprimand, the response of the offender, or the dollar amount of the fine does not sufficiently advance the purposes of the VWAP and should not normally be disclosed. Furthermore, no similar SORN provision exists for lesser administrative dispositions such as LORs, LOCs, and LOAs. In these cases, informing the victims that “appropriate administrative actions were taken,” or that “the commander decided not to impose nonjudicial punishment or prefer court-martial charges” is an appropriate disclosure. Similarly a statement that “no adverse administrative action was taken” may also be appropriate, depending on the circumstances. As always, care must be taken not to disclose protected sensitive personal information about the offender such as family, financial, medical, or duty performance information.

As an alternative basis for release, the Privacy Act permits any information contained in a Privacy Act record (such as an Article 15, LOR, LOC, or LOA) to be released to any third party requestor (including a victim or witness) if its release would be required under the Freedom of Information Act (FOIA). The facts and circumstances of a particular case, such as the rank of the individual, the public interest in the matter, the nature of the offense, the age of the offense, and other procedural facts (such as the fact the case began as a court-martial case), may establish that the offender does not have a sufficient privacy interest under the FOIA to permit withholding information about administrative disciplinary action.

<sup>3</sup> There are routine exceptions to the Privacy Act that permit disclosure of information, found at <http://www.defenselink.mil/privacy/notices/blanket-uses.html>

<sup>4</sup> This provision was consistent with civil law opinions regarding disclosure of information to victims about adverse administrative action, OpJAGAF 199/83, 30 Dec 1991; Privacy Act.

<sup>5</sup> AFI 51-201 is currently being amended to reflect the guidance found in this paper.

<sup>6</sup> Courts-martial and Article 15 Records. (December 8, 2008, 73 FR 74472).



Occasionally a criminal investigation fails to substantiate the victim's complaint, but discovers other misconduct by the offender related to the victim's complaint. In our example, the rape investigation uncovered evidence that the offender had violated GO1 by his presence in the victim's room and that the offender made false statements concerning the victim during his subject interview. In this case, the misconduct is sufficiently related to the offender's conduct toward the victim and the victim's complaint to justify disclosing the disposition of the related offenses. Alternatively, the investigation may also uncover misconduct that is unrelated to the victim's complaint. In our case, the investigation uncovered evidence the offender failed to pay his government travel card in a timely manner. Here, the misconduct, although discovered during the course of the investigation initiated by the victim's complaint, is not related to the offender's conduct toward the victim. Under these circumstances, the victim has no greater right to disclosure of this information than any other person.

#### COLLATERAL CONSEQUENCES

Finally, allegations of wrongdoing may result in collateral consequences that are unrelated to either military justice or Quality Force Management tools. Consider our initial example. Under AFI 44-119, *Medical Quality Operations*, the offender's misconduct may form the basis for clinical adverse actions, including restrictions of privileges.<sup>7</sup> Additionally, the misconduct may be reported to the Surgeon General, the Federation of State Medical Boards, and appropriate state agencies.<sup>8</sup> As a general rule, clinical adverse actions, including those that affect a medical care provider's privileges, will be documented as a quality assurance record. Information contained in quality assurance records, except for narrowly tailored exceptions, is prohibited from release by 10 USC 1102, *Confidentiality of Medical Quality Assurance Records*, DOD 6025.13-R, and AFI 44-119, *Medical Quality Operations*. There is no exception for VWAP disclosure to victims and witnesses of a provider's criminal misconduct. 10 USC 1102

<sup>7</sup> See generally AFI 44-119, *Medical Quality Operations*, para. 9.1., para 9.23., and atchs. 10-12.

<sup>8</sup> Id at atch. 9.

goes so far as to have an exemption from release under the Freedom of Information Act. However, actions affecting a medical care provider's license may be reported to state licensing authorities. The Federation of State Medical Boards maintains a directory of state licensing boards, many of which maintain a searchable database of provider disciplinary actions.<sup>9</sup> Any information made available to the public via the internet can, of course, be disclosed to any third party.

#### CONCLUSION

So, what information should you disclose to the victim in our example? Based on our analysis above, the following information can be disclosed without the consent of the offender:

- Charges were not referred. Instead, the offender was offered and accepted NJP for violating GO1, and making a false official statement to AFOSI.
- His commander found him "guilty" and he was punished by a reprimand and imposition of a fine. His appeal was not granted.
- As required by regulation, a UIF entry has been established.
- The misconduct may have been reported to his state licensing authority, depending on its relation to the practice of health care and welfare of patients or staff. If so, the results of any provider disciplinary action may be publicly available.

Remember, this is general guidance only. Every release must be considered on a case by case basis. If you have any questions or require additional information, contact JAJM at DSN 767-1539.



Lieutenant Colonel Eric Mejia, USAF, (B.S., Arkansas State University, J.D., University of Arkansas at Little Rock) is currently assigned to AFLOA/JAJM.

<sup>9</sup> [http://www.fsmb.org/directory\\_smb.html](http://www.fsmb.org/directory_smb.html)

# THE BALANCING ACT

## COMPUTER SEARCHES IN THE AOR

BY MAJOR R. AUBREY DAVIS III, USAF

HALFWAY AROUND THE WORLD, expeditionary Airmen no longer have to put pen to paper to reach their loved ones back home. Rather, the latest social networking technologies allow today's warriors to chat, Skype, text, Twitter, and talk to just about anyone at anyplace, anytime. Multiple deployed locations now feature Internet cafes and WiFi "hotspots." The morale, welfare, and recreation benefits to military members and their families are obvious. But what happens when personnel misuse these privileges, or worse, are targeted for intelligence collection by a foreign government? How can a commander search a personal computer or similar device in a deployed location? Can we access information stored on servers in other countries? Is it more or less difficult to search computers or internet service providers in the AOR? There are no easy answers to these questions. The critical determination typically boils down to whether the commander is more concerned with discipline or counterintelligence (CI) based on the facts and circumstances.

### ALWAYS AT RISK

Whether you are deployed to Kyrgyzstan, Kuwait, or Qatar, interactions with third country nationals (TCNs) and contractors are commonplace. TCNs can come from anywhere including Lebanon, Syria, Jordan, and Saudi Arabia, performing numerous construction, maintenance, and infrastructure improvements at nearly every installation in the Central Command (CENTCOM) Area of Responsibility (AOR). Moreover, TCN contractors are increasingly relied upon to provide expertise to a dizzying array of technical functional areas. In most cases, the physical location of the central servers is someplace other than the



U.S. AIR FORCE PHOTO (MSGT KAREN PETITT)

United States and is subject to intense regulation by the host nation. Additionally, there are an increasing number of scenarios where personnel are interacting on a very personal level with foreign nationals. Many of our military personnel are able to speak Arabic and can chat and communicate very easily with personnel from countless Islamic nations.

### PRIVACY PROTECTIONS

Despite the status of the law regarding stored media on a computer system, the law has evolved significantly in the arena of information stored on central computer servers. The key statute is the Stored Communications Act (SCA) which provides a number of privacy protections regarding subscribers of computer network services.<sup>1</sup> The SCA was created as a means of addressing problems specific to cyberspace that were not being adequately addressed by Fourth Amendment case law. The Fourth Amendment generally requires a warrant to perform a search. However, the government in many respects only needs a subpoena to obtain certain contents of a network account

<sup>1</sup> 18 U.S.C. § 2701-2712



WWII POSTER (NORTHWESTERN UNIVERSITY COLLECTION)

under this law. In many cases, a subpoena authorized by the Inspector General Act is more than sufficient to obtain electronic information stored on a server.<sup>2</sup>

The same rules apply in the foreign context. When the information sought is found on a server located in a foreign country, the law generally favors the foreign officers conducting the search. In the federal court system, the Fourth Amendment prohibition against unreasonable searches and seizures does not generally apply to the acts of foreign officials.<sup>3</sup> There are two exceptions. First, when the circumstances of the foreign search are so extreme that it “shocks the conscience” of the court, that evidence is generally not permitted. Second, where United States officers “substantially participate” in the search or in the alternative, have the foreign officials ostensibly acting as their agents or in a “joint venture;” that evidence will likely also

<sup>2</sup> Pub. L. No. 95-452, 92 Stat. 1101 (Oct. 12, 1978), codified as amended at 5 U.S.C. App.

<sup>3</sup> See e.g. *United States v. Barona*, 56 F.3d 1087, 1091 (9th Cir. 1995)

be excluded.<sup>4</sup> Thus, as long as a search is reasonable under the laws of the foreign nation, does not “shock the conscience” and is not a “joint venture,” there is no Fourth Amendment violation.

One example of where the government is significantly limited, however, is in the area of interception of real-time electronic communications. Generally, what is known as a Title III or “T3” order is required pursuant to 18 U.S.C. § 2518 for government personnel to monitor or intercept chats or communications as they occur. A “T3” is a species of court-order which requires significant oversight and is very difficult to obtain. However, two major exceptions to this general rule are “consent to monitoring” banners or user agreements and access to information that is generally “accessible to the public.” In the latter scenario, the law permits “any person” to intercept electronic communications which are “readily accessible to the general public.”<sup>5</sup> Examples include electronic communications posted to a bulletin board, public chat rooms, or user groups. This exception applies even in cases where the terms of use require a person to obtain a password.

## INTELLIGENCE LAW

Based on the facts and circumstances, the commander may decide that punitive action is outweighed by the operational benefit of gaining intelligence of the enemy. In most cases, service members may have become friends with foreign nationals (even on a casual basis) and inadvertently disclosed classified information. Such cases of accidental disclosure can usually be handled administratively through Quality Force Measures or through clearance suspension/revocation. Consequently, commanders may have an interest in trying to discover what entity is collecting information from their base.

<sup>4</sup> See e.g. *United States v. Behety*, 32 F.3d 503, 510-11 (11th Cir. 1994)

<sup>5</sup> 18 U.S.C. § 2511(2)(g)(i)



Executive Order (EO) 12333 applies directly to the Department of Defense (DOD) and members of the "Intelligence Community." It allows the DOD to participate in law enforcement activities to investigate or prevent clandestine intelligence activities, international terrorism or narcotics trafficking.<sup>6</sup> The purpose of EO 12333 is to provide "accurate and timely information about the capabilities, intentions and activities of foreign powers" to ensure informed decision-making in the areas of national defense and foreign relations.<sup>7</sup> It also mandates that the collection of information is to be consistent with the "Constitution and applicable law." More importantly, it requires that agencies within the "community" to use the "least intrusive collection techniques available within the United States or directed against United States persons abroad."<sup>8</sup>

Paragraph 2.5 continues by stating that the Attorney General is delegated the authority to approve the use of "any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power." In other words, there are significant privacy protections extended to United States persons even where they are operating overseas. In fact the DOD Directive that implements EO 12333 states that "special emphasis shall be given to the protection of the constitutional rights and privacy of U.S. persons."<sup>9</sup> However, there is an exception which allows collection on a U.S. person in cases where they are "reasonably believed

to be...the victims of international terrorist organizations."<sup>10</sup>

There are additional broad exceptions in the arena of foreign intelligence and CI. For example, DODD 5240.1-R § C.2.3.4.2 provides that U.S. people who are in contact with persons "who are reasonably believed to be engaged in, or about to engage in intelligence activities...or international terrorist activities" may have a DOD intelligence component collect information about them. The Directive outlines several procedures for intelligence collection, two of which are relevant to this discussion. First is "Procedure 6" which is called "Concealed Monitoring." This procedure may only be used to conduct surveillance of U.S. personnel outside of the country where the "subject of the monitoring does not have a reasonable expectation of privacy." When operating outside of the United States, monitoring may be conducted on installations and facilities owned or leased by DOD. If the monitoring occurs outside of the facility, then host nation coordination has to be made in applicable cases.

The second procedure is "Procedure 5" which refers to Electronic Surveillance. This procedure directly implicates the Foreign Intelligence Surveillance Act of 1978.<sup>11</sup> The FISA provided a statutory framework for the use of electronic surveillance in the context of foreign intelligence gathering. The intent of the law was to strike a balance between national security and privacy interests. Subsequent legislation has made significant changes to this particular statute all of which are outside of the scope of this discussion. Electronic surveillance is defined as intentional targeting against or interception of the communications of a United States person. Again, U.S. persons may be collected against in some

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<sup>6</sup> Exec Ord 12333 Paragraph 2.6

<sup>7</sup> *Id* at Paragraph 2.1

<sup>8</sup> *Id* at Paragraph 2.4

<sup>9</sup> DODD 5240.1: DOD Intelligence Activities § 4, August 27, 2007

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<sup>10</sup> DODD 5240.1-R, Procedures Governing the Activities of DOD Intelligence Components that Affect U.S. Persons, § C.2.3.3.4 (December 1982)

<sup>11</sup> 50 U.S.C. § 1801 (2008 as amended)

circumstances where they do not have a reasonable expectation of privacy. However, where they do have an expectation of privacy, permission from the Attorney General through the DOD General Counsel is required. In emergency situations, the service secretaries or a general or flag officer in some cases are authorized to grant authorization for electronic surveillance.<sup>12</sup>

Emergency situations occur where the usual time required to obtain approval would cause failure or delay in obtaining significant foreign intelligence or CI. It is intended to prevent the loss of intelligence which may result in a detriment to national security, or result in harm to a person or instillation. In any of the emergency scenarios, surveillance may not last longer than 72 hours.

#### MILITARY COUNTERINTELLIGENCE

As noted above, every DOD component has elements that are members of the intelligence community. For the Air Force it is the Air Force Office of Special Investigations (AFOSI). AFOSI is also the lead agency for providing general CI support to Headquarters CENTCOM for DOD overall.<sup>13</sup> AFI 71-101V4, *Counterintelligence*, 1 August 2000, states specifically that AFOSI is the sole agency within the Air Force authorized to use specialized techniques as defined in Procedures 5 through 10 of DODD 5240.1-R, in CI activities.<sup>14</sup> JAG Corps members may also find themselves in scenarios where they are working with other military components. For example, the Army CI program is typically handled through the Criminal Investigations Division (CID) overseas.<sup>15</sup> AFI 71-101V4 Attachment 1 defines electronic surveillance (Procedure 5 above) as the “[a]cquisition of nonpublic communication by electronic means without

the consent of a person who is party...” It further defines CI as “[i]nformation gathered and activities conducted to protect against...intelligence activities...conducted by or on behalf of foreign governments...,or international terrorist activities.”

#### PRACTICE POINTERS

The need for vigilant and consistent CI efforts cannot be over-emphasized. In fact, as the unclassified portion of the Downing Commission noted, DOD components failed to exercise and exploit “all potential sources of information.”<sup>16</sup> This fact is truer today than it was in 1996. However, in today’s deployed environment views regarding counterintelligence techniques and practice must also shift.

A very common scenario is for service members to want to try their Arabic language skills online in international chats. Chats are an attractive way to practice with native speakers while at the same time affording the ability to “cheat” by looking up words. Inevitably, the conversation will shift from small talk to what a person does for a living. Once it is established that the member works in a deployed location, the foreign national typically becomes more interested in pursuing an in-depth relationship. Much of the time, the member is not aware that they are at risk and will become more deeply involved in developing the relationship. Depending on the location and the mission, the commander has a variety of choices available to him or her. It is important for the servicing Staff Judge Advocate (SJA) to ensure that the command has all available tools at their disposal and be prepared to discuss all options. The three most important subjects to discuss with the commander are: 1) military justice; 2) administrative action options; and 3) CI.

Unless it is an extreme case like a member intentionally disclosing convoy

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<sup>12</sup> DODD 5240.1-R Paragraph C5.2.5.2.1

<sup>13</sup> DODI 5240.10: Counterintelligence Support to Force Protection, Encl. 5, September 24, 2009

<sup>14</sup> AFI 71-101V4, *Counterintelligence*, 1 August 2000, paragraph 6.1.

<sup>15</sup> Army Reg. 381-20 (1993)

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<sup>16</sup> US Department of Defense. Force Protection Assessment of USCENTCOM AOR and Khobar Towers. Washington D.C.: Downing Assessment Task Force, 30 August, 1996.

movement locations and times, the commander will typically not be as interested in military justice or courts-martial. This trend is well supported by case law. In the post cold-war era, classic espionage cases are virtually non-existent in the unclassified context.<sup>17</sup> The commander is typically faced with a member who has inadvertently disclosed some fact or information that on face value is somewhat innocuous. Under those circumstances he will either opt to send the member home or choose administrative action to keep the member in place, especially in critically manned areas.

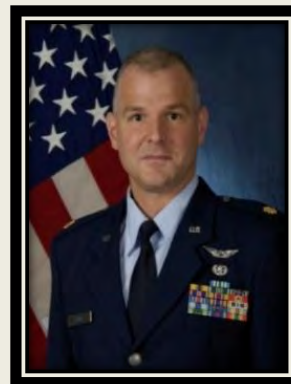
However, the commander must also be made aware of potential CI options especially where the possibility for the compromise of classified information may have occurred. There are several classified resources available which Judge Advocates should be very familiar with before advising commanders initially. The most important aspect of a review of the materials is to ensure that the procedures are followed, because as noted above, where United States persons abroad are involved, the law mandates that constitutional protections be extended and followed unless certain pre-conditions are met. Thus thorough understandings of the previously mentioned citations in addition to DOD Directive O-5240.02<sup>18</sup> and the memorandum of agreement between the Federal Bureau of Investigation and the Department of Defense are critical.<sup>19</sup>

For assistance in narrowing the issues, a call to OSI/JA via classified means (STU, STE, Red Phone or SVOIP) should be considered after which time, initial contact

with the CI (OSI or CID) detachment at your deployed location should be the next step. Once the commander has had an opportunity to consider the options, the servicing SJA should facilitate a meeting between the commander, critical staff members and the CI detachment. Additionally, the practitioner must also be intimately familiar and fluent in the mission planning process. Several publications like Joint Publication (JP) 3-33, *Joint Task Force Headquarters*, and JP 3-0, *Joint Operations*, discuss at length the degree to which SJAs should be involved in mission planning and analysis. A thorough understanding of the mission will ensure the SJA's legal recommendation is timely, accurate and relevant.

## CONCLUSION

Requests for searches of foreign computer systems present a quagmire that implicates both military applications of the Fourth Amendment balanced against an increasingly complex body of international laws and counterintelligence regulations. In the CI realm, there are no textbook answers. Every scenario will have different facets to consider, all of which require the practitioner to be fluent in the options available to the commander in order to ensure the mission remains unaffected. As such, members of the JAG Corps must become more and more familiar with the dizzying aspects of computer searches and intelligence laws as they are applied in the foreign context. By doing so, JAGs will ensure their advice is both timely and relevant to mission accomplishment in an ever-changing and computer-dependent deployed environment.



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<sup>17</sup> See e.g. *United States v. Richardson*, 33 M.J. 127 (C.M.A. 1991) and *United States v. Ott*, 26 M.J. 542 (A.F.C.M.R. 1988)

<sup>18</sup> DODD O-5240.02: Counterintelligence, December 20, 2007

<sup>19</sup> Memorandum of Agreement Between the Attorney General and the Secretary of Defense, "Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation," April 5, 1979





THE USAF PARALEGAL ASSOCIATION

# REUNION

BY MASTER SERGEANT LISA SWENSON, USAF

## FAMILY IS A WONDERFUL WORD.

It evokes feelings of comfort, compassion, and understanding. The word family sums up the lifelong connection shared by service members and spouses attending this year's USAF Paralegal Association Reunion held at the Judge Advocate General's School from 30 September to 2 October 2009. Over three dozen paralegals traveled across the nation

to this biennial gathering including retirees, reservists, spouses and active duty personnel who traveled across the nation to "return home" to Maxwell Air Force Base, Alabama.

## HISTORY OF THE REUNION

The USAF Paralegal Association was founded on 17 August 1985. The founding members were comprised of retired Chiefs Steve Swigonski, Jerry McAteer, and Master





*The reunion began with a rousing reception at the Judge Advocate General's School*

Sergeant (Ret.) Philip Boehm. These proud paralegals sought to foster the growth and development of the paralegal profession by networking to lend support, suggesting solutions to problems, and keeping abreast of new developments in the JAG Corps. It has since become an organization which allows current paralegals to draw from the experience of previous paralegals. In order to facilitate the exchange of information the organization publishes a newsletters several times a year and conducts a biennial reunion. The first reunion was held on 17 August 1985 in Las Vegas, Nevada. The organization has since held reunions every other year at diverse locations ranging from San Diego, California, to the USAF Academy, and Honolulu, Hawaii.

Upon arrival at this year's reunion, attendees were enthusiastically welcomed by a cordon of active duty and civilian personnel from the JAG School.

#### PASSING OF THE TORCH

The first day began with dynamic presentations from current JAG Corps leaders including Lieutenant General Jack L. Rives, The Judge Advocate General, and Chief Master Sergeant Debbie Stocks, the Senior Paralegal Manager to The Judge Advocate General. The legendary Chief Swigonski and his wife Jane were also in attendance. During the three-day event a discussion was held to determine if the USAF Paralegal Association Reunion would continue, as many of its founding members are now in their sunset years. Chief Swigonski said, "This may be the last year for many of our initial members. I'd like to see the organization continue after I am gone but that will be up to the current and future paralegals."

#### THE MEMBERS

The main purpose of the USAF Paralegal Association is social in nature. Currently membership consists of retirees,



*Attendees enjoyed a scenic dinner cruise aboard Montgomery's historic Harriott II Riverboat*

spouses, Reservists and active duty services members, in order of representation with retiree members having the greatest representation. While CMSgt Swigonski is the most famous of the retired members stories were shared about Chief McAteer's green pen and Chuck Buzby's many hats. The first evening ended with a sunset cruise on the Alabama River aboard the *Harriott II* paddlewheel riverboat.

This year's reunion witnessed increased participation from spouse members of the paralegal family, including Ms. Neva Gielow, whose husband CMSgt (Ret.) Robert H. Gielow passed away 10 years ago. Speaking of the USAF Paralegal Association members, Ms. Gielow said, "All of you were the most welcoming, warm, interesting, and super people that I have been associated with since retiring from the USAF a few years ago. Actually, it was my husband CMSgt Robert H. Geilow [retired], but as many of you know, being in the military is a family thing. I love the Air Force as much as Bob did."

Additionally, Reservists like CMSgt (Ret.) Walter Dodd continue to be involved with the USAF Paralegal Association. Chief Dodd said that he wants to keep up with the organization and traveled from Corning, California to attend this year's reunion. The bylaws require an annual meeting which was held this year during the reunion. It had also been planned to send the newsletter only via e-mail until Chief Dodd spoke up: "I don't have a computer but I would like to continue receiving the newsletter via regular mail." Accordingly, it was agreed to send the newsletter via mail to those who do not have an e-mail address.

Recognizing how the reunion unites the diverse group of people who have worn the paralegal badge, and the spouses who have supported them, CMSgt (Ret) Wallace Johnson stated, "I would like to see the USAF Paralegal Association biennial reunion become a KEYSTONE of sorts for paralegals. Active duty members should be allowed and encouraged to attend the biennial meeting."

*Interested in becoming a member of the USAF Paralegal Association? Go to <http://usafparalegal.com>. Membership is free this year. The USAF Paralegal Association is a private organization.*



*Master Sergeant Lisa Swenson serves as Noncommissioned Officer in Charge, Professional Outreach Division, the Judge Advocate General's School, Maxwell Air Force Base, Alabama.*



# SCHOOLHOUSE ROCK v2.0

## THE STRANGELY TYPICAL JOURNEY OF S.475

### THE MILITARY SPOUSES RESIDENCY RELIEF ACT

BY MAJOR BRIAN "BT" THOMPSON, USAF

*"I'm just a bill, yes, I'm only a bill. And I'm sitting here on Capitol Hill. Well it's a long, long journey to the capitol city. It's a long, long wait while I'm sitting in committee. But I know I'll be a law someday, at least I hope and pray that I will, but today I am still just a bill."*<sup>1</sup>

AFTER RELYING ON *SCHOOLHOUSE Rock* as a primary research tool while preparing for my year on Capitol Hill, I was shocked to learn that it may have left out a few of the details on how a bill becomes a law. After 11 months as the Legislative Fellow for Senator Dick Durbin (D-IL), I have seen enough sausage being made to understand the reality of modern legislating. The Military Spouses Residency Relief Act (MSRRA) is a good example of how a small, uncontroversial bill can navigate that "long, long journey" to the President's desk. It is also a timely case of how Congress is attempting to expand the protections of the Servicemember's Civil Relief Act (SCRA) for the benefit of military spouses.

#### PROBLEM

Besides funding the Government, and a few others Constitutional odds-n-ends, Congress seeks to solve problems through legislation. As many military spouses see it, the SCRA has a problem. While it allows servicemembers to maintain their home-state residency when moving to a new state on military orders, SCRA does not extend this privilege to military spouses. Presently, servicemembers are allowed to vote, file and pay taxes, register vehicles, maintain a driver's license, and enjoy other benefits that flow to



"home" state's residents even when they do not live there because of their military service. But spouses remain subject of the residency laws of their new state. Therefore, military spouses often end up paying property (e.g. on vehicles) and personal-income tax to their domiciliary state, which they might not have to pay if they were considered residents of their "home" state.

*"When I started, I wasn't even a bill, I was just an idea. Some folks back home decided they wanted a law passed, so they called their local congressman, and he said, 'You're right, there oughta be a law.' And he sat down and he wrote me out, and introduced me to Congress, and I became a bill."*

#### SOLUTION

Problem, say hello to solution—Congress can change the law to allow spouses to maintain residency in their "home state." Solution, say hello to lobbyists. Lobbyists are not inherently good or bad, but rather an ever-present component of the legislative process. Putting aside the legal definition,<sup>2</sup> a lobbyist in general terms is simply an advocate representing a constituency of common interests. In fact, you would be hard pressed

<sup>1</sup> Frishberg, Dave (1973), *SCHOOLHOUSE ROCK*, "I'm Just a Bill."

<sup>2</sup> 2 U.S.C. §1602(10)



*The Senate Chamber*

to find any American whose interests are not somehow being represented by at least one lobbyist/advocate in Washington D.C., whether they know it or not.

Clearly, a problem can catch the attention of a particular Senator when the “folks back home” call and ask for help. In such a case, the problem will flow up the Senator’s “chain of command.” Legislative Correspondents (LCs), who deal directly with constituents and pen the hundreds of thousands of response letters an office sends out every year, will learn of a problem and forward it to a Legislative Assistant (LA). The LA, who works a particular portfolio (such as the Military LA, MLA, who works defense issues), will take a look at the problem, determine whether it is being addressed by another Senator and, if not, will do the leg work that often ends up in a proposed solution in the form of a draft bill. That proposed solution will pass through the Legislative Director (LD), who rides herd on all the LAs, and then up to the Chief of Staff, who considers the policy and political ramifications of the proposed solution. Finally, the Senator approves or disapproves moving forward with the proposed solution—to introduce a bill.

The time-honored tradition of constituents writing their Congressman certainly follows the classic *Schoolhouse Rock* path. But more often than not, lobbyists and advocates bring problems and proposed solutions to the

attention of a particular Senator or his or her staff—and not just any Senator. Once a bill is introduced in the Senate, the parliamentarian refers it to the committee with jurisdiction over the underlying issue. Lobbyists and advocates, if they know what they are doing, will check the Senate rules to determine which committee will have jurisdiction over their proposed solution. They will seek a Senate champion for their cause from among those members who sit on the committee with jurisdiction. Here, the solution to the spouse-residency problem is to amend SCRA to extend servicemember’s residency rights to their spouses. The Veteran’s Committee has jurisdiction over SCRA issues.<sup>3</sup> Thus, advocates for military families found a Senate champion for MSRRA on the VA Committee—Senator Richard Burr (R-NC).<sup>4</sup> Consequently Senator Burr’s staff worked with the Legislative Counsel’s office to draft the actual legislative language to amend SCRA to extend servicemembers residency rights to their spouses.<sup>5</sup>

With a draft bill in hand, Senator Burr’s staff then reached across the aisle to find a Democratic cosponsor—in this case, Senator Diane Feinstein (D-CA), who represents a state with a large military population. These offices then finalized the bill, ensured the interest groups’ enthusiastic support (for advocacy work down the road) and then secured the all important Congressional Budget Office (CBO) “score.” This “score” estimates how much the legislation will cost the Federal government. Accordingly, CBO scored MSRRA as revenue neutral, meaning it will not have a negative or positive effect on Federal expenditures or revenues. That done, Senators Burr and Feinstein introduced

<sup>3</sup> See Senate Standing Rule, XXV(1)(p)(6).

<sup>4</sup> Many of the groups advocating on behalf of the military and military families are part of The Military Coalition: [www.themilitarycoalition.org](http://www.themilitarycoalition.org). I offer no endorsement, but just point out that these are the groups that are advocating for the military and military families, whether you know it or not.

<sup>5</sup> LegCo, as we affectionately called it, is the non-partisan office in the Senate that works confidentially with individual Senate offices to translate ideas into legislative language.



MSRRA on February 25, the clerk gave it a number (S.475), and the parliamentarian referred it to the VA Committee.

*"I'm just a bill, yes I'm only a bill, and I got as far as Capitol Hill. Well, now I'm stuck in committee and I'll sit here and wait while a few key congressmen discuss and debate whether they should let me be a law. ... How I hope and pray that they will, but today I am still just a bill."*

### THE PROCESS

Now that the long effort to get an idea to bill introduction is complete, the real battle begins. In the case of MSRRA, that battle was not with opponents of the bill, as none ever appeared, but to rise above the din of more than 2000 other bills crying out for attention. There are two ways to get a small bill out of the Senate—what I call *Schoolhouse Rock versions 1.1 and 2*. Under both versions, the bill needs momentum and momentum in the Senate is often about securing big numbers of cosponsors. Senators Burr and Feinstein sought the support of fellow Senators by sending out a *Dear Colleague* letter to all the Senators seeking support for the bill. Their staffs also provided interested offices with the iconic "one pager," a summary document that details the problem, how the bill solves it, and which interest groups support the bill.

Simultaneously, pro-MSRRA lobbyists and advocates held office calls with Senate staff to advocate for the bill. The members of their groups contacted their Senator's staff (and occasionally the Senator, if they have access) urging them to cosponsor the bill. The staff members then forwarded cosponsor recommendations up the "chain of command" to their Senator. This was my small part in MSRRA's journey. On behalf of Senator Durbin, I took meetings with the lobbyists/advocates of some of these groups, spoke to others on the phone, and heard from Illinois constituents in favor. Next, I prepared a cosponsor memorandum to the Senator recommending that he cosponsor MSRRA—which he did, as did many others. Generally, having over 20 bipartisan cosponsor on a piece of legislation demonstrates momentum;

MSRRA secured 44 cosponsors (27 Republicans and 17 Democrats). Certainly, S.475 now had momentum.

### SCHOOLHOUSE ROCK V.1.1—Traditional

Under the traditional model of legislating, a bill is referred to committee, the committee holds a hearing and debates it, perhaps amends it, then reports it to the full Senate, which then debates and amends it again before passing it. This is what we teach our sixth graders. This almost never happens. With limited exceptions, a bill must be reported out of committee before it can be considered by the full Senate ("on the floor"). Each "marked up" bill includes a formal report that details its particulars, including what it does, why it is needed, how it was amended (aka "marked up"), how much it may cost, comments of interested parties, and a section-by-section analysis. That takes a lot of work by committee staff; they do not have time to do this with every one of the hundreds of bills referred to each committee every session.

Thus, the effort for a small bill like MSRRA is not about winning or even having debates; it is all about getting the committee chair to find the time on the schedule to call it up for consideration at all. This is where having the sponsor of the bill on the committee and having a substantial number of cosponsors pays dividends. It paid dividends for MSRRA which was brought up for consideration at a mark-up hearing on July 15, passed without debate or amendment, and referred to the full Senate.

If committee time is limited, floor time in the Senate to consider small bills is nearly nonexistent. First, there is the Senate schedule—to allow the Senators to get back to their home states, little happens on Mondays and Fridays, plus there are various week-long recess around holidays and 4-5 week recesses in the summer and at the end of the year. Additionally, there are the familiar, "must-pass" pieces of legislation and nominations which take up much of the available time (e.g. Justice Sotomayor's confirmation, the 12 annual appropriation bills, National Defense





*The House of Representatives*

Authorization Act, health care legislation, the stimulus package, to name a few).

Furthermore, you cannot talk about the Senate without focusing on the tradition of unlimited debate (aka “filibuster”). Since almost every action in the Senate requires agreement of all the other Senators (even whether to call up a bill for consideration), threat of a filibuster is the tool by which the minority party, or any individual Senator, can bring the business of the Senate to a grinding halt. A filibuster can only be overcome through “cloture” (a motion to cut off debate), which requires affirmative vote of 3/5ths of the Senate (the magical 60 votes). To schedule a cloture vote essentially requires 24-hours notice, and even after a successful cloture vote the rules require an additional 30 hours of debate before a vote on the bill can occur.

So most non-controversial business in the Senate is accomplished through unanimous consent (UC) agreements. This is just what it sounds like--every Senator has to agree that something can happen. A common UC agreement is to pass a small bill without requiring it to take up floor time with debate and vote (though UC agreements are most often used for resolutions or inserting something into the Congressional Record).

Here’s how MSRRA went UC. After some “cloakroom” discussions, both parties agreed to poll their members to see if anyone had an objection to it. The bill was then “Hotlined,”

which means a message went out to every Senate office telling them MSRRA would pass by UC unless there was an objection. No one objected. Hence, on August 4th MSRRA. As a result, S.475 awaited its final passage in the House, or passage of its House companion (H.R. 1182) so it could complete its “long, long journey” to the President’s desk. As of October 10, H.R. 1182 had 182 cosponsors, but it had not yet completed the committee process. The expectation was that it would make it through at some point, or that the House would take up S.475 under their expedited rules, but when that would happen was anyone’s guess at that point.<sup>6</sup>

### SCHOOLHOUSE ROCK V.2—Modern

So MSRRA proponents pursued a common back-up plan that is the modern way in which small bills become law—attaching it to must-pass legislation and riding that to the President’s desk. [Spoiler alert: It did not work for MSRRA]. In MSRRA’s case, the 2010 NDAA (S.1390) was the vehicle for this legislative maneuver. The NDAA is must-pass legislation. It passes through both chambers every year, goes to a Senate-House conference committee to iron out any differences, returns to both chambers for final approval, and then the President signs it into law (absent veto).

The NDAA was considered by the full Senate from July 13-23. During those frantic days and late, late nights (did I mention the late nights), Senators offered 340 amendments to it, 118 of which made it into the final version of the bill. Senators Levin and McCain (who as Chair and Ranking Member of the Senate Armed Services Committee were the

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<sup>6</sup> The rules in the House provide the majority party much greater power than in the Senate. The House does not have a tradition of unlimited debate. Though the House does not have a UC procedure (try that with 435 members), it does have something of an equivalent in the form of the Suspension Calendar. Uncontroversial bills, but more often resolutions, that are put on the Suspension Calendar (a few most every legislative day) sidestep the normal rules of legislating--debate is limited to 20 minutes for each party, amendments from the floor are prohibited, and a bill needs the approval of two-thirds of those voting. I would not be surprised to see MSRRA on the Suspension Calendar one of these days.

“managers” of the bill) worked with the leaders of both parties to decide the disposition of each amendment. Some were just offered for show for the folks back home and then ignored. Some were technical in nature and simply “accepted” by the managers and inserted into the bill (subject to vote when the entire bill comes up for final vote after the amendment process). Some were “hotlined” for UC and passed that way. But the remaining amendments, which could not achieve UC because of the objection of as few as one Senator, were brought to the floor, “debated,” and voted up or down. This primarily happened during a period known as “vote-a-rama.” On the last night of consideration of the NDAA (July 23), about 60 amendments were teed up for votes, most preceded by short debate (*i.e.* two minutes of debate, evenly divided between the supporter and an opponent, if any).

Now and again, when the Senator who blocked UC on an amendment realized the fight was not worth it, the amendment passed on voice vote. If not, though, then there was a 10-15 minute roll-call vote during which the clerk calls out the name of each Senator and the Senator signifies his or her vote by giving a thumbs up/thumbs down, which the clerk manually records (the Senate has not caught up to the 21st Century, or the House, and has yet to transition to electronic voting). If you are thinking that this is no way to do business, you are right but it is the way the Senate does business—I like to think of it as a process of orderly disorder.<sup>7</sup> Senator Burr offered MSRRA as an amendment and it passed by voice vote during vote-a-rama, becoming Sections 573-575 of the Senate version of the 2010 NDAA (S.1390). The Senate and House

<sup>7</sup> But this old-fashioned process does serve one purpose—it is about the only time you will have almost all the Senators together in one place and they spend it chit-chatting and, more importantly, horse trading while the clerk is recording votes. Usually, when you see a Senator speaking from the Senate floor on C-SPAN (which I am embarrassed to say I watch all day) they are about the only person in the chamber. It is amazing how much can actually get done when one Senator talks to another without their staff around (no staff allowed in the “well” of the Senate where the voting occurs).

versions of the 2010 NDAA were different (*i.e.* the House version authorized the second engine for the F-35 while the Senate version did not). So the competing bills went to a Senate-House (or as the House likes to call them, House-Senate) conference committee. Each chamber appointed conferees (in the Senate, they are the members of the SASC), and they hammered out a final version. Unfortunately the proponents of MSRRA in the House were not as forward-leaning as their Senate colleagues. They did not amend the House version of the 2010 NDAA to include the MSRRA provisions. Thus, in the conference, the conferees removed the Senate MSRRA provisions, disappointing some advocates. However, the final bill would now pass by an overwhelming margin.

*“It's not easy to become a law, is it? No! But how I hope and pray that I will, but today I am still just a bill. . . He signed you, Bill, now you're a law.”*

#### SUMMARY

The reality of modern legislating is messy, maddening, inefficient, inscrutable, in some ways unexplainable, and bears only a passing resemblance to *Schoolhouse Rock*. But sometimes it works, and the Congress does a good thing. After 11 months on the Hill’s sausage factory, I am still generally optimistic about our democratic processes. And while it certainly wasn’t easy, on Veteran’s Day, President Obama officially signed the Military Spouses Residency Relief Act into law. Congratulations, Bill—you’ve made it!



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# DEVELOPMENTS FROM THE FIELD

## AIRCRAFT INVESTIGATION FIELD SUPPORT CENTER

BY MR. KENNETH G. CALDWELL, AFLOA/JACC

ONE OF THE MOST SUCCESSFUL JAG CORPS 21 initiatives is the Accident Investigation Board Field Support Center (AIBFSC) created within AFLOA/JACC in September 2007. The AIBFSC provides legal support to aircraft (AIB) and ground (GAIB) Class A mishap investigations. DODI 6055.07 defines Class A mishaps as those causing damages to government and other property in an amount of \$2 million or more; destruction of a DOD aircraft; or a fatality or permanent total disability. For most Class A mishaps, and for mishaps with probable high public interest, DODI 6055.07 requires two separate investigations: a safety investigation known as Safety Investigation Board (conducted IAW AFI 91-204) and a legal investigation, which is the AIB or GAIB depending on the type of mishap. AFI 51-503 governs AIBs; AFI 51-507 governs GAIBs.



*The AIBFSC Team*

Mishap investigation is a specialized area that requires considerable hands-on expertise. In the past, however, service as an AIB Legal Advisor (LA) was an additional duty for JAGs and often a one-time experience. The AIBFSC was established as a JAG Corps 21 specialty office to provide a cadre of experienced, well trained JAGs to support mishap investigations exclusively. Since many mishaps involve potential claims and an Aviation and Admiralty Law Branch already existed under AFLOA/JACC, the logical place for the AIBFSC was under the same AFLOA division.

The AIBFSC stood up with five attorneys – one Lieutenant Colonel and four Captains. The concept of using Captains as AIB LAs was new. AFI 51-503 provides that the AIB LA should “normally” be a field grade officer and an “experienced judge advocate.” With JAGs exclusively dedicated to mishap investigations, however, rank has proved to be less important than practical AIB LA experience. AIB Board Presidents, some of whom are general officers, have uniformly provided feedback that the LA’s company grade rank was not an issue.

Recorders provide administrative support to accident boards and are usually paralegals. In August 2008, the AIBFSC began collaborating with the Air Force Claims Service Center (AFCSC) to allow their paralegals to become dedicated AIB Recorders. The AIBFSC quickly realized the incredible synergy between AIB LAs and experienced AFCSC paralegals. The end result was higher quality reports with reduced investigation times. For example, having AIBFSC LAs and Recorders support unmanned aerial vehicle mishap investigations reduced investigation times from approximately 29 days to 2 weeks. These successes highlighted the need for permanently dedicated paralegals in the AIBFSC. As of 1 November 2009 the AIBFSC has seven paralegals assigned to serve as AIB and GAIB Recorders.

Since its inception through October 2009 the AIBFSC has supported 47 AIBs and 9 GAIBs, including 23 AIBs and 2 GAIBs for calendar year 2009. This accounts for approximately half of the mishap investigations Air Force wide for the respective calendar years. The AIBFSC has also explored the total force route for AIB legal support, rather than pulling other active duty JAGs from their permanent jobs



for 30 days. Utilization of Air Force Reserve and Air National Guard JAGs and paralegals has shown strong signs of success in the early phase. The AIBFSC has identified a pool of trained reserve and guard JAGs and paralegals who are interested and available and continues to look for others.

While the primary focus of the AIBFSC is providing LAs and Recorders for mishap investigations, it satisfies other JAGC and Air Force needs such as reach-back expertise for non-AIBFSC LAs, improved communication with MAJCOM/JA AIB points of contact, creating and maintaining media for AIB resource sharing in the JAGC, and preserving continuity materials. Because all AIBFSC attorneys work in the same office, there is an increased exchange of information regarding lessons learned. By specializing in mishap legal investigations, the AIBFSC also fills the role of counterpart to the Air Force Safety Center which specializes in mishap safety investigations. Before the AIBFSC no such counterpart existed.



U.S. AIR FORCE PHOTO (LT COL LESLIE PRATT)



U.S. AIR FORCE PHOTO (SRA KENNY HOLSTON)

In the two years that the AIBFSC has been supporting AIBs, feedback from the MAJCOM/JA offices and AIB Board Presidents has been overwhelmingly positive. They have appreciated having an experienced legal team as well as improved quality in AIB reports and reduced investigation times. Instrumental to the AIBFSC's initial and ongoing success has been its working relationship with AFLOA/JACC's Aviation and Admiralty Law Branch. This branch is responsible for setting the aviation law policy for the Air Force and adjudicating all Air Force aviation claims. Many of the individuals assigned to the branch are former aviators and/or have extensive knowledge in aviation law and AIBs. They have been able to give JAGs new to the aviation world an important running knowledge of the operational world. In addition, the AIBFSC has been able to provide feedback regarding the AIB process, and many of these inputs have been captured in significant rewrites of AFI 51-503 and AFI 51-507, which are currently in the finalization process. AIBFSC personnel also work hand in hand with the Aviation and Admiralty Law Branch in preparing and presenting course materials for the Aviation Accident Investigation Course conducted annually at the Air Force Judge Advocate General's School.

JAGs and paralegals who serve on AIBs express great satisfaction with the work they accomplish for the Air Force. They are often given unique leadership and operational experience opportunities. For instance, when an aviation mishap involves a fatality, AFI 51-503 requires the Board President to be a general officer or select. The AIB LA becomes the exclusive legal advisor to this senior officer. In this respect, it is great experience for someone who is interested in becoming an SJA or DSJA one day. Another highly satisfying aspect of the job is exposure to the operational side of the Air Force. Many of the investigations require visiting the mishap sites and access to aircraft. In the course of their investigations, some LAs and Recorders have taken opportunities to fly in various airframes or training simulators. There can be no doubt they leave this job with a much better understanding of their client and the people they will be responsible for advising throughout their careers. The AIBFSC job is also a great opportunity to hone legal skills as it requires familiarity in a wide range of areas of the law. *For more information about the AIBFSC, please check our webpage on FLITE.*

## COMMERCIAL LITIGATION FIELD SUPPORT CENTER

### *Document, Document, Document*

BY MR. MARTIN GIBBS, AFLOA/JAQ

*For want of a nail the shoe was lost.  
For want of a shoe the horse was lost.  
For want of a horse the rider was lost.  
For want of a rider the battle was lost.  
For want of a battle the kingdom was lost.  
And all for the want of a horseshoe nail.<sup>1</sup>*

**M**OST OF US HAVE HEARD THE TALE OF THE KINGDOM LOST for want of a nail. As you contemplate contract award decisions, think of documentation<sup>2</sup> as the nail. Proper documentation is absolutely critical to avoid protesters successfully challenging award decisions. A good starting point for thinking about the documentation requirement is the Federal Acquisition Regulation (FAR) § 15.308. This provision requires the Source Selection Authority (SSA) to assess the proposals vis-à-vis the solicitation criteria. Second, the FAR states that the SSA must make an independent award decision; everything in the nature of evaluations, recommendations, or assessments that precedes the SSA's final decision is merely advisory. Finally, the FAR mandates that the SSA "document the source selection decision," requiring the documentation to "include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs."



For the most part, contracting officers are very good at populating the contract file with documents. Contract files generally include the source selection plans, market research, government estimates, funding documents, solicitations, proposals, evaluation documents, the ultimate award decision, and other required documents. But in connection with protests, it's the depth and breadth of the documentation that becomes the issue. Just because there is a document in the contract file called a source selection decision document does not mean that the SSA has properly explained his award decision. Where most source selection officials go wrong is in thinking that conclusory statements are sufficient to explain their decisions.

<sup>1</sup> The proverbial rhyme is found in a number of forms, starting as early back as the 14th century

<sup>2</sup> While documentation is required in all contracting activities, the focus of this discussion is negotiated contracting governed by FAR Part 15. There are numerous other FAR provisions that discuss documentation requirements; contracting officers must also

<sup>2</sup> While documentation is required in all contracting activities, the focus of this discussion is negotiated contracting governed by FAR Part 15. There are numerous other FAR provisions that discuss documentation requirements; contracting officers must also comply with these. See FAR § 15.406-1 and § 15.406-3.

AFLOA/JAQ has reviewed many source selection documents that cover several pages, often as many as 75 or more. Usually, the source selection document will explain the history of the procurement; it will identify who the offerors were and what each offeror proposed; it generally will restate the comments from the source selection evaluation team, including the ultimate ranking of the proposals; and it usually will discuss pricing and the reasonableness of the putative winner's price. Finally, the decision section will typically summarize what was stated in the preceding pages, and often will have the following statement:

*I agree with the evaluators' ranking of the proposals, and since X Corporation was ranked first, and since this offeror's price is reasonable, I have determined that an award to X Corporation represents the best value and is in the Government's best interest.*

Certainly, most people would consider this to be a logical, reasonable documentation of the award decision. Notwithstanding that it is preceded by several pages of factual information, this explanation is conclusory for two reasons. First, in simply stating that he agrees with the evaluators, the SSA has missed the opportunity to explain the rationale for his decision. What information in the proposals does the SSA believe supports the evaluators' position? One or two sentences explaining why the SSA agrees with the evaluators would be sufficient—and is essential—even though it may seem to repeat information found earlier in the decision document. Second, the SSA does not adequately explain why an award to X Corporation represents the best value and is in the Government's best interests. Without such an explanation, all we have is a conclusory statement. An example of a better explanation would be as follows:

*After considering all of the evaluations, and reviewing the proposals, I have determined that X Corporation's proposal represents the best value to the government because X Corporation proposed to achieve nine of the ten objectives the solicitation established beyond the threshold requirements. While the other offerors all satisfied the minimum requirements, none of them came close to achieving our objectives. Notwithstanding that X's price exceeded the low offeror's price by \$1 million dollars, I have determined that awarding a contract at this higher price is justified because X Corporation proposes to achieve nine of the ten objectives, and because, based on my review, the proposal appears to be reasonable and achievable. The price difference is also justified based upon the resources and manpower X Corporation proposes to use in accomplishing the requirements. I have determined that this price is fair and reasonable and represents the best value to the Government. Therefore, it is in the best interests of the Government to award a contract to X Corporation.*

Although one may quibble about whether this explanation adequately describes the SSA's rationale, the point is that the SSA expressed an in-depth rationale. The goal of documentation is to preserve and "nail" down all the information the agency relies upon in making its decisions. The absence of contemporaneous information detailing why the agency has made an award decision will be fatal to any award that is the subject of a protest. In preparing the documents that support the award, always remember to ask and answer the question: "Why is this conclusion proper?" If you always answer this question, your award decisions stand a significantly better chance of being upheld by GAO.



# BOOKS IN BRIEF



## THE PENTAGON: A HISTORY BY STEVE VOGEL (RANDOM HOUSE TRADE PAPERBACK, 2008)

REVIEWED BY MAJOR CHRISTOPHER M. SCHUMANN, USAF



IN DECEMBER 1941, as three thousand men worked day and night on what would come to be known as the largest office building in the world, a letter arrived addressed to “The Pentagon Building.” Up to that point, the press and the Army had referred to the mammoth construction site as either the “New War Department Building in Arlington” or the “Pentagonal Building.” As Lt Col Bob Furman, executive officer for the Pentagon project, would later recall, “It was the first time we realized that the post office recognized something called the Pentagon.” In his book, *The Pentagon: A History – The Untold Story of the Wartime Race to Build the Pentagon – and to Restore it Sixty Years Later*, Steve Vogel presents a compelling study of the history of the Pentagon, providing a fascinating look at the creation and eventual rebirth of this remarkable American landmark.

Vogel’s account focuses primarily on events surrounding the construction of the building in 1941 and its reconstruction following the terrorist attacks of September 11, 2001. Along the way he provides brief glimpses of key moments during the intervening years that

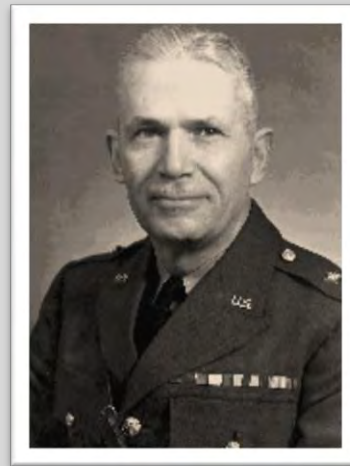
helped define the building as both an American icon and the nerve center of the American military machine. The story behind the idea, design, planning, and eventual construction of the Pentagon is nothing short of amazing. The author brings these facts to life through a detailed account that tells the story through the people that not only made the building a reality but also those who made it rise from the ashes some 60 years later. It is difficult to imagine the full scope of both the construction and the reconstruction. The resources required and the costs associated with both were staggering. The original price tag was estimated at \$35 million, a startlingly high amount that ultimately ballooned up to \$75 million (\$925 million in 2006 dollars). The reconstruction costs after 9/11 came in closer to \$5 billion. Vogel’s clear and concise narrative provides the reader with a vivid, coherent picture of the colossal undertaking and the price paid both in 1941 and 2001.

In the late 1930s, America was coming to terms that war was inevitable. Nazi advances caused great alarm, and with the War Department dispersed all around Washington, the need for a new consolidated headquarters building at a time of national emergency was painfully obvious. One of the many strengths of this book lies in the characters we meet as the story is told. Some, like Franklin Delano Roosevelt and General George C. Marshall, are well known, while others have been obscured by history and may never have been fully recognized for their contributions had it not been for Vogel’s account. Vogel introduces us to General Brehon Burke Somervell, a visionary who had a very specific idea of what he wanted in a new War Department headquarters, one big enough to hold 40,000 workers, parking for over

10,000 cars, and four million-plus square feet of office space. He would accept nothing less. Vogel chronicles Somervell's efforts in great detail, from his unwillingness to alter his original vision to his blatant contempt for Congress and those he saw as obstructionists to his ultimate goal, and does so in a manner that provides a recounting of events that almost reads like an adventure novel. Vogel presents a complex and driven man whose perseverance and determination were directly responsible for nearly every aspect of the Pentagon.

In retelling these individual stories, Vogel highlights the enormity of the undertaking, and the overwhelming obstacles facing those visionaries charged with building the Pentagon. Epic battles were fought over nearly every detail, from the location of the building to its design and overall size. Political opponents sought to undermine the effort with the president, congress, and with the public, while proponents focused on the urgency of completing the building in time for the coming world war. Politicians like Senator Harry S. Truman of Missouri and Congressman Albert Engel of Michigan launched numerous investigations into every aspect of the construction, doing all they could to derail what Engel deemed to be a "willful, extravagant and outrageous waste of taxpayers' money." Vogel works with this material quite well, weaving every facet of the project into a gripping tale. He has clearly done his research, and certainly one of the lasting benefits of his effort is that he has created an unsurpassed reference book detailing the history of this great building. The story of these people and their accomplishment is the story of America: larger-than-life characters willing to take enormous risks in the hopes of great achievement.

The author juxtaposes the creation of the Pentagon with its rebirth some 60 years later, in the wake of the September 11, 2001 terrorist attacks. Once again we are introduced to a cast of characters whose ingenuity and resourcefulness was the driving force behind the reconstruction. We meet Lee Evey, the chief of the Pentagon Renovation Program, who upon hearing of the attack on the morning of 9/11 raced to the Pentagon with a trunk full of fast



*General Somervell*

food for his renovation team, completely unprepared for what he would discover upon arrival. We meet Allyn Kilsheimer, the structural engineer in charge of demolition and redesign, who stood in the middle of the burning rubble and pledged to repair the damage and "have people back here within a year," a promise he and his team kept. We also meet many of the heroes who selflessly acted that day to save lives and minimize the loss, from first responders to military and civilian employees working in the Pentagon. Most Americans are familiar with the events surrounding that day, but Vogel takes us inside the building and describes through eyewitness accounts what happened from the moments before impact to the ongoing efforts to extinguish the fires days later. The reader gains a greater understanding of why the structure responded to the impact the way it did without becoming confused by overly technical engineering jargon. The parallels between the construction and the reconstruction are also clearly evident, not the least being the speed and urgency that motivated everyone involved in the face of seemingly insurmountable odds.

Vogel devotes less attention to the intervening six decades between construction and reconstruction. What happened during these years is important and relevant to defining what the Pentagon is and means to America, but we learn just enough of the key historical facts to understand the development of the building and the main events that helped shape it, from daily life in the Pentagon from the 1950's through the 1990's. We gain a better understanding of the

impact of the Vietnam War and the attendant protests. We are introduced to characters like Bill Ayers, a radical domestic terrorist who in 1972 masterminded the successful bombing of one of the building's interior bathrooms on the anniversary of Ho Chi Minh's birthday. - We are shown a glimpse of life during the Cold War, when much of American military policy toward the Soviet Union was shaped in the bowels of the building. Vogel focuses on the historical highlights and as a result the story is never bogged down by a mundane retelling of day-to-day life in the building. Importantly, Vogel chronicles during this period the foundations of the renovation project that would be featured so prominently in the events leading up to 9/11.

Overall, *The Pentagon: A History* is evenhanded and fair. The author generally avoids direct criticism of the most controversial events in the building's history, leaving it to the reader to decide whether the ends justified the means. In a very matter-of-fact manner Vogel describes General Somervell's tendency to provide false information to Congress on everything from the cost of construction to the planned size and location of the building, and the methods he employed to encourage his subordinates to do the same. We also learn that the government, in an effort to secure the land for the building, unceremoniously displaced the residents of Queen City, a thriving, predominately African-American neighborhood. Many of its residents were placed in tent cities that were still populated long after construction was completed. Vogel recounts the heroic story of Jimmy Harold, a young African-American who in 1942 refused to eat his lunch in the "colored" section of the cafeteria, a defiant act that ultimately resulted in desegregation at the

Pentagon. He also describes how former Secretary of Defense Donald Rumsfeld, in an act seen as courageous by some and foolish by others, left his office to help assist with rescue operations on the ground moments after the plane struck on September 11. These actions inspired many by running to the scene to assist the injured, but frustrated others by refusing to evacuate and by insisting that the building be open for business on September 12. The author's background in journalism may have contributed to his dispassionate portrayal of these controversial events, a refreshing fact given the blurred line between news reporting and opinion journalism. Thanks to the author's care, the reader is in a better position to reach his own conclusions.

In summary, this book is a must read for any Judge Advocate who has or will serve in the Pentagon. But it is also compelling reading for those who have often marveled at the structure and wondered about the stories that have shaped its history. Vogel's revealing account provides those gripping details through a vivid portrayal of larger-than-life personalities that made the impossible possible in 1941, and brought the Pentagon back to life 60 years later. For anyone that has worked in the Pentagon, or has viewed the building from the ridges of Arlington, there is an unavoidable sense of awe and amazement. Steve Vogel's absorbing tale of the history of this modern engineering and architectural marvel, and the individual stories he shares, has resulted in a valuable biography of one of America's greatest landmarks.

*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, Major Ryan Oakley, at [ryan.oakley@maxwell.af.mil](mailto:ryan.oakley@maxwell.af.mil)*



*Major Christopher Schumann (B.A. Arizona State University, J.D., University of Pittsburgh School of Law) currently serves as the Deputy Staff Judge Advocate, Misawa Air Base, Japan.*



# PARALEGAL

## PERSPECTIVE



BY MASTER SERGEANT PHILIP BOEHM, USAF  
(RETIRED)



I JOINED THE AIR Force in June 1954, as a 17-year old high school dropout. I saw joining as a big adventure. As Steve Swigonski once said, "When we went in you either joined the military or worked in the coal mines. I hated the coal mines so I joined the military." I caught the next bus from Manhattan to Sampson AFB near

Rochester, New York, for basic training, one of the few who didn't go to Texas. My first job was working in an orderly room in Okinawa, Japan as an administrative specialist, with a follow-on assignment to Roswell, New Mexico, working at a Bomb Wing. You can imagine I spent a lot of time in the legal office getting advice on various problems. After working with the JAG office I got to know them pretty well and they asked me to become a paralegal. The entire Bomb Wing moved to Pease AFB and shortly after the move, when I was an E-4, I retrained from the administrative 70250 career field into 70550 to become a paralegal.

### PARALEGAL TRAINING

I was one of the few who attended the Naval Justice School in 1961. Most of the students in my class were members of the Navy. Over the course of my career I found education to be very important, especially regarding the writing requirements of being a paralegal. After becoming a paralegal, I was able to get my GED, attend night school and was approved for a year off to complete my Bachelors Degree, majoring in Insurance and Tort Law. At age 34, I graduated from the University of Nebraska. Additionally, I continued taking night classes



*MSgt (Ret.) Boehm at work today*

and eventually completed my Masters in Business Administration. Back then, training as a paralegal consisted of reading the book and figuring it out. My educational experience proved to be invaluable, both in my Air Force career and beyond.

### WORKING CLAIMS OVERSEAS

During my career I worked by myself mostly in the claims arena. My first exciting claims job was in 1961. I was in Morocco. I was only there about a week and half when the entire Base Exchange burned down. We had claims from everyone, people who had jewelry in shops and vendors. The only person I knew I could call on was my good friend Billy Edwards. By today's standards, one could call him a mentor. Billy was at Wiesbaden and he was a great sounding board. He gave me solid advice to resolve the claims. I also worked a lot of foreign claims in both Morocco and Libya. I spent two years at each location. Eventually, I felt like I could actually judge or make the decision on the outcome of the claim. Learning the laws of the host country which you are applying to the claim was very interesting. The claims officer would review the claim and then the Foreign Claims Commission would do the final review of my work.

## THE IMPORTANCE OF ONE WORD

Although the majority of my career was spent alone in claims offices, I once did a short stint as the court reporter for a General Court Martial in Morocco. The case came down to one word. *One word*. I was asked several times if I said the word correctly. Actually I was asked so many time I began to doubt myself that I had actually said the right word. In those days we didn't have the tape recorder back up. If I fell asleep the court wouldn't be transcribed. Sixteen years after I retired, court reporting equipment now allows for four channels with the court reporter being on one channel and the judge, counsel and witnesses being on the other channels. That would have been nice to have!

## INNOVATION IS KEY

When I was in Florida, I was only there a few weeks when Hurricane Betsy hit. I completed over 1200 claims in two weeks. I created a processing center in the base theater which expedited the filing process. As I worked through the process I would hand specific files to the typist who would complete the files. At Homestead AFB there were seven people in charge of claims. I noticed my paralegals were giving the same information over and over again. Each client would have the same questions which would take about 30 minutes to go over. By simply implementing a claims briefing once a week I was able to reduce my staff by three personnel. Of course the office didn't want to give up the three positions so sometimes my ideas and organizational style weren't overwhelmingly acceptable.

My favorite job was working HQ SAC in Omaha Nebraska at Offutt AFB. General Chris Kowski was the staff judge advocate at the MAJCOM. MAJCOMs were just taking over the claims departments so I asked him if I could work for him. I turned down a commission in the Army and the Navy in order to take the position. While there, I also enjoyed working with Colonel Vincent Jordan, the Chief of Civil Law. I liked to make changes and he could make change happen. When I had a suggestion he would go to bat for me. One of the changes we made was centralizing claims funds. In the past each base was given a budget for claims. Bases didn't know if a plane would crash or a major accident would cause them to spend all of their funds very quickly or if they'd end up with a surplus. We spent a great deal of time trying to get money from other bases. I decided it would be easier to pay claims from the

MAJCOM. We tried this process for six months and decided this was a good change. I appreciated Colonel Jordan's support.

## LOOK BEHIND THE STATISTICS

One time, while working at HQ SAC, we were doing our base inspections. We noticed one base, McCoy AFB in Orlando, Florida had a three day processing time. Then when the paralegal left and his replacement had arrived the processing time shot up to 180 days. I flew down to McCoy to find out why the processing time was so high. What I found out was the new guy was finding files which weren't opened. The new guy was frantically trying to input all of the old claims into the system and then start processing them. They were very backed logged. I learned then never to take statistics at face value—.it can be garbage in, garbage out when it comes to the numbers game.

## ADVICE FOR TODAY'S PARALEGALS

In order to be successful when you separate from the military, you must be a good communicator, both orally and in writing. If you know law and can write well, these two skills will allow you to articulate your case without ever entering a courtroom. Be willing to and get out of your comfort zone. I don't believe it would be a good idea for paralegals to specialize in a specific area of law like I did with claims. Forty years ago we were discussing this possibility but it seems best, especially for small bases, for paralegals to be trained to work in all areas of the law. And most of all, recognize the value of a good education. I may have dropped out of high school to begin my Air Force career, but I left with a Master's degree. Don't let an opportunities pass you by. Take advantage of them now, to be ready for your next big adventure.



*Master Sergeant (Ret.) Philip Boehm (B.A., University of Oklahoma, M.B.A., University of Nebraska) served in the United States Air Force from 1954-1974. He is the past President of the USAF Paralegal Association. Today, he is the Senior Partner of Boehm & Associates in Alameda, California, overseeing the direction of the company, including its legal department. He provided this oral history to MSgt Lisa Swenson at the Judge Advocate General's School.*





# HERITAGE TO HORIZONS

## THE SECRET ORIGINS OF THE JUDGE ADVOCATE GENERAL'S SCHOOL

BY MR. WADE SCROGHAM, JAGC HISTORIAN

*"Some may consider having their building called the Taj Mahal a slight or an affront, but I take this as a compliment."*

--LIEUTENANT COLONEL DONALD ARMSTRONG, USAF (RET.)

THE JUDGE ADVOCATE GENERAL'S School has undergone a transformation in recent years, moving from Air Education and Training Command to the Air Force Legal Operations Agency, and emerging as a hub for multiple JAG Corps 21 initiatives. While many are familiar with the JAG School as an institution, few know of its history as a facility.

In the summer of 1988, Air University's new Deputy Chief of Staff for Engineering Lieutenant Colonel (Lt Col) Donald Armstrong learned of his assignment to a major project in the FY91 MILCON budget - the design and construction of the Judge Advocate General's School. He enthusiastically embraced the tasking and set to

work alongside JAG School Commandant Colonel Donald Rasher to identify a suitable site for the proposed facility. They ultimately selected a location adjacent to Chennault Circle. To this day, Lt Col Armstrong credits Colonel Rasher for assembling an exceptionally strong project team mindful of the school's unique needs. "Senior Master Sergeant Jim Whitaker and Lieutenant Colonel Bill Bowen were my main contacts to learn particulars about the JAG School and how it functioned, so that I could guide the architect during the design process." Utilizing information provided by the project team, Lt Col Armstrong compiled an extensively detailed project book. Formally titled "Design



*"The architect/engineer must remember he is designing a facility for THE Air Force JAG...The atmosphere created...must be one of having just entered the most important lawyer's office in the Air Force."*

*--DESIGN CONCEPTS FOR TJAG FACILITIES A.K.A. ARMSTRONG'S EPISTLE*

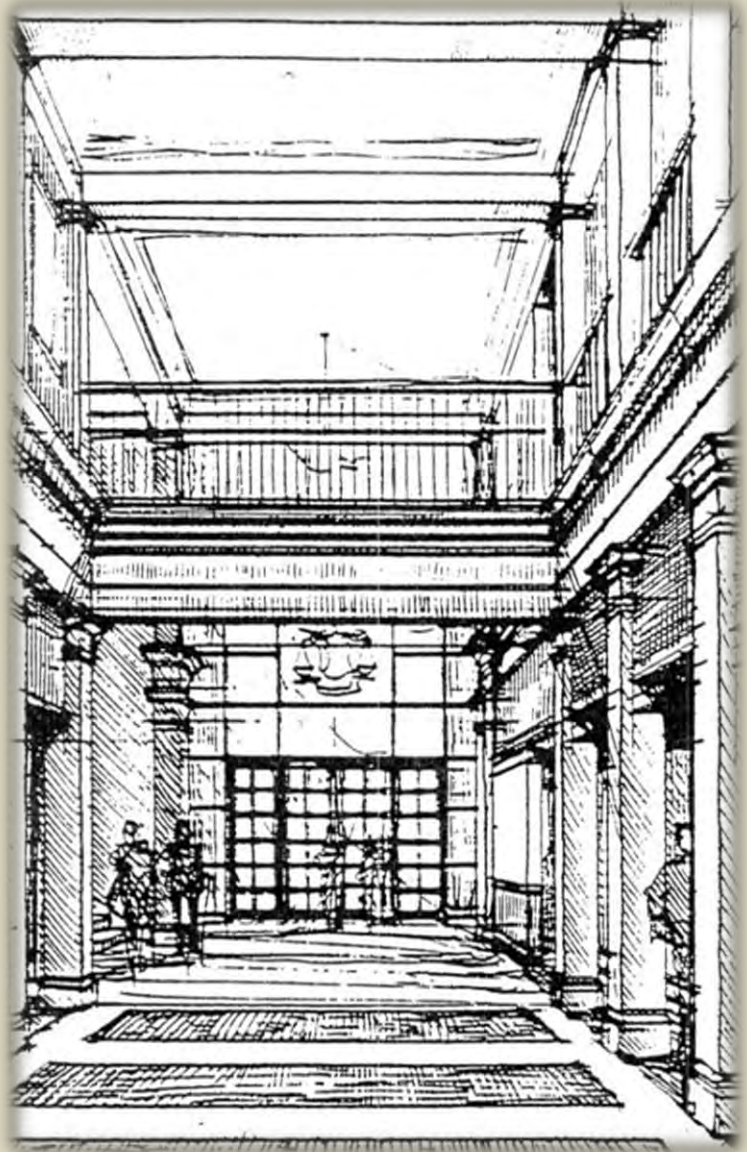
Concepts for The Judge Advocate General Facilities," the book was more popularly known as Armstrong's Epistle."

"I spent a lot of time talking to people," said Lt Col Armstrong, who submitted multiple drafts of his "epistle" to Colonel Rasher for review before the final version was forwarded to Major General Robert W. Norris, The Judge Advocate General. General Norris returned the package with only one critique: "Too many kitchenettes!"

Questions were also raised about the appropriate number of women's restrooms for the facility. Although the architects' plans complied with existing Air Force guidelines, the regulations themselves were outdated and failed to take into account the Air Force's growing diversity. The forward-thinking project team concluded that two toilets for women would fall short of meeting the JAG School's future needs. In order to expand the women's restroom, Colonel Rasher directed Lt Col Armstrong to sacrifice space in the building's command section.

In addition to its controversial galleys and progressive lavatories, the new facility also boasted state-of-the art computing capabilities and audio-visual equipment. However, the JAG School's impressive features were by no means confined to its interior. "I made sure the budget had landscaping included," states Lt Col Armstrong. During a design process meeting, he silenced a room filled with architects and engineers by announcing, "There is more to landscaping than planting trees. Foresters plant trees. I want shrubs and bushes planted too." As a result, the JAG School featured a much "greener" footprint than other MILCON projects of the era.

The ambitious plans contained in the Armstrong' Epistle benefitted from the support of several key leaders who were determined to see the proposed JAG School



*Artist's sketch – The Main Corridor*

become a reality. As a result, the effort moved forward at an atypically accelerated pace.

"It is not often that the local Congressman and the Air Force Chief of Staff get together and agree to push a project through the system on a fast track program," said Lt Col Armstrong. "Part of the reason for this high level of support may be because TJAG had located a civilian



*Under Construction 1992-1993*

that was making a very good offer to move the JAG School to their campus, and the local Congressman wanted the school to remain in his District. With their very strong support, everyone who worked on the project knew it was to be handled expeditiously, and it was to be approved." The combined clout of the Chief of Staff, The Judge Advocate General, and Alabama Congressman William L. Dickinson kept potential bureaucratic challenges to a minimum.

Lt Col Armstrong said his only regret on the project was seeing the JAG School miss out on a design award. Because of to the high level of interest in the project, the Air Force Engineer quickly dispatched a design review committee to inspect the still-evolving building plans. The review team identified a design error in the elevation study for the back side of the JAG School, and though it was quickly corrected, Lt Col Armstrong believes the committee's comments ultimately led to the design award going elsewhere.

In reflecting on his work, Lt Col Armstrong is most proud that the JAG School was completed on time and under budget. He retired from the Air Force in September 1992, prior to the May 1993 dedication, but he made several unofficial

site visits to check on the progress of the construction.

"The best thing about this project is...that the JAG School staff and the students who have come through the school have liked the building," said Lt Col Armstrong. The building has allowed students to have a good educational experience."

With the JAG School continuing to expand its operations and broaden its responsibilities as part of JAG Corps 21, the next chapter in the school's history will eventually unfold with the construction of a proposed 38,000 square foot annex to the existing facility. Thanks to the efforts of those involved with the original project, the Judge Advocate General's School can build on a rich past towards a very bright future.



*Mr. Wade Scrogam (B.A., Armstrong Atlantic State University) serves as the JAGC Historian at the Judge Advocate General's School, Maxwell AFB, Alabama. He is the first historian to serve in this position in 15 years.*



# AFJAGS UPDATE



PHOTO BY SENIOR AIRMAN ALEXANDRE MONTES

## KEYSTONE 2009 LEARNING CENTER

The KEYSTONE Leadership Summit took place in Dallas, Texas, 26-30 October 2009. Once again, the JAG Corps' premier conference featured any exciting array of speakers and innovative presentations from senior Government officials, Air Force and JAG Corps senior leaders, as well as private-sector experts on national security and leadership issues. A learning center has been established on CAPSIL to provide JAGC personnel the KEYSTONE experience through high-quality videos and participate in virtual water cooler conversations. Join the discussion!

## DISTANCE LEARNING UPDATE



The Fiscal Year 2010 schedule for JAG School webcasts is available on CAPSIL. With multiple sessions scheduled each month, JAG School webcasts are a great way to enhance your office training program. Upcoming webcasts will cover an diverse topics including paralegal preparation for trials, forensic computer issues, contracting lessons learned in Afghanistan, base-level labor issues, the AFOSI-JA working relationship, and much more! Remember - most live JAG School webcasts offer CLE credit. If you miss a session or want to view a previous webcast, recordings of all sessions are posted on CAPSIL. Visit the Webcast Learning Center on CAPSIL via the link below for more details, and watch each week's Online News Service for announcements about upcoming sessions.

<https://aflsa.jag.af.mil/apps/jade/collaborate/course/category.php?id=198>





**“HIKING IN THE YORKSHIRE DALES”** BY CAPTAIN NICHOLAS MEANZA, USAF  
*Captain Meanza currently serves as the Deputy Staff Judge Advocate, 421st Air Base Group, RAF Menwith Hill, United Kingdom.*

*If you have a unique, funny, or poignant photograph of your travels in the JAG Corps for inclusion in “Where In The World?” please e-mail the editor at [ryan.oakley@maxwell.af.mil](mailto:ryan.oakley@maxwell.af.mil).*



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