Spring 2010 Volume 37, No. 1

# The Reporter

The Judge Advocate General's Corps

***Plus:***

Chastising Pirates

Kelly Who?

The Fate of Cluster Munitions

Platforms for Medical Readiness

## A New Chapter for the JAG Corps Begins

Spring 2010 Volume 37, No. 1

# The Reporter

The Judge Advocate General's Corps

## Features



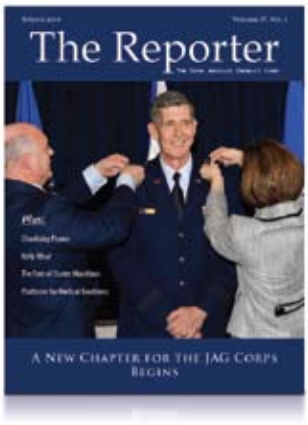
*The 16th Judge Advocate General, Lieutenant General Richard C. Harding, with his wife, Ms. Linda Harding.*

## Departments



## On the Cover

*Vice Chief of Staff of the Air Force General Carrol H. Chandler and Ms. Linda Harding pin-on Lieutenant General Richard C. Harding at his investiture ceremony held on 23 February 2010 at Bolling Air Force Base, D.C.*



# The Reporter

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

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# Message from the Commandant

## Colonel Tonya Hagmaier

Before we turn the page, we should pause and reflect that we stand on the shoulders of giants … They brought us this far in our journey, and what a journey it has been.

Lieutenant General Richard C. Harding
The Judge Advocate General

SPRING IS A TIME OF CHANGE and our JAG Corps is no exception. As our Nation's capital was blanketed by a late winter blizzard, I attended the retirement of Lieutenant General Jack L. Rives, who along with Major General Charles J. Dunlap, Jr. and Chief Master Sergeant Debbie Stocks provided us with a bold, brilliant, and visionary leadership team. In this edition of *The Reporter*, we honor their service over three decades in building a better JAG Corps. Simultaneously, we celebrate a new chapter with the investiture of Lieutenant General Richard C. Harding as our 16th Judge Advocate General, sharing his enthusiasm for an even more promising future.

In that spirit, we are proud to share with you a series of forward-leaning articles on topics across the expansive field of practice areas in the JAG Corps. First, Lieutenant Colonel Theodore Vestal and Colonel Albert Klein, Jr. consider the appropriate instruments of power to challenge the global scourge of piracy, including the use of air power. Next, Major Jeffrey Palomino addresses the lessons learned from the Kelly Flinn case, while Captain Matthew Dunham tackles the controversial issue of cluster munitions. Captain Charles Kels covers the medical community's efforts to balance wartime readiness and peacetime care. Additionally, Major Conrad Huygen analyzes the results of an AFLOA/JAJM study on the use of expert witnesses and consultants, providing excellent practice pointers for base legal offices to follow.

As we turn the page, it is worth reflecting that we indeed stand on the shoulders of giants. In the words of Lieutenant General Harding, "we owe them our thanks and pledge to carry on with the same dedication and excellence they demonstrated."

Tonya Hagmaier

# Point Counterpoint

## *In Response to: Protecting Privileged Communications in the Age of the DOD Notice and Consent Banner, The Reporter, Fall 2009*

*By Mr. Rick Aldrich*

**The Defense-Wide Information Assurance Program** is responsible for responding to inquiries relating to and tracking compliance with the new DOD Banner, which was revised and updated in the wake of *United States v. Long*, 64 M.J. 57 (CAAF 2006). An article in the last issue of *The Reporter* raised several issues concerning the new privileged communications provisions of the banner. We requested an opportunity to respond to the article and provide clarification for practitioners on this important topic.

First, the article asserted, "The new banner requires system administrators to examine data or communications and ascertain whether they are privileged before turning them over to LE/CI [law enforcement/counterintelligence] or personnel misconduct (read CDI) investigators." The banner does not expressly place such a burden on system administrators. This provision was never intended to require *system administrators* to screen data or communications for privilege prior to turning it over to LE or CI personnel. Indeed most system administrators are not trained to recognize privileged communications (other than plain markings to that effect, but those are not determinative). There is also a concern that if system administrators tried to make such determinations they may unnecessarily and perhaps inadvertently impede investigations.

Certainly there is nothing wrong with a system administrator alerting LE or CI personnel that the communications were marked privileged, if he or she happened to note that fact, but system administrators are not required to perform any screening role and there are potential dangers in them assuming such a role. LE/CI personnel do utilize procedures to screen information for privileged materials, and system administrators may support these efforts, but the screening is best performed by personnel who are specifically trained for that task.

The article also stated, "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 [information system] 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."

The mere fact that an e-mail is encrypted provides no reliable indication as to whether the e-mail contains information that may prove useful to a system administrator in his/her role of protecting the system. Even though DOD systems are designed with protections against malware and viruses, and even if all DOD information systems were all properly configured, that would not guarantee a virus-free and/or hacker-free environment. Indeed, increasingly, sophisticated hackers are using encryption to introduce malware or hacker tools to DOD systems and using encryption to exfiltrate valuable or sensitive information.

Finally, the article suggested a list of attorneys, psychotherapists, clergy and their assistants could be provided to the Network Control Center (NCC) and then whenever the NCC wanted to look at one of the e-mails from or to someone on the list they would call the 24th AF legal office for directions. This would impede systems administrators in their ability to protect DOD information systems. For example, if a system administrator needs to review an e-mail for purposes related to securing and protecting the network or system, this important activity is not restricted by the fact that the sender or receiver of the e-mail may fall into one of those categories, nor the potential for the e-mail to contain privileged information (and of course, not all e-mails to or from those persons will contain privileged information). Indeed, the user agreement states,

> 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.

Much careful thought went into the banner's development, to ensure, among other things, it would maximize DOD's legal authority to defend its systems while still protecting privileged communications. It will, nevertheless, continue to be refined and updated as dictated by the dynamic nature of information systems and the evolving nature of technology and the law.

*Rick Aldrich (B.S., U.S. Air Force Academy (1981); J.D., UCLA (1986); LL.M., University of Houston (1999) is currently a Lead Associate with Booz Allen Hamilton, supporting the Assistant Secretary of Defense for Networks and Information Integration/Department of Defense Chief Information Officer and the Defense-wide Information Assurance Program. He previously served as the Deputy Staff Judge Advocate for the Air Force Office of Special Investigations, specializing in the cybercrime portfolio.*

## ***Response from:*** Lt Col Graham Todd, Author, *Protecting Privileged Communications in the Age of the DOD Notice and Consent Banner*

WHILE THE USER AGREEMENT DOES NOT EXPRESSLY STATE that system administrators will determine whether a communication is privileged prior to turning the communication over to investigators, the requirement can be logically inferred from two provisions in the Agreement. The first provision of the memorandum from the DOD Chief Information Officer, on the Standard Consent Banner and User Agreement policy (9 May 2008) states: "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." The second provision states: "Further, the U.S. Government shall take all reasonable measures to protect the content of captured/seized privileged communications and data to ensure they are appropriately protected."

Regardless of whether the drafters "never intended to require *system administrators* to screen data or communications for privilege prior to turning it over to LE or CI personnel," the language of the Agreement and logic necessitate such an inference. First, the Agreement does not provide consent to "investigative searching or monitoring of the content of privileged communications, or work product." Second, "the U.S. Government shall take all reasonable measures to protect the content of captured/seized privileged communications." Thus, if the user has not consented to investigators searching/monitoring their privileged communications, and the U.S. Government will take "all reasonable measures to protect" privileged communications, who is going to "take all reasonable measures" mentioned in the Agreement? It seems logical and appropriate that system administrators are in the best position to screen e-mails and other communications prior to handing them over to investigative personnel.

The fact that system administrators are not currently trained for this responsibility is a key reason why I wrote the article. Until good policy, procedures, and training are in place, my article provided three steps to help protect privileged communications against investigative access prior to a proper review by a team involving network personnel, a judge advocate, and when appropriate, investigative personnel, often referred to as a "taint team." Those steps include marking the subject line and the message body, encrypting the message, and providing a list to the installation network control center of users who are most likely to engage in privileged communications. Right now, users can implement two of the three steps, and installations can begin creating "privileged user lists" as I proposed in my article. Meanwhile, I hope readers will consider the article a catalyst for the development of clear policy and procedures that will ensure privileged communications are truly protected. We owe our clients the best legal roadmap as soon as possible.

## ***Have a different perspective on one of the articles?***

*The Reporter* welcomes diversity of opinion. Send your responses to Maj Ryan Oakley at ryan.oakley@maxwell.af.mil.

# AFJAGS Update

## GATEWAY I TAKES FLIGHT

Thirty-two judge advocates attended the inaugural GATEWAY I leadership course on 11-29 January 2010 at the Judge Advocate General's School. This mid-career course was developed to prepare new JAG majors for the increasingly diverse and complex issues they will face in the next level of their careers. The unique curriculum was based on the recommendations of over 400 survey respondents, including 200 field-grade officers concerning "what majors need to know."

At GATEWAY I, students interacted in small seminar groups led by subject-matter experts on a myriad of front-burner legal issues, with a focus on enhancing leadership, management, and communications skills. Additionally, students had the opportunity to participate in groundbreaking judge advocate-focused wargame called JAGWAR, which was held at the Air Force Wargaming Institute at Maxwell AFB.

The next chapter begins on 9-27 August 2010, with a even bigger and better GATEWAY II. Also be on the lookout GATEWAY III, tentatively scheduled for January 2011. Check the Course Nomination System for further updates.

*The Inaugural GATEWAY I Class*

## 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 diverse topics including voir dire, professional responsibility, cyber law, clemency, appellate updates, 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

## UPCOMING COURSES

| | |
|---|---|
| 14 – 25 Jun | Staff Judge Advocate Course 10-A<br>Law Office Management Course 10-A |
| 22 Jun – 4 Aug | Paralegal Apprentice Course 10-05 |
| 12 Jul – 19 Sep | JASOC 10-C |
| 12 Jul – 24 Aug | Paralegal Craftsman Course 10-03 |
| 9 – 27 Aug | GATEWAY II |
| 10 Aug – 22 Sep | Paralegal Apprentice Course 10-06 |
| 23 – 27 Aug | Environmental Law Course 10-A |
| 13 – 24 Sep | Trial and Defense Advocacy Course 10-B |
| 20 – 24 Sep | Aircraft Accident Investigation Course 10-A |

***Check the Course Nomination System on FLITE for up to the minute schedules and class availability.***

*Background, U.S. Air Force photo by SrA Stephen Reyes*

# A New Chapter

## The Investiture of the 16th Judge Advocate General

*The following is an excerpt of the remarks made by Lieutenant General Richard C. Harding at his investiture ceremony held on 23 February 2010 at Bolling Air Force Base, D.C.*

**This ceremony is more about you than me.** This ceremony signifies change and a new chapter in our history. Before we turn the page, we should pause and reflect that we stand on the shoulders of giants. Those who preceded us and guided us to this point are those giants. They brought us this far in our journey, and what a journey it has been. We owe them our thanks and our pledge to carry on with the same dedication to excellence they demonstrated.

Two weeks ago, while cleaning out my desk in the Office of the AFLOA Commander, I came across an "I LEAD!" tablet. "I LEAD!" tablets are familiar to JAG Corps members. These tablets contain quotes from Air Force JAG Corps members of the past. On top of the tablet was a quote from Major General James Cheney, a former Air Force TJAG. General Cheney passed away in 1998, but his words ring true across a timeless void, and in that sense, he is present with us today. General Cheney's words quoted on the tablet said, "Though the past may inspire us, it is the challenge of the future that must motivate us." General Cheney was right at the time he said those words, and he is right today. While we are proud of our storied past, we are even more excited about our future … and it's our vision of what our future can be that propels us forward.

*Lt Gen Harding addresses the Corps for the first time as TJAG.*

Our future is just over the horizon, always within sight.

As a great leader of our Nation once said, the torch has been passed to a new generation. In a timeless sense, generations of JAG Corps members not yet born are counting on us to carry the torch high and to carry it far. We will not fail to meet the expectations of our fellow Airmen today as well as the expectations of those who will follow us in the future. Greatness is not our birthright, but it can be our destiny. To paraphrase Thomas Paine, "We have it within our power to mold our destiny."

I am certain we will succeed in maintaining excellence in support of the Air Force and achieve an honored place in JAG Corps history, because our beliefs allow for nothing less … And what are our beliefs? We believe in our core values … integrity, service and excellence. We believe in our JAG Corps strengths … our core character competencies, which are drawn from our Air Force core values. They are wisdom, valor, and justice. We believe in wisdom … the belief that you never stop learning your craft and developing your professional skills. No one is too senior to stop learning … me included. We believe in valor … leaning into the wind when you're right and your views on a legal topic are unpopular. We believe in justice … In that regard, we believe that Dr King's letter from the Birmingham jail in 1963

***We believe in wisdom … the belief that you never stop learning your craft and developing your professional skills.***

was spot on when it said, "Injustice anywhere is a threat to justice everywhere."

We believe that we are a nation of law … founded on the principal that no person is above the law, and no person is beneath the law. We believe that when we go to war, we take our national values with us, the uppermost of which is respect for the rule of law.

We believe in each other. We believe that when we face tough challenges, we can count on each other. We believe that when we are reassigned or deployed, our families can count on support from each other. We believe we are Wingmen for Life.

And we believe in our client … the United States Air Force. We believe it is the best on the planet, second to none. We believe that, as a full partner in the joint fight, it protects the Nation with unmatched power and agility.

We believe our values guide, comfort and protect us, no matter what the circumstances. In a few hours from now, JAGs and paralegals will wake up in Bagram, Kandahar, Balad, and Baghdad. They will carry with them wisdom, valor, justice. Those traits will sustain them, guide, comfort and protect them, in the combat environment and when they return home.

If I could pick one time, one place, and one team in the span of the JAG Corps' history to lead, I would pick this time, this place, and this team. The challenge is great; the rewards are many. I am confident you are ready to succeed and will succeed, because you carry values that will allow nothing less. You are the dream team. The big game awaits. And I am so awfully proud to take the field with you!

Gen Stephen Lorenz officiates Lt Gen Rives retirement ceremony

# THE LONG BLUE LINE

## THE 15TH JUDGE ADVOCATE GENERAL REFLECTS UPON RETIREMENT

*The following remarks, which were edited for this publication, were made by Lieutenant General Jack L. Rives at his retirement ceremony at Bolling Air Force Base, D.C., on 5 February 2010.*

THOSE OF US IN THE MILITARY are in service to a grateful Nation. When we travel in uniform, people often approach us just to say "thank you." Many don't know which service we're in or what rank we have, they just want to express appreciation for our service. That of course means a lot. Today, I'm the grateful one: grateful for the opportunity to serve with fellow members of the military and grateful for the experiences I've had.

In the summer of 1970, I tried on an Air Force uniform for the first time as an incoming ROTC cadet. This morning, while I prepared and put on my uniform for the final time, I had a flood of memories: some poignant and some that brought smiles to my face. I thought of those in the room today and countless others who can't be with us.

My thanks begin at home. I would not be here without the inspiration and support of my family. Marie sacrificed a lot to pack up, move

around, and repeatedly start home life anew, all over the world. All my memories begin with her.

There are a lot of things we can't control, such as when or where we're born, and the conditions under which we're raised. My home town of Rockmart, Georgia had about 4,000 people. I was blessed with the best of families. My parents were great role models and I've tried to live my life in the manner they lived theirs.

At the University of Georgia, I joined ROTC. I had no idea the impact that decision would have. I knew I wanted to be a lawyer; after I was commissioned I went to law school on an educational delay, then I entered the Air Force with a four-year commitment. The one thing I knew for certain was that I would serve only four years.

And then the journey began. What a great way to spend 33 years! There is nothing I would rather have done. The places I've been and the things I've done have been extraordinary. I came into the military with a lot of education but with a lot to learn. From the very first day, I helped Airmen with legal assistance issues. I advised commanders on disciplinary matters. I saw the difference judge advocates can make. We're members of two professions: the profession of law and the profession of arms, and we're able to do both the right way.

Through time, I came to appreciate the Air Force core values: Integrity, Service and Excellence. And even before we formally identified them, I learned that members of the JAG Corps live by our guiding principles: Wisdom, Valor and Justice.

People sometimes ask about my favorite assignment. I enjoyed them all. One reason is because judge advocates have such a diverse practice of law. A few years ago, I heard Justice Stephen Breyer of the United States Supreme Court say that the legal profession has three facets: the bar, the bench, and academia. In my career, I served in all three areas.

*Lt Gen Rives with his wife Marie and family*

It's been a special privilege to serve alongside the senior leaders of our sister service JAG Corps during a remarkable time in our Nation's legal history. The primacy of law was under attack, even in this country by some. My colleagues in the JAG Corps stood up for what's right.

***While technology has changed, the truly important things have not. Our values remain constant, and so do our people.***

Much has changed since I entered active duty: the typewriters, rotary dial telephones, and carbon paper we relied on would mystify my grandsons. We mailed letters, and they arrived days later. We used actual books to research the law. Our computer assisted legal research was very basic. But while technology has changed, the truly important things have not. Our values remain constant, and so do our people.

My life in the Air Force has been about people—those I've been privileged to know, to serve, and to serve with. I've had wonderful leaders and mentors. Today is about a long blue line. That line stretches from past generations who built the foundation on which my colleagues and I served, to today's superb junior officers and enlisted personnel. We stood on the shoulders of those who came before us and took as a sacred trust our responsibility to prepare, mentor, and groom those who follow.

That line includes Major General Charlie Dunlap, my Deputy and strong partner for the last four years. He is brilliant, creative, and always engaged. It includes Chief Master Sergeant Deb Stocks, our Senior Paralegal Manager. She is beloved in the paralegal community and has helped us find ways to utilize paralegals more effectively. And the blue line continues with the next Judge Advocate General, Lieutenant General-select Rich Harding; the new Deputy Judge Advocate General, Major General-select Steve Lepper; and our new Senior Paralegal Manager, Chief Master Sergeant John Vassallo. They will lead the JAG Corps with integrity and distinction. I wish them the very best in the years ahead.

Our JAG Corps features a strong partnership between the active force and reserve components. More so than at any time in our history, our active duty, Reserve, and Guard personnel are integrated in a Total Force, serving shoulder to shoulder throughout the world. It takes real commitment and sacrifice to do what our reserve component colleagues do. JAG has been described as "the ultimate team." We all take pride in the accomplishments of fellow members of the JAG Corps. Consider four and half years ago, when Hurricane Katrina blew through the Gulf Coast.

A young JAG major helped prepare fellow members of the Utah Guard to deploy to New Orleans. After several long days, she stood on the tarmac as aircraft took members of her unit to New Orleans. She wrote in an e-mail that it was the proudest moment of her life. To prepare her unit, she had reached out to JAG Corps members all over the country, and they responded. As she watched the last plane depart, she knew that she hadn't done it alone. She wrote of "the incredible team standing invisibly around" her.

Several senior Air Force leaders have observed that JAGs enable all military operations. They note that "if it weren't for the things the lawyers do, we couldn't do the things the Air Force needs to do."

Members of the JAG Corps: I am awed by your service. Daily, you live up to our Mission Statement: "To deliver professional, candid, independent counsel and full-spectrum legal capabilities to command and the warfighter."

In a very real way, you serve on the front lines of our Nation's defense: maintaining our second-to-none military justice system that inspires confidence and fosters the good order and discipline so essential to the mission; representing Airmen in courts; providing legal assistance to servicemembers and families in need; offering sound, ethical advice and guidance to the civilian and military leaders we serve. You have the fortitude to tell commanders "no" when that's the right answer.

You have put your own lives at risk to help rebuild the rule of law abroad. In so many ways and in so many places around the world, you have played a key role to ensure the advance of freedom and democracy, grounded in the rule of law.

You've shown that where the JAG Corps is needed is where we will go, doing whatever it takes. You never say, "That problem is too hard" or "No, you can't do that" and simply walk away. You never complain, "That place is too far away or too dangerous, or the hour is too inconvenient." The challenges facing the Air Force have been your challenges, and you do not rest until you exhaust your imagination and energy to find legitimate ways to support the mission.

You've "been there" whenever and wherever you're needed, from the flight lines in Nevada to the mountains of Afghanistan; from the courtrooms at CONUS bases to the corridors of the Pentagon, from Hickam to Langley, from Beale to Baghdad, from Cuba to Kabul, and everywhere in between. All of you have played a part, and I am immensely proud of you. As Douglas MacArthur observed, you are always on parade. You lead by example. You've answered the biblical call of "Who would be sent?" with a resounding: "Send me!"

When I was in Kuwait 10 years ago, I visited their Prisoner of War and Missing in Action Museum. The curator of the museum was a young

*"We stood on the shoulders of those who came before us and took as a sacred trust our responsibility to prepare, mentor, and groom those who follow."*

man who had studied in the United States for five years. He went home to visit his family in July of 1990. Within weeks, Iraqi troops invaded Kuwait. For six months, he lived in fear. He saw horrible things. After the war, he dedicated himself to remembering the people who had suffered the most. He took me on a tour of the Museum, and when we finished he looked me in the eyes and said, "Thank you." His thanks were not directed to me personally, but to me as a representative. He said that because the American military was in Kuwait, he had peace of mind and could go about his daily activities, knowing his family was safe.

I spoke earlier of things we cannot control. But we all have choices we can make. For the important things in life, we can choose what to do and how to do it.

Four years ago, I took a solemn oath. I swore that I would "support and defend the Constitution of the United States," and that I would "well and faithfully discharge" my duties as the Judge Advocate General of the United States Air Force. I hope the record will reflect that I always tried to do my best, to do what's right, and to treat everyone with dignity and respect.

It has been a privilege and an honor to have served with you. Although the privilege ends today, the honor will remain for the rest of my life. I look forward to learning of your future successes and the important things you're doing for the Nation.

It's been said that once you put on the uniform of your country, you can never really take it off. Soon, I will hang up this uniform for the last time and put it in the back of my closet. But in the ways that really matter, this JAG badge will be where it's been for the past 33 years: right here, over my heart.

Marie and I wish each of you and your families the very best that life has to offer. Thank you so much for being with us.

# A WONDERFUL LIFE

THE RETIREMENT OF MAJOR GENERAL CHARLES J. DUNLAP, JR.—THE DEPUTY JUDGE ADVOCATE GENERAL

Gen Carrol H. Chandler, the Vice Chief of Staff of The Air Force, congratulates Maj Gen Dunlap.

*The following remarks, which were edited for this publication, were made by Major General Dunlap at his retirement ceremony at Bolling Air Force Base, D.C., on 19 February 2010.*

In preparing for these remarks, I asked one of our bright young captains, Captain Nina Padalino, what she thought company grade officers would be interested in hearing from me. She replied they would like to have some advice on whether or not make the Air Force JAG Corps a career, and what circumstances helped me make my decision. She continued they would like to know what I learned when I was a company grade officer that helped in my career and, finally, is there anything that I would have liked to have known back then.

Let me try to tackle just a few of those. I'm not one of those people who come to something like this and say, "I have no regrets." I have lots of regrets in life. I think anybody that doesn't have regrets probably isn't thinking hard enough about it. But, I don't regret the decision to continue to serve in the Air Force. Why is that? *The people*.

What about the people? My theory is you tend to like people who are happy and the key to happiness is serving others; and that's essentially what servicemen and servicewomen do in the Armed Forces. So being around people who are mostly happy, motivated, and working towards a common goal, is actually a good place to be. In addition, because service in uniform may require the ultimate sacrifice, it creates a special kind of mindset. It's one where principles mean something. In the JAG Corps, ours are: Wisdom,

Valor and Justice; and most of our people really to live up to that. It's great to be around people who have values *and who stand up for them*.

Over the years, I have been privileged to have been mentored by a great number of genuinely stand up people. But, let me talk about some experiences I had as a company grade officer with one of those people. One of my first SJAs was a lieutenant colonel everyone knew as "Mean Henry Green." He's quite a legend in the JAG Corps. He was and is a colorful character and deserved his "Mean Henry" title. There are a million Henry Green stories and, although some of his techniques would be out of place today, I did learn a lot from him as a company grade officer.

Let me give you a couple examples. Like a lot of young JAGs, I got into the bad habit of running into his office to get a quick and easy answer (for me anyway!) to some military justice questions. I think he realized I was getting sloppy and lazy and decided he was going to put an end to it.

So, one day, when I went into his office, I barely got my question out, when I looked up to realize, too late, that "Mean Henry Green's" Manual for Courts-Martial was sailing directly towards my head. And this wasn't the nice skull-friendly paperback version. This was heavy bound version of the manual. Just before it impacted, I remember him saying to me, and I'm leaving out a few of the words, "Dunlap, read this damn book! There is a dangerous amount of information in there." I did, and it made all the difference.

He was teaching me that the tedious process of self-education and self-reliance was essential to success. But don't think that he left any of the young captains adrift. He truly cared. He spent untold hours one-on-one and in groups, teaching us, not just about the practice of law, *but about how to be an officer.* He insisted that the young captains learn everything about the Air Force. He made us understand we were part of a larger team; the Air Force and the Armed Forces of the United States.

He was a voracious reader of history. And let me tell you, in the course of my career, if there's one thing that's made a difference, it's the fact that I like to read. I've read everything I can about military history, the Air Force, strategy, and the other services. So I simply can't emphasize how important that lesson was for me and my career.

Let me tell you about another example that stayed with me all these years. I remember one time when we actually recommended dismissal of charges against some Airman because of insufficient evidence. We were a very prosecutorial-oriented office, so this was a very unusual circumstance.

The recommendation enraged the accused's commander, who was this gigantic full colonel. He got Lieutenant Colonel Green in the parking lot after work and read him the riot act. He told Colonel Green, "your career is over, you're done, you're finished, get out of here." I'm leaving out some words there. This was an era where young captains were not exposed to that kind of spectacle from senior officers. So, it was really unusual.

I can clearly remember Lieutenant Colonel Green standing there holding his ground telling him, "Colonel, you can do whatever you want, but I'm not changing my mind." It was really quite something to see. And afterwards, when I talked to "Mean Henry" later, he told me simply that that's we do as judge advocates. We tell people what they need to hear, not just what they might want to hear. He taught me earlier on about the importance of speaking truth to power.

In the years since that event, I've found that speaking truth to power can sometimes come at personal costs. But, I've always thought of "Mean Henry Green's" example. As the Reverend Billy Graham once said, "Courage is contagious when brave men take a stand. The spines of others are stiffened." "Mean Henry" stiffened my spine on more than one occasion ….

Getting back to Captain Padalino's questions, there's more to why I stayed. It was the opportunity for adventure. It was wonderful to be a young single captain traveling around Asia and Europe. I'm not going to tell you any stories from those travels. (My wife is here!). There is one more story that I will relay. Although it isn't from my company grade days, it may illustrate how military service can create memories that really are almost impossible to obtain otherwise.

***Having a "life" means having the opportunity to serve. It is challenging yourself over and over again. It is to have adventure after adventure.***

I can well remember my first deployment for Operation PROVIDE RELIEF/RESTORE HOPE. It was during Christmas, and most of the headquarters element to which I was assigned were Marines. The operation was an urgent one. There were thousands of people dying as a result of a civil war; the sheer chaos of a violent, imploding country dominated by squabbling warlords. A drought had destroyed crops. I saw some terrible things during that deployment and even just thinking about the smell of rotting bodies makes me gag.

But, Christmas was a respite from what we were seeing in Somalia. The Kenyan priest said Mass in a tent on our little compound. His accent was strong, but his energy really communicated. There was a Christmas party. Despite the 90 degree heat, someone dressed up in a Santa outfit and asked what we wanted for Christmas. Well, don't ask a bunch of people deployed what they want for Christmas. Everybody wants to go home! But it was a lot of fun.

The most memorable part was Christmas dinner. It was set up outside under a dazzling, clear, African night. Believe me, in that part of Africa, there isn't much competition for the stars by artificial light. Our African food contractors often served us gazelle and other kinds of weird food, but, for that particular night, the menu they came up with was Italian food. At the dinner, kind of ironically, some Germans joined us. They were deployed with us for that operation. In fact, it was the first time they had served in Africa since Rommel was there.

Somebody arranged to have an African band to play. They knew a lot of African music, which was interesting, but not exactly seasonal for most of us. In fact, the repertoire of U.S. tunes seemed to be nonexistent until, that is, they got to the very last one. Completely unexpectedly, they started playing one piece of music familiar to all Americans: *Amazing Grace*.

It struck me then, and it still strikes me now, what a wonderful life the military can be. There I was a Philadelphia lawyer, in Africa, eating Italian food with a bunch of Marines and some Germans, listening to Amazing Grace—and all outside under a spectacular Christmas night sky. What an adventure!!!

Life can be strange. When I first put on the Air Force uniform in 1970, I never envisioned myself ending up where I was that day in Africa or in the years to come. I treasure those memories. I have always believed that serving in the military is not just a living, it's having a life. There is a difference. It's a life, when you look back on it, that means something.

So, I guess the best answer to the question young Captain Padalino posed to me about why stayed in is to pose a question back. When you're going to be, as I will be on my next birthday, 60 years old, what do you want to look back on? And as for me, I can't speak for anyone else, but having a "life" means having the opportunity to serve. It is challenging yourself over and over again. It is to have adventure after adventure. And it's to have the privilege to meet and work with people who are so terrific and wonderful.

So, Captain Padalino's final question was: Is there anything that I wish I had known then that I know now? Well, there is. I wish I knew that I was going to meet my wife, Joy. Knowing I would meet her would have made my social life a lot easier. It would have taken a lot of stress out of being a young captain!

In closing, let me just say, it's been a wonderful life. It's been a wonderful life because of many of the people who are here. You have made our life a wonderful life. We hope, in the future, we will be able to continue our relationships with you because Joy and I have nothing but good feelings about our Air Force career. We are really looking forward to the next phase of our lives.

Still, the shadows are lengthening for us. We hope to continue to try, as we always have tried, to do our duty as God gives us the light to see thy duty. Thank you so much.

# *The Finest* Professionals

During her tenure as the senior paralegal manager to TJAG, Chief Master Sergeant Debbie Stocks spearheaded the Utilization and Training Workshop which led to major career field improvements, to include the implementation of electronic training records career-field wide and vastly improved training and education of the entire paralegal force. A true visionary, she conducted the first-ever Paralegal Utilization Horizons session which provided valuable feedback for the future of the paralegal career field. Chief Stocks' exemplary foresight to see attorneys and paralegals working side-by-side in all areas of the law, led to full integration of training between judge advocates and paralegals at the Judge Advocate General's School. This vision led to the successful utilization of paralegals worldwide and has forever changed the contributions to the Judge Advocate General Corps' mission the enlisted force has offered and will continue to offer for generations to come. Chief Stocks has left a legacy as she moves on to the next phase of her life; here is an excerpt of her retirement remarks.

*Each and every paralegal has the ability to take on more challenging roles and responsibilities.*

*The following remarks, which were edited for this publication, were made by Chief Stocks at her retirement ceremony on 12 February 2010 at the Women In Military Service for America Memorial in Washington, D.C.*

**FROM MY FIRST DAYS ON THE FLIGHT LINE** at Nellis Air Force Base to today at the Pentagon, I still find myself in awe of the opportunities I have been given and the fact that I get paid to do this!

I have been blessed to work with the finest professionals on the face of this earth, and along the way, I've made lifelong friends. That's really what it's all about. It's not about the work that we do—although it is important—it really is about the relationships we build over the years.

As we talk about taking care of Airmen, I would ask each and every one of you to think about the Airman behind the uniform on both sides—both you and them. Never get so caught up in your rank or position that you lose sight of the fact that we are all in this together and we need each other. Get out from behind your desk and computer and talk to people. Get to know what makes your peers, subordinates and superiors tick. You'll be amazed at what you'll learn—not only about them, but about yourself.

Looking back, of course, you only remember the good things. But honestly, I think I can count the number of "bad" things I've experienced on two hands. For the most part, the tough experiences make us stronger because they truly test our mettle. And somehow, you can always find something good, even from the bad days. As I look ahead, I see great things for the JAG Corps and especially, our paralegals. We have been struggling for as long as I can remember to find our niche in the Corps. I've said it before and will continue to say it—the future is in our own hands. Each and every paralegal has the ability to take on more challenging roles and responsibilities. I am beyond excited when I see our newest JAGs and paralegals working together. Continue to move forward!

It has been an awesome ride, and I thank you for letting me be your Chief!

*Chief Stocks salutes Major General Dunlap after receiving the Legion of Merit.*

# Chastising Pirates

## An Operations Law Challenge

*Members of Combined Task Force 151 (CTF 151) head back after disabling a suspected pirate skiff*
*U.S. Navy photo by Petty Officer First Class Cassandra Thompson*

*By Lieutenant Colonel Theodore Vestal, USAFR & Colonel Albert Klein, USAF*

On 11 April 2009, snipers from U.S. special forces aboard the U.S.S. Bainbridge[1] terminated the seizure of a U.S.-flagged commercial vessel *MV Maersk Alabama* by killing three Somali pirates and capturing a fourth.[2] Even with its successful resolution, the incident serves as a stark reminder of the global security threat posed by modern-day piracy—most noticeably in the waters off the Horn of Africa and the Straits of Malacca, but also across West Africa, India, the South China Sea, and the Caribbean.

### THE THREAT ON THE HIGH SEAS

Pirates naturally operate in waters with large coastal areas and small national police or naval forces, with high levels of commercial shipping, and weak regional or collective security. These environments facilitating piracy further enable other maritime threats including terrorism, smuggling of arms and drugs, illegal fishing, dumping of toxic and other wastes, and human trafficking. Outflows of refugees and immigrants escaping dire economic and security situations increase the potential for conflict in these areas. Nor are Western powers immune from acts of piracy and other criminal endeavors on the high seas. In August 2009, the freighter *Arctic Sea* vanished for two weeks after being hijacked off the Swedish coast (or possibly in the English Channel), only to reappear off west Africa, thousands of miles from its intended destination of Algeria. Russian forces retook the ship after the band of pirates from the Baltic region and Russia threatened to kill the crew and sink the vessel.

Mysterious circumstances still surround the hijacking, including the lack of a distress call, a demand for ransom, and action by Russian military forces, which fueled speculation that the *Arctic Sea* was carrying nuclear material or weapons rather than its stated cargo of lumber.[3] The event highlights the potential for piracy to evolve into a means to acquire or employ weapons of mass destruction.

Most vessels under attack have less than 15 to 30 minutes between the first sighting of the pirates and their boarding of the ship and taking of hostages.[4] Naval combatant ships can steam at speeds of up to 30 knots (speeds of 20+ knots might

[1] In an ironic twist, this ship is named after Commodore William Bainbridge, a veteran of the Barbary pirate campaigns.

[2] The Discovery Channel produced a documentary of the event entitled *Somali Pirate Takedown: The Real Story*, including actual film footage, interviews with crew members, and detailed graphics, *available at* http://military.discovery. com/pirates/pirates.html.

[3] Lynn Berry, *Ship location kept quiet to protect hijacked crew*, Associated Press, 18 Aug. 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/08/18/AR2009081800407.html.

[4] Congressional Research Service, *Report for Congress: Piracy Off the Horn of Africa*, at 8 (Apr. 24, 2009), *available at* http://www.fas.org/sgp/crs/row/R40528.pdf.

be more likely), so unless a naval ship happens to be a few miles away when a commercial ship comes under attack, it won't arrive until after (perhaps long after) the 15 to 30 minute window has come and gone. The large area of water to be patrolled by the relatively small number of naval ships available means that the closest naval ship is often too far distant to arrive within that timeframe.

Piracy based in Somalia exemplifies this challenging environment. Several groups of sophisticated pirates operate in Somali waters according to reports from the United Nations Secretary General and his Special Representative for Somalia. Organized predominately along clan lines and based in distinct and separate port towns along the lengthy Somalia coastline, the pirate groups have varying capabilities and patterns of operation, making generalized responses difficult. The Secretary General warns that some of the pirate groups now rival established Somalia authorities in terms of military capabilities and resource bases.[5] The range of Somali based pirates extends through the Gulf of Aden and deep into the Indian Ocean resulting in an operating area covering over a million square miles. Pirates in Southeast Asia range throughout the archipelagos of Indonesia, Malaysia, the Philippines, and beyond.

## THE LEGAL FRAMEWORK

The United States has enjoyed a long and colorful history employing military power against piracy—most famously in the war against the Barbary pirates on "the shores of Tripoli" memorialized in the Marine Corps hymn. Further, the U.S. Constitution provides legal authority to "punish" pirates. Article 1, Section 8 of the Constitution gives Congress "the Power … To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." A little-known yet significant Presidential order directing U.S. Naval and Marine forces in 1832 to "inflict chastisement" on pirates operating in the Straits of Malacca resulted in the destruction of four pirate forts guarding the town of Kuala Batu (then known as Quallah Batoo). The town itself was reduced to ashes.[6]

Present-day U.N. Security Counsel Resolutions (numbers 1816, 1838, 1846, and 1851) issued in 2008 facilitate an international response to piracy off the Somalia cost. Resolution 1851 authorizes international naval forces to engage in anti-piracy operations in Somali territorial waters and ashore. In January 2009, a multilateral Contact Group[7] on Piracy off the Coast of Somalia was established to coordinate anti-piracy efforts.[8]

Resolution 1816 (June 2008) authorized states cooperating with the Somalia Transitional Federal Government (TFG) to "enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea." The initial Resolution lasted only six months, but Resolution 1838 (October 2008) called on states with military capacities in the region to contribute to anti-piracy efforts, and the authorization established in Resolution 1816 was extended for another twelve months by Resolution 1846 (December 2008).

Resolution 1851 expanded this authorization to "undertake all necessary measures that are appropriate 'in Somalia' for the purpose of suppressing acts of piracy and armed robbery at sea."[9] Based on Resolution 1851, the Bush administration led the formation of a federation of twenty-four member governments and five regional and international organizations with the goals of sharing investigative and surveillance information and strengthening the legal framework to prosecute pirates.[10]

[5] The Secretary-General, *Report of the Secretary-General pursuant to Security Council Resolution 1846* (2008), S/2009/146 (Mar. 16, 2009); and International Expert Group on Piracy off the Somali Coast, *Final Report: Workshop commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah* (Nov. 10-12, 2008).

[6] M. Almy Aldrich, History of the United States Marine Corps 68 (1875), *available at* http://openlibrary.org/b/OL7164354M/History_of_the_United_States_marine_corps ….

[7] The US Department of State Official Blog defines a Contact Group as a kind of diplomatic "pick-up" team—28 countries and six international organizations (the African Union, the Arab League, the European Union, the International Maritime Organization, NATO, and the UN Secretariat) who have created an informal forum to share information and coordinate efforts against piracy. The Contact Group gives countries a new way to come together to creatively use what Secretary Clinton calls "smart power" to coordinate a broad range of diplomatic and security efforts to confront piracy in the short to medium term, while parallel international development initiatives to bring stability to Somalia continue in other multilateral bodies, such as the United Nations International Contact Group on Somalia, *available at* http://blogs.state.gov/index.php/entries/counter-piracy_contact_group/.

[8] *Piracy Off the Horn of Africa*, *supra* note 4, at 19.

[9] *Id.*

[10] *Id*. at 16.

## REGIONAL EFFORTS

A number of efforts intended to track and reduce the effects of piracy have been implemented in recent years. The "Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia" (ReCAAP), went into force on 4 September 2006. The nations that have signed on for ReCAAP include Cambodia, Japan, Laos, Singapore, Thailand, Philippines, Burma, South Korea, Vietnam, India, Sri Lanka, and Brunei.[11] ReCAAP is the first regional government-to-government agreement to combat piracy and armed robbery against ships in Asia. Among the initial steps taken was setting up a permanent multi-nationally-staffed "Information Sharing Centre" (ISC) in Singapore. ReCAAP supplements earlier agreements among Singapore, Malaysia, and Indonesia to combat piracy in the Straits of Malacca (SOM).

Although the U.S. Pacific Fleet had a role in promoting both the SOM and ReCAAP projects as examples of "Regional Maritime Security" consortia, there is no direct American role in the program. But given the constant and widespread presence of the U.S. Navy in the region, there will likely be informal U.S. participation in these anti-piracy programs. Additionally, NATO, the European Union, the International Maritime Organization (IMO), and IMO-sponsored groups have all taken steps to address piracy.[12] In April 2009, NATO reported that alliance warships and helicopters foiled an attack on a Norwegian tanker by Somali pirates in the Gulf of Aden.[13] Unfortunately, a Belgium tanker in the vicinity vanished.

## THE U.S. RESPONSE

Combined Task Force (CTF) 151 was established in January 2009 with the sole mission of conducting anti-piracy operations in the Gulf of Aden and the waters off the Somali coast in the Indian Ocean. That role had previously been filled by CTF 150, which continues to perform counterterrorism and other maritime security operations as it has since 2001. In August 2008, CTF 150 and partner forces agreed to the establishment of a maritime security patrol area (MSPA) in the Gulf of Aden to serve as a dedicated, more secure transit zone for merchant vessels. The MSPA has been credited in part with lowering the success rate of Somali pirates in the Gulf of Aden transit zone.[14] As of March 2009, CTF-151 consisted of personnel and nearly two dozen ships from the United States, United Kingdom, Canada, Denmark, France, Germany, Greece, Italy, Malaysia, Netherlands, Saudi Arabia, Spain, Turkey, and Yemen. Countries expected to participate in the near future include Bahrain, Jordan, Japan, Singapore, South Korea, Sweden, Belgium, and Poland. Three countries, Russia, China, and India, have deployed naval forces to the region to participate in monitoring and anti-piracy escort operations. While these three nations do not formally and fully coordinate their policies with CTF-151, there are ongoing communication efforts to increase cooperation.

## THE USE OF AIR POWER

The legal framework for airstrikes against pirates stems from the U.S. Constitution—to punish piracies—and U.N. Resolution 1851, which contains diplomatically-phrased language to take "all necessary measures." Four specific air power missions are suggested here to address modern piracy.

First is the overlying need for intelligence, surveillance and reconnaissance (ISR) to prepare the battlespace for successive missions. ISR may extend far beyond the battlespace and into, for example, surveillance of businesses or individuals suspected of assisting pirates to select target vessels based on cargo, time of passage, or nationality of flag.

Second is an immediate tactical response to prevent pirates from seizing a vessel or crew. Such armed response requires extremely fast action, as the window of opportunity shuts in approximately 15 to 30 minutes.

Third is a loiter capability used subsequent to pirates seizing a vessel or crew. This mission would include elements of ISR and tactical response, as

[11] RECAAP Press Release, Feb. 27, 2009, *available at* http://www.recaap.org/news/pdf/press/2009/Press%20Release-3GC%20Mtg.pdf.

[12] U.S. Department of State, Office of the Spokesman, *Policy Statement: Contact Group on Piracy Off the Coast of Somalia*, Jan. 14, 2009, *available at* http://www.marad.dot.gov/documents/POLICY_STATEMENT_for_Contact_Group_on_Piracy_off_Coast_of_ Somalia.pdf.

[13] *NATO Ships, Helicopters, Foil Pirate Attack*, CBS News Online, Apr. 19, 2009, *available at* http://www.cbsnews.com/stories/2009/04/19/national/main4954691.shtml.

[14] *Piracy Off the Horn of Africa*, *supra* note 4, at 19.

it will include monitoring of the seized vessel or crew and waiting for the unlikely opportunity to strike back.

Fourth is a preemptive or punitive strike at known pirate cities, ports, vessels, or individuals. Preemptive and punitive strikes may blur into one and the same; for example, intelligence gathered after a seizure may be used to punish those pirates responsible, and at the same time prevent a recurrence from being launched by the same city, port, vessel, or individual.

Helicopters have occasionally exhibited success against pirate attacks. In May 2009, a Korean navy destroyer called *Munmu the Great* launched a helicopter to ward off an attack by Somali pirates against a 74-ton Egyptian-flagged vessel transiting through the troubled Gulf of Aden region. Once airborne, the Korean aircraft joined with a U.S. helicopter and used gunfire to turn the pirates away. Although this is the first time a Korean helicopter has reportedly teamed with a U.S. helicopter to thwart an assault against a ship at sea, it is the fourth time assets of the Korean navy have engaged pirates. The previous times were in defense of vessels registered in Denmark, Panama, and North Korea.[15]

## LAW OF ARMED CONFLICT (LOAC) ISSUES

Careful crafting of any operation order for the use of military power or rules of engagement (ROE) will be necessary to avoid potential LOAC violations. As Vice Admiral Kevin J. Cosgriff (Ret.), the former Chief of Naval Forces in U.S. Central Command noted in a speech to the Middle East Institute, one of the most difficult issues will be that of identification and differentiation of pirates. Positive identification (PID) of targets is of paramount importance because there is a minimal chance of identifying a pirate as a pirate unless the individual is caught red-handed in the act of seizing a vessel or crew. As *The Economist* magazine noted, "Just owning piratical kit [equipment or gear] may not be enough."[16]

[15] *Korean/U.S. Helicopters Ward Off Pirates*, Aviation Today, May 15, 2009, *available at* http://www.aviationtoday.com/rw/topstories/KoreanU-S-Helicopters-Ward-Off-Pirates_32133.html.

[16] *Piracy: Wrong signals. Confusing laws hamper international naval efforts to fight piracy*, May 7, 2009, The Economist, *available at* http://www.economist.com/world/international/displaystory.cfm?story_id=13610785&fsrc=rss 85.

*DOD photo by Mass Communication Specialist First Class Eric L. Beauregard, U.S. Navy*

PID reiterates the law of war obligation to discriminate between combatants and non-combatants. This works well when the enemy complies with the law of war by wearing fixed insignia recognizable at a distance. It is rarely possible when fighting civilian-belligerents.

Counterinsurgency force employment decisions are almost always based on conduct, even when mission-specific ROE declare the enemy insurgent, terrorist, or guerrilla group hostile.[17] The same positive identification requirement will be applicable to antipiracy endeavors, made all the more necessary by the vastness of the world's oceans and legitimate human activity occurring on those oceans.

Lacking PID, costly mistakes are sure to occur. In a tragic case of mistaken identity, forces of the Indian navy attacked what it thought was a pirate mother ship, only to discover afterwards that the targeted ship was an innocent Thai commercial trawler.[18]

## UNINTENDED CONSEQUENCES

Commanders and their planners must take into consideration the extent of unintended indirect civilian destruction and probable casualties that will result from a direct attack on a military objective and, to the extent consistent with military necessity, seek to avoid or minimize civilian casualties and destruction. Anticipated civilian losses must be proportionate to the military advantages sought.

Legal, intelligence, and operations personnel play a critical role in determining the propriety of

[17] Commander Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, Army Law., July 2007.

[18] *Piracy Off the Horn of Africa*, *supra* note 4, at 9.

***Heavy-handed policies could have the unintended consequence of driving pirates into the arms of terrorists.***

*U.S. Navy photo by Petty Officer First Class Cassandra Thompson*

a target and the choice of weapon to be used under the circumstances known to the commander when planning an attack. This, then, is what is known as collateral damage in the physical or traditional sense—the killing of innocents and the destruction of non-military property. But a new form of collateral damage or unintended consequences may arise as piracy evolves.

So far, any link between piracy and terrorists appears weak. However, heavy-handed policies could have the unintended consequence of driving pirates into the arms of terrorists. Likewise, because many nations have a vested interest when a ship is hijacked it is often unclear who should prosecute captured pirates. The inability of Somalia to prosecute its own pirates creates numerous legal complications for the outside states that are conducting antipiracy patrols in the Gulf of Aden.[19] Whether a specific country can prosecute pirates will depend on its own laws, where pirates are found, the nationality of the arresting ship, the nationality of the arrested pirates, and circumstances in which they are arrested. "There is a different response available in almost every case," according to Rear Admiral Philip Jones, who heads the European Union's piracy task force.[20] Some nations have released captured pirates back into Somalia because they could not find an appropriate international venue to prosecute or lacked sufficient evidence to meet a certain country's legal standards.[21]

Clearly the best long-term strategy for combating piracy is a capable coast guard force (who can act both inside and outside a country's territorial waters and has the legal authority to search and detain forces … where most military ships and crews do not have that authority nor the skill set to achieve this mission). As a recent article from the Council of Foreign Relations points out, "Experts unanimously stress that the only effective long-term piracy deterrent is a stable state. When Somalia was briefly under the control of the Islamic Courts Union in 2006, piracy stopped completely."[22]

Heavy-handed policies may further alienate an entire population considering whether to harbor pirates and make that population the friend of our enemy. Alliances are formed for various reasons, but a common theme among tribal entities appears to be, "[t]he enemy of my enemy is my friend." Accordingly, it would be no surprise for pirates and terrorists to join forces against a common enemy. Additionally, as the *Wall Street Journal* noted, military intervention could also have economic repercussions on the shipping industry.[23]

[19] Stepanie Hansen, *Combating Maritime Piracy*, Council on Foreign Relations, Jan. 7, 2010, *available at* http://www.cfr.org/publication/18376

[20] Oliver Hawkings, *What to do with a captured pirate*, BBC News, Mar. 10, 2009, *available at* http://news.bbc.co.uk/2/hi/7932205.stm

[21] *Id.*

[22] Hansen, *supra* note 19.

[23] Chip Cummins, John W. Miller, and Sarah Childress, *Rescue at Sea Sparks Calls for Firepower: Shipping Groups Applaud Military Action; Obama Says U.S. Will Work With Allies to Fight Piracy*, Wall St. J., Apr. 14, 2009, *available at* http://online.wsj.com/article/SB123962637556913367.html.

Insurance rates are already higher due to piracy attacks and could further escalate based on the possibility of lethal firefights between pirates and navies. Companies may also choose longer, more expensive routes to avoid piracy hot spots.

## RETALIATION AND ESCALATION

The use of force against Somali pirates has raised the prospect that revenge may become a motivating factor for pirates whose associates are killed or captured. For example, the 14 April 2009 attack on the U.S.-flagged *MV Liberty Sun* allegedly was undertaken with the intent of damaging or sinking the vessel and capturing or killing the crew in retaliation for the pirate deaths suffered at the hands of U.S. snipers on the Bainbridge.[24] The world may see a change in a force of what was essentially (dis)organized crime into a fighting force targeting Americans. Nevertheless, groups such as the Council of American Master Mariners are calling for more military action, not less.[25]

## FINAL TAKEAWAYS

There is no one-size-fits-all solution available to counter piracy. All instruments of national power, including military options, remain on the table. Consequently, close interagency cooperation will be required to develop solutions and resolve issues, as exemplified in the successful rescue of the *Maersk Alabama*. In weighing military action against pirates, commanders must consider their actions in a comprehensive and thorough manner in order to implement intended effects on targets and manage unintended consequences. The complexities and nuances of antipiracy operations

*U.S. Navy photo by Mass Communication Specialist First Class Elizabeth Allen*

also present real challenges for an operations lawyer providing advice on ROE and PID. Judge advocates may be called upon to offer a position that kinetic means are not necessarily the final solution. A solid understanding of a potential target's background is a must, to include a pirate's operating location and surrounding tribes or clans, their harboring population(s), potential allies and enemies, and their ability to obtain and use insider information about ships' cargo, route, and sailing times.

The potential results of any proposed military action should be projected outward to a reasonable degree of extension beyond kinetic effects. This requires commanders and their legal advisors to question whether a potential military response will likely result in further challenges to the operations theater, not fewer. Just as the United States has been chastising piracy since the battles along the shores of Tripoli, long range solutions should be sought instead of short-term fixes that ultimately fail to secure the high seas.

[24] *Piracy Off the Horn of Africa*, *supra* note 4.

[25] *Rescue at Sea Sparks Calls for Firepower*, *supra* note 23.


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# Kelly Who?

## Refreshing the JAG Recollection on the Media, the Air Force, and the First Court-Martial of Public Opinion

*by Major Jeffrey G. Palomino, USAF*

On 21 May 1997 Air Force Chief of Staff General Ronald R. Fogelman testified before the Defense Subcommittee of the Senate Armed Services Committee. A tough, no-nonsense fighter pilot, General Fogelman had become the Chief three years earlier with the charge to restore accountability to an Air Force that had lost sight of its core values.[1] The scheduled testimony was the budget and the impact to the Air Force of the recently published Quadrennial Defense Review.[2] When the time came for Senator Tom Harkin (D-Iowa) questions the hearing took a decided turn. Senator Harkin didn't ask about the F-22, the Joint Strike Fighter, or base realignment and closure, but about a court-martial at Minot Air Force Base, North Dakota. He wanted to know about the Kelly Flinn case. With a basis of knowledge admittedly informed by media coverage, Senator Harkin expressed indignation: "General, how many attorneys do you have in the Air Force running around trying to find out how many people are committing adultery?"[3]

### BACKGROUND

The case against First Lieutenant Kelly Flinn formally began with preferral of four charges on 28 January 1997.[4] What was unique about the

[1] Dr. Richard H. Kohn, ed., *The Early Retirement of Gen Ronald R. Fogelman, Chief of Staff, United States Air Force*, Aerospace Power J., Spring 2001, at 10. General Fogelman's full comments were as follows: "When I became the chief, I received a number of letters from people like you who essentially said that they thought the chief needed to restore the soul of the Air Force. That caught me somewhat by surprise because I was not sure exactly what the soul of the Air Force was, or what was required to fix it. But my conclusion was that somehow we had found ourselves, or allowed ourselves, through a series of decisions and actions, to lose sight of our values. The trouble came not from some overriding set of principles, but more from employing situational ethics (i.e., cronyism and other things) that made it seem as though the institution lacked integrity. So in the back of my mind, there seemed to be a necessity, or charge if you will, to work this issue on my watch." *Id*. Notably, he gave this comment after his resignation and in response to Dr. Kohn's question, "General Fogelman, why did you decide to ask for early retirement?" *Id*.

[2] *Hearing of the Defense Subcommittee of the Senate Armed Services Committee, FY 98 Defense Appropriations*, 105th Cong., 1st Sess., 1 (1997) [hereinafter Hearing].

[3] *Id*. at 25.

[4] Colonel Jack L. Rives, *The Case Against Lieutenant Kelly Flinn*, The Reporter, Dec. 1997, at 6. The charges were fraternization (i.e., Flinn had a sexual relationship with a single enlisted man), adultery with an enlisted airman's husband, false official statement, and violation of her commander's no-contact order. Most would agree that the charges were hardly unique to the military justice system, nor are they unique now. Interview with Lieutenant General (Retired) Jack L. Rives, Former Judge Advocate General of the Air Force (16 Mar. 2010) [hereinafter Rives Interview].

case and what makes it seminal in Air Force history was the media blitz that followed the charges, paralyzed the Pentagon, and persuaded the Secretary of the Air Force to give Flinn a general, under honorable conditions administrative discharge in lieu of a court-martial.[5] In *United States v. Flinn* the Air Force was "out-flanked" by strategic media campaign that radically shifted public opinion against the Air Force.[6] Flinn's "brilliantly innovative public defense" was the first of its kind in the Air Force.[7] Unfortunately, this landmark case sits outside the corporate memory of most judge advocates.

***The idea was to do a "frontal assault on the Air Force" with the shots coming so fast the "Air Force would not know what hit them."***

The facts of Flinn's case are straightforward. Flinn graduated from the Air Force Academy, finished at the top of her class in B-52 flight training, and appeared in Air Force promotional videos. Assigned to Minot in the fall of 1995, she was the first female B-52 pilot in the Air Force. In June 1996 the Air Force selected her to fly the Secretary of the Air Force Sheila Widnall in a B-52 demonstration flight.[8] That same month Flinn had sex on two occasions with an enlisted man at Minot.[9] In July she began a sexual relationship with Marc Zigo, someone she knew was the husband of an airman basic assigned to Minot. Months later Flinn lied to investigators under oath about the Zigo affair. She later violated her commander's order to have no contact with Zigo.[10]

After preferral and the Article 32 hearing, the Flinn family hired attorney Frank Spinner. A retired Air Force judge advocate, Spinner had achieved notoriety as a civilian attorney for his defense of Aberdeen Proving Grounds drill sergeant Delmar Simpson and Air Force Captain Jim Wang.[11] Spinner started receiving media inquiries before he even traveled to Minot to meet Flinn.[12] His first task was to ask the Eighth Air Force commander to give Flinn an Article 15. Spinner told the commander of the burgeoning media interest. He advised the commander that "no one could predict how it would turn out." This was not a threat, but something Spinner felt the convening authority should consider. The request for nonjudicial punishment was denied, and all charges were referred on 26 February 1997. A few days before referral, the Air Force issued the first press release of the case. Flinn read articles about her adultery in the *St. Louis Post-Dispatch* and saw a similar story on *CNN Headline News*. Although ethically tight, the release contained factual errors which enraged Flinn and motivated the defense.[13]

## THE MEDIA BLITZ

The defense media campaign had one strategic goal: "to posture the case to get a resolution outside of court."[14] To reach this end, the defense worked along three lines of operation. First, the defense decided to arrange media stories to hit around the same time, one to two weeks before the scheduled 20 May 1997 court-martial date. The idea was to do a "frontal assault on the Air Force" with the shots coming so fast the "Air Force would not know what hit them." Spinner knew this timing would render the Air Force unable to respond. Second, the defense wanted to get the story to as many media outlets as possible. Spinner was helped by the fact that the Flinn family was well connected, and an uncle in the family had appeared on *60 Minutes* before. Through this connection the defense contacted the show's producers and arranged Flinn's 11 May 1997 appearance. The defense followed up the *60*

[5] Interview with Brigadier General (Retired) James W. Swanson, General Counsel & Corporate Secretary, Military Officers Association of America (10 Mar. 2010) [hereinafter Swanson Interview].

[6] Rives, *supra* note 4, at 5.

[7] Colonel James W. Swanson, *Military Justice Under Scrutiny: Exploring the Conflict Between Society's Norms and the Military's Needs*, The Reporter, June 1998, at 3.

[8] Kelly Flinn, Proud To Be 152-54 (Random House 1997).

[9] Rives, *supra* note 4, at 5-6.

[10] By this time Flinn was living with Zigo off base, an arrangement that continued for approximately five more weeks after the no contact order. *Id*.

[11] Flinn, *supra* note 8, at 210. Capt Wang was the AWACS crew member acquitted in the Blackhawk shoot down case. *Id*. Notably, each of those clients had appeared on major network news programs. Interview with Mr. Frank Spinner, Defense Counsel, (16 Mar. 2010) [hereinafter Spinner Interview].

[12] Spinner Interview, *supra* note 11.

[13] The factual errors in the Air Force press release related to the charges. According to Flinn, "The charges were all wrong: CNN was saying that I'd had an affair with a married enlisted man." Flinn also took issue with the fact that neither she nor her squadron commander was told of the press release. FLINN, *supra* note 8, at 212.

[14] Spinner Interview, *supra* note 11.

Photo by Bartlomiej Stroinski

***SJAs must aggressively anticipate media interest in military justice cases and other legal issues.***

*Minutes* segment with Monday morning talk show interviews with Flinn family members. The defense surrounded this coverage with sympathetic stories in *The Washington Post, the New York Times*, and *USA Today*. This was "target marketing" of the legislative audience, a liberal demographic, and the business traveler market. Third, the defense reset its own message, which it framed through the adultery charge. The message was Flinn was an innocent victim who had made naïve mistakes of the heart. Now, "this pioneer was being persecuted by an Air Force of old men applying old men's morals on a new generation."[15]

The defense media assault blindsided the Air Force. Although it had media plan for the case, "much of it centered on providing information as the case unfolded judicially."[16] When the case began to unfold outside the courtroom the Air Force clammed up and stiff-armed reporters with "no comment." This "left a news vacuum that the Flinns were only too happy to fill" and the Air Force image took a beating.[17] Later, when the Air Force finally did choose to say something, it badly misstepped.[18] This added to the perception that the Air Force was mistreating Flinn. Ultimately, the defense's plan achieved the desired end state. Lieutenant Flinn's discharge was approved on 22 May 1997.

## LESSONS LEARNED

The *Flinn* case leaves lessons for legal offices today. First, legal offices must aggressively anticipate media interest in military justice cases and other legal issues. This is true even more today than it was in 1997.[19] The media today runs at an accelerated pace.[20] Created by a reliance on the Internet, the surplus of media outlets, and advancement in technology, this frantic pace not only speeds up reporting of the news, but also how quickly the public forms opinions to news.[21]

Added to this mix are social media such as *Twitter, Facebook*, and blogs that effectively leave "no secrets."[22] To operate in this environment, legal offices must identify media-worthy cases early. Key factors to consider include immediacy of the issue, proximity, prominence of the accused, oddity, conflict, suspense, emotional appeal of the case, and sex or scandal.[23] Just imagine the potential impact that a Kelly Flinn blog would have today.

[15] Swanson Interview, supra note 5.

[16] Colonel Jack L. Rives, *Who You Gonna Call? AFPAZ! An Overview of the Air Force Executive Issues Team*, The Reporter, Dec. 1999, at 19.

[17] Tony Capaccio, *The Kelly Flinn Spin Patrol*, Amer. J. Rev. (Sept. 1997), available at http://www.ajr.org/Article.asp?id=2258.

[18] Swanson Interview, *supra* note 5. The best example of this is the official Air Force response given during the *60 Minutes* feature. The person chosen to respond was Col Bob Reed, a judge advocate in charge of the Air Force's military justice division. Unfortunately, the Air Force put so many constraints on Colonel Reed that he ended up looking ill-prepared and evasive in response to the reporter's questions. *Id*.

[19] Colonel Morris D. Davis, *Effective Engagement in the Public Opinion Arena: A Leadership Imperative in the Information Age*, Air & Space Power Chron. Online J., (5 Nov. 2004), available at http://www.airpower.maxwell.af.mil/airchronicles/cc/davis1.html.

[20] Philip Seib, Beyond The Front Lines 12 (Palgrave MacMillan, 2004).

[21] *Id.*

[22] Swanson Interview, *supra* note 5.

[23] U.S. Air Force Public Affairs Center of Excellence, Meeting The Media: A Pocket Guide To Assist Airmen In Communicating With The News Media 15-16 (2008). Most journalists agree these factors are the key elements of "news." Immediacy is defined as something that has just happened or is about to happen. Proximity means the closer to "home" the better. A prominent case

## CREATING A MEDIA PLAN

The second lesson is that legal offices must put together a media plan early that can respond to wrong or misleading information.[24] This should be done parallel to, and with the same emphasis as, trial counsel's preparation of the case. Do not assume that if the Air Force says nothing or does not cooperate that the story will go away.[25] In 2008 lecture at the Air War College, *60 Minutes* correspondent Scott Pelley remarked, "There's an immutable law of the universe, and that is that every *60 Minutes* story is 12 minutes long. If the Air Force, the Army, the Department of Defense won't speak to me and present its side of the story, the story's still going to be 12 minutes long." Certainly, the best position is for legal offices to plan their own information operation early. Pelley added, "The military and journalism are similar in at least one—in many respects—but one of those respects is we're very mission oriented in journalism … and my boss does not want to hear about mission failure. We are not going to fail. We are going to get the story."

## THE JA/PA PARTNERSHIP

A third lesson related to early planning is for legal offices to "get to know Public Affairs (PA) before a crisis happens."[26] PA is specially trained to work with the media, has an extensive knowledge of how the media operates, and can provide media training should comments be requested. A strong relationship also allows legal offices to brief PA on "Military Justice 101." In doing so, legal offices can educate PA on the military justice system, its basic procedures, and its fundamental fairness. This ensures unity of effort when a crisis erupts.

## SMART CHARGING DECISIONS

The final lesson relates to charging. In *Flinn*, most agree that the adultery charge was a "trailer offense."[27] The charge was less serious "both in terms of authorized punishment and also in terms of breach of standards involved."[28] Notably, it was that charge that became "the lightening rod" of the case.[29] "The most visible reaction from the civilian community focused on the adultery charge."[30] All of this begs the question of whether or not it should have been added at all. Here, *Flinn* proves that choosing to charge everything a creative chief of military justice can think of can be fatal. Instead, legal offices should charge only "the gravamen of the offense … what it is that got you angry about the case, and not the extraneous stuff."[31]

## SUMMARY

In conclusion, the *Flinn* case offers a ground breaking view of the strategic use of the media as a tool of advocacy. Before *Flinn*, no Air Force accused had ever made such a strong challenge to the system in the public arena.[32] As a result, many more do today and, correspondingly, the Air Force is now generally better positioned to respond. Ultimately, the Air Force did finally respond well in the *Flinn* case. At that same Senate hearing, General Fogelman offered this superb sound bite: "I think that in the end, this is not an issue of adultery. This is an issue about an officer who was entrusted to fly nuclear weapons, who disobeyed an order, who lied—that's what this is about."[33] To be certain, that was what the Kelly Flinn case was about, but it quickly became lost in the fog of a media war.

involves public figures, elected officials, famous persons. Oddity is something bizarre, unusual or unexpected. A case with conflict involves one with arguments, debates, or situations where there is a winner and loser. A suspenseful case is one when the outcome cannot be foreseen. An emotional case is one where situations that stir up sympathy, anger or other emotions. Finally a case of sex or scandal is almost always newsworthy because in appropriate behavior sells media. *Id*.

[24] Rives Interview, *supra* note 4.

[25] Scott Pelley, Address at the National Security Forum, Air War College (13 May 2008).

[26] Rives Interview, *supra* note 4.

[27] Rives, *supra* note 4, at 6.

[28] *Id*.

[29] Swanson Interview, *supra* note 5.

[30] Kingsley R. Brown, *Military Sex Scandals from Tailhook to the Present: The Cure Can Be Worse Than The Disease*, 14 Duke J. Of Gender. L. & Pol. 749, 773 (2007).

[31] Swanson Interview, *supra* note 5.

[32] Spinner Interview, *supra* note 11.

[33] Hearing, *supra* note 2, at 25.

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# THE FATE of CLUSTER MUNITIONS

By Captain Matthew E. Dunham, USAF

U.S. Air Force photo

Two days after President Obama took the oath of office as the 44th President of the United States, his administration deposited instruments of ratification for three additional protocols to the Convention on Prohibitions or Restriction on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects—also known as the Certain Conventional Weapons (CCW) Convention.[1] Afterwards, the Department of State issued a short press release stating, "The United States took a leading role in negotiating these protocols … [having] long complied with the norms contained in them, and is pleased to become a party to each of them. This action reaffirms our commitment to the development and implementation of international humanitarian law."[2] What is the impact of these new protocols on the United States continued and controversial use of cluster munitions? In the face of global criticism, will U.S. policy remain unchanged, or is a total ban just around the corner?

## THE NEW PROTOCOLS

In recent years significant efforts have been made to develop and strengthen the CCW Convention. New rules have been adopted to extend the application of the CCW to internal conflicts, improve the regulations on landmines, booby traps and explosive remnant of war and prohibit blinding laser weapons. The newly ratified protocols include the Protocol on Prohibitions or Restriction on the Use of Incendiary Weapons (Protocol III),[3] the Protocol on Blinding Laser Weapons (Protocol IV),[4] and the Protocol on Explosive Remnants of War (Protocol V).[5] Specifically, Protocol V on Explosive Remnants of War requires the clearance of UXO (unexploded ordnance), such as unexploded fragments of cluster munitions.

Despite depositing the ratification documents soon after President Obama took office, the new ratifications do not appear politically driven. The protocols have been endorsed by both past Democrat and Republican Presidents. In February 2007, a full two years prior to the ratification, Mr. Jeffrey T. Bergner, Assistant Secretary of State for Legislative Affairs, forwarded the Bush Administration's "treaty priority list" for the 110th Congress.[6] Protocol III, Protocol IV, and Protocol V were included on the list of treaties for which the Bush Administration supported immediate Senate action.

[1] Convention on Prohibitions or Restriction on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137. In addition, the Senate provided its advice and consent and the President ratified an amendment to Article I of the CCW, extending its scope to non-international armed conflicts. *See* 154 Cong. Rec. S9223, 9333 (daily ed. Sept. 23, 2008).

[2] Press Release No. 2009/072, U.S. Dep't of State, U.S. Joins Four Law of War Treaties (Jan. 23, 2009) *available at* http://www.state. gov/r/pa/prs/ps/2009/01/115309.htm.

[3] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, 19 I.L.M. 1524.

[4] Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995, 35 I.L.M. 1218.

[5] Protocol on Explosive Remnants of War (Protocol V), Nov. 28, 2003, U.N. Doc. CCW/MSP/2003/2.

[6] Letter from Jeffrey T. Bergner, Assistant Secretary of State for Legislative Affairs, to The Honorable Joseph R. Biden, Jr., Chairman of the Committee on Foreign Relations, United States Senate 1 (Feb. 7, 2007), *available at* http://www.state.gov/documents/organization/116355.pdf.

## REASONS FOR RATIFICATION

In light of bipartisan support, why was ratification delayed? In testimony before the Senate Committee on Foreign Relations in April 2008, Mr. John B. Bellinger, the U.S. Department of State Legal Advisor, stated that the United States generally takes its time to ratify treaties because "close examination is necessary, and allows us to be sure that the treaties we propose to ratify are in our national interests."[7] Mr. Bellinger then gave four reasons why the time was ripe for the United States to become a party to Protocols III, IV, and V. First, "over time we have seen how these treaties operate and we are confident that they promote U.S. national interests and are consistent with U.S. practice." Second, "ratification would promote U.S. international security interests in vigorously supporting both the rule of law and the appropriate development of international humanitarian law." Third, "when the United States ratifies a treaty, other nations are more likely to ratify as well, with the result that overall implementation of and compliance with these norms will improve over time, which ultimately helps to protect our forces." Finally, ratification enhances United States' leadership in international humanitarian law and will allow us to fully participate in member state meetings and increase our "negotiating leverage and credibility in our work on other law of war treaties."

While valid, the first three reasons do not fully explain the delay in ratification. Presumably, the Clinton and George W. Bush administrations felt sufficient time had passed to evaluate their effects on national interests and United States' practices when they sent them to the Senate in 1997 and 2006. The second and third explanations apply regardless of delay. These arguments would have had greater effect if the protocols were ratified earlier in time. Rather, the final reason given by Mr. Bellinger seems to be the primary purpose for ratification. The United States clearly needs "negotiating leverage and credibility" on the issue of cluster munitions, specifically due to the emergence of the Convention on Cluster Munitions, which bans their use, production, or transfer.

Presently, the United States opposes this treaty, preferring the CCW Convention as the proper framework treaty to regulate, rather than ban, cluster munitions. Advocating for the ratification of Protocol V, Mr. Charles Allen, Deputy General Counsel for International Affairs for the Department of Defense, made the following statement before the Senate Committee on Foreign Relations:

> [T]his year a key element in our effort to deal with the issues posed by cluster munitions is ratification of Protocol V to the Convention on Conventional Weapons (CCW), on explosive remnants of war. ***Our ratifying this Protocol would strengthen U.S. efforts to show that we are serious about dealing with cluster munitions in the CCW framework***. The CCW framework is advantageous to the United States because it balances humanitarian and military interests; ***the alternative to CCW is an effort by some other countries to achieve a ban on the use, production, and transfer of these weapons without recognizing their military utility in some circumstances***.[8]

*U.S. Air Force photo by SSgt Lee O. Tucker*

[7] John B. Bellinger, Testimony before Committee on Foreign Relations, U.S. Senate 11-12 (Apr. 15, 2008), *available at* http://foreign.senate.gov/testimony/2008/BellingerTestimony080415p.pdf [hereinafter Bellinger Testimony]. Notably, Mr. Bellinger stated that the precise wording of the Reservation to Protocol III submitted by the Clinton Administration "continued to undergo military review, in order to ensure that the United States was able to retain its ability to employ incendiaries against high-priority military targets." It is unclear whether the wording in the current Reservation is any different than that originally proposed by the Clinton Administration. Certainly, from President Clinton's transmittal documents to the U.S. Senate, the meaning is the same, and even if tweaked, it seems unrealistic that the precise wording of a 90-word statement would take nearly 12 years to rectify.

[8] Mr. Charles A. Allen, Testimony before Committee on Foreign Relations, U.S. Senate 2 (Apr. 15, 2008), (emphasis added).

## THE CCM

The Convention on Cluster Munitions (CCM), which was adopted in Dublin, Ireland on 30 May 2008, will enter into force on 1 August 2010. The CCM becomes international law on the first day of the sixth month after being ratified by Burkina Faso and Moldova, which were the twenty-ninth and thirtieth nations to ratify the treaty on 16 February 2010.[9] The CCM prohibits state parties from using, developing, producing, acquiring, stockpiling, retaining or transferring cluster munitions under any circumstance.[10] As of February 2010, there are one-hundred and four signatories and thirty state parties to the convention.[11] The United Kingdom and several NATO nations are signatories, but Brazil, China, India, Israel, Pakistan and Russia, nations which have the major stockpiles of cluster munitions, have not signed on to the agreement.

## THE U.S. POSITION

The United States remains opposed to a comprehensive ban on cluster munitions under the CCM, preferring to reach a regulatory agreement via the CCW Convention because according to a DOD Cluster Munitions Policy, "unlike the Oslo process, [it] includes all of the nations that produce and use cluster munitions [including Brazil, China, India, Israel, Pakistan, and Russia], making any agreement reached there much more practically effective."[12]

Moreover, according to the U.S. Department of State, cluster munitions are "legitimate weapons with clear military utility in combat" and the elimination of cluster munitions would put lives of its servicemembers and those of its coalition partners at risk.[13] The United States' position is that "cluster munitions can often result in much less collateral damage than unitary weapons, such as a larger bomb or larger artillery shell would cause, if used for the same mission." Notably, this position is very similar to the position the United States has taken with regard to incendiary weapons, which resulted in the "opt-out" reservation it filed for Protocol III.[14]

***According to the U.S. Department of State, cluster munitions are "legitimate weapons with clear military utility in combat."***

While negotiations continue under the auspices of the CCW Convention, the United States has taken significant steps to regulate its use of cluster munitions. On 19 June 2008, Secretary of Defense Robert Gates issued a Department of Defense policy, eliminating the use of cluster munitions after the year 2018, if the weapon has a greater than 1 percent unexploded ordinance rate.[15] Prior to 2018, any cluster munitions not meeting this standard must be specifically approved by the combatant commander. The policy also prohibited the sale or transfer of cluster munitions not meeting the 1 percent standard. Further, on 11 March 2009, President Obama truncated the timeline on the sale or transfer of cluster munitions to other nations by signing the Omnibus Appropriations Act of 2009 into law, which immediately and permanently banned the export of any cluster munitions if the weapon did not have a 99 percent or higher functioning rate.[16]

[9] Edith M. Lederer, *Cluster Bomb Ban to Enter into Force on Aug. 1*, Wash. Post, Feb. 16, 2010, http://www. washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021605770.html

[10] Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Convention on Cluster Munitions, May 30, 2008, *available at* http://www.clusterconvention.org/downloadablefiles/ccm77_english.pdf.

[11] Human Rights Watch, *Cluster Bomb Ban Reaches Ratification Milestone*, *available at* http://www.hrw.org/en/news/2010/02/16/ cluster-bomb-ban-reaches-ratification-milestone.

[12] News Release No. 577-08, U.S. Dep't of Defense, Cluster Munitions Policy Released (July 9, 2008), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=12049.

[13] Policy Statement, U.S. Dep't of State, Cluster Munitions, *available at* http://www.state.gov/t/pm/wra/ c25930.htm.

[14] That reservation states, "The United States of America, with reference to [Protocol III,] Article 2, paragraphs 2 and 3, reserves the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons…" By filing this reservation, the United States essentially rejected Protocol III, Article 2, paragraph 2, which strictly prohibits the use of incendiary weapons in concentrations of civilians when launched by an air attack. Thus, the United States did not commit itself to any greater restriction under paragraph 2 that did not already apply under the law of armed conflict via the principles of proportionality.

[15] Memorandum from Sec'y of Defense to Sec'ys of the Military Dep'ts, et al., Subject: DOD Policy on Cluster Munitions and Unintended Harm to Civilians (June 19, 2008), *available at* http://www.defense.gov/news/d20080709cmpolicy.pdf.

[16] Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 7056(b), 123 Stat. 524, 895. The law further specifies that the transfer or sale of cluster munitions must specify that the cluster munitions will only be used against clearly defined military targets and will not be used where civilians are known to be present.

*The United States remains opposed to an outright ban on cluster munitions.*

*U.S. Air Force photo by SSgt Matthew Hannen*

## NOT A "MAJOR POLICY SHIFT"

World media and proponents of banning cluster munitions have given attention to President Obama's export prohibition, exclaiming a "major policy shift" by the United States on cluster munitions.[17] However, the Consolidated Appropriations Act of 2008, signed into law by President Bush on 26 December 2007, contained identical language, though it limited the export ban for one year.[18] Also, as noted above, Secretary of Defense Gates, who in June 2008 worked for President Bush, directed an export and use ban as a matter of DOD policy. The DOD policy affects more than 95 percent of current U.S. stockpiles, which consists of more than five million cluster munitions with 700 million sub-munitions, and will cost approximately $2.2 billion to destroy.[19]

Despite reports from some media organizations, the United States remains opposed to an outright ban on cluster munitions, and policy remains focused on regulating cluster munitions within the framework of the CCW Convention by pressing for a new cluster munitions protocol. On 12 November 2009, in his opening statement at the Meeting of the High Contracting Parties to the CCW Convention in Geneva, Switzerland, Mr. Stephen Mathias, Head of the U.S. Delegation focused his remarks on this objective.[20] Recognizing that many nations represented at the meeting had signed the CCM, Mr. Mathias noted:

> [A] comprehensive international response to the humanitarian concerns associated with cluster munitions must include action by those States that are not in a position to become parties to the CCM, because among those States are the States that produce and stockpile the vast majority of the world's cluster munitions … A CCW protocol that imposes meaningful requirements on the countries that hold 90 percent of the world's stockpiles of cluster munitions would be an important step forward from a humanitarian standpoint.[21]

Mr. Mathias emphasized the United States' commitment to achieving a cluster munitions protocol and noted that an existing draft protocol provides a foundation for work towards this goal in 2010.

## FINAL THOUGHTS

Ratification of Protocols III, IV, and V is "a symbol of U.S. application of the rule of law in armed conflict and helps restore U.S. leadership

[17] *See, e.g.*, Peter Beaumont, *Obama Takes U.S. Closer to Total Ban on Cluster Bombs*, GUARDIAN.CO.UK, Mar. 13, 2009; Human Rights Watch, *U.S. Cluster Bombs Exports Banned*, WWW.HRW.ORG, Mar. 12, 2009; Frida Berrigan, *Progress on Cluster Bombs*, FOREIGN POLICY IN FOCUS, Mar. 25, 2009; United Press International, Group to Obama: Ban Cluster Bomb Use, UPI.COM, Mar. 12, 2009.

[18] Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 646(b), 121 Stat. 1844, 2336 (2007).

[19] Opening Statement by Harold Hongju Koh, U.S. Mission to the U.N., Geneva, Third Conference of the High Contracting Parties to Protocol V on Explosive Remnants of War (Nov. 9, 2009), *available at* http://geneva.usmission.gov /2009/11/09/erw/.

[20] At the November 2009 conference, the High Contracting Parties to the CCW Convention convened to consider the report to the Group of Governmental Experts of the States Parties to the Convention on Certain Conventional Weapons (CCW-GGE), which had met two times during 2009 and produced a draft protocol. The CCW Cluster Munitions draft protocol is available at http://www.unog.ch/80256EDD006B8954/(http/Assets)/DFCDA-FA34278B5E5C1257620004D7238/ $file/CLUSTER+MUNITIONS+CHAIR.pdf.

[21] Opening Statement by Mr. Stephen Mathias, Head of U.S. Delegation, Meeting of the High Contracting Parties to the CCW Convention, Geneva (Nov. 12, 2009), *available at* http://geneva.usmission.gov/2009/11/12/openingstatement/.

*U.S. Air Force photo by Harold Fyke*

in the law of war."[22] This is the driving purpose behind the United States ratifying these protocols. No additional restrictions have been placed on the United States' military, especially given the reservation filed with respect to Protocol III that essentially nullifies the driving force of the agreement. Concerning Protocols IV and V, the United States' military has acted in compliance with these agreements since they came into effect. By publicly ratifying the protocols, the United States hopes to increase its international credibility and leverage to facilitate the negotiation of a new international agreement regulating cluster munitions short of an outright ban.

Whether ratification of these protocols is too little, too late is yet to be seen. It is certain, however, that negotiations for a new international treaty within the CCW Convention framework are proceeding. As most NATO nations have already signed the Convention on Cluster Munitions, and as it becomes binding international law for at least thirty nations on 1 August 2010, the negotiation of a regulatory based protocol under the CCW Convention is an uphill battle. Yet as noted by Ambassador Stephen Mull, the Acting Assistant Secretary for Political-Military Affairs for the U.S. Department of State, "unless you get all the major producers and users of these weapons to agree on how they're going to regulate them, the—[sic] you're not going to meet your goal of addressing the humanitarian impact of them."[23] In other words, real humanitarian impact necessarily includes participation by Brazil, China, India, Israel, Pakistan, Russia, and of course, the United States.

[22] *See* Bellinger Testimony, *supra* note 8, at 2.

[23] Stephen D. Mull, On-the-Record Briefing on U.S. Cluster Munition Policy, Wash., D.C. (May 21, 2008), *available at* http://www.america.gov/st/texttrans-english/2008/May/20080522163101eaifas0.8921015.html.

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# PLATFORMS FOR MEDICAL READINESS

*by Captain Charles G. Kels, USAF*

After the first Gulf War, the Government Accountability Office (GAO) was tasked by the House Committee on Armed Services with evaluating the wartime performance and capabilities of the Army,[1] Navy,[2] and Air Force[3] medical components. The results of all three reviews were worrisome, suggesting that the skill deficits identified among medical personnel could have proved catastrophic had Operation Desert Storm achieved the duration and casualty levels that many predicted. In its report on the Air Force, the GAO concluded that the medical and evacuation units provided to U.S. Central Command "would not have been sufficient to handle the large number of predicted casualties." Among the problematic factors identified were a lack of training and currency in appropriate skills, particularly when personnel serving primarily in administrative roles at their permanent stations were rapidly deployed to provide in-theater care.[4]

## BALANCING WARTIME READINESS AND PEACETIME CARE

The GAO reports provided the impetus for a general recognition within the military health system (MHS) of the need to place greater emphasis on the wartime mission, especially with respect to clinical skills. The "Medical Readiness Strategic Plan 2001" (MRSP 2001), released in early 1995, acknowledged that the structure and priorities of the MHS had "resulted in a peacetime care orientation with an active duty specialty skill mix of personnel and training programs that differ significantly from skills required to support wartime operations." In order to remedy the training shortfall, the MRSP 2001 cited "an ongoing need … for individuals to practice their operational skills in an environment that simulates contingency situations."[5]

*Combat Lifesaving Training in Iraq*
*U.S. Air Force photo by MSgt Trish Bunting*

To meet this need, the Congressional Budget Office (CBO) suggested rotating "military medical personnel through civilian shock trauma centers, in which the conditions of patients resemble those that military physicians would encounter in wartime much more closely than do the diagnoses found in treating military beneficiaries." For example, the CBO estimated that 98 percent of

[1] U.S. Gov. Accountability Office, Operation Desert Storm: Full Army Medical Capability Not Achieved (Aug. 1992).

[2] U.S. Gov. Accountability Office, Operation Desert Storm: Improvements Required In The Navy's Wartime Medical Care Program (July 1993).

[3] U.S. Gov. Accountability Office, Operation Desert Storm: Problems With Air Force Medical Readiness (Dec. 1993).

[4] *Id*. at 2-3, 7-8.

[5] U.S. Dep't of Defense, Medical Readiness Strategic Plan 2001 at 39-40 (Mar. 1995) [hereinafter MRSP 2001].

the cases treated at the R. Adams Cowley Shock Trauma Center in Baltimore, Maryland, matched a "casualty-related diagnosis," compared with just 5 percent of the caseload in military medical treatment facilities (MTFs). Thus, military healthcare providers needed to treat roughly 400,000 patients in an MTF in order to obtain the same "war-related" training that could be derived from seeing 20,000 patients at the Baltimore trauma center.[6] In light of these findings, the CBO concluded that "the care furnished in military medical centers and hospitals in peacetime bears little relation to many of the diseases and injuries that medical personnel need to be trained to deal with in wartime." Civilian "level 1 shock trauma facilities," in contrast, were "likely to provide the best wartime training in trauma care and casualty-related diagnoses."[7]

Congress formally acted on the CBO's recommendation in the 1996 National Defense Authorization Act (NDAA), providing for "a demonstration program to evaluate the feasibility of providing shock trauma training for military medical personnel through one or more public or nonprofit hospitals."[8] The Assistant Secretary of Defense for Health Affairs subsequently convened the Combat Trauma Surgical Committee to develop trauma care training recommendations, which were approved by the service Surgeons General the following year.[9] By 1999, the MHS had established the Joint Trauma Training Center at Ben Taub General Hospital in Houston,[10] which accommodated nine military rotations per year, alternating among the uniformed medical services.[11] The Surgeons General continued to explore additional trauma training sites, which

*C-STARS Training*
*U.S. Air Force photo by A1C Wesley Farnsworth*

the Air Force called Centers for Sustainment of Trauma and Readiness Skills (C-STARS).[12]

## CENTERS FOR SUSTAINMENT OF TRAUMA AND READINESS SKILLS (C-STARS)

The C-STARS concept entails embedding Air Force healthcare providers in busy civilian level 1 trauma centers for high-intensity rotations lasting two to three weeks. The three C-STARS sites established by the Air Force Medical Service (AFMS) include the University of Maryland's aforementioned R. Adams Cowley Shock Trauma Center, the Cincinnati University Hospital Trauma Center, and the St. Louis University Health Sciences Center.[13] These "civilian academic medical centers serve as training platforms to help sustain necessary readiness skills."[14] C-STARS completion is mandatory for all clinical personnel assigned to "primary trauma or critical care" unit type codes (UTCs), with the frequency of attendance determined by whether or not the individual medic's daily practice otherwise mirrors "the trauma skills needed to care for combat casualties." The C-STARS Cincinnati program is specifically

[6] *Hearing on the Wartime Mission of the Military Medical System Before the Subcomm. on Mil. Personnel of the H. Comm. on Nat'l Security*, 104th Cong. (1995) (statement of Neil M. Singer, Cong. Budget Office).

[7] U.S. Cong. Budget Office, Restructuring Military Medical Care at 6-7, 37-38 (July 1995) [hereinafter CBO, Restructuring Mil. Med. Care].

[8] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 744, 110 Stat. 386 (1996).

[9] U.S. Gov. Accountability Office, Medical Readiness: Efforts Are Underway for DOD Training in Civilian Trauma Centers (Apr. 1998).

[10] Ernest E. Moore, et al., *Military-Civilian Collaboration in Trauma Care and the Senior Visiting Surgeon Program*, 357 New Eng. J. Med. 2723 (2007).

[11] Mark Kinkade, *Weekend in a War Zone*, Airman, July 2001, at 2.

[12] Lieutenant General (Ret.) Paul K. Carlton and Colonel Donald H. Jenkins, *The Mobile Patient,* 36 Crit. Care Med. S255, S256 (2008).

[13] *See* Colonel Dan R. Hansen, C-STARS: *Honing Skills to Make a Difference*, A.F. Med. Corps Examiner, Fall 2009, at 7.

[14] *Hearing on Medical Programs Before the Subcomm. on Mil. Personnel of the H. Comm. on Armed Services*, 107th Cong. (2002) (statement of Lt Gen Paul K. Carlton, Air Force Surgeon General) [hereinafter Carlton statement].

designed and required for members of Critical Care Air Transport Teams (CCATTs).[15] A fourth C-STARS platform, also focused on CCATT training, is being developed at the San Antonio Military Medical Center.[16]

The "hands-on clinical sustainment training" provided through C-STARS immersion is intended to "offer an intense workload coupled with clinical experience that sharpens and refreshes medics' trauma care."[17] The advent of C-STARS training opportunities also enabled the AFMS to cultivate the Readiness Skills Verification Program (RSVP),[18] which defines "the clinical tasks required of deployable medics" and sets corresponding standards for clinical currency.[19] The RSVP is "designed to ensure all medical personnel maintain adequate skills to perform their duties during wartime, humanitarian assistance, and installation response contingencies."[20] It has been compared to flight-hour requirements for rated career fields in that its standardized checklists specify training tasks and performance items by Air Force specialty code (AFSC).[21] The C-STARS curriculum facilitates completion of each rotator's RSVP requirements by course end.[22] Over the course of eleven full training days, for example, the University of Cincinnati site provides "30 hours of lecture material, five hours of lab, 48 hours of clinical time, eight hours of simulator time, and 22 hours in flight operations."[23]

***To date, the Surgeon General has approved five STARS-P locations, at Luke, Nellis, Wright-Patterson, Travis, and Lackland Air Force Bases.***

## SUSTAINMENT OF TRAUMA AND RESUSCITATION SKILLS PROGRAM (STARS-P)

Even as the C-STARS program was developing, the AFMS recognized that some MTFs already had "existing training affiliation agreements (TAAs) with local civilian facilities to provide care for acute patients," and that these TAAs provided another "opportunity for Air Force medical personnel to work within a civilian hospital to maintain skill currency."[24] Whereas C-STARS provides an intense immersion experience and the opportunity for "just-in-time training," it is necessarily episodic in nature. The long-term goal of maintaining the skills learned or relearned through C-STARS requires "on-going clinical exposure to high-acuity patients."[25]

In August 2009, the Surgeon General issued a guidance memorandum implementing the Sustainment of Trauma and Resuscitation Skills Program (STARS-P). The STARS-P concept is intended to fill in the gaps left by C-STARS "by regularly immersing staff in on-going clinical rotations at nearby civilian level 1 trauma centers to maintain clinical proficiency." Unlike C-STARS, the STARS-P initiative does not envision embedding AFMS personnel in civilian medical centers. Instead, participating medics will rotate through the local STARS-P site as part of their normal duties for at least two days each month, or one week every three months. Whereas C-STARS is centrally funded and overseen by the Air Force Expeditionary Medical Skills Institute (AFEMSI), STARS-P is a decentralized program executed by the MTF commander and appropriate major command surgeon general, with AFEMSI providing overarching guidance. The STARS-P vision is not to supplant C-STARS, but rather to develop into a program robust enough to diminish the frequency of C-STARS attendance for everyone except assigned CCATT members.[26]

[15] U.S. Dep't of Air Force, Instr. 41-106, Unit Level Management of Medical Readiness Programs at ¶ 5.7.2 (14 Apr. 2008) [hereinafter AFI 41-106].

[16] Colonel Dan R. Hansen, *STARS-P Program Unveiled*, A.F. Med. Corps Examiner, Winter 2009, at 7.

[17] *Hearing on Medical Readiness Before the Subcomm. on Defense of the S. Comm. on Appropriations*, 110th Cong. (2008) (statement of Lt Gen James G. Roudebush, Air Force Surgeon General).

[18] Carlton and Jenkins, *supra* note 12, at S256.

[19] Carlton statement, *supra* note 14.

[20] AFI 41-106, *supra* note 15, at paragraph 5.7.1.

[21] Colonel Michael Restey, *C-STARS Prepares Medics for Expeditionary Duties*, Air Force Surgeon Gen. Newswire (Mar. 04).

[22] Memorandum, Air Force Surgeon General, to MAJCOM Surgeons General, subject: C-STARS (6 Mar. 2003).

[23] *Hearing on Medical Readiness Before the Subcomm. on Defense of the S. Comm. on Appropriations*, 110th Cong. (2008) (statement of Maj Gen Melissa A. Rank, Asst. Air Force Surgeon General).

[24] AFI 41-106, *supra* note 15, at paragraph 5.7.2.3.

[25] Hansen, *supra* note 16, at 7.

[26] Memorandum, Air Force Surgeon General, to MAJCOM Surgeons General, subject:

*Diverse Trauma Training Saves Lives*
*U.S. Air Force photo by MSgt Scott Reed*

To date, the Surgeon General has approved five STARS-P locations, at Luke, Nellis, Wright-Patterson, Travis, and Lackland Air Force Bases. With the exception of Lackland AFB, where participating personnel will rotate through their own facility within the San Antonio Military Medical Center, the local STARS-P sites will be established and renewed every three years through TAAs with non-federal institutions.[27] As the current STARS-P sites are developed and new sites are approved, these no-cost agreements for proficiency training will be reviewed by base legal offices and medical law consultants to ensure the best possible protection for the rotating MTF staff and the Air Force.[28]

## TRAINING AND RESULTS

While the data is incomplete and the current conflicts still ongoing, the events since 2001 reflect "a military medical system that has made fundamental—and apparently effective—changes in the strategies and systems of battle care, even since the Persian Gulf War." Through a combination of skill, courage, mobility, strategy, and technological advancement, military medics are saving "the lives of an unprecedented 90 percent" of servicemembers wounded in action.[29]

The tension inherent in the twofold mission of the MHS as both a provider of full-spectrum care to eligible beneficiaries in a peacetime environment, as well as a force of "ready medics" prepared to triage, treat, and evacuate wartime casualties, may not be susceptible to a complete resolution as long as military medicine remains so dually charged. However, by turning to civilian shock trauma centers for the right mix of patient loads and medical conditions, the health services have made significant strides in mitigating the experiential deficits and atrophy of critical care skills that can hamper wartime readiness. Approaching the readiness and peacetime missions as "inextricably linked" has yielded innovative training platforms and apparently improved patient outcomes.[30]

Given the military roots of trauma care, the renewed collaboration between military and civilian institutions seems particularly appropriate. In 1961, when the Army provided a grant for the nation's first shock trauma unit, it selected Dr. R. Adams Cowley as the recipient.[31] Forty years later, the Baltimore medical center bearing the name of the late pioneer in emergency medicine opened its doors to Air Force surgical teams seeking vital trauma care experience. The Army's Cold War-era largesse continues paying dividends for deployed troops to this day.

STARS-P Concept of Operations (10 Aug. 2009).

[27] *Id.*

[28] *See* U.S. Dep't of Air Force, Instr. 41-108, Training Affiliation Agreement Program (1 Jan. 2005).

[29] Atul Gawande, Casualties of War – Military Care for the Wounded from Iraq and Afghanistan, 351 New Eng. J. Med. 2471, 2475 (2004).

[30] Carlton statement, *supra* note 14.

[31] CBO, Restructuring Mil. Med. Care, *supra* note 7, at 37.

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# Recent Efforts to Abolish the Feres Doctrine in Military Medical Malpractice Cases

By Ms. Robin Brodrick, AFLOA/JACC

Photo by Adam Ciesielski

When Congress enacted the Federal Tort Claims Act (FTCA) in 1948, the legislation was momentous in its express waiver of sovereign immunity, which would allow individuals alleging personal injury or property damage as a result of the act or omission of a federal government employee acting within the scope of their employment to bring suit against the government.[1] However, the applicability of the FTCA to allegations of negligence resulting in injury to members of the armed forces incident to their military service was not clear on the face of the law. That question was clarified by the Supreme Court nearly sixty years ago when the Court declined to apply the FTCA to such allegations.[2] The refusal of the Court to extend the FTCA to members of the armed forces based on its interpretation of the legislative intent of the Act has since been the subject of significant attacks, particularly by service members and their families alleging serious injury or death as the result of military medical care.

In the case of *Feres v. United States*, the Supreme Court held that there was no waiver of sovereign immunity under the FTCA for claims "incident to service."[3] In reaching this holding, the Court examined the legislative history of the Act and concluded that the purpose of the FTCA was to create a remedy where there was none, not to create unprecedented liabilities. The Court noted that, to date, no law had ever "permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving."[4] Further, noting that the FTCA specifically provided that "the United States shall be liable … in the same manner and to the same extent as a private individual under like circumstances," the Court opined that there was no "like circumstance" for a private person.[5] In reaching its holding, the Court also found it significant that the FTCA applies "the law of the place where the act or omission occurred." The Court reasoned that it did not make sense to use the geography of the injury in selecting the applicable law for an active duty service

[1] 28 U.S.C. §§ 1346(b), 2671-2680.

[2] *See Feres v. United States*, 340 U.S. 135 (1950).

[3] *Id.* at 146.

[4] *Id.* at 141-42.

[5] *Id.*

member, who had no choice in where they were stationed.[6] The majority further pointed out that most states had abolished the common law action for damages between an employer and employee, superseding it with worker's compensation statutes. Likewise, the military had a uniform system of compensation through its disability system strengthening the argument that it would make no sense to subject military members to the varying state laws based on mere geography.[7] Finally, the Court opined that "the relationship between the Government and members of its armed forces is 'distinctively federal in character,'" and should not be subject to state law.[8] This holding, which became known as the *Feres* Doctrine, has been applied for nearly sixty years to prohibit military members from suing the United States for medical malpractice.

***Since 1950, the Feres Doctrine has been the subject of many challenges.***

Since 1950, the *Feres* Doctrine has been the subject of many challenges in both the judicial and legislative arenas. Most recently, Congressman Maurice Hinchey of New York introduced the Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478.[9] The stated purpose of the bill is, "to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care and for other purposes."[10] The bill is named after Marine Sergeant Carmelo Rodriguez, who died of metastatic cancer, allegedly the result of delayed diagnosis by military medical providers.[11] If passed, the bill would allow claims against the United States for personal injury or death of a military member arising out of "a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) that is provided by a person acting within the scope of the office or employment of that person by or at the direction of the Government of the United States."[12] The bill proposes a retroactive date of 1 January 1997, a date which appears to be specifically intended to allow the family of Sergeant Rodriguez to pursue an action under the FTCA. Another significant provision in the proposed legislation would permit members of the Armed Forces to sustain actions under the FTCA for acts and omissions occurring outside the United States, an entitlement that is not available to other categories of FTCA plaintiffs.[13] For acts or omissions occurring outside the United States, the bill purports to apply "the law of the place of domicile of the plaintiff."[14]

The original version of H.R. 1478 contained several important provisions, which were deleted in a subsequent amendment. For example, in the original bill, a service member's recovery under the FTCA would be reduced by the value of disability payments related to the injury.[15] This would prohibit an injured party from recovering lost wages in an FTCA action to the extent they had already been compensated for those same damages by the disability system. The deletion of this set off would mean instead, individual cases would be subject to the varying collateral source rules of applicable state jurisdictions, without any uniformity in recovery.

[6] *Id*. at 143.

[7] *Id*.

[8] *Id*. at 143-44.

[9] H.R. 1478, 111th Cong. (2009). Representative Hinchey previously introduced a similar bill in 2008. H.R. 6093, 110th Cong. (2008). That bill died in subcommittee at the conclusion of the 110th Congress.

[10] *Id*.

[11] Sergeant Rodriguez died of skin cancer in 2007 at the age of 29. His family alleges that the initial examination he received in 1997 when he joined the Marine Corps revealed a melanoma on his buttocks, but he was never informed of the finding. The family further alleges that while deployed to Iraq in 2005, Sergeant Rodriguez sought care from a military physician for bleeding from a sore on his buttocks. His family claims the physician diagnosed a birthmark or a wart and that this further delayed diagnosis of melanoma, leading to metastatic disease and death.

[12] H.R. 1478, *supra* note 9, at § 2.

[13] The FTCA's "foreign country exclusion," specifically excludes "any claim arising in a foreign country." 28 U.S.C. § 2680(k). For incidents occurring in a foreign country, the Military Claims Act provides a remedy, but the agency is the final arbiter with no judicial recourse. *See* 10 U.S.C. § 2733. Interestingly, Representative Vic Snyder (D-AR-2), introduced H.R. 3285 on 21 July 2009, a bill to amend the FTCA to permit "individuals accompanying Federal employees who are engaged in missions for the United States Government in foreign countries" to bring claims under the FTCA, thereby providing legal recourse against the United States. The bill, which currently doesn't have any co-sponsors, was referred to the House Committee on the Judiciary and has remained in the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law since 14 September 2009.

[14] *Id*.

[15] *Id.*

On 7 October 2009, the amended bill was ordered to be reported by the House Committee on the Judiciary by a vote of 14-12. The amended bill was reported to the Committee of the Whole House of the State of the Union and placed on the Union Calendar on 26 April 2010.[16] The bill currently has twelve co-sponsors. A companion bill, S.1347, was introduced to the Senate by Senator Charles E. Schumer (D-NY), and referred to the Committee on the Judiciary on 24 June 2009.[17]

The *Feres* Doctrine has also been the subject of recent attacks in the courts, including two petitions for certiorari to the Supreme Court. Earlier this year, in the case of *Hafterson v. United States*, petitioners Matthew and Barbara Hafterson alleged negligence in the treatment their son Nathan, an active duty military member, received at the Naval Hospital Jacksonville, when he died a day after being admitted with pneumonia. After their case was dismissed by the U.S. District Court for the Middle District of Florida and the Court of Appeals for the Eleventh Circuit based on *Feres* and its progeny, the Haftersons petitioned the Supreme Court, imploring the Court to reconsider the nearly sixty-year-old doctrine. The Supreme Court denied the petition on 13 October 2009.[18]

The most recent *Feres*-barred plaintiff to petition the court is Aimee Zmysly, wife of Yuriy Zmysly, an active duty Marine Corps member who suffered severe brain damage after he was admitted to Cherry Point Naval Hospital for an emergency appendectomy. Mrs. Zmysly filed a petition for certiorari on 15 March 2010, after her case was dismissed by the U.S. District Court for the Northern District of Illinois and the Court of Appeals for the Seventh Circuit, also based on *Feres*.[19] Although it is anticipated that the Court will again deny certiorari, this is certainly a case to monitor, as several of the sitting justices have expressed their disagreement with the *Feres* decision in the past.[20]

Many of the proponents of a judicial or legislative "repeal" of the *Feres* Doctrine, particularly in the context of medical malpractice, argue that a fix is necessary to hold military medical providers accountable for negligence. Military attorneys should be aware that there are several processes in place to ensure the quality of care provided to service members, even when a claim would be barred by the *Feres* Doctrine. Under current Department of Defense policies, the services are required to report every malpractice payment to the National Practitioner Data Bank (NPDB) when a determination is made that the payment was a result of the failure to meet the requisite standard of care.[21] In addition, the services are also required to identify and report cases where a disability payment is made as result of medical care provided by a military healthcare provider based on the failure to meet the standard of care.[22]

[16] According to Clause (a)(1) of Rule XIII of the Rules of the House of Representatives, the Union Calendar is "[a] Calendar of the Committee of the Whole House on the state of the Union, to which shall be referred public bills and public resolutions raising revenue, involving a tax or charge on the people, directly or indirectly making appropriations of money or property or requiring such appropriations to be made, authorizing payments out of appropriations already made, releasing any liability to the United States for money or property, or referring a claim to the Court of Claims."

[17] S. 1347, 111th Cong. (2009).

[18] *See Hafterson v. U.S.*, No. 3:08-cv-533-J-16MCR, slip op. at 4 (M.D. Fla. Nov. 4, 2008), *aff'd*, 08-16857-AA, slip. op. at 2 (11th Cir. Apr. 8, 2009), *cert. denied*, 130 S.Ct. 416 (2009).

[19] *See Zmysly v. U.S.*, No. 1:08-cv-0611, slip op. (N.D. Ill. Aug. 20, 1009), aff'd, 09-3402, slip. op at 2 (7th Cir. Dec. 7, 2009), *petition for cert. filed*, 2010 WL 979064 (U.S. Mar. 15, 2010). On 16 April 2010, Alexis Witt, whose husband Air Force Staff Sergeant Dean Witt died after an appendectomy at Travis Air Force Base in 2003, filed a brief amicus curiae. 2009 WL 6363654 (U.S. Sept. 16, 2009)

[20] *See, e.g., U.S. v. Johnson*, 481 U.S. 681, 700 (1987), *Scalia dissenting* ("*Feres* was wrongly decided and heartily deserves the 'widespread almost universal criticism' it has received."). Justice Stevens joined in the dissent.

[21] U.S. Dep't of Defense, Reg. 6025.13, Military Health System (MHS) Clinical Quality Assurance (CQA) Program Regulation at ¶ C10.3. (11 June 2004).

[22] Memorandum, Assistant Secretary of Defense (Health Affairs) to Service Assistant Secretaries (Manpower and Reserve Affairs), Improved Medical Quality Assurance Program Procedures for National Practitioner Data Bank Reporting Under DOD Directive 6025.13 (16 Jan. 2009).

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# Expert Witnesses and Consultants:

## A Comprehensive Study

*By Major Conrad I. Huygen, USAF*

When a court-martial hangs in the balance, the opinion of an expert witness can tip the scales between a finding of guilty and an acquittal. Whether they are explaining how the Air Force screens urine for the presence of drug metabolites, the theory behind reconstructed memory, or the characteristics of street gang activity, experts are fixtures in the military justice landscape, and in complex cases they are absolutely essential to a fair trial. The powerful impact that forensic experts can have on a case—even if they never take the witness stand—goes beyond the courtroom, as there are few topics that will ignite a more spirited debate among judge advocates than the funding, use, and availability of expert witnesses and consultants.[1]

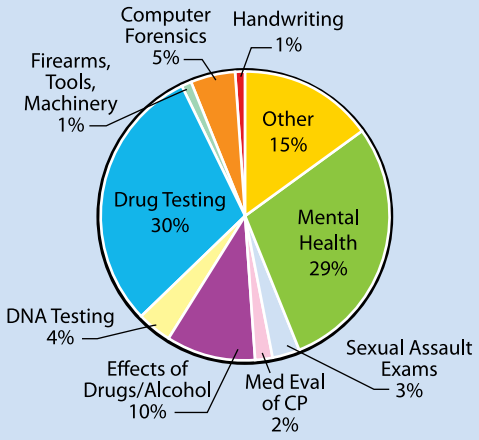
Everyone involved with the military justice system has opinions and anecdotes about experts, but personal experiences are no substitute for the dispassionate analysis of data collected on a global scale when it comes to making decisions that affect courts-martial. In order to establish a clear picture of the number, types, uses, and costs of this critical resource, the Military Justice Division (JAJM) of the Air Force Legal Operations Agency conducted a study of the hundreds of experts who served as court-martial consultants and witnesses in 2007 and 2008. The two-year snapshot that emerged not only provides a comprehensive view for the JAG Corps of the forensic expert landscape but also establishes a foundation for sound decisions about how the Air Force can improve trial management practices.

### METHODOLOGY

In March 2009, JAJM asked each of the major command legal offices to lead the effort in gathering data that would permit a meaningful analysis of expert usage for calendar years 2007 and 2008 without causing an undue collection burden to the field. Judge advocates, paralegals, and civilians at every level forwarded the types of experts used in courts-martial broken down into 10 standardized categories, the number of active duty military and Department of Defense (DOD) civilian experts versus non-DOD experts, whether the expert assisted the prosecution or the defense, whether the expert testified at trial as a witness or remained a consultant, and how much convening authorities paid to non-DOD experts in professional fees. To keep the data collection focused and as simple as possible, JAJM did not request any information that would not further

[1] For the purposes of the study, the term "consultants" refers to experts who were appointed to assist counsel either before or during trial but who never took the stand, while "witnesses" are those experts who did in fact testify at some point during the proceedings.

**Figure 1. Experts by Field of Practice (CY07 & CY08)**




the study's goal of describing what kinds of experts we use, how we use them, how often DOD experts are meeting the demand for court-martial support services, and how much the Air Force pays when DOD experts are unavailable. This focused approach yielded 120 data points for each calendar year studied.

## NUMBERS AND TYPES OF EXPERTS

In 2007 and 2008, the Air Force completed a total of 1,225 general and special courts-martial.[2] During this two-year period, convening authorities appointed a total of 928 experts to assist the prosecution and the defense with trial duties.[3] Counsel consulted with a variety of experts and Figure 1 illustrates the percentages of experts by fields of practice in each of the study's 10 standardized categories. Of the experts who participated in Air Force courts-martial in any capacity, 30 percent (275 of 928) were for drug testing purposes[4] and 29 percent (270 of 928) were for mental health issues.[5] These areas of expertise ranked first and second in terms of overall usage, respectively. The fact that counsel used these two types of experts most frequently is not surprising given the overall prevalence of drug and sexual assault charges that are referred to trial. What is surprising is that no other category comes close in terms of frequency of use and that together these two areas accounted for 59 percent of all experts during the study period.

Experts who helped counsel understand the effects of drugs and alcohol,[6] which can have significant overlap with the same pool of experts who assist with drug testing and mental health issues, add another 10 percent (95 of 928) to the already large drug testing/mental health portion of the pie. Only 5 percent (48 of 928) of experts were used for computer forensics and just 4 percent (34 of 928) aided with DNA analysis, although the impact of these numbers is magnified by the length of time it takes to complete forensic reports in both areas and the effect that this type of evidence can have on a case. Perhaps not surprising is that sexual assault examiners accounted for only 3 percent (28 of 928) of experts. Cases alleging sexual misconduct often involve delayed reporting by the complainant or, if the report is timely, do not revolve around whether sexual contact occurred but rather whether there was consent or mistake of fact as to consent. Although every specialty can play a critical role in the right case, the high demand for drug testing and mental health experts merits the most attention when it comes to overall resource management.

## EXPERT FEES AND OTHER COSTS

One of the biggest concerns from a convening authority's perspective is the cost associated with hiring non-DOD civilian experts when DOD assets are not available, which was the case for 61 percent (569 of 928) of all expert trial support services in 2007-2008. Depending on the subject area, it is common for expert fees in a litigated court-martial to reach $2,000 or more a day for an expert to be present at trial assisting counsel. Multiply that figure by two if the opposing party also has an expert, then multiply it by another eight to cover the days spent travelling, preparing, observing and testifying in a typical five-day trial. Now add travel and per diem on top of that, not to mention any pretrial consultation

[2] Court data compiled from the Automated Military Justice Analysis and Management System (AMJAMS).

[3] Although some experts assisted in more than one case, for the purposes of the study each appointment was counted separately to ensure an accurate measure of usage and costs.

[4] E.g., a toxicologist to explain how hair is tested for the presence of drug metabolites.

[5] E.g., a psychiatrist to discuss the impact of trauma on how people perceive, retain, and recall events.

[6] E.g., a psychologist to explore the phenomenon of alcohol-induced blackouts.

costs, and before long convening authorities are looking at a sizable bill. In cases that require more than one expert per side in highly specialized fields of practice, total expert costs can exceed $100,000 if DOD assets are not available to provide trial support.

While the potential for high expert costs in extremely complex trials is real, those cases are the exception rather than the rule, and the study provides the JAG Corps with a level of fiscal comfort for the vast majority of cases brought to trial. Over the two-year period, convening authorities spent just under $4.4 million ($2.2 million annual average) on expert fees in all Air Force courts-martial. Those fees, which apply only to the 569 non-DOD civilians identified in the study, averaged about $7,700 per expert for services rendered in each court-martial. However, because this figure combines various levels of consultation along with in-court testimony, it reflects neither the cost of a few hours of pretrial consultation (which typically stays in the range of $2,000-$3,000) nor the cost of an expert witness who is present throughout trial (which can approach $12,000-$20,000). Because individual convening authorities absorb court costs at varying degrees with budgets under increasing strain, it is sometimes difficult to maintain a broader institutional perspective on expert fees. In terms of overall mission value and relative to other service expenditures, $2.2 million a year is not an unreasonable price for ensuring the Air Force maintains a world-class justice system.

In addition to expert fees paid to non-DOD civilians, there are also logistical costs that apply to all experts who are required to travel for trial support. In another effort to keep the data collection burden to legal offices at an absolute minimum, JAJM did not request the field to provide information on travel or per diem expenditures. Instead, the division leveraged data already compiled in the Central Witness Funding System (CWFS). In a nutshell, CWFS handles the logistical costs of both military lay witnesses travelling between commands (e.g., Airmen returning to home station from a deployed location) and drug testing expert witnesses (e.g., toxicologists from the Air Force Drug Testing Laboratory). The volume of witnesses handled by the system provides a large body of information to calculate average logistical costs for any type of traveler, including experts. Over the two-year period studied, travel and per diem costs averaged $1,285 per witness ($763,052 divided by 594 individuals). Using this average as a cost basis, if all 928 experts appointed in 2007 and 2008 travelled, convening authorities would have spent just under $600,000 per year in logistical costs. Because not every expert travelled, this projection is on the high side, but it provides an accurate ceiling for cost estimate purposes.

## PROSECUTION VERSUS DEFENSE EXPERTS

The military justice system is unique in that the defense does not have an independent means of obtaining expert assistance. Instead, Air Force defense counsel request experts from the convening authority who referred charges to trial.[7] Contrary to the perceived sense of imbalance sometimes expressed by legal offices as they process these requests, the use of experts by both sides is fairly even, as prosecutors accounted for 45 percent (416 of 928) of all expert witnesses and consultants appointed in 2007-2008. Although the defense averaged a robust total of 256 experts in each of the two years studied, the prosecution's average of 208 was not far behind.

***The use of experts by both sides is fairly even.***

The government requires experts because it bears the burden of proving its case beyond a reasonable doubt, and experts are sometimes the only means by which certain evidence can be presented in court. The defense, in turn, asks for experts to prepare effective cross examinations of expert and lay witnesses, explore affirmative defenses, and develop matters in extenuation and mitigation.

The balanced distribution of experts between the prosecution and the defense reflects the Air Force's commitment to providing "equal opportunity to obtain witnesses and other

[7] R.C.M. 703(d).

evidence,"[8] and a single convening authority controlling access to expert assistance for both sides helps ensure this balance.

## CONSULTANTS VERSUS WITNESSES

For the purposes of the study, the term "consultants" refers to experts who were appointed to assist counsel either before or during trial but who never took the stand, while "witnesses" are those experts who did in fact testify at some point during the proceedings. Because the government has the burden of proof, one would expect the prosecution to call its experts to the stand more frequently than the defense, and the numbers bear out this commonsense assumption. Over the two-year period, 44 percent (185 of 416) of prosecution experts testified at trial compared with only 19 percent (95 of 512) of defense experts. The fact that the defense has the right not to put on a case, and commonly exercises this right, explains why the government was more than two times as likely to put its experts on the stand. What is also significant in terms of overall resource management is that so few experts for both sides combined—30 percent (280 of 928)—ever testified at all. The prevalence of consultation suggests that the parties are fully exploring issues before trial and calling experts to testify only when necessary. Counsel, convening authorities, and military judges all play a role in ensuring that experts who do not testify are present for court only when necessary.[9]

## MORE EXPERTS, FEWER COURTS

The study's two-year time span does not establish a sufficient foundation to identify long-term trends in any category. However, one short-term trend from 2007 to 2008 stood out. In 2007, convening authorities appointed a total of 413 experts for both the prosecution and the defense Air Force-wide. In 2008, that number jumped by 102 for a total of 515 experts, which represents a nearly 25 percent increase from one year to the next. If the number of courts-martial during that same time period had increased at approximately the same rate, this rise in experts would have been expected. The reality is that there were 12 percent fewer general and special courts-martial from 2007 to 2008 (646 down to 579), which makes the spike in experts all the more surprising. Although significant changes to the Uniform Code of Military Justice that went into effect on 1 October 2007[10] may account for a portion of the increase in experts in 2008, there is insufficient data to establish a causal link between these two events. Courts-martial in 2009 have returned to near 2007 levels,[11] and JAJM will continue to monitor whether this short-term trend has any long-term implications.

***The demand for mental health experts in courts-martial far exceeds the supply.***

## MENTAL HEALTH VERSUS DRUG TESTING EXPERTS

After completing an initial analysis of the study data, JAJM took a closer look at the two largest categories of experts appointed by convening authorities: drug testing and mental health specialists. Combined, these two areas accounted for 59 percent (545 of 928) of experts during the study period in roughly equal numbers (275 versus 270, respectively). Even though the demand for each specialty was almost identical, the sources and costs of these two types of professionals were markedly different. Over the two-year period, non-DOD civilians comprised 43 percent (118 of 275) of drug testing experts at an average cost of $4,461 per trial; experts from the Air Force Drug Testing Laboratory and other DOD sources made up the remaining 57 percent. During this same period, non-DOD civilians comprised 87 percent (234 of 270) of mental health experts at an average cost of $10,294 per court-martial, excluding travel and per diem. Conversely, DOD mental health experts provided trial support an average of only 18 times a year during the study period to account for the remaining 13 percent.

The study highlights that the demand for mental health experts in courts-martial far exceeds the supply of available DOD assets and the Air Force is paying a disproportionately heavy price as a result. Of the $4.4 million paid

[8] Article 46, UCMJ.

[9] *United States v. Kelly,* 39 M.J. 235 (C.M.A. 1994).

[10] E.g., Article 120, UCMJ.

[11] According to AFJAMS, there were 632 general and special courts-martial in CY09.

***Expert availability can be the single point of failure when it comes to docketing a case.***

in expert fees across all specialties in 2007-2008, mental health experts received $2.4 million. To put it another way, even though non-DOD mental health experts comprised 41 percent (234 of 569) of all civilians hired by convening authorities worldwide, they received 55 percent of the fees paid to all non-DOD civilian experts. Finding ways to leverage new or existing DOD assets to displace costly private mental health services in courts-martial presents the Air Force with a tremendous opportunity to save tax dollars and increase support to the field.

## BRIDGING THE MENTAL HEALTH GAP

Based on the study's findings, JAJM reached out to our counterparts in the Air Force Office of the Surgeon General and established an ad hoc working group in September 2009 to develop various courses of action on how to improve forensic mental health support in courts-martial while reducing overall taxpayer costs. Through this dialogue, we gained a better understanding of the tremendous challenges facing the mental health career field. The Air Force currently has only nine forensic psychiatrists and just one forensic psychologist out of its worldwide cadre of providers. Mental health professionals are high demand-low density assets who are often not available to provide trial support due to increasing clinical workloads, both at home station and in deployed locations. Even when available for trial, some Air Force providers feel unqualified to meet the demands of trial work and are hesitant to provide expert testimony without additional forensic training.

After consulting with sister services and considering a range of possible solutions, the working group overwhelmingly supported the concept of creating two civilian mental health positions dedicated to court-martial support. With a forensic psychiatrist based out of Wilford Hall Medical Center in San Antonio, Texas, and a forensic psychologist based out of Wright-Patterson Air Force Base in Dayton, Ohio, the Air Force could realize direct and indirect savings of up to $300,000 annually[12]—a figure that represents a 25 percent reduction in current mental health expert costs. Just as important, having embedded mental health experts would exponentially increase the pretrial consultation options for both trial and defense counsel. These experts would also serve as a training team to create a secondary cadre of mental health providers with the forensic skills necessary to assist counsel with their court-martial duties. Although two full-time experts would not eliminate the need for non-DOD civilian experts, it would provide more balance to the equation, increase consultation and training capabilities, and still save tax dollars. This concept of operations has won support from JAG Corps leadership and could serve as a model to improve expert support in other areas as we move towards its implementation.

## RECOMMENDATIONS

While long-term infrastructure solutions are being developed and implemented, both the government and the defense can take immediate steps to help improve the management of forensic expert services:

1. With the exception of capital cases, counsel for both sides need to do their homework and avoid a knee-jerk response that a certain type of case always requires an expert. Supervising attorneys must play an active role in this threshold decision.

2. Base legal offices should reach out to installation resources, especially in the field of mental health, to assess and develop their in-house expert capabilities. Many Air Force professionals want to develop forensic skills, and judge advocates should incorporate those individuals in advocacy training.

3. Since the government controls the investigation, preferral, and referral of charges, trial counsel should plan for the appointment of experts as an integral part of trial preparation.

[12] Cost estimate based on OMB Circular A-76 (Atch C) standards, 2009 GS-15/14 pay and locality tables, and CY07-08 expert fee averages applied to five proceedings per month.

Expert availability can be the single point of failure when it comes to docketing a case and waiting to line up an expert can be a costly mistake.

4. It is nearly axiomatic that if the government has the services of an expert, the defense should have equal access to an expert of its own.[13] Trial counsel should inform the defense as soon as possible about any government experts and have the names and availability of qualified individuals ready for the defense.

5. Defense counsel should never wait to make a request for expert assistance and meritorious requests must be made as early as possible. If the government provides what it considers an adequate substitute for a by-name request from the defense, trial counsel must refrain from attacking that expert's qualifications in the appointed field of practice if he or she takes the witness stand.[14]

6. When a defense request for expert assistance comes in, the government must immediately act on it. Grant the request in full, grant it in part, find an adequate substitute, or deny the request when appropriate as soon as possible so that the defense can either make use of the expert early or file the appropriate motion to compel. A sluggish response to an expert request can result in unnecessary trial delays.

7. Travel experts only when necessary. Once an expert has been consulted, counsel for both sides, and trial counsel in particular, must make informed decisions about whether the expert is necessary for trial if there is little likelihood that they will testify or be of any added value in a continuing consultation role.[15]

8. Finally, as wise stewards of taxpayer funds, both the government and the defense should in good faith make every attempt to find qualified DOD, federal, state, or, if only to save logistical costs, local expert support. Air Force counsel often limit themselves to a relatively small pool of professionals who do not fall into any of these money-saving categories. If the JAG Corps is rethinking how we manage experts, that must also include reevaluating which experts we use.

[13] *United States v. Lee*, 64 M.J 213 (C.A.A.F. 2006).

[14] *See* R.C.M. 915; fair cross-examination into other matters would be permitted.

[15] *See United States v. Lee, supra*. If trial counsel travels an expert, defense counsel is justified to request the same.

## CONCLUSION

The expert witness and consultant study paints an overall balanced picture that the Air Force can be proud of and that taxpayers can applaud in terms of resource management. Trial and defense counsel are both zealously representing their clients by exploring all aspects of their cases with the assistance of a variety of experts who can translate complex subjects into more easily understood concepts for the benefit of the court members. The types and numbers of experts used reflect the types of charges the Air Force is referring to trial. Although anecdotal experiences can color one's perspective, not once did anyone over the course of the study suggest that Airmen facing court-martial should not have the tools necessary for a vigorous and effective defense.

JAJM will continue to analyze this dynamic issue and collaborate with functional areas across a range of subjects to engineer new solutions that will meet the needs of justice in an ever-changing landscape. The Military Justice Division is always open to suggestions from the field on how to improve our system, and we invite your constructive feedback, thoughts, and ideas.

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BOOKS IN BRIEF

# CRISIS AND COMMAND:

## A History of Executive Power From George Washington to George W. Bush

**By John Yoo (Kaplan Publishing, 2010)**

*Reviewed by Major Matt Burris, USAF*

***For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in the face of the public.*** Thomas Jefferson

ADMITTEDLY, I WAS SHARPENING MY PEN upon starting John Yoo's latest book, *Crisis and Command – A History of Executive Power from George Washington to George W. Bush*. After all, Yoo is the attorney primarily responsible for the Justice Department's post-9/11 memoranda providing legal cover for the enhanced interrogation of detainees at the hands of the CIA[1] and the NSA's domestic warrantless wiretapping program. Yoo's opinion on the latter was so radically expansive that then Attorney General John Ashcroft and FBI Director Robert Mueller, among other notables, threatened to resign if the program was not reigned in.[2] Surely, exposing the fallaciousness of the views of this zealot would be a cakewalk, or so I thought. As is turns out, to read Yoo is to discover a serious practitioner of history with an undeniable knack for making the radical seem reasonable. Although not without its flaws, *Crisis and Command* is a genuinely clever—albeit utterly humorless—retort to critics of the Bush Administration, in particular those who argued Bush's claims of executive authority and dismissal of congressional oversight were unprecedented in U.S. history.

Yoo quickly sets about dispelling those notions by examining the presidencies of George Washington, Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and those he dubs, "The Cold War Presidents". Dedicating a chapter to each, Yoo recounts how these Presidents, their bona fides solidified by history, exercised executive authority during times of national crisis. The picture painted is one in which the qualities of the unitary executive—"decision, activity, secrecy, and dispatch"—are uniquely suited to steer the ship of state through times of crisis, and, more importantly, that the greatest of these did not allow the Constitution, the Congress, or the Supreme Court to wrestle him from the helm.

On its face, this seems an absurd notion—a President free to disregard or subvert laws passed by the Congress; free to exercise unchecked constitutional powers specifically enumerated to the Congress; or free to disregard the Supreme Court's interpretation of the Constitution if it contradicts *his* interpretation of the Constitution. However, according to Yoo, none of the aforementioned is unprecedented in our history. Among the precedents Yoo cites are: Washington's proclamation of neutrality in the war between France and Great Britain following the French

[1] To which the Judge Advocates General of the Air Force and Army, as well as the Staff Judge Advocate to the Commandant of the Marine Corps, expressed opposition. Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/14/AR2005071402187.html; Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html.

[2] *Frontline: Cheney's Law* (PBS television broadcast, Oct. 14, 2007), *available at* http://www.pbs.org/wgbh/pages/frontline/cheney/.

Revolution—a move supported by Alexander Hamilton, but which James Madison believed was a usurpation of the Congress's power to declare war and a "practice in tyranny;" Jefferson's exercise of John Locke's prerogative in concluding the Louisiana Purchase, an action Jefferson believed to be extra-constitutional; Jackson's lack of deference to the Congress, the Supreme Court, and even former U.S. Presidents regarding the constitutionality of the Second Bank of the United States; Lincoln's invoking of his Commander-in-Chief authority to support the Emancipation Proclamation, the suspension of the writ of habeas corpus, and military detention without trial; and, Roosevelt's unprecedented expansion of executive branch authority under the New Deal, as well as his domestic surveillance program during World War II, to name a few.

What makes *Crisis in Command* so clever is that Yoo leaves it to the reader to draw parallels between the extra-constitutional (and in some instances *unconstitutional)* actions of our most revered presidents and the heavily criticized actions of the Bush presidency—to include, *inter alia*: warrantless wiretapping of American citizens, military detention of combatants without trial or access to U.S. courts, and broad claims of executive privilege. Indeed, Yoo does not explicitly draw these parallels until the book's final chapter, by which time the ingenuous reader has already drank the proverbial Kool-Aid.

However clever, this tack also exposes a weakness in Yoo's thesis. It is what Walter Isaacson, who reviewed *Crisis and Command* for The New York Times calls, "'advocacy history,' in which scholarly analysis and narrative are marshaled into the service of a political argument."[3] While the historical parallels to present debates are evident from the telling, it is both fair and necessary to ask whether Yoo has crafted the text in such a way as to avoid the drawing of false equivalencies. The issue, as historian Howard Zinn put it, is not dishonesty, "it is omission or deemphasis of *important* data.[4] "The definition of *important*, of course, depends on one's values."[5]

Consequently, what Yoo deems important—chiefly, his aggressive advocacy of the unitary executive theory—permeates his work, whether he is authoring *Crisis and Command* or providing legal advice to the President. Recently, a strikingly similar criticism was levied against him by Associate Deputy Attorney General David Margolis, the Justice Department official responsible for the disposition of professional misconduct allegations relating to the aforementioned enhanced interrogation memoranda. While disapproving the Office of Professional Responsibility's (OPR) harsher reprimand, Margolis wrote:

> While I have declined to adopt [OPR's] findings of misconduct, I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, view of executive power while speaking for an institutional client. [6]

Are his claims in *Crisis and Command* "striking heresies" for which he deserves to be "cut … to pieces in the face of the public?" Perhaps, but as Yoo indicated following a recent appearance on The Daily Show with Jon Stewart, in which the quick-witted host Stewart uncharacteristically failed to land a blow, "I've spent my whole career learning to settle down unruly college students who have not done the reading."[7] As *Crisis and Command* reminds us, those seeking to duel with John Yoo must clearly do their homework first.

[3] Walter Isaacson, *Who Declares War?*, N.Y. Times, Jan. 24, 2010, *available at* http://www.nytimes.com/2010/01/24/books/review/Isaacson-t.html.

[4] Howard Zinn, The Use and Abuse of History, in Passionate Declarations – Essays on War and Justice 48, 51 (Harper Perennial 2003).

[5] *Id*. at 89.

[6] Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. Times, Feb. 19, 2010, *available at* http://www.nytimes.com/2010/02/20/us/politics/20justice.html?scp=1&sq=Report%20Faults%202%20Authors%20of%20Bush%20Terror%20Memos&st=cse.

[7] Christopher Beam, *YooTube - Why Jon Stewart failed to make John Yoo squirm*, Slate Mag., Jan. 15, 2010, *available at* http://www.slate.com/id/2241742/.

# DROWNING IN THE DESERT:

## A JAG's Search for Justice in Iraq

**By Vivian H. Gembara with Deborah A. Gembara (Zenith Press, 2008)**

*Reviewed by Captain Wendy S. Kosek, USAF*

*Photo by Rob Bakker*

For JAGs preparing to deploy, Former Army captain Vivian Gembara's memoir of her year-long deployment to Iraq provides tremendous insight into the day-to-day life of a judge advocate in the AOR. As the only JAG assigned to a forward-operating base with Third Brigade, Fourth Infantry Division, Gembara details the challenge of establishing the rule of law in a constantly changing warzone where mission flexibility is mandatory, and the desire to "win the fight" can lead some in uniform to cross the line.

As the first JAG to prosecute an American Soldier on Iraqi soil, Gembara describes her role as trial counsel, explaining not only the difficulties she experienced in obtaining evidence, but also the risks associated with "leaving the wire" to visit crime scenes and meet reluctant witnesses. Firsthand, she sees the impact of combat-related casualties on her fellow officers and enlisted members, including the deaths of two senior noncommissioned officers in the Army JAG Corps. Preparing for trial, Gembara and her fellow Soldiers literally must build a courtroom from scratch, scavenging for materials to use as seats and desks from the limited resources available. During her first court-martial, one of the key Iraqi witnesses becomes so nervous after seeing another accused in the back of the courtroom that he almost decides not to testify out of fear the soldier will harm him. Ultimately, Gembara is able to convince the witness to testify against the accused and obtains a conviction—underscoring the critical importance of the military justice process as a diplomatic tool.

However, in the closing chapters, Gembara's narrative takes a darker turn. Outranked and inexperienced, she struggles under the burden of advising commanders who place a higher priority on "the fight" versus accepting sound legal advice. In the central controversy of the book, the captain investigates a high-profile case after U.S. Soldiers are accused of forcing two unarmed Iraqis to jump into the Tigris River, resulting in the death of a 19-year old. Gembara implicates the entire chain of command, both officer and enlisted, in a conspiracy to conceal the drowning and other suspicious deaths. These deaths of Iraqi civilians were widely-publicized in 2004 and outrage spread when only two cases

went to trial. Rather, several higher-ranking officers including a lieutenant colonel, major, and a captain, received non-judicial punishment for their roles instead of courts-martial. Further, the author alleges that the Army denied her request to exhume the body of one of the men to prove beyond a reasonable doubt that he died by drowning. Dejected, Gembara returns home to Fort Carson only to hand over the pertinent case files to two JAG majors at the airport—who she believed would not seek justice. In Gembara's opinion, the military justice process failed, thus

***Gembara's lack of faith in the Army JAG Corps will trouble many JAGC members.***

weakening diplomatic relations between the United States and Iraq. Ultimately, the book is a search for justice the author believes the Iraqi victims and their families did not receive.

Gembara's lack of faith in the Army JAG Corps will trouble many JAGC members, as will her unsupported claim that the Army deliberately selected inexperienced JAGs from Fort Hood to court-martial a first lieutenant and a sergeant first class, the only Soldiers tried in relation to the drowning in the desert. Moreover, the author's steady barrage of blunt criticisms leveled at her coworkers strikes the wrong note.

*Air Force photo by SSgt JoAnn S. Makinano*

On page 12, Gembara calls her senior paralegal (using his full name and rank) "a thorn in my side" and describes working with him as "death by a thousand cuts, daily." While *Drowning in the Desert* serves as a frank, no-holds-barred account of the author's experience in Iraq, her berating of colleagues throughout the book is unnecessary. The author could have accurately described her experiences and raised legitimate criticisms without mentioning actual names.

In conclusion, all Air Force judge advocates and paralegals will find Gembara's book relevant to the myriad of challenges they will face while deployed, including the willingness to "speak truth to power." However, the lingering bitterness behind the censure of her former institution and its members leaves a bad taste after an otherwise intriguing read.


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# On Sentencing:

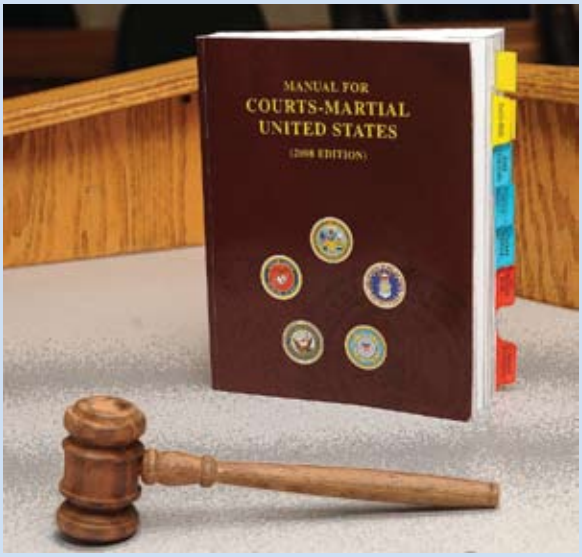
## Who's The Fairest of Them All?

*By Staff Sergeant Michael J. Badilla, USAF*

**Do you go judge alone or members?** It's one of the most difficult questions that an Airman facing court-martial has to decide. As a former defense paralegal for the United Kingdom Office of the Area Defense Counsel, I saw a number of cases go to trial. When an Airman is convicted, I ensured the sentencing package was ready for admission as evidence, including matters in mitigation for the sentencing authority to consider when recommending an appropriate punishment. How will that evidence be weighed by a military judge versus a panel? What I learned is that the forum chosen by the accused at the beginning of trial will often determine how well he or she fares when the gavel falls.

Sentencing procedure and severity are concepts that have been heavily debated by military members for some time, and JAGC members will continue to do so. There is no standard, agreed-upon definition of what an "appropriate" sentence is, nor what the fairest forum for trial is. Nevertheless, choosing the "right" forum for a case affords the defense an opportunity to get the most favorable outcome for their client.

Additionally, opinions on the harshness of a sentence is a clear subjective matter subject to interpretation of the various parties from their vantage point in the system. Society at large, as well as individual participants in the criminal justice system, victims, and the accused all will have particular viewpoints on how severe a sentence is.




Military judges, officer members, and enlisted members tend to base their sentencing opinion on quite different backgrounds. Each diverse group of potential panel members brings with it opinions that formulate one of the most fairly operated criminal justice systems in the world. Differing opinions play a part in shaping how a particularly educated individual reacts to certain criminal cases brought before them.

When the accused requests a jury trial, picking the best panel of members through additional forum choices and the *voir dire* process is the most effective way to get the fairest individuals to decide on factual questions and sentencing recommendations. However, court-martial panels typically have little to no legal training. Their opinion is based simply on what each side presents to them and decided upon by the military judge's instructions.

One cannot forget that military judges are officers as well. What separates the opinion of a typical rated or nonrated officer and a senior judge advocate sitting on the bench is the level of legal training. Military judges have a significantly diverse legal background to base their sentencing

***Sometimes the only clear choice in selecting a forum is to first consider the social tolerance of the crime at issue.***

opinion on. They have likely not only prosecuted individuals, but defended ones as well, as an area defense counsel, a senior trial counsel, or possibly as an appellate attorney. Seeing issues from both viewpoints makes for a better informed decision. In drug cases however, military judges tend to sentence slightly harsher than officer panels do.

Sometimes the only clear choice in selecting a forum is to first consider the social tolerance of the crime at issue. To do so, the defense team must analyze possible viewpoints of each forum and apply lessons learned from this study when appropriate to affectively guess how a particular choice would pan out in the end, always keeping the possibility of sentencing in mind.

There is no doubt that whichever forum an accused chooses, they will receive nothing less than the fairest treatment afforded by law. But by carefully weighing forum choices however to fit the particular criminal act(s) at issue, one can attempt to acquire the most favorable outcome; if not in findings, then at least in sentencing. For both sides, the hardest part about this task is to accurately read the tea leaves of the court member's data sheets, looking for weaknesses or strongpoint's to focus on during *voir dire*.

So long as there is not an option to have a panel determine findings and a military judge decide sentencing, punishment consideration will always play a major role in choosing which forum to select for trial. At present, military law does not allow for an accused to mix military judge sentencing and a panel for findings, which the federal court system allows. Amending the Manual for Courts-Martial to allow for this option, as suggested by Colonel Steve Ehlenbeck,[1] could greatly affect how a member decides on a forum and perceives the fairness of the military justice system.

This is especially relevant to particularly heinous crimes such as unusual sex cases and other violations which are not tolerated in society. In these cases, the defense team may face a decision dilemma, believing that an officer panel is the best to decide on findings while a military judge may be best in deciding an appropriate sentence if necessary. The accused must then choose, making a gamble that will affect the rest of his or her life. Having a choice to mix forums in findings and sentencing would provide an additional element to the member's right to due process, and enhance the perception of fairness in the military justice system.

Thus, in deciding the question of members or judge-alone perhaps the best and fairest answer is *all of the above*.

[1] Colonel Steven J. Ehlenbeck, *Court-Martial Sentencing with Members: A Shot in the Dark*, The Reporter, Summer 2008, at 33. *See also*, Major Brian Thompson, *Judge Alone Sentencing: Judicial Power Grab?*, The Reporter, Spring 2009, at 12.

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# Legal Assistance Notes

## Legal Assistance Website Update

The new legal assistance website is being used on an increasingly frequent basis. As of 12 May the website had 24,649 hits, 9,435 tickets issued, and 4,890 tickets processed. Website survey use continues to increase, but is an area that will require continued attention in order to ensure success. TJAG has expressed definite interest in survey completion rates as well as the content of those surveys. The average Air Force ratings received so far are excellent, so don't fear the feedback. Also, please give AFJAGS feedback as we continue to improve the content of the website and its functionality.

## Lessons Learned—Lessons Shared

Many great ideas originate at the base level, as well as important lessons learned. As the JAG Corps continues to utilize CAPSIL, AFJAGS wants to expand its utilization into sharing these best practices and lessons learned. One area under development is legal assistance articles. If your office published legal assistance articles, please post them in CAPSIL so other bases can benefit from the knowledge shared and avoid recreating the wheel. CAPSIL also contains a learning center where individuals can share legal assistance handouts from their respective bases. If you have a single area where you need to get a significant change in state law out to other chiefs of legal assistance or you have a novel approach to a common problem, please send that information to AFJAGS so that we can post a notice in the New Developments in Legal Assistance Learning Center.

## Don't Forget About FLITE

While CAPSIL is where AFJAGS will continue to place all new legal assistance information, don't forget that there is still a wealth of information located on the FLITE AFJAGS Legal Assistance Field of Practice, at https://aflsa.jag.af.mil/AF/lynx/tolls/content.php?qrylvl=3&lvl2id=122232&lvl2folder=yes. Eventually AFJAGS plans to update and migrate all of the field of practice data into CAPSIL, but in the meantime continue to look on FLITE if you're not able to satisfy your quest for information on CAPSIL.

## National Guard and Reservists Debt Relief Act of 2008

Speaking of valuable information on FLITE, the National Guard and Reservists Debt Relief Act of 2008 is referenced under the *Bankruptcy* Field of Practice under *Consumer/Financial Affairs*. Thank you very much to those who responded to the short notice request for information sent by Capt Scott Hodges in March regarding the Act. It appears from the responses that the Act is something JAG Corps practitioners have very seldom had a need to utilize in the past year. However, as the number of Airmen facing the possibility of bankruptcy increases, keep in mind the protection this Act provides to the ANG and Reserves. During active service of 90 days or more, and 540 days following activation, Guardsmen and Reservists are exempt from the means-test requirement for bankruptcy. If you need more information on the Act, please look at the Bankruptcy section on FLITE.

## Legal Assistance E-mails—Are You Getting Them?

AFJAGS regularly sends out information and requests for information through the chiefs of legal assistance e-mail distribution list. If have not received any legal assistance e-mails from AFJAGS in the last few months, and you want to be added to the distribution list, please send an e-mail to Capt Scott Hodges at scott.hodges@maxwell.af.mil.

## Legal Assistance Webcast Highlights

On 17 December 2009, Maj Jeff Kuebler, an Army National Guard JAG who practices immigration law, presented an introduction and overview of the immigration legal arena. On 21 January 2010 he followed up with some practical tips and advice. His presentations introduced attorneys to some of the agencies that can help with immigration law issues and also explained some of the forms that are used. In addition to the recorded webcast, Maj Kuebler provided templates which are also available in the recorded webcast learning center.

On 28 January 2010, Ms. Christina Smith, from the Pentagon Legal Assistance Office, gave a presentation on the Military Spouses Residency Relief Act. She helped base legal assistance attorneys understand this short but complex piece of legislation and its impact on military families. Most importantly, Ms. Smith went through several scenarios that legal assistance attorneys could encounter and explained how the law would probably impact their residency status and tax status in particular.

If you would like to view these or any previously recorded legal assistance webcast go to the Previously Recorded Webcast learning center on CAPSIL at https://aflsa.jag.af.mil/apps/jade/collaborate/course/category.php?id=297. The learning centers for the recorded webcasts also contain the presenter's slides. The webcasts are arranged by date. If there are specific areas you would like to see covered in a webcast in the future, please notify Capt Scott Hodges at DSN 493-2851, scott.hodges@maxwell.af.mil.

CAPSIL
Capturing Wisdom

## 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.

*U.S. Air Force photo by SSgt Jacob N. Bailey*

## Tax Filing Year 2010

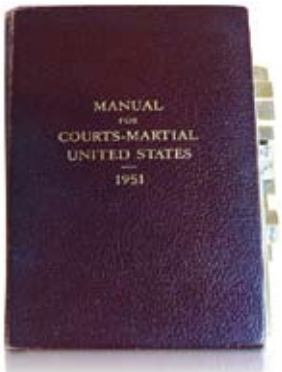
Thanks so much for all your hard work to support the Volunteer Income Tax Assistance program again this year. Please remember that your interim reports for tax filing year 2010 are due 15 June for CONUS installations, and 15 July for OCONUS. Utilize the Tax Program Reporting System in JAGUARS to report the number of federal and state electronic returns and paper returns, calculated savings, and number of staff involved.

## Your Legal Assistance Chief
## Major Jeff Green

I will leave the school and the legal assistance position this summer. I have really enjoyed working with all of you over the past year and a half.

Capt Scott Hodges, who is currently an instructor in the Professional Outreach Division at the JAG School, will take over as the Air Force Chief of Legal Assistance. Capt Hodges has been working on legal assistance issues since the beginning of this year, so the transition should be smooth. As many of you have already started doing, please make sure you include him on all correspondence you send to me.

If you have any legal assistance issues, please contact Capt Hodges at scott.hodges@maxwell.af.mil.




# Heritage to Horizons

## The 60th Anniversary of the UCMJ

*Major General Keithe E. Nelson's personal copy of the 1951 Manual for Courts-Martial*

This year marks the 60th Anniversary of the Uniform Code of Military (UCMJ). On the 5th of May, President Harry Truman signed the Military Justice Act of 1950, establishing the UCMJ. Drafted by a working group comprised of both civilian and military attorneys, the bill called for the creation of a single system of justice for all members of the United States Armed Forces. The resulting changes to military justice not only increased the fledgling Air Force JAG Department's[1] workload, but also required massive training efforts to familiarize judge advocates with the new procedures and Manual for Courts-Martial. Major General Reginald C. Harmon, the first Air Force TJAG, did not support the changes and remained critical of the UCMJ throughout his career. In a 1952 address to the Judge Advocates Association, General Harmon likened the effects of the UCMJ to "a train being pulled too far down a track by too much momentum, unable to stop when needed."

Up until World War II, military justice in the Army had been governed by the Articles of War. This system was several hundred years old and had been formulated primarily to serve the needs for strict discipline. The Constitutional rights of individual defendants had not been a major consideration in the evolution of the system. During the war, there was massive exposure of the system, as for the first time literally millions of Americans had direct experience with it, which included over two million courts-martial. The average American viewed the system as too severe and subject to too much command influence, resulting to widespread public pressure for comprehensive reform. The first round of reforms was instituted with the 1948 amendments to the Articles of War, also known as the Elston Act, which directed that TJAG appoint a Judicial Council composed of three general officers to review of all cases in which a bad conduct or dishonorable discharge was adjudged. However, the Act was never intended to be more than an interim solution to the problem. Even before the Elston Act became effective, Secretary of Defense James Forrestal appointed a committee to draft a uniform code for all three services that would completely replace the Articles of War and the corresponding provisions pertaining to the Navy. A working group of military and civilian attorneys from the Department of Defense, chaired by Harvard Law School professor Edmund Morgan, drafted the bill presented to the Congress in 1949. It passed almost exactly as it had been drafted.

The Military Justice Act of 1950 and the resulting UCMJ and Manual for Courts-Martial made sweeping and sudden changes in the processes of military justice. The immediate need for all JAGs to be trained in the new procedures led to the creation of the first Judge Advocate General Staff Course (JAGSOC) at Maxwell Air Force Base, Alabama. Additionally, on the heels of reform, the June 1950 invasion of South Korea once again put the nation at war, providing an immediate test of the UCMJ—which Air Force judge advocates would ensure it passed.

*For further information, read The First 50 Years of the U.S. Air Force Judge Advocate General's Department, by Lieutenant Colonel Patricia A. Kerns, USAFR, upon which this article is based.*

*The JAG School is in the process of establishing an archive to preserve documents, photographs, and memorabilia of historical significance to the JAG Corps. Offices and individuals maintaining such materials are encouraged to contact Mr. Wade Scrogham, the JAG Corps Historian, to discuss potential donations to the JAG Corps Historical Archive. Wade.scrogham@maxwell.af.mil*

[1] On 1 July 2003, the Secretary of the Air Force re-designated the Judge Advocate General's Department as the Judge Advocate General's Corps.

# Where in the World?

**"The Sands of QATAR" by Major James Jimmy Do, USAF**, an instructor at the U.S. Air Force Academy, while deployed with Major R. Aubrey Davis, HQ AFSOC/JA. 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.

## Call for Submissions!

Volume 67 of the *Air Force Law Review*, scheduled for publication in April 2011, will be dedicated to the topic of criminal law. Members of the JAG Corps are encouraged to submit articles that fit within this broad topic area. Submissions are due by 15 October 2010. Submission guidance is available on the Judge Advocate General's School FLITE website or by contacting Capt Scott Hodges at scott.hodges@maxwell.af.mil, or Maj Ryan Oakley at ryan.oakley@maxwell.af.mil.

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*U.S. Air Force photo by TSgt Rene Castillo*