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The Reporter

The Judge Advocate General's Corps

Foundational Leadership

Rising to the Challenge

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The Reporter

THE JUDGE ADVOCATE GENERAL'S CORPS

"In the final measure, nothing speaks like deeds."

— General John A. Wickham, Jr.

TEAMING

TRAINING

MILITARY JUSTICE

LEGAL ASSISTANCE

FIELDS OF PRACTICE

BOOKS IN BRIEF

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

"SOMETIMES YOU ONLY HAVE WHAT YOU BROUGHT."

Lt Gen Richard C. Harding, The Judge Advocate General

As legal professionals, we may be challenged to advise on an issue of great consequence, often when reach-back support is unavailable and no time exists for deep reflection. When that day arrives, the expectation is that attorneys, paralegals, and other legal professionals will rely on the training, subject-matter expertise, and leadership skills accumulated during their entire service.

General Harding emphasizes to graduates of the Judge Advocate Staff Office Course (JASOC), that they may face a "9-11 day" one day. He advises the new graduates that "sometimes you only have what you brought."

This edition of *The Reporter* showcases JAG Corps members rising to the challenge of providing commanders, Airmen, and family members with creative solutions to complex problems. First, Lt Col Mark Patterson and Maj Chris Schumann detail the awe-inspiring response of Misawa's legal team following the devastating 9.0 earthquake, tsunami, and nuclear crisis in Japan. In "Close to Home," Capt Thomas Alford describes the aftermath of two tragic aircraft accidents at Edwards AFB, identifying the immediate issues legal offices must be prepared to address following a fatal crash. Capt Tom Marrs tells of his experiences in the 603d Operations Division during Operation ODYSSEY DAWN.

We continue our focus on the JAG Corps' revival in our Military Justice practice. This edition includes two very practical articles for field practitioners. First, Lt Col Mark Stoup details a little-known yet highly-effective approach that can help your legal office partner with local law enforcement to gain jurisdiction of off-base drunk-driving cases. Further, Maj Seth Deam discusses how to handle high-profile nonjudicial punishment cases that attract attention in today's volatile social media environment.

As you are probably aware, General Norton Schwartz has placed great emphasis on the Exceptional Family Member Program as part of his focus on taking care of Air Force families. In an article by Lt Col Elizabeth Schuchs-Gopaul, you can learn more about assisting military families with special needs children in public schools. You can also take advantage of the training module in CAPSIL to review slides, webcasts, and legal sources related to this new focus area.

We have many other outstanding contributors. In "Retention vs. Discharge," Lt Col Jeremy Weber outlines a framework for commanders and SJAs to analyze Air Force fitness test failures. In a must-read article for deploying JAGs, Lt Col Thomas Murrey tells how a simple acquisition process can be used to effectively partner with coalition forces to win today's fight. Last but not least, Capt Scott Taylor explains the pros and cons when considering pre-foreclosure settlements for legal assistance clients caught up in the current housing crisis.

Clearly, we cannot predict every challenge on the horizon or the precise circumstances in which our legal mettle will be tested. Yet every day around the globe, JAG Corps members embody the pillars of foundational leadership by training, teaming, and preparing to confront the toughest challenges facing our Air Force. We hope you enjoy this edition of *The Reporter* and trust that when your 9-11 day comes, you will be ready!

THE JAPAN EARTHQUAKE

A LEGAL TEAM RISES TO THE CHALLENGE

by Lieutenant Colonel Mark H. Patterson and Major Christopher M. Schumann, USAF

Many of us have experienced earthquakes in our lifetimes, usually nothing more dramatic than a few seconds of shaking and a picture or two falling from the wall. The earthquake which struck the Tohoku Region of Japan on 11 March 2011 at 14:46 local time was far from ordinary. Measuring 9.0 on the Richter magnitude scale, with an epicenter approximately 200 miles south of Misawa and about 100 miles off the coast, it damaged or destroyed thousands of homes and took an unprecedented toll on the country's infrastructure. Unfortunately, the worst was yet to come. Five powerful aftershocks of up to 7.1 magnitude quickly followed the initial quake. Then, 15 minutes later, a massive tsunami consisting of multiple waves and measuring up to 10 meters (33 feet) struck the coast of Miyagi Prefecture. Over the next two hours, Fukushima, Iwate and Aomori Prefectures all experienced the surge which pushed seawater and debris up to six miles inland in some places.

The devastation wrought by this unprecedented disaster is difficult to calculate or capture. Raw numbers alone don't draw a complete picture, but are staggering. Almost 20,000 people were killed and tens of thousands more were injured. More than 100,000 buildings were damaged or destroyed. Walls of water swallowed entire towns, destroyed farms and factories, damaged roads and rail lines and even an airport, and swept up cars and trucks like children's toys. Yet, a more ominous challenge lay ahead for Japan.

Within 24 hours of the earthquake, radiation began to leak from a nuclear power plant on the eastern coast of Japan, near the city of Fukushima. Because it had been built along the coast, the plant was equipped with a 6-meter high tsunami wall. Unfortunately, the colossal wave that struck that location was more than 7 meters high. Water quickly flooded the generators, causing a power outage followed by a dangerous spike in the reactor's temperature. When cooling systems failed, the resulting hydrogen gas build up caused explosions within the outer containment buildings. Suddenly the scope of the disaster had the potential to increase in magnitude far beyond anyone's imagination.

Six million households across the country experienced complete power loss, and 1.5 million lost access to water. The disaster produced 300,000 refugees and resulted in critical shortages of food, water, shelter, medicine, and fuel. As the sole U.S. military installation in the Tohoku Region, Misawa Air Base was about to be thrust into history, facing monumental and unexpected challenges that were difficult to predict as events unfolded. The men and women of the 35th Fighter Wing Legal Office (35 FW/JA), with support from JAGs and paralegals from across the Pacific, immediately rose to the challenge.

Almost 20,000 people were killed and tens of thousands more were injured. More than 100,000 buildings were damaged or destroyed.

A Day Like Any Other

When the earthquake struck, most 35 WG/JA members were present for duty at the Torii Building on Misawa Air Base. The office had completed an administrative discharge board the day before, and was now engaged in a Phase I exercise. The biggest quake in Japanese history started with a sustained rocking and shaking that lasted almost four minutes. A few moments after the building stopped violently shaking, power went out across the base. Although no one appreciated the full scope of the disaster at the time, it quickly became evident that this was a very serious event, and accountability became a top priority.

Two members of the office were out of the area on leave and TDY, and others began to try and locate family around the base. Captain Jacob Frank was returning from a TDY in Korea and got caught at Narita airport in Tokyo, unable to travel forward or contact anyone from the office for 24 hours due to

a loss of cell phone service. With communications down, base leaders initiated a comm-out recall, which lead to the SJA and DSJA traveling off base late into the night through a darkened city with no power to find JAGs and paralegals living outside the gate who could not be reached. The last person contacted was paralegal Staff Sergeant Daniel Vargas, who had been driving back to Misawa with his family. They were on the expressway, just outside the city of Sendai, when the quake struck. Hundreds of citizens in the area were killed and the Sendai coastal area suffered catastrophic damage from the ensuing tsunami. Fortunately the entire Vargas family made it back to Misawa safely, just in time to join in the emerging recovery effort.

The Recovery Begins

While the earthquake was creating havoc across Japan, Misawa Air Base was dealing with some significant issues of its own. The catastrophic loss of power took down Internet, heating, and phone service for a population of nearly 13,000 base residents. Because an exercise was already underway, a JA representative was already working in the Emergency Operations Center (EOC) and 24-hour shifts had been set up. JA representatives quickly got to work.

In addition to performing traditional JA functions to include advice to commanders, legal assistance, and disaster-related claims prep, JA personnel served as EOC representatives for the Wing's various staff agencies. JA soon agreed to take on liaison issues for all DoDEA, AAFES, and Defense Commissary Agency (DeCA) employees and their families to relieve some of the pressure from Force Support Squadron personnel. From the moment the quake hit, JAGs and paralegals provided 24/7 coverage in the EOC and to the Unit Control Center, in addition to providing regular disaster related briefings to the Emergency Family Assistance Control Center (EFACC).

The recovery effort was quickly dubbed "Operation Tomodachi" (tomodachi means "friend" in Japanese), and JA personnel supported reception of aircraft, transportation of over 1 million tons of relief supplies and personnel to the affected disaster area, and assisted with the hosting of approximately 300 search and rescue teams from the U.S., United Kingdom, France, Switzerland, and Germany. 35 FW/JA also remained open 24/7 from the very beginning, operating out of an unlighted and unheated Staff Agency UCC and an alternate facility with limited generator power until power was restored to the Legal Office a week later.

"God Bless the Legal Office"

On 17 March, as concerns over the situation at the Fukushima nuclear plant grew, the State Department authorized the voluntary departure of DoD eligible family members from Japan, dubbed Operation Pacific Passage. When the voluntary departure program began, the Legal Office worked with the communications squadron to set up two computers and a printer on the processing line for two paralegals and an attorney.

Personnel began processing through the line hours later. 35 FW/JA served clients both on the line and in the Legal Office itself, helping 173 clients with 267 POAs, notarized over 283 documents, and executed 33 wills, all in less than 72 hours. Navy paralegals with CTF-72 and NAF Misawa also provided POA service and even helped staff our office during the biggest spike on 19 March. The area defense counsel and defense paralegal also stepped in to assist, providing legal assistance support while others worked the processing line. It was truly a team effort, with everyone committed to the cause.

From 17 March through 22 March, legal office personnel provided 24-hour coverage to the processing line in support of Operation Pacific Passage, assisting with the short notice voluntary departure of over 1,400 dependents from Misawa to safe haven locations in the United States. Since the legal office had quickly established 24-hour operations,

we were able to facilitate legal assistance support to many family members unsure about what the future would hold for them and their sponsors—many of whom are deployed—in Japan. One thankful client exclaimed on American Forces Network's Facebook page, "God Bless the Legal Office!"

Bringing What We Had to the Fight

The scope and variety of legal and non-legal issues JA personnel faced were daunting. Almost immediately JAGs were advising the installation commander on issues as varied as the legality of using base equipment to clear debris in local communities to the ramifications of allowing nearly 50 unannounced U.S. refugees from the devastated city of Sendai shelter on Misawa. In addition, fuel was now unavailable off base. The JA EOC representative worked closely with AAFES and the DeCA, and after some negotiation with a representative from the Japanese Ministry of Foreign Affairs, secured the blessing of the government of Japan to allow non-SOFA mission essential personnel to receive fuel from on-base sources.

When it was discovered that nearly 80 students from Misawa High School sports teams were traveling around the Tokyo area, it was the JA EOC representative that coordinated with Yokota Air Base and provided constant updates to unit leaders and family members on the status of the students as they made their way back to Misawa. The JA EOC representative also worked closely with PA, drafting and reviewing Frequently Asked Questions guidance that was then passed to the local community through social media and other sources, answering many of the questions on the minds of Misawa's residents.

At the EFACC, JAGs and paralegals provided daily briefings on claims and other legal assistance issues, created handouts with key information, and provided POA and notary service at all hours of the day and night. As SJA, I accompanied the installation commander in meeting with the United States Agency for International Development (USAID) advance planners. Judge advocates were on the flight line briefing incoming USAID workers within 18 hours of the disaster. JAGs also closely coordinated with the Ministry of Foreign Affairs to allow relief workers access to the BX and commissary despite their non-SOFA status.

The most significant issues involved determining how we could help non-passport holding dependents who wished to leave Misawa as part of Operation Pacific Passage. On average, a baby is born every day on Misawa Air Base. As a result, we had a number of infants who would not be able to get passports in time—16 born since 11 March alone. Misawa also has numerous dependents who are citizens of countries other than the U.S. and Japan, such as the Philippines and Thailand, who did not have travel documents that would allow them to enter the United States.

With no time to plan, we had to rely heavily upon pre-established relationships with the Consulate in Sapporo and later upon ever-fluid guidance from USFJ/JA. Working closely with these contacts and the entire military legal family in Japan, PACAF and PACOM, we were ultimately able to relay that those who were U.S. citizens without passports would be permitted entry into the United States or to alternate Safe Haven locations.

We worked very closely with the Wing comptroller to ensure that personnel considering whether to participate in Operation Pacific Passage had good information regarding JFTR entitlements—especially joint-spouse parents or single military-essential parents faced with the dilemma of escorting their dependents back to the states. Many issues were raised at a series of Town Hall meetings held on base, where Major Chris Schumann, Deputy SJA, and I were invited to join the installation commander to

address the audience on a myriad of questions related to the departure.

Even as we addressed dozens of challenging issues percolating on a daily basis, complex issues loomed on the horizon. JAG Corps members became immersed in strategic planning for the possibility of a mandatory evacuation of American citizens from Japan, as well as planning the logistics of their eventual return. I began meeting regularly with a Department of State representative who was an expert in noncombatant evacuation operations (NEO) to gain a better understanding of what Misawa might be expected to do and how we could assist. Meanwhile, Major Schumann partnered with various base leaders and planners to prepare for the potential return of thousands of Pacific Passage departees in the next few weeks.

While JAGs and paralegals focused on a number of big picture issues, there were individual stories of accomplishment that demonstrated what JA brings to the fight. One particular highlight involved an attentive paralegal and JAG who were contacted by a dependent spouse desperate to return to the U.S. on one of the contract carriers chartered to take the dependents out of Japan. The spouse hadn't originally planned to depart, but had just received distressing news that her mother was very ill and would likely not survive more than a few days. She didn't have a valid passport, and was concerned she wouldn't be able to get out of the country if she took a commercial flight from Tokyo.

Major Schumann, working in the EOC, received the call and began discussing with the dependent the limited options available for travel back to the states when he overheard an LRS representative mention that the last contract flight, currently on the flight line and ready to depart, was delayed for a few hours due to maintenance. Major Schumann quickly contacted the installation deployment officer and got the okay to get the dependent and her two kids on that last flight. Literally while working that issue, a CE representative approached and said a different dependent was on the phone and was also notified that a close family member was gravely ill, and she also needed to get home fast. After another series of phone calls and some close coordination with the Force Support Squadron, Maj Schumann was able to get all four dependents on the plane shortly before its departure.

Continuing Aftershocks

To date, there have been well over 1,000 aftershocks since the March 11 quake. The power loss at Misawa lasted until 15 March, when only limited power was restored to certain parts of the base. The Legal Office only regained power on 21 March. Even after the immediate crisis passed, JAGs and paralegals stayed fully engaged, participating in planning sessions, EOC coverage, and the return of Misawa's families once the voluntary departure order was lifted on 15 April.

With the blessing of the Wing Commander, the 35th Fighter Wing Legal Office became one of the first organizations to volunteer as an office to participate in what has been dubbed "Misawa Helps," a program designed to organize and transport an army of volunteers interested in doing our part to assist our host nation friends in cleaning up and rebuilding their lives. There have been a total of 3,000 volunteers, participating in over 55 missions, dedicating more than 26,000 man-hours to help Japanese friends and neighbors throughout the area.

The legal office team spent an entire day clearing commercial fishing-related wreckage from a local beach, and then traveled to a local pig farm that had been completely destroyed by tsunami waters. "Misawa Helps" is still going strong, and JAGs and paralegals from the 35th Fighter Wing continue to volunteer their time to help the Japanese recover. We expect these efforts will pay dividends for years to come in strengthening and solidifying U.S.-Japanese relations across the nation.

Lessons Learned

As Lieutenant General Harding has noted, sometimes you can bring only what you have to the fight. We were fortunate to have well-established liaisons with relevant government agency representatives from the Government of Japan (largely due to diligent efforts of the United States Forces Japan Legal Staff at 5th Air Force, at Yokota AB) and with representatives from the Department of State. We were also glad to have good working relationships with the 35th Force Support Squadron and 35th Communications

Squadron, to spin up an emergency legal assistance machine on very short notice.

We were pleased as paralegals and JAGs alike at how the Air Force legal assistance website worked and with the products it produced, in a time of crisis. Previous training efforts clearly paid off. And while considering website-based tools, we were grateful to have familiarity with social media services as a means of information dissemination. More than one senior leader was surprised by just how much the average Misawa Air Base community-member relied upon social media to communicate and gain information—even before power and internet became widely available across the base. Future disaster-response planners in the legal world would be well-served to consider how Facebook and other such tools will be used by their communities to understand and cope with a disaster.

One of the greatest rewards from our experience as a legal office at Misawa during this crisis was the greater sense of appreciation we received as JAGs and paralegals from across the community. From the lowest ranking Airman to senior Wing leadership, there was a noticeable realization that JAGs and paralegals are valuable assets that have much to offer. One senior leader commented, in reference to the "smart, caring" JAGs and paralegals making a difference at Misawa: "They understand the law, work through difficult events, and actually care about their clients…[they] give their best every day."

On the downside, finding personnel and family members in a "comm-out" situation presented a considerable challenge. As an SJA, I learned that extra effort needs to be made to provide command and control when personnel are scattered across different shifts, in multiple locations, and when stress and anxiety levels are high—it's harder than I would have expected, even with a relatively small office.

The End?

From 11 March 2011 until today, Japan has dealt with a mammoth earthquake and hundreds of aftershocks, a devastating tsunami, and a nuclear disaster that led to the voluntary departure of hundreds of Misawa families in a matter of days. While the difficult recovery will continue for quite some time, U.S.-Japan relations have been further strengthened due to the efforts of thousands of U.S. military members, civilians and family members across Japan. The men and women of the 35th Fighter Wing Legal Office played a pivotal role in nearly every aspect of recovery operations. We are honored by the opportunity to serve at this historic time, and are humbled by the spirit and resilience of our Japanese hosts.

(back L-R) Capt Jeff Clark, Mr. Hitoshi Yamauchi, MSgt Joe Fleming, Capt Chris Stein, Mrs. Sarah Stein, Lt Col Mark Patterson, A1C Nikkole LaForest, Capt Jacob Frank, SSgt Daniel Vargas, TSgt Josh Kennedy; (front L-R) Mrs. Sue Clark, Mrs. Evelyn Fleming, Shoichi Ichisawa, Jr., Mr. Shoichi Ichisawa, TSgt Tracy Zeece

Close To Home

Responding to Fatal Aircraft Accidents on Private Land

by Captain Thomas J. Alford, USAF

I had been in the JAG Corps less than a year when the Edwards Air Force Base community was shaken by two fatal aircraft accidents less than 60 days apart. When the first call came in, our SJA was deployed and our legal office was undermanned. Quickly we pulled together as a team and assumed positions of great responsibility. Hopefully, you will never need to respond to a major accident. But if it does happen, the following discusses the critical fields of practice for which your legal office can train and prepare.

When an aircraft crashes off-base, the judge advocate and paralegal's role in the immediate aftermath is crucial.

Background

On 25 March 2009, at 1010 Pacific Standard Time, the Edwards command post was notified that an F-22A "Raptor" aircraft had crashed on private property 35 miles northeast of base.[1] The subsequent accident investigation board (AIB) concluded that the pilot, David P. Cooley, a Lockheed Martin test pilot and retired United States Air Force (USAF) lieutenant colonel, had an "adverse physiological reaction to high acceleration forces, resulting in channelized attention and loss of situational awareness (SA) during recovery from a test maneuver" he was performing in the aircraft.[2] By the time Lt Col Cooley regained partial situational awareness, "he determined there was inadequate altitude for a safe recovery and ejected."[3] Because the ejection had been initiated 165 knots above the ejection seat's design limit, Lt Col Cooley "suffered fatal injuries due to blunt force trauma caused by windblast."[4] The F-22A was completely destroyed upon impact with the ground. The main impact site, located in a remote, uninhabited section of the Mojave Desert, was contained to an approximately 45 x 48 x 20 foot deep crater. Debris, however, was scattered across several acres of private land. The property damage near the impact site "consisted of ground scarring and chemical (fuel, hydraulic fluid) contamination."[5]

Less than two months later, on 21 May 2009, at approximately 1330 hours, the command post reported another aircraft crash. A T-38A Talon, with two Test Pilot School (TPS) students on board (a pilot and navigator), experienced a critical malfunction in the rudder operating mechanism in the skies above Edwards AFB.[6] According to the AIB report, the malfunction "disconnected the flight controls from the rudder actuators and caused the rudder to deflect 30 degrees left." This induced an

[1] Edwards AFB, CA is home to the Air Force Flight Test Center (AFFTC). AFFTC's mission is to conduct and support research, development, test and evaluation of aerospace systems from concept to combat. Edwards test forces have played a vital role in the development of virtually every aircraft to enter the Air Force inventory since World War II.

[2] Maj Gen David W. Eidsaune, United States Air Force Aircraft Accident Investigation Board Report, F-22A, T/N 91-4008, 26 (2009).

[3] *Id*.

[4] *Id*.

[5] *Id*. at 2.

[6] Maj Gen Curtis M. Bedke, United States Air Force Aircraft Accident Investigation Board Report, T-38A, T/N 68-8153, 36 (2009).

uncontrollable yaw and resulting roll, causing the aircraft to depart from controlled flight. The pilot, Maj Mark Paul Graziano, was fatally injured when the T-38A impacted with the desert 12 miles north of Edwards AFB. The navigator, Maj Lee Vincent Jones, ejected prior to the impact, but sustained severe injuries. The T-38A, like the F-22A months before, was destroyed on impact.[7] The debris was scattered over a remote area of unimproved desert land, covering multiple plots of private property.

Our Role

When an aircraft crashes off base, the judge advocate and paralegal's role in the immediate aftermath is crucial.[8] A myriad of legal issues arise immediately which include, but are not limited to, federal and state criminal law issues, as well as constitutional, environmental, tort, and property law issues. Commanders responding to an aircraft accident off-base will rely heavily on the base legal office for advice and counsel during the initial response, the aftermath of the crash, and the restoration and clean-up of the accident site. The specific duties of a legal office during an emergency are discussed in AFMAN 32-4004, *Emergency Response Operations*, 1 December 1995, paragraph 1.2.12. Both the F-22A and the T-38A crashed in uninhabited areas. As a result, the pilots were the only fatalities. Clearly, this scenario will not always be the one you will face.[9]

Initial Response

Immediately after both accidents, the command post sent out a base-wide recall. One JAG from the AFFTC Legal Office was dispatched to the Emergency Operations Center (EOC), and two JAGs were sent to the Installation Control Center (ICC). While a JAG's presence is not necessarily required at the EOC,[10] the EOC commander will likely request that a JAG be present during the first phase of the aircraft accident response.

Leadership will likely activate the Mobile Emergency Operations Center (MEOC), and the JAG attached to the EOC will travel with the MEOC to the accident site with the EOC commander.[11] In the early response, it is crucial for the EOC JAG to be in constant communication with the ICC JAG to ensure that commanders are not receiving conflicting or cumulative advice from the legal office. Ideally, advice should be given solely by the ICC JAG directly to the ICC commander (typically the installation commander), who will make the decision and communicate it to the EOC (thereby rendering the EOC JAG's advice redundant and unnecessary). However, the ICC JAG should keep the EOC JAG informed of any advice given to the ICC commander. Further, be prepared to work at least 12-hour shifts during the early stages of the accident response. The ICC and EOC were manned "around the clock" during the first several days. The EOC JAG was relieved within a few days, allowing the ICC JAG to handle all further legal issues.

One of the first questions posed by the responding commanders is "How exactly do we declare a National Defense Area (NDA)?"

NDA: To Declare or Not Declare?

One of the first questions posed by the responding commanders is "How exactly do we declare a National Defense Area (NDA)?" But the more difficult question for the JAG is not *how* to declare[12] but, rather, *whether* a commander should declare an NDA? In neither of the accidents did the Edwards AFB commanders declare an NDA, nor did the legal office recommend declaring one. Despite checklists

[7] *Id*.

[8] This article concerns "Class A" aircraft accidents that take place within the United States, as defined in DoDI 6055.07, *Accident Investigation, Reporting, and Record Keeping*, 3 October 2000 (incorporating Change 1, dated 24 April 2008). Furthermore, many of the legal issues faced in an off-base accident will be similar to an on-base accident; however, since the range of legal issues dealt with in an off-base accident will likely be greater than in an on-base accident, this article's focus will be on the former.

[9] *See, e.g.*, Richard Marosi and Tony Perry, *Military Jet Crashes in San Diego Neighborhood*, Los Angeles Times, Dec. 9, 2008, http://www.latimes.com/news/la-me-jetcrash9-2008dec09,0,1422044.story.

[10] *See* AFI 10-2501, *Air Force Emergency Management Planning and Functions*, 24 January 2007.

[11] In the case of both the F-22A and T-38A, an AFFTC JAG was present at the crash site, along with the Air Force Office of Special Investigations (AFOSI) and Security Forces (SFS), shortly after the accident.

[12] This procedure is clearly articulated in AFI 31-101, *Integrated Defense*, 8 October 2009 (formerly AFI 31-101, *The Air Force Installation Security Program*, 1 March 2003). This instruction is For Official Use Only (FOUO).

and (some) guidance to the contrary, an NDA should not be declared in every "Class A," off-base aircraft accident. In fact, an NDA should probably be a last resort.[13] AFLOA/JACC (Aviation Law) will be the legal office's best source on the proper course of action regarding NDAs. An NDA is defined as follows:

> An area established on non-Federal lands located within the United States or its possessions territories [*sic*] for the purpose of safeguarding classified defense information or protecting DOD equipment or material. Establishment of a national defense area temporarily places such non-Federal lands under the effective control of the Department of Defense and results only from an emergency event. The senior DOD representative at the scene will define the boundary, mark it with a physical barrier, and post warnings. The landowner's consent and cooperation will be obtained whenever possible; however, military necessity will dictate the final decision regarding location, shape, and size of the national defense area.[14]

There are several advantages in declaring an official, *de jure* NDA.[15] The primary benefit is that it gives a commander the right to exclude both landowners directly affected by the accident (the landowner of the crash impact site) and non-landowners (trespassers) from the NDA.[16] These powers granted to an installation commander are found in 50 U.S.C. § 797, which states that it shall be a misdemeanor for any person to "willfully violate[] any defense property security regulation."[17] A "defense property security regulation" can be created by a qualifying commander designated by the Secretary of Defense.[18] DoDD 5200.8 specifically grants installation commanders the authority to create NDAs for the protection of DoD property.[19]

An NDA gives an installation commander arrest and detention authority on par with the commander's arrest and detention authority within the confines of her installation. Just as an arrest of a civilian on a military installation for crimes committed on base is not a violation of the Posse Comitatus Act (PCA),[20] an arrest of a civilian on an NDA should similarly not violate the PCA.[21] As a matter of policy, however, the Air Force has made it clear that apprehension and detention of civilians who violate the boundaries of the NDA should normally be accomplished by civil-

[13] The F-22A, probably the most advanced weapon in the Air Force's arsenal, did not warrant declaring an NDA in our case. It is important to note that there is little guidance from any court regarding NDAs since few NDAs, if any, have been challenged.

[14] AFMAN 32-4004, *Emergency Response Operations*, 1 Dec. 1995.

[15] For a comprehensive discussion of NDAs, *see* ARMY LAW; Oct. 1981 at 8, 13.

[16] It is important to note that the declaration of an NDA *may* raise Fifth Amendment "Takings Clause" issues because the land is temporarily seized from the landowner and used by the government.

[17] *See* The Internal Security Act, 50 U.S.C. § 797 (2009). The power to grant an NDA can be delegated by the installation commander.

[18] *See* DoDD 5200.8, Security of DoD Installations and Resources, 25 April 1991 ("commanders of MAJCOMs, NAFs, wings, and groups have been delegated the authority to issue regulations to safeguard 'property and places'").

[19] *See* DoD 5200.8, para. 3.2.1 ("That authority extends to temporarily established 'National Defense Areas' under emergency situations such as accident sites involving Federal equipment or personnel on official business.").

[20] *See* 18 U.S.C. § 1385 (2009) (this statute makes it illegal for a person, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, [to] willfully use[] any part of the Army or the Air Force as posse comitatus or otherwise to execute the laws."). To date, no one has been fined or imprisoned under the PCA.

[21] *See* United States v. Banks, 539 F.2d 14 (9th Cir. 1976), *cert. denied*, 429 U.S. 1024 (1976) (affirming authority of military police to detain and arrest civilian for heroin possession on base and turn over to civilian authorities, holding the PCA "does not prohibit military personnel from acting upon on-base violations committed by civilians."); *see also* Application of the Posse Comitatus Act to Assistance to the United States National Central Bureau, 13 Op. O.L.C. 195, 197 (1989) ("we agree that *the Posse Comitatus Act does not prohibit military involvement in actions that are primarily military or foreign affairs related*, even if they have an incidental effect on law enforcement, provided such actions are not undertaken for the purpose of executing the laws." (emphasis added)).

ian law enforcement authorities.[22] In the absence of an official NDA, does a commander have the same authority to arrest or detain an individual that enters the site of an aircraft incident? If the commander does not have that authority, is the military violating the PCA if it excludes, arrests, or detains a civilian who insists on entering the crash site? What if the civilian who desires to enter the crash site is the owner of the affected land?

The punitive reach of 50 U.S.C. § 797 includes "property subject to the jurisdiction, administration, or in the custody of the Department of Defense, any Department or agency of which that Department consists, or any officer or employee of that Department or agency."[23] The property covered by the statute expressly includes "aircraft."[24] Therefore, 50 U.S.C. § 797 gives a qualifying commander the authority to protect a military aircraft from civilian interference *even if* it is not within the confines of a military installation or on Federal land. Logically, this would seem to include a military aircraft that has crashed on privately owned land. Therefore, 50 U.S.C. § 797 appears to give a qualifying commander arrest and detention authority for an aircraft accident site regardless of an express NDA declaration, so long as the commander complies with the regulations promulgated under 50 U.S.C. § 797.[25] Furthermore, because 50 U.S.C. § 797 creates an exception to the PCA, a commander who had not officially declared an NDA arguably would not violate the PCA by exercising his or her arrest or detention authority, as long as the commander was doing so in order to protect the remnants or parts of a military aircraft at a crash site.

[22] *See* AFI 31-101, *Integrated Defense*, 8 October 2009; *see also* DoDD 5525.5, DoD *Cooperation with Civilian Law Enforcement Officials*, 15 January 1986.

[23] 50 U.S.C. § 797.

[24] *Id*.

[25] This is, essentially, a *de facto* NDA. *But see* 10 U.S.C. § 375 (2009) ("The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity . . . does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law."); DoDD 5525.5, para. E4.1.3 (direct assistance to law enforcement in the form of "a search or seizure" or an "arrest, apprehension, stop and frisk, or similar activity" is prohibited); AFI 10-2501, para. 4.6.5.6.1 ("Involvement of military resources in an off-base response gives the Air Force no specific rights or jurisdiction *unless* an NDA is established." (emphasis added)).

Even without relying on 50 U.S.C. § 797, a commander would arguably not violate PCA by apprehending a civilian for entering the crash site. Military operations can fall outside of the PCA readily based on the underlying motive of a military action.[26] The "primary purpose" in both aircraft incidents near Edwards AFB was to protect military aircraft remnants; the purpose was *not* to enforce civilian law. Therefore, if SFS detains and turns over a trespasser to the local sheriff, it is only because the person poses a security issue for what is left of the aircraft.

Declaring an NDA may or may not be necessary, depending on the severity, sensitivity, and location of the aircraft accident.

Declaring an NDA may or may not be necessary, depending on the severity, sensitivity, and location of the aircraft accident. In any case, make sure to contact your respective NAF or MAJCOM SJA, as well as AFLOA/JACC before giving advice in this arena, time permitting. Ultimately, whether an NDA is officially declared by a commander or not, the base legal office should immediately begin contacting the affected landowners in and around the aircraft accident site. Landowner consent is crucially important and may render the NDA question moot.

Contacting Landowners

As soon as possible, the ICC JAG should be contacting the landowners affected by the crash. In total, the F-22A crash site, including the debris, was confined to twenty separate parcels of land.[27] Ownership of the twenty parcels was divided among sixteen individual landowners. Once the impact site is located, the ICC JAG should talk to the Civil Engineering (CE) representative and/or the Environmental Management Representative (EM), since one or

[26] *See* DoDD 5525.5, para. E4.1.2.1 (the following activity is not restricted by the PCA: "Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities").

[27] As with the T-38A accident, all parcels affected by the F-22A accident were uninhabited. The decision whether to declare an NDA becomes more complicated if the land affected by an accident is densely populated.

both of these units may support a program called the "Geographic Information System" (GIS). GIS had its own representatives at the Edwards AFB ICC, and they were able to provide the exact location of the impact site and debris field on a printable computer map. In addition, GIS was able to provide parcel numbers, which are nine-digit codes that correspond to each respective parcel. GIS also provided some landowner data and contact information. Using this data, the JAG should be able to contact the landowners. Without GIS's assistance or without good contact information for a landowner, the JAG should contact the local county recorder, who should be able to provide a name and contact information as long as the JAG has the parcel number for a given piece of land. Lexis-Nexis and Westlaw also provide tools that enable the ICC JAG to find contact information for landowners.

It is a good idea to create a script before you contact the landowners. Keep the description of the event brief,[28] and tell the landowners they will be receiving further details in a written letter. Make sure to confirm the landowner's identity when you call, and ask for consent[29] for the Air Force to conduct recovery and clean-up operations. Our script for the F-22A incident read as follows:

> Our records indicate that you own property near Harpers Lake in San Bernardino County, California. The parcel number is _____. On 25 March 2009, an F-22 aircraft crashed near your property. We are currently in the area removing debris and estimate we will be conducting clean-up efforts through April 2009. We wanted to make you aware that we are in the area and request your permission to be on your property as we manage this situation.
>
> We are happy to provide periodic updates on the situation if you would like and, at the end of operations, we will send you a letter summarizing the operations and providing you more information.
>
> What is a good address and contact number for you? If you have any questions, please feel free to contact Captain Thomas Alford and Staff Sergeant Jill Smith at (555) 555-5555.

In both aircraft incidents at Edwards, the landowners were extremely cooperative. To be thorough, the legal office sent letters to the landowners before and after the clean-up, describing the efforts undertaken to ensure the land was restored to its previous condition. Before sending letters to landowners, you should contact Public Affairs (PA) so they can review the final draft. After receiving the initial letter from the legal office, some landowners requested to visit their land during the clean-up, and, in order to accommodate their requests, the legal office scheduled a time with SFS for the landowner to inspect their land (once, of course, it was safe to do so). While, in our experience, we were fortunate to have cooperative landowners, this will not always be the case. Both aircraft accidents occurred over remote desert property owned mostly by absentee landowners. But what happens if a landowner will not allow the Air Force to enter his/her land for the recovery and clean-up?

If a landowner denies entry onto the land, then you need to have clearly articulated rules for the use of force.

Crafting Rules for the Use of Force

Once you receive consent from the landowners affected by the crash, recommend to SFS that they contact local law enforcement in order to have a local law enforcement agent on call (or, if possible, on site) in case a non-landowner (trespasser) tries to enter the crash site. In the absence of an NDA, this is the most prudent method to prevent non-landowners from approaching the crash site. However, if a landowner demands access to his land during the recovery or

[28] Remember OPSEC and do not mention any sensitive details, especially if there are casualties.

[29] A trespass action is a permissible cause of action under the FTCA. *See, e.g.*, Hatahley v. U.S., 351 U.S. 173 (1956); Epling v. U.S., 453 F.2d 327 (9th Cir. 1971); Best v. U.S., 505 F. Supp. 48 (E.D.N.C. 1980). Consent and necessity have long been defenses to the tort of trespass. *See, e.g.*, Ploof v. Putnam, 71 A. 188 (Vt. 1908) (necessity); Mohr v. Williams, 104 N.W. 12 (Minn. 1905) (consent).

other critical stages of the clean-up, or, worse, denies officials entry to the land, then you need to have clearly articulated rules for the use of force (RUF) both for Security Forces and the on-site commander.

For both the F-22A and the T-38A accidents, the legal office crafted RUF. These RUF provided guidance for the on-site commander and SFS in dealing with several hypothetical situations. The first section of the RUF concerned the use of physical force. In conspicuous language at the top of the RUF, it stated "USE THE MINIMUM FORCE REASONABLY NECESSARY TO PREVENT A VIOLATION OF AN NDA OR, IF NO NDA, TO PROTECT THE REMNANTS OF THE AIRCRAFT."[30] The second section of the RUF dealt with consent:

> Always attempt to obtain consent to operate on the land. If no consent is obtained from the landowner due to the lack of contact, continue to operate. Officially, establishing a "National Defense Area" should be a last resort; that is, when dealing with a "hostile landowner."

Although the ICC JAG was able to obtain consent from some of the landowners, they were not able to contact every landowner affected by the crash. Even without express authorization due to the lack of contact with a landowner and even without a declared NDA, necessity should still justify the clean-up, recovery, and crew operation on the affected parcels.[31]

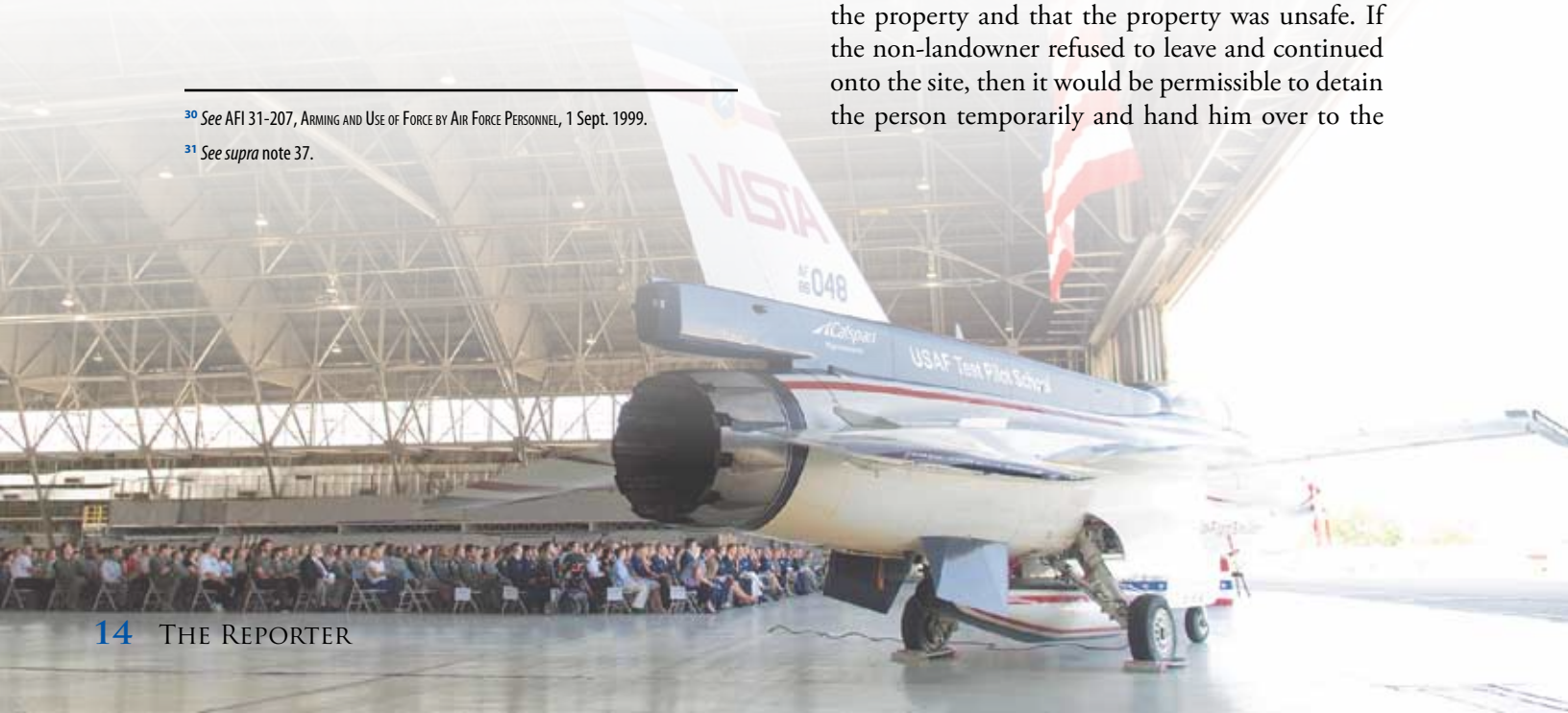
The third section of the RUF dealt with a situation in which a landowner was asserting his or her rights. The responding SFS member should first explain the health risks of entering the land (debris, fire, etc.), determine if it would be possible for the landowner to proceed without encountering a hazard or disturbing the site, or request that the landowner leave the site until it can be made safe.

The fourth section of the RUF dealt with the "hostile landowner" or one that either proceeded onto his land against the recommendation of the USAF representative, or one that expressly refused to grant entry to the USAF. If an on-site commander or SFS member encountered a "hostile landowner," then the legal office advised the on-site commander to officially declare an NDA orally or by signing the NDA declaration document on the spot. At that point, the responding commander could inform the landowner that proceeding onto the land would violate federal law. If the individual continued to proceed, then SFS could detain the individual. The legal office also advised the on-site commander that it was not necessary to declare an NDA if the landowner in question came into contact with any part of the aircraft, since this would be illegal for a landowner to do in and of itself.

The last section of the RUF dealt with non-landowners. In the event a non-landowner desired to approach the crash site (without a declared NDA), then the on-site commander should inform the non-landowner that he was not allowed onto the property and that the property was unsafe. If the non-landowner refused to leave and continued onto the site, then it would be permissible to detain the person temporarily and hand him over to the

[30] *See* AFI 31-207, Arming and Use of Force by Air Force Personnel, 1 Sept. 1999.

[31] *See supra* note 37.



local authorities, who may be able to prosecute the individual for violating the state criminal trespassing statute.[32]

Assistance to Survivors

Lt Col (Ret.) David P. Cooley (1960-2009) and Maj Mark P. Graziano (1979-2009) both perished in their respective aircraft accidents. Both deaths were a tremendous loss for the Edwards AFB and Air Force communities. When a pilot dies in an aircraft incident, the legal office should be involved in assisting commanders with any legal issues that arise surrounding the fatality. Immediately after being notified, a JAG may be called to assist the installation commander in drafting summary court officer (SCO) and family liaison officer (FLO) appointment letters.

The primary resource a JAG should consult in order to answer questions regarding aircraft accident fatalities is AFI 34-1101, *Assistance to Survivors of Persons Killed in Aviation Mishaps and Other Incidents*, 1 October 2001. This AFI is a services instruction and is usually implemented by the Force Support Squadron (FSS), but JAGs should nonetheless be familiar with the regulation since commanders will frequently have questions regarding the "legalities" surrounding a fatality. AFI 34-1101 implements the Air Force Survivor Assistance Program (AFSAP) and formalizes procedures for commanders and functional managers to provide information, referrals, death benefits, and other forms of assistance to the next-of-kin and other family members of persons who lose their lives due to Air Force aviation mishaps. The instruction also implements Air Force Policy Directive (AFPD) 34-11, *Service to Survivors*.

AFI 34-1101 states that "the survivors of any Air Force member or civilian employee who dies, regardless of cause of death or place of assignment, should be provided a FLO and the maximum level of assistance permitted by law."[33] A FLO should be appointed by the installation commander in writing within 24 hours of a fatal Air Force mishap.[34] Initially, a single FLO should be assigned for each person lost in a mishap and should interact with only the family members or next-of-kin (NOK) affected by that person's loss.[35] FLOs are expected to make contact with the families to which they are assigned at least daily until the funeral is over, and periodically as the situation warrants, or until the accident investigation is complete.[36] The FLO should also "help families conduct benefits-related business with other Air Force personnel (casualty affairs, mortuary affairs, etc.) and to work with other supporting military personnel as needed."[37]

The SCO should be provided with the business card for the Chief of Legal Assistance to give the family for follow-up legal questions.

Likewise, a SCO is a commissioned officer appointed on orders, in writing, by the installation commander, pursuant to AFI 34-244, *Disposition of Personal Property*, 1 October 2001, to collect, safeguard, and promptly dispose of property belonging to the deceased at the time of their death. The SCO process is "part of the larger Mortuary Affairs program, and is specifically designed to help survivors through the management procedures necessary to close out a member's service."[38] Each base should have a Mortuary Affairs Plan that is maintained and created by services. The legal office should have, at one time, reviewed the Mortuary Affairs Plan and made sure it complied with AFI 34-242, *Mortuary Affairs Program*. The legal office should also brief the SCO on his or her duties, as they are unlikely to have performed this function before. The SCO should be provided with the business card for the Chief of Legal Assistance to give the family for follow-up legal questions. AFI 34-242 also requires the base legal

[32] In the case of the accidents near Edwards AFB, it would have been a violation of Cal. Pen. Code § 602 (2009).

[33] AFI 34-1101, para. 1.1.1.1.

[34] *Id.* at para. 2.2.1. (the FLO should be provided initial training by the Services squadron or Services division personnel in accordance with the AFI before a fatal mishap requires their services).

[35] *Id.* at para. 2.2.2.

[36] *Id.* at para. 2.2.5.

[37] *Id.*. at para. 2.2.6.

[38] *Id.*

office to review the SCO case file for legal sufficiency, before closing the case.

The base mortuary affairs officer (MAO) is supposed to be appointed in writing by the installation commander in accordance with AFI 34-242 well before any incident occurs.[39] The MAO "oversees the administration of the survivor assistance program for the installation commander and will…[p]romote survivor assistance awareness…[and f]acilitate FLO training."[40] This officer is also responsible for maintaining contact with any FLOs throughout the casualty process and to report issues and progress to the MAJCOM point of contact (POC) as required. When presented with a question regarding pilot fatalities after an aircraft accident, it is best practice for the JAG to contact the MAO first and, if he/she is not available, begin researching the issue by reading AFI 34-1101.

In the case of an off-base accident on private land, the legal office must be prepared for an emergency tort claims situation.

Claims

Aircraft accidents may involve civilian injuries or deaths, extensive damage to property, or the evacuation and disruption of a civilian population under circumstances where the United States may incur liability under tort-based statutes. In these circumstances, the base legal office should implement its respective Major Accident Claims Plan. The Federal Tort Claims Act (FTCA) causes the United States to be liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances."[41] However, unlike a private individual, the United States is never subject to absolute or strict liability.[42] Rather, courts are directed to look to the negligence standard in the state where the alleged tort occurred.[43] In order for a claim to be processed by a government agency, the injured party must *first* submit a signed, written demand, articulating a sum certain, to an appropriate federal agency.[44] A tort claim will be forever barred unless it is filed "within two years after such claim accrues."[45] A claim accrues within the meaning of § 2401(b) when the claimant knows both the existence and the cause of his injury, and not at a later time when he also knows that the acts inflicting the injury may constitute a tort.[46] If a claim is not disposed of by an agency within six months after receiving it, or if the claim is denied by the agency, then the claimant has six months to file suit in United States District Court.[47]

Additionally, the Military Claims Act (MCA) allows the United States to pay claims for property damage, personal injury, or death sustained as a result of the noncombat activities of the armed forces.[48] Unlike the FTCA, which waives sovereign immunity, the MCA is purely an *ex gratia* administrative remedy for a claim. Also unlike the FTCA, the MCA's "noncombat activities" provision does not require that the claimant prove negligence on behalf of the government, only that the activity in question caused the claimed injury. Advanced payments, while authorized under the MCA, are *not* authorized under the FTCA.[49] If an MCA claim satisfies the prerequisite to filing under both the FTCA and MCA, then the claimant may file suit under the FTCA, but must prove negligence in order to be successful.[50]

[39] *See* AFI 34-1101, para. 2.8.

[40] *Id.*

[41] The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (2009), is the statute by which the United States authorizes tort suits to be brought against itself. The Supreme Court has said that "like circumstances" are not limited to "the same circumstances," but include "analogous" circumstances. See also United States v. Olson, 546 U.S. 43, 47 (2005), quoting from S. Rep. No. 1400, 79th Cong., 2d Sess., 32 (1946).

[42] *See* Laird v. Nelms, 406 U.S. 797 (1972).

[43] *See* 28 U.S.C. § 1346(b) (2009). Procedural rules under the FTCA, however, are still governed by federal law. *See, e.g.*, 28 U.S.C. § 2401(b) (2009).

[44] *See* 28 U.S.C. § 2401(b).

[45] *Id.*

[46] *See* United States v. Kubrick, 444 U.S. 111 (1979).

[47] *See* 28 U.S.C. § 2675(a) (2009).

[48] *See* 10 U.S.C. § 2733(a) (2009).

[49] *See* AFI 51-501, Tort Claims, 15 December 2005, para. 1.17.2.

[50] The MCA has two parts: a "fault" part and a no-fault "noncombat activities" part. However, since the FTCA pre-empts the MCA, the "fault" part of the MCA only comes into play when the FTCA cannot, primarily for tort claims arising overseas. When it does, the claimant must still prove "fault" which all the services' regulations define as "negligence." The "noncombat activities" part requires only a showing of causation (causation in fact, not proximate cause, which is a negligence concept) between the claimed injury and the noncombat activity. Even so, we may not be able to agree on the value of the

In the case of an off-base accident on private land, the legal office must be prepared for an emergency tort claims situation. All legal offices should have an up-to-date Major Accident Claims Plan, which articulates the procedure for activating and instituting the claims process in the event of an accident. AFLOA/JACC has its Major Accident Claims Plan available on FLITE, and each base legal office should consider modeling its respective plan on this template.[51] The Air Force Claims Service Center also has several resources available.[52] At the Edwards legal office, the Major Accident Claims Plan is located in each of the Emergency Management (EM) claims binders, which are located in the EM claims kits.[53]

Each claims kit should contain Standard Form (SF) 95 and 1034s; advance payment agreement forms;[54] an emergency payment memorandum (required by the comptroller for processing electronic payment via fund cite); blank forms or a blank bound book formatted as a claims log, a supply of writing tablets, plain paper, pen, pencils, and file folders; "Claims Office" signs; local maps, which should include the jurisdictional boundaries of your installation; a current copy of AFI 51-501 and information on advanced payments; a list of names, addresses, and telephone numbers of key base officials and offices, local police and fire departments, rescue and emergency squads, individuals on the Major Accident Claims Team,[55] and JACC; a camera and film; tape measure; calculator; flashlight with batteries; plastic bags for evidence; and coins for a pay phone or a pre-paid phone card.[56]

When notified of an accident, the base SJA must decide, based on the severity and degree of the damage caused, whether to activate the legal office's Major Accident Claims Plan. If the plan is activated, the Major Accident Claims Team should travel to the accident site with the MEOC in order to begin taking any claims. Note that bases have zero advance payment authority, but that JACC will generally delegate its authority up to $25,000 to the base upon written request (this can be done via e-mail). Advanced payments, while not appropriate in all instances, can be an effective method used to provide necessities for those who have a legitimate claim against the Air Force and have also lost shelter, clothing, or food as the result of an aircraft accident.

Conclusion

The hours and days following an aircraft accident can be chaotic for both the commanders and the legal office involved. Commanders will expect that the JAG give them timely and accurate responses to their questions, even if their questions are not technically legal questions. You will be expected to provide your best advice and technical assistance, no matter how unclear or confusing the issues at hand. Sometimes, you will not know the answer off the top of your head, nor will you be able to provide a 100% researched, definitive answer. You never know if, when, or how many times you will be tested in your career, but rest assured, you can be prepared.

claim, resulting in the claimant filing suit under the FTCA, which requires him to prove negligence and proximate cause, as well as avoid application of the FTCA's discretionary function exception.

[51] JACC's plan "sets forth basic guidelines for pre-accident preparation and a course of action for claims response to a major accident in which the Air Force is involved."

[52] https://aflsa.jag.af.mil/AF/CLAIMS/#disaster.

[53] Pursuant to AFLOA/JACC's guidance, a claims kit should contain materials prepared in advance and maintained in readiness for an emergency.

[54] *See* Tort Claims Field Support Center Action Officer Handbook, Tab A-1, "Sample Advance Payments Agreement."

[55] Usually the SJA appoints in writing primary and alternate members of a major accident claims team.

[56] The exhaustive list of recommended supplies and the proper course of action in the event the major accident claims team is activated are included in JACC's plan.

Ask the Expert

Aircraft Accident Investigations

The base legal office can expect to face a number of challenging issues when dealing with aircraft accident investigations. Below is a sampling of the breadth of questions raised by commanders, staff, and dependents, along with the applicable regulations. Remember to carefully research all issues, and seek appropriate higher headquarters and field support center guidance, as issues may be fact-specific and the below-noted authorities are subject to change.

- ***Can the base fly the flag at half staff in memory of the deceased?*** (Yes, in certain circumstances; see AFI 34-1201, Protocol, 4 October 2006, paragraph A3.8.)
- ***Can the Safety or Accident Investigation Boards get a copy of the pilots' and maintainers' personnel records?*** (Yes; see AFI 91-204, Safety Investigations and Reports, 24 September 2008, and AFI 51-503, Aerospace Accident Investigation Boards, 16 July 2004.)
- ***Can all those who had contact with the aircraft be given a non-consensual urinalysis?*** (It depends; see Mil. R. Evid. 312, 313 (military) and DODD 1010.9, DOD Civilian Employee Drug Abuse Testing Program, 23 August 1988 (DOD employees).)
- ***Can (non-dependent) family members of a deceased active duty pilot or civilian pilot receive legal assistance?*** (Yes, if deemed beneficial to command and approved by the staff judge advocate; *see* AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, 27 October 2003, paragraph 1.3.11.)
- ***Can the Air Force pay for the family of the deceased to fly to a memorial service?*** (No, the family is only entitled to be flown to the burial/funeral ceremony; *see* the Joint Federal Travel Regulation, U5242.)
- ***What is the difference between a safety investigation board (SIB) and an accident investigation board (AIB)?*** (The SIB will submit findings and recommendations to convening authority to prevent future mishaps; *see* AFI 91-204. The AIB produces a publicly releasable investigation report as to cause and/or substantially contributing factors of the mishap, and preserves evidence for claims, litigation, adverse administrative actions and for all other purposes; *see* AFI 51-503, para. 1.2.)
- ***Does the AIB report make recommendations about administrative or adverse proceedings, such as a flight evaluation board or court-martial?*** (No. The AIB report only discusses the facts and cause(s) of a mishap. Air Force commanders determine further actions. *See* AFI 51-503, para. 1.2.2.4.)

- ***Are AIBs required in all mishaps?*** (No. They are mandatory for Class A mishaps—those involving fatality or permanent total disability, destruction (or damage beyond economical repair) of an aircraft, or total mishap damages of $2,000,000 or more to government or other property. Other classes of mishaps are discretionary. *See* AFI 51-503, para. 1.5 and 1.6)
- ***How long do AIBs and Ground accident investigation boards (GAIBs) take to accomplish?*** (Both boards attempt to complete their investigation within 30 days of receiving Part I of the SIB report. AFI 51-503, para. 1.3 and AFI 51-507, para. 4.4.4.)
- ***How long does the base have to keep storing the aircraft wreckage?*** (The host installation commander is responsible for removing and storing the wreckage and, in most cases, if the wreckage is from a Class A mishap, it must be retained and preserved until specifically released from legal hold by AFLOA/JACC upon written request submitted by the host installation's SJA through the convening Authority's SJA. *See* AFI 51-503, para. 9-5 and 9.6.)

Special thanks to the Aircraft Investigation Board Field Support Center (AIBFSC) and AFLOA/JACC (Aviation Law) for their assistance in responding to these questions from the field.

TWELVE THINGS EVERY JAG SHOULD KNOW:

Legal Issues Facing Military Families with Special Needs Children

A PRIMER AND INTRODUCTION

by Lieutenant Colonel Elizabeth L. Schuchs-Gopaul, USAF

Over 17,000 Air Force families have a member with a disability; many of whom have a child with a disability or a "special needs child."[1] Moving once every three years, these families face unique financial, medical and legal issues; particularly during deployment or a PCS. Parents of children with a disability will need the assistance of the newly appointed Exceptional Family Member Program service coordinators[2], Air Force school liaison officers, as well as JAG Corps members in navigating these challenges.

Parents also need to understand their legal rights under the *Individuals with Disabilities Education Improvement Act (20 U.S.C. 1400), Section 504 of the Rehabilitation Act of 1973* and the Interstate Compact on Educational Opportunity for Military Children.[3] They may require advice on estate planning, wills, powers of attorney and other legal assistance topics. Finally, they need coaching on advocacy skills. Parents are their child's best advocate—and will be

[1] Per AF/A1SA, there are 1,549 Air Force EFMP children in San Antonio. There are 1,216 in the NCR and over 1,000 in the Langley AFB area.

[2] Military parents are required to enroll in the EFMP program if they have a child with a qualifying medical issue or with a disability. *See* AFI 40-701, *Special Needs Identification and Assignment Coordination*, para. 1.1. As an EFMP family, every effort will be made to ensure a new assignment location has suitable medical and educational services available. In addition, the family can seek help from one of 35 EFMP family service coordinators linking them to needed services in the military and civilian community. Installations without a dedicated EFMP family service coordinator will have a civilian or military member who is taking on this role as an extra duty.

[3] You can view the model language of the compact at http://www.mic3.net/.

in that role for years. The following are the twelve things that every judge advocate and paralegal should keep in mind when working with families with a child with a disability.

1. Children with a disability are legally entitled to special education or accommodation as needed to help them progress toward educational goals. Under the *Individuals with Disabilities Education Improvement Act of 2004* (referred to as IDEA), children with a disability[4] who need specially designed instruction to meet their needs[5] have the right to a free appropriate public education between the ages of 3 and 21.[6] These children are, to the maximum extent appropriate, to be educated with children who are not disabled.[7]

Qualifying children also must receive an individually tailored educational program based on peer-reviewed research, called an Individual Education Program (IEP)[8] that sets forth a program and services needed for the child to progress. In determining the IEP goals, placement of the child in school, and related services, parents have the right to "meaningful participation" in the decision-making process.[9]

Section 504 of the Rehabilitation Act of 1973 provides rights to children with a disability who do not need specially designed instruction, or special education, but do need accommodations to progress or attend public schools.[10] Section 504 plans usually outline accommodations like extra time, between classes, to get from class to class, or additional time on tests. Children with a disability covered under this act, but not covered under IDEA, are still entitled to a free appropriate public education (FAPE) in the least restrictive environment (LRE).[11]

2. Children, under age 3, with a suspected disability are also entitled to assistance (but parents should check state law before PCS-ing). Under federal law, children who are suspected of having a disability are entitled to be evaluated at no expense.[12] Often, this state-run program is called "Child Find." Further, under IDEA, a child determined to have a qualifying disability can be provided services as part of an early intervention program before the age of three.

However, this same part of IDEA, called Part C, allows states great flexibility in how each offers services. Consequently, programs differ from state to state. For example, in Alabama, a child with a "developmental delay" receives services if he or she is delayed by 25 percent or more.[13] But, in Arizona,

[4] Child with a disability means one with mental retardation; hearing impairments to include deafness, speech or language impairments; visual impairments including blindness; serious emotional disturbance; orthopedic impairments; autism (added in 1997); traumatic brain injury, other health impairments, or specific learning disabilities and needs special education and related services. *See* 20 USC 1401(3) and 34 CFR 300.8. Other health impairments are defined as something that limits the strength, vitality or alertness of the child (ADHD, cancer, etc.).

[5] 20 USC 1401(29).

[6] 20 USC 1400. IDEA applies to all schools that receive federal funding.

[7] This concept is referred to in the law as "least restrictive environment" or LRE.

[8] Parents should be given written notice of an IEP meeting. An IEP must be reviewed at least annually per 20 USC 1414(d)(4). Further, an IEP must be in effect at the beginning of each school year per 34 CFR 300.323(a). Peer-reviewed research was added by Congress in 2004. *See* 20 USC 1414.

[9] Meaningful participation includes being part of the team that meets and decides all of these issues. If a meeting is set at a time that the parents cannot attend, they should request that the meeting be changed to another time. Meetings usually take place at a school, but do not have to. Further, with the consent of both the parents and the school, meetings can be held over the telephone or over VTC. Parents also have the right to request a meeting with the school, testing for their child, independent evaluations conducted at school expense, and even the right to decline services on behalf of a child. Part of meaningful participation includes having access to information. Parents have the right to review their child's school record under the Family Educational Rights and Privacy Act (FERPA) and, arguably, under IDEA 2004. *See* 20 USC 1232g; 34 CFR Part 99. FERPA also provides parents with the right to request a correction of records that are inaccurate or misleading. FERPA applies to all schools that receive federal funding. Finally, parents should request regular progress reports on their child at least one per report card period.

[10] The act says that no otherwise qualified individual with a disability shall "solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…." *See* 29 USC 794(a).

[11] A child with a disability under IDEA means a child with a qualifying disability and needs special education and related services. *See* 20 USC 1401(3) and 34 CFR 300.8. The right to a free appropriate public education is more often associated with IDEA than with Section 504. The right under Section 504 is spelled out in 34 CFR 104.33. This right is often said to be stronger in Section 504 than in IDEA because of its wording: "the provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet individual education needs of handicapped person *as adequately as the needs of non-handicapped persons are met*…. [emphasis added]"

[12] The request for testing should be in writing. Schools are required to conduct the evaluation within 60 days of receiving the parent's written consent. However, federal law allows states to further define what "60 days" is. For example, this is 60 calendar days in Texas, 60 business days in Louisiana, and 60 school days in Florida. Once the evaluation is complete, if the parent disagrees with the evaluation, the parent can request an independent educational evaluation at school district cost. *See* 20 USC 1415(b)(1) & 34 CFR 300.502. If the parents request is denied, the school must either (1) request a due process hearing to show that its evaluation is appropriate or (2) ensure a IEE is provided at public expense [34 CFR 300.502(b)]. The school must act "without unnecessary delay" and even if the parent loses this request, the parent retains the ability to privately pay for an IEE and have it considered by the school.

[13] Alabama information at www.rehab.state.al.us/Home/default.aspx?url=/Home/Services/AEIS/General+Information#1.

a child must be developmentally delayed 50 percent or more to qualify for services.[14] If a military child moves from Alabama to Arizona, the change in definition may change the child's eligibility for services before age three.[15] States also differ in who pays for these services; with Alabama and Maryland paying for services, while Virginia and Arizona require some to all of the costs to be paid by the parent.[16]

States differ in who pays for services; with some paying for services, while others require some to all of the costs to be paid by the parent.

3. Parents have the right to school records. Parents have the right to review their child's school record under the *Family Educational Rights and Privacy Act* (FERPA) and, arguably, under IDEA.[17] The law states that the school must provide a parent with an opportunity to inspect and review his or her child's education records within 45 days following receipt of a written request. FERPA also provides parents with the right to request a correction of records that are inaccurate or misleading.[18] If the school does not amend the record, the parent can request a hearing. If the hearing does not resolve the issue, the parent has the right to insert a statement in the educational records to explain his or her view on the contested information. Parents can also file an appeal, within 180 days of the date that they knew or reasonably should have known, of the alleged violation, with the Family Policy Compliance Office in the United States Department of Education.[19] FERPA applies to all schools that receive federal funding.

4. Military parents changing public schools should receive "comparable services" at the child's new school. According to IDEA, a child who transfers school districts and has an IEP in effect shall be provided "with a free appropriate public education, including services comparable to those described in the previously held IEP."[20] Similarly, the *Interstate Compact on Educational Opportunities for Military Children* states that the new state "shall initially provide comparable services to a student with disabilities based on his or her current IEP and…shall make reasonable accommodations and modifications to address the needs of incoming students with disabilities, subject to an existing 504 or Title II Plan, to provide the student with equal access to education."[21]

While new IEPs are normally redrafted at the end of a school year, military parents should request a new IEP be created and enforced before the end of the school year. It is better to transfer with an IEP *in effect* rather than only an agreed to IEP.[22] Further, if the new school district wants to change or reduce services, the parents can point out that progress was

[14] *See* ARS §15-761(3) . AZ information at https://www.azdes.gov/main.aspx?menu=98&id=5741. Virginia information at www.infantva.org/documents/forms/3028eEI.pdf. Maryland information at www.marylandpublicschools.org/MSDE/divisions/earlyinterv/.

[15] Services like these are available at some overseas facilities. These services are part of the Educational and Developmental Intervention Service (EDIS) and can provide early childhood special education, occupational therapy, physical therapy, social work, speech-language pathology, audiology, psychology, child psychiatry and access to a developmental pediatrician. *See* https://www/afspecial needs.af.mil for more information

[16] Overseas, DoD provides "Child Find" services at no cost to the parent; defining developmental delay as being 25 percent or more delayed in one or more areas. DoDI 1342.12, section E2.1.18.1., defines a child with a developmental delay as "as measured by diagnostic instruments and procedures of 2 standard deviations below the mean in at least one area, or by a 25 percent delay in at least one area on assessment instruments that yield scores in months, or a developmental delay of 1.5 standard deviations below the mean in two or more areas, or by a 20 percent delay on assessment instruments that yield scores in months in two or more of the following areas of development: cognitive, physical, communication, social or emotional, or adaptive." Child Find-like services overseas, called Educational and Developmental Intervention Service (EDIS), can include early childhood special education, occupational therapy, physical therapy, etc. *See* https://www.afspecialneeds.af.mil.

[17] *See* 20 USC 1232g; 34 CFR Part 99.

[18] This process may be used to challenge facts that are inaccurately recorded, but it may not be used to challenge a grade, an opinion, or a substantive decision made by a school about a student.

[19] A parent may obtain a complaint form by calling (202) 260-3887. The address for the office is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202-8520. http://www2.ed.gov/policy/gen/guid/fpco/index.html.

[20] 20 USC 1414(d)(2)(C)(i). The Commentary to Regulation 300.323(f) explains that "the Department interprets 'comparable' to have the plain meaning of the word, which is 'similar' or 'equivalent.'" [*See* Commentary in the Federal Register, page 46681.]

[21] Article V, part C of the Compact. You can view the model language of the compact at http://www.mic3.net/. Thirty-six states including Texas, California, Virginia, and Florida have adopted the compact. The compact provides for uniform treatment of military children transferring between school districts and states. It applies to children of active duty members, National Guard and Reserve on active duty orders, members or veterans who are medically discharged or retired (but only for a year) and members who die on active duty. It addresses issues like enrollment, absences related to deployment, eligibility for extracurricular activities, and graduation requirements.

[22] *A.M v. Monrovia Unified Sch. Dist*., 2010 U.S. App. LEXIS 25503 (2d Cir.)(unpublished); In this case, the Court of Appeals held that a school was not obligated to implement a prior school's IEP (agreed to) as it had not yet been implemented.

being made on the IEP during that last portion of the school year.

Even with an *in effect* IEP and armed with the law, many military parents find that school districts reduce or alter IEP services shortly after their arrival. It is within the rights of the receiving school district to re-evaluate an incoming child, draft a new IEP and propose its own placement and services solution. Parents have the right to challenge these recommendations and decisions. Anecdotally, military parents have often encountered the most extreme reductions in school services when moving to a short-stay assignment like attending Air War College.[23]

If possible, parents should always attempt to live in a school district that provides programs and services that are comparable to their old school district.[24] While a parent can legally fight for services at a new duty location, they may avoid a protracted battle if the services are available within the district. Finally, awaiting resolution in a protracted legal battle with a school district can outlast their time on station, making the subject often moot and the battle not worth the cost.[25]

5. Parents should know how discipline is applied to children with disabilities. Generally, children with disabilities are subject to the same disciplinary standards as other children. In fact, a child with a disability can be removed from the classroom, placed in an alternative school, or even suspended for violations of the school code of conduct.[26] However, children with a disability should not be disciplined for "manifestations of their disability."[27]

Generally, children with disabilities are subject to the same disciplinary standards as other children.

If a child with a disability is placed in an alternative school or suspended from school for ten or more days (cumulative) during a school year, then it is a "change in placement" and triggers a "manifestation of disability" hearing. This hearing determines whether conduct was a result of the disability.[28] If yes, the committee must determine what steps are needed, to include changes in the IEP, behavior intervention plan or even a change in placement to address the conduct.[29] Then the punishment can stand and further discussion should be held on the educational placement. Any decision made at the manifestation of disability hearing is subject to appeal by the parents.[30]

School districts may recommend the use of restraints or seclusion to address behavior problems.[31] Parents

[23] This is likely because appealing reductions in services or placements takes time and may not be resolved prior to PCS.

[24] Military families cannot control when and where they move. However, unless the military member is required to live in military housing, they can control where they live in a new area. Often, duty locations will have more than one school district in the area. Parents should work with the installation school liaison officer to find out everything they can about services in those school districts. They should join local community website list servs and find out what parents who have a child with a disability are saying about that school district. Finally, they should make an appointment and go visit the Office of Special Education at each school district. They should use this visit to learn about the entire continuum of services offered in a school district.

[25] Attorney fees can be awarded to the prevailing party for due process hearings and court proceeding. IEP meetings, mediation, and reconciliation hearings are not covered by provisions that would allow the awarding on attorneys fee. Many legal practitioners argue that parents may be the best advocates in these forums. IDEA will not reimburse parents for expert assistance even though in many cases, due process and court hearings are a "war of the experts." On March 17, 2011, the IDEA Fairness Restoration Act was introduced in Congress to allow parents to recover expert witness fees when they prevail in due process hearings and court actions under the IDEA. This bill will overturn the Supreme Court decision in *Arlington Central School District v. Murphy*, 548 U.S. 291 (USSC 2006) that ruled that parents could not recover such expert fees when they prevail.

[26] 20 USC 1412(a)(1) and 20 USC 1415(k). Services may be provided in the alternative setting or even at home during the 10 days or less. However, the school is only required to provide services if they would provide them to a similarly-situated non-disabled child. *See* 34 CFR 300.530(d)(3).

[27] 20 USC 1415(k)(E)(i). This is defined as conduct that was "caused by or had a direct and substantial relationship to the child's disability or was the direct result of the school's failure to implement the IEP."

[28] 20 USC 1415(k). School day means any day to include a partial day per 34 CFR 300.11. There are also exceptions that allow the school to enforce a suspension for up to 45 days if the violation included guns, drugs or serious bodily harm. Also, there is no right to "stay put" where a disciplinary issue triggers the change in placement per 34 CFR 300.533.

[29] Parents may also request that the suspension be removed from the child's school records. *See* FERPA (FN 9).

[30] 34 CFR 300.532 on appeals.

[31] This can include placing a child with a disability in physical restraints in a sitting or lying down position or placing the child in a private or semi-private room with no contact with or without physical restraints. It also can include the use of chemical restraints, like the administration of prescription medication in response to certain behavior. In 2009, a GAO report stated that abusive restraint and seclusion were widespread in schools. They were being used as a routine disciplinary tactic rather than in response to an emergency. They also explained that it was not uncommon to see ropes, duct tape, chairs with straps and bungee cords being used to retrain and isolate young children. Finally, per a recent change to IDEA, schools cannot require a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving services. *See* 20 USC

should exercise caution in agreeing to an IEP with restraint or seclusion as a method to address behavior issues. First, there is very little peer-reviewed research to support that these techniques improve behavior.[32] Second, if these methods are in the IEP, the parents may have little recourse against the school if restraints and/or seclusion is used inappropriately; even if the school uses them to demean, belittle or hurt the child.[33] Federal legislation has been introduced that would place minimum safety standards to prevent abusive restraint and seclusion in schools.[34] Some states, like Maryland, already place limits on these practices.[35]

Junior enlisted parents of a child with a disability can receive financial aid to provide needed support for their child through SSI payments.

6. Supplemental Security Income (SSI) and military pay—know the rules and how moving can change things for a military family. Junior enlisted parents of a child with a disability can receive financial aid to provide needed support for their child through SSI payments.[36] Entitlement to these payments, between $1.00 and $674.00 per month, is often the gateway to enter other federal programs like Medicaid that can provide greater support for the disabled.[37]

Parents of a disabled child will have to meet a "means test" to qualify for SSI. Part of their income and property will be tallied in a process called "deeming." Per the *Heroes Earning Assistance and Relief Tax Act of 2008* (called the HEART Act), military base pay, BAH and BAS are counted by the Social Security Administration as "earned" income while housing on base (where the military member does not receive BAH) is considered in-kind support and maintenance.[38] This is important because, in qualifying, parents are able to have more "earned" income than "unearned" income; helping junior enlisted families qualify for this benefit.

However, qualifying for this benefit in one state does not guarantee that a military family will qualify in another state. BAH payments can vary greatly from state to state. So, if a family qualifies at Moody AFB then moves to a high-BAH area like Los Angeles or Washington DC, their eligibility for SSI payments and any other related assistance may cease.[39] If a military family receiving SSI is moving, they should consider the impact on SSI benefits and remember to notify their local Social Security Office before leaving (or risk repayment and penalties).[40] On a positive note, military families can receive SSI while overseas and can apply for SSI while serving overseas.[41]

1412(a)(25)

[32] *See* GAO Report, entitled, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* at http://gao.gov/new.items/d09719t.pdf

[33] *See C.N. v. Willmar Public Schools, Indep. Sch. Dist. No. 347*, 591 F. 3d 624 (8th Cir. 2010). In this case, the parents and a psychologist disagreed with the use of restraint and/or seclusion against a primary school child. However, the parents never appealed the inclusion in the IEP. A teacher mistreated the child with a disability by using both excessively, demeaning and belittling the child, denying her use of the bathroom and choking and hurting the child. The Court of Appeals hearing an complaint filed under the 4th amendment stated that even if the restraint and seclusion met seizure under the 4th Amendment, it was not unconstitutional because the IEP authorized it and the teacher, even if overzealous it is use, can rely on the IEP.

[34] On 6 Apr 2011, the Keeping All Students Safe Act was introduced by Congressman George Miller of California. If passed, the law would limit physical restraint and locked seclusion, outlaw mechanical restraints and prohibits restraints that restrict breathing and require schools to notify parents after incidents when restraint and seclusion is used.

[35] Links to all state's policy can be found at http://www2.ed.gov/policy/seclusion/seclusion-state-summary.html.

[36] SSI is a program for low income people 65 or older, the blind and those with a disability. See http://www.ssa.gov/ssi/.

[37] Some states offer additional financial supplements in addition to this amount.

[38] 122 Stat 1624 (2008). Also see 20 CFR 416.1130(b) and 20 CFR 416.1110(a)(2). If a military member lives in on-base housing or lives in privatized housing provided through a contract where BAH is not received by the member, but is paid directly to the housing provider, it is considered "in-kind support and maintenance." As such, it may reduce the SSI benefit for a family by up to 1/3 of the federal benefit. So, the decision to live on or off base will affect this benefit. Combat pay is not going to count for SSI [37 USC 310 and 20 CFR 416.1130(b)(19)].

[39] This example is based on an E-3 with a spouse and two children; one of which has a disability. The spouse does not work. At Moody AFB, the BAH is $894.00. At Los Angeles AFB, the BAH is $1932.00. This example presumes that the family already has little in savings. Additional children, additional income and/or additional savings can easily change eligibility. In-kind support and maintenance

[40] Military families can also call 1-800-772-1213 to get more information about moving between states with SSI benefits. If the family is overpaid because of an unreported change in status or income, they can be subject to recoupment and, in some cases, a penalty can be assessed against future payments. *Also see* 20 CFR 416.216.

[41] Contact nearest U.S. Embassy or Consular Office or write: Social Security Administration, Attn: SSI Military Children Overseas Coordinator, 1 Frederick Street, Suite 100, Cumberland, Maryland 21502.

7. DoDEA Schools play by their own rules. About 8% of military connected children attend one of the 194 DoDEA schools world-wide. Of the children attending DoDEA schools, 11% of children are receiving special education services. While DoDEA schools are like their civilian counterparts in many ways, they follow different guidelines and timelines for providing special education services. First, while public schools in the United States are required to comply with IDEA, DoDEA schools comply with DoDI 1342.12, *Provision of Early Intervention and Special Education Services to Eligible DoD Dependants*. This instruction does incorporate by reference the substantive and procedural due process requirements found in IDEA part B and C.[42]

Both IDEA and DoDI 1342.12 guarantee a FAPE in the least restrictive environment, but DoDI 1342.12 makes no guarantees that timelines and rules it sets for itself will be followed. Instead, it states "[this instruction]…does not create any rights or remedies and many not be relied upon by any person, organization or other entity to allege a denial of such rights or remedies."[43] This section of the DoDI will likely make a case regarding a procedural violation of rights more difficult in a DoDEA school.

Parents can challenge the decision to not classify a child as a "child with a disability".

8. Parents can disagree with and challenge any decision made by the school about their child. Parents do not have to sign the IEP. Further, parents can agree to consent to some services offered by a school district and not to others. Parents can refuse to consent to an evaluation or even services.[44] Finally, parents can challenge the decision to not classify a child as a "child with a disability," any change in placement and/or services, and anything they believe violates their right to either procedural or substantive due process.[45]

When a school proposes to initiate or change, or refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, the school must give the parents written notice. This document, called "Prior Written Notice" (PWN), is the key to a parent's right to appeal. With this notice in hand, the parent can contest the decision by requesting mediation or a due process hearing before an administrative law judge.[46] If the parent loses at the due process hearing, the parent can appeal to federal court. Generally, appeals must be filed within 90 days unless state law provides another deadline.[47]

Any court ordered or agreed to remedy given to military parents through mediation, a due process hearing, or any other proceeding should consider the transient nature of the family. For example, suppose the hearing officer orders a school district to fund 30 hours a week of private tutoring for 18 months as a form of compensatory education (as remedy for not providing FAPE in the past). An order that requires payment only while the family remains in the school district may be useless if the family is due to PCS.[48]

[42] 10 USC 2164(f) and 20 USC 927(c).

[43] DoDI 1342.12, para. 2.5 (11 Apr 2005).

[44] If the parent refused to consent to the initial evaluation, and the child is in a private school or home school, then the school district cannot demand a "due process hearing" to try and force an evaluation [34 CFR 300.300(d)(4)(i)]. Even if parents consent to the evaluation, parents still have the right to refuse consent for special education services. However, if parents refuse offered services, then the school is no longer legally required to provide a free appropriate public education and they are not required to draft an IEP for the child [20 USC 1414(a)(D)(ii)].

[45] Some states may provide parents greater rights than under federal law. For example, in Virginia, parent consent is required for change in placement. *See* 8 VAC 20-81-170.

[46] *See* 34 CFR 300.506 on mediation and 34 CFR 300.57 on due process complaints and hearings. Generally, the statute of limitations for due process hearings is two years from the alleged violation of procedural or substantive due process rights. See 34 CFR 300.57(a)(2).

[47] 20 CFR 300.516.

[48] The IDEA does not explicitly authorize the award of compensatory education. However, the IDEA "...authorizes the court to 'grant such relief as the court determines appropriate.'" *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Todd* A., 79 F.3d 654, 656 (7th Cir. 1996)(quoting 20 U.S.C. Section 1415(3)(2)(now at 20 U.S.C. Section 1415(i)(2)(c)(iii)). Compensatory educational services can include an award of additional time at an appropriate residential or day placement, *Sanford School Dept*, 47 IDELR 176 at 16 (Maine State Educational Agency, Oct. 31, 2006) (ordering payment of 1 year of residential placement for a child with learning disabilities); *Draper v. Atlanta Independent School System*, 518 F.3d 1275 (March 6, 2008) (11th Cir. 2008) (ordering 3 years of private school for a student with learning disabilities); *Carbondale Elementary School District 95*, 23 IDELR 766 (Illinois State Educational Agency, Jan. 12, 1996)(ordering two years of private day school for failing to address dyslexia); *Chicago Public School*, 108 LRP 35213 (Illinois State Educational Agency, Apr. 17, 2008) (awarding two additional years at Hyde Park Day School as compensatory education). Awards can also include reimbursement for the costs of private educational tutoring. *Heather D. v. Northampton Area School District,* 48 IDELR 67 (E.D. Penn, June 19, 2007) (awarding 2,428 hours of compensatory education at $75 an hour, creating a $182,100 compensatory education fund).

9. Parents have some powerful tools they can use (with caution) under the law. If parents disagree with a change in services or placement for their child and choose to challenge the decision, they can send the school a written demand for "stay put."[49] Per federal law, during the pendency of any proceeding, unless agreed to otherwise, "the child shall remain in the then-current educational placement of the child." This does not apply in disciplinary situations that result in a change in placement.[50]

If a parent believes that the school is failing to provide FAPE for a child with a disability, they can, with a 10-business day written notice to the school district, remove the child from the public school and place the child, at their own expense, in a private school.[51] Then, the parents can file for reimbursement of the cost of private school with the public school. In these cases, it is likely the demand for payment will be denied by the public school and the case will be heard at a due process hearing. Parents must be aware, should they lose the hearing or the subsequent civil court case, they will have to pay the costs of private education.[52]

10. The law will not reimburse parents for experts, but military parents may have an expert. TRICARE/ECHO, a supplement to TRICARE, provides up to $36,000 in funds for additional therapy and services for military children with a disability.[53] Often this money is used by parents to fund therapy prescribed by a doctor, but not provided by the school district. Professionals providing routine services through the ECHO benefit may have insights into what additional support and resources a child with a disability needs—and can be a great ally in advocating to the school district for appropriate services for a child. They can be invited by a parent to an IEP meeting or even serve as a factual witness in an administrative hearing.[54]

If the child with a disability will need assistance through programs like SSI and Medicaid into the future, parents should start planning now.

11. Estate planning is important—and not all military benefits will work for military parents. If the child with a disability will need assistance through programs like SSI and Medicaid[55] into the future, parents should start planning now. Many benefit programs require the recipients to not exceed specific income limits. These income limits can be easily exceeded if the child inherits money or property through a will or becomes the beneficiary of military benefits like Servicemembers Group Life Insurance (SGLI) or Survivor Benefits Plans (SBP) payments. The military child's inheritance may disqualify him or her from federal and state assistance programs while not providing sufficient income to replace the loss of these benefits. To protect the child with a disability from losing needed eligibility, parents should consider creating a special needs or supplemental needs trust to receive assets for the child with a disability.[56] Funds placed in a special

[49] *See* 20 USC 1415(j) and 34 CFR 300.518.

[50] See 34 CFR 300.533.

[51] *See Burlington v. Massachusetts*, 471 US 359 (USSC 1985). In this case, parents did not believe that the IEP was providing FAPE to their child. After repeated evaluations and discussions with school officials and experts, they moved their child to a private school that could provide the specialized education their son needed while requesting payment of private school fees from the school. USSC ruled in favor of the parents. Also see 34 CFR 300.518(d) on payments during a school district appeal. *Read* 34 CFR 300.148 and 20 USC 1412. There are specific procedural steps that a parent must follow to even be eligible for reimbursement by the school district. This includes not only notice, but also making the child available for evaluations.

[52] *See J.W. V. Fresno Unified Sch. Dist.*, 626 F.3d 431 (9th Cir. 2010) and Bd. of Education v. Rowley, 458 U.S. 176 (USSC 1982) where parents did not win reimbursement.

[53] *See* http://www.tricare.mil/mybenefit/home/overview/SpecialPrograms/ECHO; The family must be enrolled in EFMP before applying for the ECHO program. The $36,000 is per person, per fiscal year. There are a wide range of services covered by the ECHO program.

[54] This group is composed of a general education teacher, a special education teacher, school specialists who work with the child, a school administrator and the parents. *See* 20 USC 1414(d)(1)(B)(vi). If a member of the IEP team required to be at the meeting cannot attend, then the member can submit their input in writing and the meeting can be held with consent of the parents and the school. Parents consent must be in writing. *See* 20 USC 1414(d)(1)(C)(ii). The parents have the right to bring along others to the meeting. This can include the ABA therapy provider. Parents may have to pay for this time. However, as the therapist already spends time with the child, they will not have to pay for an expert to learn about the child. It has already occurred through normal covered services. Also, often the therapist will have credentials in working with children with a disability that are equal to or exceed those of school representatives. This can be very persuasive if a dispute arises.

[55] 42 U.S.C. § 1396d(a) (2000) (listing approximately 30 different services covered by Medicaid, including inpatient and outpatient services, dental, physical therapy, nurse, hospice, and community care).

[56] *See* 42 USC 1396p(d)(4)(A) or (C). Sterling L. Ross, *The Special Needs Trust: A New Wrinkle No More*, 36 U. MIAMI INST. ON EST.PLAN. 16, para. 1601 (2002). Also Major

needs or supplemental needs trusts do not count as assets or income for receipt of federal benefits.[57]

Parents can have assets pour into the trust, protecting the child's eligibility; knowing that trust funds can be used to provide comfort items for the child.[58] Unfortunately, SBP and another benefit called Dependency and Indemnification Compensation (DIC) payments[59] cannot be routed *directly* into a trust.[60] While a statutory solution is being devised, parent may chose to redirect SBP benefits away from the child with a disability and direct a future caregiver of a child/adult with a disability[61] to consider impact of DIC payments before applying for them.[62]

12. Parents of a child with a disability need to do additional legal preparation before deployment. Military parents of a child with a disability must carefully catalogue the doctors, service providers and others that they interface with on behalf of their child. Who will attend IEP meetings? Who will handle SSI issues? Does a representative or protective payee need to be appointed? Who will take the child to medical appointments and will they have access to the child's medical information? How will the caregiver get on base for medical appointments? Can the caregiver get respite care from the Air Force? Will the caregiver be able to pick up Easter Seals donations of diapers for the child? These issues, and more, may need the help of a notary or special power of attorney. In addition, if the caregiver is not a parent, a *Health Insurance Portability and Accountability Act* (HIPAA) waiver may need to be signed for each provider and for the EFMP office. Finally, if the caregiver will need to file TRICARE claims paperwork, talk with TRICARE about how they would like to handle this. The caregiver may need a special power of attorney.

Conclusion

Special needs and EFMP families are part of the Air Force family and we need to reach out to them. The JAG Corps, working with EFMP family service coordinators and SLOs, can make a significant different in the lives of these families by educating them on the specific challenges they will face as they navigate the often unique medical, financial and legal issues.

We can't solve every problem faced by a military family with a special needs child. However, being attuned to their unique legal issues will help us help them and, as needed, provide the best legal advice and guidance possible. In the end, educating military parents about these issues will help them as they continue to advocate for their children in assignment after assignment. For some, this role of advocate will be a lifelong occupation.

Check out the CAPSIL learning center for further information on Special Needs Families at https://aflsa.jag.af.mil/apps/jade/collaborative/course/view.php?id=1096

Michael R. Renz, USMC, *The Special Needs Trust and the Military Client: The Critical Issue-Spotting Role of the Legal Assistance Attorney*, Naval Law Review, Volume 59, 2010, 45.

[57] How special needs trust work and the differences between first party, third party, pay back and pooled trusts is beyond the scope of this article. Income limits and other related rules for receipt of a benefit like SSI can vary from state to state and from year to year. For this reason, these trusts are very complex and should only be drafted by an attorney with expertise in this area.

[58] A properly drafted SNT can provide for such luxuries as field trips or vacations, tickets to a movie or sporting event, or entertainment options. It can also provide for over-the-counter medicines, experimental treatments, and even the employment of a companion for the disabled dependent. *See* Major Michael R. Renz, USMC, *The Special Needs Trust and the Military Client: The Critical Issue-Spotting Role of the Legal Assistance Attorney*, Naval Law Review, Volume 59, 2010, 45.

[59] DIC is a monthly tax-free cash payment to survivors and dependent of service members killed while on active duty and for survivors and dependants of certain veterans. DIC payments can be made to the guardian of child (under 18) or, in the case of what the VA calls a "helpless child," then payments can be made after the age of 18. To be a "helpless child," the child must be permanently incapable of self-support by reason of mental or physical defect and it must be shown that such incapacity existed prior to the date the child attained age 18. For a sole surviving "helpless child" over the age of 18, the DIC payment can be over $700 per month. Current DIC rates can be found at http://www.vba.va.gov/bln/21/rates/comp03.htm#BM07. DIC is paid to a surviving spouse, child or even parents of the member (limited circumstances) by law and is not a benefit that can be redirected at will by the member. If receipt of this payment will disqualify a disabled child/adult from other benefits without providing enough money to pay for lost benefits, the person may not chose to apply for DIC. The best solution may be to alter the law for DIC to allow it to be redirected into a special needs trust. *See* 38 USC 1314 and 1314.

[60] SBP was enacted into law in 1972 by PL 92-425 and is codified at 10 U.S.C. Sec. 1447 et.seq. Under SBP, active duty military are provided the SBP benefit without cost. Military retirees must pay for the cost of the SBP benefit through a reduction in retirement pay, with the cost determined by rank at retirement and years of active service. The SBP benefit provides an annuity for the surviving spouse and/or dependent children of the retiree or active military member of up to 55% of the military member's retirement pay.

[61] This article did not discuss guardianship and alternatives to guardianship that a military family may need to know about if the child with a disability will not be able to live an independent adult life.

[62] For SBP, parents can draft a letter of intent to the person and ask that the money from a program SBP be placed in the trust. This letter is not binding and any addition to the trust should be discussed with the attorney who drafted the trust. There are two general types of special needs trust: first party trusts and third party trusts. The rules vary on who can add money to them and what happens to any funds left in the trust upon the death of the person with a disability.

FROM IMA TO CAT A
A WHOLE NEW WORLD

by Lieutenant Colonel Steven J. McManus, USAFR

The majority of JAG Corps reservists are individual mobilizations augmentees (IMA) or Category B reservists. Indeed, the first seven years of my reserve career were spent as an IMA. But three years ago, I became a Unit or Category A reservist, upon being assigned as the staff judge advocate at Grissom ARB, Indiana, a standalone Reserve base. So what is the Cat A world like? Looking back, I must say there has been a lot to learn, but also a ton of rewarding experiences along the way.

Terminology

First, there is a dizzying set of new terms to learn, some of which you may already know, such as ART, AGR, and Seasoning Training. An ART is an Air Reserve Technician (an individual whose civil service position is tied to his/her reserves position) while an AGR is an Active Guard and Reserve (a reservist who has been put on extended active duty orders). Seasoning Training is a program where reservists who are new to the reserves, or new to a career field, can be on extended active duty to learn their new job. Frequently, these duties may be performed at another base where the job is done on a full-time basis. For example, a new reserve paralegal at a standalone Reserve base could go to an active duty base to get trained on courts-martial.

There are also a different practices and procedures to get used to. For example, in the Unit-reservist world, you do not use an Air Force Form 40a[1] to document inactive duty training (IDT) when performed as part of the normal reserve weekend. Rather, in our unit, you "swipe in and out" with your identification card at the beginning and end of each day. Likewise, a reserve personnel appropriation (RPA), the Cat A version of a military personnel appropriation (MPA), is used when you are supporting a Reserve mission. RPA days are approved and funded by your unit, not by AFRC/JA. A readiness management period or RMP (commonly pronounced "rump") day is an extra four-hour block in which you perform duties. Essentially, RMP days are like additional inactive duty training (IDT) that can be performed when additional work is needed. Again, these days are approved and funded by your unit.

Duties

There are also substantive differences in the type of work we do, in part, because our unit members are reservists, not active duty. As an IMA, I still dealt with courts-martial and Article 15s. But in the Cat A world, these do not occur with any frequency whatsoever. In my unit at Grissom, one reservist was court-martialed while at tech school, but the active duty base handled it. We have not had a single court-martial since I have been stationed here, and none for a very long time before that. Article 15s are also rare because most of the misconduct does not occur during the individual's duty (or between swipe in and swipe out or two-week annual tour) period.

Even the civil law arena is different. Discharges are performed under a separate instruction, and AFRC/JA actually handles the discharge board instead of the base legal office. We do a lot of line of duty determinations. However, unlike the active duty counterparts, we need to take a look at whether the condition existed prior to the term of service. This option is rarely seen by an IMA, but is frequently the finding in the Cat A world. Another difference

[1] Record of Individual Inactive Duty Training

is that a recipient of an LOR most certainly will get 30 days to respond to the LOR instead of 3 days.

Interesting jurisdiction issues will arise in the Cat A environment. Our commanders are either traditional reservists (TRs) or ARTs, and thus are typically only in status during the reserve weekends. If they are ordering a commander directed investigation or mental health evaluation, or taking a disciplinary action, we need to make sure the commander is actually in military status. The commander must use an RPA, RMP, or annual tour days to be in status if the commander needs to exercise military authority before the next reserve weekend.

Of course some things remain the same. Like any base, our office does a lot of legal assistance. Even as the SJA, I do my fair share. We also provide ongoing deployment, newcomer, and reenlistment briefings.

Benefits

There are benefits to the Cat A world that I did not know existed beforehand. Like active duty, your role in the Air Force team is more clearly defined. You develop relationships with commanders, first sergeants, and wing staff members, focusing on long-term problem solving. You participate in working groups, conduct urinalysis inspections, and help formulate wing policies. I have often been contacted during the month at my civilian job or at home to discuss developments for a particular disciplinary matter, or because a new issue has arisen. These ongoing relationships are very much like the ones you see on active duty and can be just as rewarding.

Another benefit is the opportunity to develop subordinates through mentorship and training. When I arrived at Grissom ARB, there were two 3-level paralegals assigned. I had no idea what a Career Field Education and Training Plan (CFEPT) was, much less the training a paralegal must accomplish to be upgraded. However, I was suddenly required to begin training. This was a learning curve for me, but the rewards in teaming have been amazing. We have created a more efficient process by having the paralegals assist the attorneys in drafting wills for our clients. When a drill weekend consists of only 16 hours, the time saved using this process is significant.

Related to this, you will also be responsible for drafting enlisted performance reports, awards and decorations. Admittedly, when I arrived at Grissom ARB, I had never been required or even asked to accomplish these tasks. You must learn quickly when all of these deadlines are, so you can plan how you will be using your 16-hour drill weekend, or whether you will need to request an RPM or RPA. It is also important to submit worthy members for appropriate awards and heartening to see your team's accomplishments acknowledged (such as MSgt Wes Marion winning the AFRC Paralegal of the Year Award). All in all, these past few years have given me a great appreciation for what Unit reservists do, and are expected to accomplish in the 16-hour UTA. My eyes are truly opened—to a whole new world.

COMMON AIR RESERVE TERMS

Active duty (for) training (ADT) – Air National Guard and Air Force Reserve members serving on military orders in an active-duty status.

Inactive duty training (IDT) – Training performed by members of the Selected Reserve in order to maintain worldwide mobility and war fighting readiness requirements for contribution to the total force. Members perform this duty in reserve status and are not on active-duty orders.

Individual mobilization augmentee (IMA) – An individual reservist who usually is assigned to a Regular Air Force unit and provides augmentation when active-duty members are absent. The IMA normally trains with the active-duty organization he or she augments.

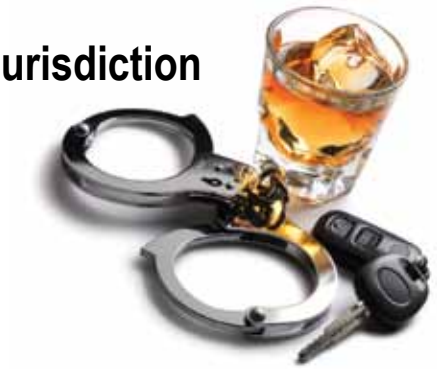
Mobilization aassistant (MA) – An Air Force Reserve colonel or above assigned to back-fill a general officer active-duty billet.

Reserve personnel appropriation (RPA) – Money budgeted by the Reserves and National Guard to pay reservists for performing reserve or active-duty related training. oints or just retirement points on a recurring basis.

More terms available online at: http://www.afrc.af.mil/library/factsheets/factsheet.asp?id=13900.

DODI 5505.11

A Little Known Tool to Help Gain Off-Base Jurisdiction



By Lieutenant Colonel Mark D. Stoup, USAF

A recent DUI case reminded me of a recurring frustration experienced by legal offices and commanders across the Air Force. A staff sergeant at Whiteman AFB was behind the wheel of his personally-owned vehicle on a Saturday night, with a subordinate riding in the passenger seat. The two had been drinking at the subordinate's off-base residence before deciding to hit a local hot spot. Along the way, the staff sergeant spun his tires in front of a highway patrolman. He was summarily pulled over, arrested, and cited for driving under the influence. Immediately, the squadron commander wanted to issue an Article 15. Since this case involved an NCO and his subordinate, the chief of justice called the local district attorney (DA) and made a strong argument for the state to cede jurisdiction to the Air Force. The DA denied the request, citing the need for a conviction. The DA's concerns were valid. The Air Force would offer nonjudicial punishment (NJP) but the DA believed the facts of the case demanded a permanent record, which could only be obtained through a court conviction. As the staff judge advocate (SJA), I personally visited the DA and again requested jurisdiction. My request was denied for the same reasons.

Consequently, the commander had little recourse but to issue an LOR/UIF.[1] He also initiated an administrative demotion for a failure in NCO responsibilities because the staff sergeant was drinking and driving with his subordinate. The staff sergeant was reduced in rank to E-4 and the case was forgotten after the quarterly Status of Discipline briefing. Approximately seven months later, the staff sergeant's commander called me on separate issue which was only remotely related to the administrative demotion case. During the conversation, I learned that the group commander had given the member his staff sergeant stripe back. His reasoning was based on the DA's subsequent decision to not prosecute the member for DUI, accepting a plea for a much less serious offense. The group commander believed that without a DUI conviction, the administrative demotion was no longer warranted. He never bothered to discuss the case with the legal office and simply reinstated the member's rank and disposed of the UIF.

One of the biggest advantages of nonjudicial punishment is speed. Its disadvantage is the lack of a record within civilian jurisdictions.

Unfortunately stories like this occur every day. They highlight frustrations common to both military and civilian officials when dealing with crimes like drinking and driving. Military and civilian authorities have similar goals. Both cite deterrence as a top priority. However, both jurisdictions have advantages and disadvantages within their respective systems that can lead to jurisdictional disputes.

[1] Letters of Reprimand (LOR) and Unfavorable Information Files (UIF) are governed by AFI 36-2907, Unfavorable Information File (UIF) Program, 17 June 2005.

Tracking NJP Actions

One of the biggest advantages of nonjudicial punishment is its speed. Its disadvantage is the lack of a record within civilian jurisdictions. On the other hand, DUI cases in the civilian sector result in a permanent record, but often take an extraordinarily long time. In many cases the permanent record is a conviction for a less severe offense that may not capture the gravamen of the offense. So what is the best way for the Air Force and civilian jurisdictions to cooperatively dispose of a DUI case? The answer is very clear: swift justice resulting in a permanent record that transcends jurisdictional lines. But the real issue is how to accomplish that goal. This case prompted our office to think of creative solutions to the off-base jurisdiction dilemma and eventually led us to Department of Defense Instruction (DODI) 5505.11.[2] DODI 5505.11 mandates that the Department of Defense enter certain cases into the National Crime Information Center (NCIC) criminal history databases. This instruction allows the military to store criminal case disposition in NCIC, effectively adding an additional system of records to track the outcome cases. Aside from DODI 5505.11, an Article 15 is kept in the local legal office for a period of three years.[3] A record of NJP action is also maintained in the Automated Military Justice Analysis and Management System (AMJAMS) for an indefinite period of time.[4] Some NJP actions are also maintained in other records such as UIFs,[5] Senior NCO Selection Records, Officer Selection Records, Command Officer Selection Records[6] and Senior Officer Unfavorable Information Files.[7] That is about where the paper trail ends.

There is very little ability to track an NJP action beyond these systems of records. For civilian authorities, these records might as well not exist. The same applies to court-martial proceedings. Records of trial are forwarded to JAJM[8] and promulgating orders are distributed to a limited number of people.[9] Just like NJP actions, courts-martial are also tracked in AMJAMS and remain in that system indefinitely.[10] There are only three other places that record a court-martial conviction. One tracking device is a service member's discharge paperwork, also known as a DD Form 214. But this form only captures the characterization of service.[11] The basis for discharge is simply reflected as a code, which is of little use to the majority of those who might have a need to know that type of information. Secondly, certain court-martial convictions require additional registration, such as offenses against children, sexual offenses and domestic abuse, and DNA processing. These cases generally require the Air Force to notify specific agencies in each circumstance.[12] Finally, AFLOA/JAJM (Military Justice Division) is the agency that maintains the original record of trial, which is kept at JAJM for 15 years after final review.[13] The problem is that none of these tracking mechanisms are of much use to our civilian counterparts, particularly in routine criminal background checks.

How DODI 5505.1 Works

Knowing and understanding all the available military justice tracking mechanisms is important for JAGs and paralegals. It definitely benefits the Air Force in promoting good order and discipline. However, the tracking mechanisms provide little benefit to our civilian counterparts. DODI 5505.11 is a relatively new and important tool that can make a significant impact in this area, but it is not well known and is rarely used. Understanding how this tool works

[2] DODI 5505.11, Fingerprint Card and Final Disposition Report Submission Requirements, 20 June 2006.

[3] AFI 51-202, Nonjudicial Punishment, 7 Nov. 2003, paras. 6.8 and 6.10. "The legal office is authorized to destroy copies of an NJP action after three years or when no longer needed, whichever is later." AFI 51-202 cites AFMAN 37-139 Table 51-3; however the AFMAN was rescinded on 2 June 2004 and superseded by Air Force Records Information Management System (AFRIMS).

[4] According to AFLOA/JAS (Legal Information Services), AMJAMS has not been purged of old cases and there are no plans to do so in the future.

[5] AFI 36-2907.

[6] AFI 36-2608, Military Personnel Records System, 30 Aug 2006, governs NJP entry into all selection records.

[7] AFI 90-301, Inspector General Complaints Resolution, 15 May 2008, paras. 3.6 and 4.10.

[8] AFMAN 51-203, Records of Trial, 17 Nov. 2009, Chapter 13.

[9] AFLOA/JAJM, AFPC/DPSFCM, the authorities of the command where the accused is held in custody or to which transferred, and the commander of the place where the accused is confined receive copies of the court-martial order, AFI 51-201, para. 10.7.2.

[10] *See* footnote 4 on NPJ Actions in AMJAMS

[11] DODI 1336.01 and AFI 36-3202 govern issuance of the DD Form 214, Certificate of Release or Discharge From Active Duty. Item 24 of the DD Form 214 is used to list the "Character of Service." The authorized entries are; "Honorable, Under Honorable Conditions (General), Under Other Than Honorable Conditions; Bad Conduct; Dishonorable or Uncharacterized. For officers dismissed by court-martial the entry is "Not Applicable." *See* AFI 36-3202, Table 4, Rule 56.

[12] AFI 51-201, Sections 13K, 13L, and 13M

[13] AFRIMS Table, T 51–03 and Rule R 10.01

can improve the administration of justice. It allows justice practitioners to appropriately notify other law enforcement agencies nationwide of certain disciplinary history of military members. Obviously, a person's prior experience with the justice system can play an important role in carrying out subsequent justice actions. Therefore, it is critical that the entire law enforcement community be aware of any prior disciplinary history, not just those people who have access to AMJAMS or other military documentation such as a person's DD Form 214.

DODI 5505.11 allows court-martial convictions to be entered in to the NCIC data base. It specifically states that the Secretaries of the Military Departments and the Heads of the other DoD Components shall issue "procedures, as may be necessary, to implement and comply" with the instruction.[14] The instruction further requires NCIC entries "when a military judicial proceeding is initiated or command action is taken in nonjudicial proceedings against a military subject investigated by a DoD criminal investigative or law enforcement organization for an offense listed in Enclosure 3."[15] Finally, the instruction requires NCIC entries for final disposition of military judicial and nonjudicial proceedings.

The DODI specifically includes entries for Summary Courts-Martial as an example of these proceedings.[16] NCIC entries for Summary Courts-Martial and NJP actions are entered, not as a conviction, but as a record of punishment. Even though Summary Courts-Martial and NJP actions are not considered convictions; tracking their disposition, at a minimum, shows that a person has been previously punished for a crime.

Notification Requirements

There are two instances in which DODI 5505.11 requires the military to notify appropriate investigative or law enforcement organizations of criminal activity. First, the military must notify when "a military judicial proceeding is initiated or command action is taken in nonjudicial proceedings against a military subject investigated by a DoD criminal investigative or law enforcement organization for an offense listed in Enclosure 3."[17] Second, the military must notify "[o]f the final disposition of such military judicial or nonjudicial proceeding."[18] The definition of a DoD criminal investigative organization in DODI 5505.11 specifically includes the Air Force Office of Special Investigations.[19] DoD law enforcement organization is not defined, but the plain language of the DODI and Air Force policy and instructions make it apparent that Security Forces also fits within this definition.[20]

DODI 5505.11 doesn't solve the tough jurisdictional issue of which agency should punish a criminal offender, i.e. the local DA or the Air Force.

Other investigations such as a commander directed investigation or an Inspector General investigation do not fit within the definition of DODI 5505.11. Dispositions resulting from these types of investigations would not qualify for entry into NCIC.[21] Although Rule for Courts-Martial (RCM) 303, and the ensuing discussion, makes it clear that a commander has an inherent right to investigate an offense under the UCMJ, RCM 303 does not trigger DODI 5505.11 action. If after a preliminary inquiry into an offense, a commander believes the disposition should eventually be tracked in NCIC, the commander should turn the investigation of the offense over to an investigative agency.

[14] DODI 5505.11, paras. 5.2 and 5.2.1.

[15] *Id.* at para.. 5.2.2.1.

[16] *Id.* at para. 5.2.2.2.

[17] *Id.* at para. 5.2.2.1. Enclosure 3 includes military offenses that have a similar offense in the civilian criminal system. Uniquely military offenses such as AWOL and disrespect are, therefore, not included in Enclosure 3.

[18] *Id*. at para. 5.2.2.2

[19] *Id*. at Enclosure 2, para. E2.1.1

[20] AFPD 31-2, Air provost Operations, 10 April 2009 and AFI 31-206, Security Forces Investigations Program, 16 September 2009, make it clear that Security Forces are Law Enforcement organizations. Additionally, AFI 31-206, para. 2.1 and Attachment 2, Rule 38, allow SF members to investigate crimes such as DUI and to coordinate with local law enforcement agencies to complete a thorough investigation.

[21] Although Rule for Court-Martial (RCM) 303, and the ensuing discussion, makes it clear that a commander has an inherent right to investigate an offense under the UCMJ, RCM 303 does not trigger DODI 5505.11 action. RCM 303, *Preliminary Inquiry into Reported Offenses* states "Upon receipt of information that a member of the command is accused or suspected of committing an offense…the immediate commander shall make or cause to be made a preliminary inquiry into the charges."

Although DODI 5505.11 has been in existence for over four years, the Air Force only addressed the requirement to report criminal history data to NCIC in September 2009 and again in January 2010. AFI 31-206, para. 2.24, mandates Security Forces compliance with DODI 5505.11.[22] AFI 31-206 also provides details on how and when Security Forces are to comply with DODI 5505.11. AFPD 71-1, para. 1.1.9, requires that OSI comply with DODI 5505.11.[23] The DODI, AFI and AFPD do not limit NCIC entries to offenses that occur on base or within exclusive Federal jurisdiction. Enclosure 3 of DODI 5505.11 dictates that offenses occurring off-base, in a civilian jurisdiction, still warrant entry into NCIC as long as those offense were investigated by the appropriate agency and result in final disposition through court-martial or NJP action.

For example, an off-base DUI that results in NJP can be entered into NCIC if the DUI was investigated by Security Forces. AFI 31-206 requires compliance with DODI 5505.11 "on all suspects under investigation by Security Forces for offenses listed" in the DODI.[24] Cases jointly investigated by both Security Forces and local law enforcement fit within plain language of the AFI. However, the level of investigative measures is an issue for Security Forces and should be determined on a case by case basis. An investigation into an off-base DUI, for example, might only include a check of the service member's records and a request for information from the local law enforcement agency. However, it must be a properly documented investigation within the SFS or AFOSI system of records.

DODI 5505.11 doesn't solve the tough jurisdictional issue of which agency should punish a criminal offender, i.e., the local DA or the Air Force. However, it does provide military justice practitioners with additional ammunition as they approach local prosecuting attorneys with jurisdictional requests. The capability to enter NJP into a national criminal data base provides the AF with the ability to meet the primary goal of most local prosecutors; to ensure a permanent record of punishment that crosses jurisdictional lines. Federal, state and local law enforcement access this data for a number of reasons from background checks and routine traffic stops to criminal records checks for booking and presentencing investigations.[25] Drunk driving is one of the offenses listed in DODI 5505.11, Enclosure 3. Although military members who receive NJP for a DUI will not receive a conviction, DODI 5505.11 will provide a permanent record of punishment for the offense.[26]

The Air Force's ability to enter data into NCIC for tracking judicial and non-judicial punishments is a significant step in the right direction…

DUI investigations often begin with a routine traffic stop. Law enforcement officers then run the vehicle's license plate and the driver's license information through the state's criminal data system. This is accomplished by either communicating with a dispatch office, which will complete the records check, or by accessing a computer in the patrol car. For example, Missouri law enforcement uses the Missouri Uniform Law Enforcement System, known as MULES. In most cases the state system interfaces with NCIC. These systems show an individual's criminal history to include any record of arrest or conviction. They also indicate whether or not the person's driver's license has been suspended or revoked. Once this data is accessed, it becomes part of the investigative record. In other words, law enforcement provides the information to the pros-

[22] AFI 31-206. Security Force Investigations Program, 16 September 2009.

[23] AFPD 71-1, Criminal Investigations and Counterintelligence, 6 January 2010.

[24] AFI 31-206, para. 2.24.

[25] Missouri law allows a judge to consider arrest records and military records as part of a presentencing investigation. See State v. Edwards, 228 S.W.3d 88 (Mo. App E.D. 2007), Martin v. State, 291 S.W.3d 846 (Mo. App. W.D. 2009) and Missouri Supreme Court Rule 29.07(a). Detailed discussions go beyond the intent of this article. Even if a judge can't consider information from a military record or a prior arrest record, prior NJP will still serve as an important data point for the prosecutor as he or she makes charging decisions and during plea negotiations.

[26] According to the NCIC 2000 Operating Manual, section 3.8 states an Interstate Identification Index (III) "record can be deleted either permanently (e.g. when a record was established in error or if the subject has reached 99 years of age) or temporarily (e.g., when internal corrections are needed and the record will be reentered)." Enclosure 3 entries discussed in this article are "III" entries.

ecutor to help determine the appropriate disposition of each case.

Case in Point

In theory, DODI 5505.11 sounds like a great tool, but will it really make a difference? The answer is YES! Case in point: in August 2010, an Airman assigned to Whiteman AFB, MO, was arrested by civilian police for DUI. Security Forces worked with the local law enforcement and completed a joint investigation. Whiteman AFB received jurisdiction and completed NJP on the member. Security Forces complied with DODI 5505.11 and AFI 31-206 by fingerprinting the Airman and eventually entering the final NJP disposition into NCIC. The Airman received a reduction in grade, 30 days restriction and a reprimand. The NCIC entry showed the punishment exactly as listed in the preceding sentence as well as other valuable information. NCIC listed the specific date of the offense, the arrest date and the SFS or AFOSI case number, the arresting agency and address and the state criminal code that was violated. Additionally, the MULES report showed that the Airman's driver's license was revoked and it listed the type of revocation as "Admin Alcohol Revocation."[27] Even though the civilian DUI arrest resulted in an Article 15, the Airman still lost his privilege to drive.

Approximately two months later the same Airman was again arrested by civilian police for DUI. The local DA prosecuted the case. The previous NJP was extremely beneficial to the DA. First, the DA was able to see that this Airman had a prior arrest and was driving with a revoked license. This gave the DA the option to prosecute the Airman for driving on a suspended license in addition to the DUI. Second, the DA also saw from the NCIC report that the Airman was punished once before for a DUI, so the DA had more incentive to prosecute and convict the Airman for DUI instead of accepting a plea bargain for a less severe offense. The DA decided to stick with the DUI charge and successfully used the Article 15 punishment to convince the Airman and his defense attorney to plead guilty to a DUI.[28]

The Air Force's ability to enter data into NCIC for tracking judicial and non-judicial punishments is a significant step in the right direction for addressing the shared interests of all law enforcement agencies, prosecuting attorneys and military justice practitioner. It provides notice to all interested parties that punishment was administered by the military.

Way Forward

In order to benefit from this tool, legal offices must be proactive with local prosecuting attorneys. Chiefs of military justice must educate local law enforcement and prosecutors alike to ensure they fully understand our ability to permanently record prior offenses and punishments. The SJA must also get SFS and, if necessary AFOSI, on board to dedicate appropriate resources by opening a formal investigation in their database and gathering the necessary information. The more civilian prosecutors understand the Air Force military justice system, the more likely they will be to cooperate with commanders to meet the disciplinary goals of both systems.

[27] The arresting agency listed was USAF SEC POL WHITEMAN AFB: MO and the charge listed was "Charge Literal DRIVING UNDER THE INFLUENCE OF ALCOHOL-CITY ORDINANCE #340-1.70." In Missouri the Department of Revenue (DOR) issues driver's licenses and the DOR revokes an individual's privilege to drive. The actual license is not confiscated from the driver, although law enforcement has the ability in some cases to actually confiscate a license. Additionally, a person's driver's license can be revoked by judicial order.

[28] A first time DUI offense is charged as a Class B misdemeanor, RSMo §577.010. The sentence range for a Class B misdemeanor is 30 days to 6 months imprisonment. RSMo §557.021. Subsequent DUI convictions can result in more serious charges such as a Class A misdemeanor, a Class D felony or worse.

HIGH-VIS JUSTICE

RELEASING MINOR DISCIPLINARY INFORMATION—A SCENARIO-BASED LOOK AT THE RULES

By Major Seth R. Deam, USAF

Disciplinary actions falling short of court-martial can nevertheless take on a high-profile posture based on the nature of the offense, the victim, or the offender. These cases raise a number of interconnected questions relating to the stakeholders who have an interest in knowing the outcome and the offender who has a diverging privacy interest:

- How do you handle the expectations of a victim who wants to have closure by knowing what happened to the person that caused them harm?
- How do you handle questions from the media?
- How do you handle questions when the victim is intertwined with the media?

What follows looks at these questions by first, detailing a fictional, but realistic scenario and second, providing the rules and analysis of that potential resolution.

A Hypothetical Scenario

While on leave after returning from deployment, Airman Y decides to take some time to let off some steam in his hometown of Las Vegas, Nevada. With his best friend in tow, he heads to the Strip where they begin an alcohol-fueled evening winding up at the New York-New York Casino. At the Coyote Ugly bar, the Airman gets into a minor scuffle inside after someone bumps into him, causing him to spill his drink. After bouncers "ask" him to leave the bar, Airman Y lingers near the entrance, talking to his friend. Thirty minutes after the incident, the individual who spilled his drink and his friend exit the bar. The two men are holding hands. As the pair walk past him, Airman Y unleashes a verbal assault on their sexual orientation and repeatedly taunts the couple. After one of the men suggests he "get some education," Airman Y attacks the pair. In a matter of seconds, he throws a flurry of drunken punches, some of which connect, followed by several shoves and kicks. The pair do not fight back, but do not run away either. Hotel security guards arrive on-scene moments later, alerted by some bystanders. Airman Y shows the guards his military ID and claims that he was just defending himself. The casino security video shows a different version of events. However, the security guard does not inform the Las Vegas Police Department, and Airman Y returns to his assigned base back East.

While the two victims are not seriously injured, they are deeply upset to learn the assailant was a U.S. military member. One of the two men works on the campaign staff for the Mayor of Las Vegas, who at the time is running for Governor and weighing his chances to run for an open U.S. Senate seat. The other victim works as a freelance reporter for the *Las Vegas Sun.* He is also an active blogger on the side with a significant following, as well as a local gay rights activist. The reporter blogs about the assault

the following day, speculating if the LVPD and the military are going to "sweep this hate crime under the rug."

Not surprisingly, this incident receives the attention in the *Las Vegas Sun* and is discussed on various local blogs and social media communities for several days. The Mayor's office becomes involved, and the top levels of the Air Force, including TJAG, are made aware of the incident. Also not surprisingly, the Clark County District Attorney's (DA) office makes contact with the Airman's base legal office to make arrangements to return Airman Y to Las Vegas to face charges. The staff judge advocate (SJA) requests the DA allow the Air Force to exercise jurisdiction, but the DA, as part of their Victim and Witness Assistance Program (VWAP) requirements, needs to bring the two victims into the conversation. The DA arranges for a teleconference with the two victims and the SJA.

When the victims find out the military wants to handle the case instead of the Las Vegas Police Department, they are suspicious but not outright hostile. The SJA talks with both victims, and she discusses the range of disciplinary options under the Uniform Code of Military Justice (UCMJ) as to the commander's options to address the Airman's misconduct and how the Airman's commander would decide what option would be most appropriate. This opens a dialogue and increased understanding about the range of punishment, timelines, risks, and career implications of the options available to a commander, including the possibility of offering nonjudicial punishment instead of a court-martial. After considerable discussion, the victims agree to allow the Air Force to handle the case, and are supported by the DA.

After careful consideration, Airman Y's commander decides that nonjudicial punishment is the most appropriate course of action. Based on the evidence, the commander finds Airman Y committed the assaults and imposes a punishment of reducing him by one rank and writes a blistering reprimand.

Both the commander and the SJA want to share the punishment with the victims, but must make sure the demands of VWAP and the protections of the Privacy Act and Freedom of Information Act (FOIA) are complied with. Generally speaking, it makes sense that there would be a different rule for victim release than for general public release.

At the same time, *The Air Force Times* also makes a media inquiry requesting the status of the Airman Y's punishment. But the SJA has determined that it would not be appropriate to release any information to the media about the Airman Y's punishment under Article 15, UCMJ. Therefore, the SJA and PA shop coordinate on the following initial release to *The Air Force Times*:

> Airman Y is currently stationed at Base X. The case was investigated and is now closed, short of a court-martial. While the details of courts-martial are public, nonjudicial punishments and administrative actions are not. Therefore, if Airman Y received punishment other than a court-martial, we could not reveal that action due to Privacy Act concerns.
>
> Courts-martial are public proceedings, but the Privacy Act arises if any possible misconduct is addressed otherwise. This statute and Department of Defense

> policy require the Air Force to protect individual privacy by restricting access to this information by third parties. These rights apply to all persons for whom the government maintains records, including those who may be accused of misconduct whether action was taken or not. Any release of information requires a balancing of the individual's privacy interests against the public's interests in the matter. Of course, the member himself or herself can choose to waive the limitations of the Privacy Act and authorize the Air Force to disclose this information.

Questions remain: Should the SJA release information from the Article 15 to the victims? If the SJA releases any of the Article 15 information to the victims, can she release the same information to the media? Does it matter whether it is an Article 15 or other administrative action? Does it make any difference that a release to the victims may be a *de facto* release to the media given their roles?

Law and Analysis

This situation can be broken down into the release of information to two separate entities, to the victims and to the general public. Additionally, we must analyze how to release information to a victim who is also a member of the media, and finally, to what extent disciplinary action short of an Article 15 may be released.

The Privacy Act, 5 U.S.C. § 552a, states that no agency shall disclose any record which is contained in a system of records, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be for a routine use.[1] "Routine use," is defined as the use of the record for "a purpose which is compatible with the purpose for which it was collected."[2] Each agency that maintains a system of records shall publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records. This notice must include each routine use of the records contained in the system, including the categories of users and the purpose of such use.[3] Additionally, Air Force Instruction (AFI) 33-332, *Privacy Act Program*, notes "routine use" as one of 12 exceptions where release of Privacy Act information can be made without the consent of the subject of the Privacy Act record.[4]

Release to Victims

The Department of the Air Force published a System of Records Notice (SORN) in the Federal Register in December of 2008 for "Courts-martial and Article 15 Records."[5] This SORN is described as including the following: "Individual's name, Social Security Number (SSN), records of trial by courts-martial; records of Article 15 punishment; discharge proceedings; documents received or prepared in anticipation of administrative nonjudicial and judicial proceedings; witness statements; police reports; other reports and records from local, state, or federal agencies."[6]

Furthermore, the "Routine Uses" section states: "In addition to those disclosures generally permitted under 5 U.S.C. § 552a(b) of the Privacy Act, these records, or information contained therein, may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. § 552a(b)(3) as follows:…To victims and witnesses of a crime for the purposes of providing information consistent with the requirements of the Victim and Witness Assistance Program and the Victims' Rights and Restitution Act of 1990."[7]

According to AFLOA/JAJM, disclosure of the following items are permissible: "that the offender received and accepted NJP; the findings of the commander; the general nature of the punishment, i.e., a fine and a reprimand; any collateral consequences that follow by operation of regulation or are documented on the Article 15, including UIF entry, officer/SNCO selection record entry appeal results."[8]

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[1] 5 U.S.C. § 552a(b)(3).

[2] 5 U.S.C. § 552a(a)(7).

[3] 5 U.S.C. § 552a(e)(4)(D).

[4] AFI 33-332, Privacy Act Program para. 12.4.3 (29 Jan. 2004) [hereinafter AFI 33-332].

[5] Federal Register, Volume 73, Number 236, December 8, 2008, "Courts-martial and Article 15 Records."

[6] *Id*.

[7] *Id*.

[8] https://aflsa.jag.af.mil/AF/JUSTICE/LYNX/ons_vwap_disc.docx (AFLOA/JAJM/VWAP Field of Practice), "Disclosure of Case Disposition to Victims and Witnesses," posted 22 July 2009, last accessed on 23 September 2010.

Release to General Public

The Air Force does not proactively release information to the public on minor disciplinary matters. Of course, the Air Force does receive media inquiries in high-profile cases. The request for information may come in the form of a Freedom of Information Act (FOIA) request. A FOIA request can be made by any person and must be in writing (includes requests sent by facsimile or electronically), explicitly or implicitly invoke the FOIA, reasonably describe the desired record, and give assurances to pay any required fees or explain why a waiver is appropriate.[9]

Whether or not a FOIA request is made, an analysis under the Privacy Act is required for disciplinary records as it is contained in a system of records.

If such a request is made, FOIA Exemption (b)(6) covers information contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[10] "If the information qualifies as Exemption 6 information, there is **no discretion** in its release."[11] Examples of information from personnel records include "[f]iles containing reports, records, and other material pertaining to personal matters in which administrative action, including disciplinary action, may be taken."[12]

Regarding the release of Article 15 information, AFI 51-202 states "[p]ublic release of information subsequent to imposition of punishment should be limited to an individual's rank, offense, punishment and squadron. Do not release information that would readily identify the member."[13] As an initial matter, any public release of the imposition of Article 15 punishment for an Airman would require approval of AFLOA/JAJM, as it would require an exception to the restriction under AFI 51-202. AFI 36-2907 *Unfavorable Information File (UIF) Program*, does not address public release of UIF documentation.[14]

Whether or not a FOIA request is made, an analysis under the Privacy Act is required for disciplinary records as it is contained in a system of records.[15] AFI 33-332 provides the three analytical steps to consider under a Privacy Act analysis: 1) Would the subject have a reasonable expectation of privacy in the information requested?; 2) Would disclosing the information benefit the general public?; and 3) Balance the public interest against the individual's probable loss of privacy.[16]

First, does the subject here have a reasonable expectation of privacy in the information requested?[17] As with many other Airmen who are punished under Article 15 or given administrative action, this Airman has a reasonable expectation of privacy in the information requested. That expectation of privacy is reasonable due to the protections built into the nonjudicial punishment process, including the limitations on public punishment[18] and the restrictions on releasing his punishment results.[19] If an Airman receives a reduction in grade, the expectation of privacy is somewhat diminished, given that those he or she comes into contact with afterwards are likely to notice the reduced grade; the same holds true to some extent for extra duties and restriction.

Second, "[w]ould disclosing the information benefit the general public?"[20] Since this information does reveal something regarding the operations or activities of the Air Force, there is a public interest in this information. In routine cases generally, there is minimal insight provided by the disciplinary resolution of a case involving an enlisted member who committed minor offenses under the UCMJ, especially in light

[9] DOD 5400.7-R, DoD Freedom of Information Act Program para. C1.4.2 (Sept. 1998).

[10] 5 U.S.C. § 552(b)(6).

[11] DoD 5400.7-R para. C3.2.1.6 (emphasis in original).

[12] DoD 5400.7-R para. C3.2.1.6.1.2

[13] AFI 51-202, Nonjudicial Punishment para. 3.19 (7 Nov. 2003) [hereinafter AFI 51-202].

[14] AFI 36-2907, Unfavorable Information File (UIF) Program (17 Jun. 2005).

[15] *See generally*, AFI 33-332.

[16] AFI 33-332 para. 12.3.

[17] *Id*.

[18] AFI 51-202 para. 3.13.3.

[19] AFI 51-202 para. 3.19.

[20] AFI 33-332 para. 12.3.

of the fact that the Air Force processes thousands every year.

Given these allegations involve assaults consummated by a battery against two gay males in conjunction with anti-gay slurs, there is a higher interest in this case by specific interest groups and others concerned with handling of offenses by those accused of attacks based on sexual orientation. This higher level interest is reflected in "hate crimes" laws that include sexual orientation currently in place in 31 states, including Nevada, according to the Anti-Defamation League.[21] However, there is no evidence that this Airman targeted these men because they were homosexual. Further, no media coverage has extended outside of Las Vegas. The greatest interest in the outcome of the case is with the victims of the assault.

Finally, we must balance the public interest against the individual's probable loss of privacy.

Finally, we must balance the public interest against the individual's probable loss of privacy.[22] The general public interest in this case is low. When balancing the privacy interests of the Airman against the public's interest in disclosure, courts have routinely held the public holds little to no significant public interest in the alleged misconduct of government employees who do not hold high-ranking positions.[23]

While there may be a public interest generally in determining whether the Air Force enforces minor offenses of criminal law, this generalized inquiry does not override the privacy interests of the Airman.[24] Here, however, the nature of the allegations involves assault against two homosexual males and includes insults targeting the sexual orientation of the victims. While there may be a greater interest in Las Vegas and with various groups supporting gay rights, the general public interest in the final disposition of this case is low.

Although most cases involving release of information concerning nonjudicial punishment involve flag officers, there are two notable cases involved officers who were lower in grade. First, in *Chang v. Department of Navy*, Commander (O-5) Chang was the commander of a naval vessel that collided with another ship and faced nonjudicial punishment for dereliction of duty.[25] The Navy withheld the names and specific punishments of all other officers who were punished, but the court found that did not weaken the public interest at stake.[26] The court focused on the significant media attention, two admiralty suits, and that Commander Chang was the commander of the vessel, in upholding the Navy's release of details about his nonjudicial punishment.[27]

Second, in *Schmidt v. U.S. Air Force*, Major Schmidt was the pilot that dropped a laser guided bomb that killed several Canadian military members and injured several others in a "friendly fire" incident at Tarnak Farms, Afghanistan.[28] The court in *Schmidt* noted he was not a senior military official, but upheld the Air Force release of his nonjudicial punishment details with a focus on the significant public and media attention, that it was a deadly incident with international effects, and that the punishment addressed acts carried out in the performance of his duties.[29]

Contrary to both *Chang* and *Schmidt*, our hypothetical Airman's acts were not carried out in the performance of his official duties. His offenses caused no international impact, and he caused no significant property damage or personal injury. Only sporadic and localized media attention had resulted. Additionally, the fact that Airman Y is enlisted provides another distinction from *Chang* and *Schmidt*.

[21] http://www.adl.org/learn/hate_crimes_laws/map_frameset.html, last visited 3 October 2010.

[22] AFI 33-332 para. 12.3.

[23] Dunkelberger v. Dep't of Justice, 906 F.2d 779, 782 (D.C. Cir. 1990) and Schonberger v. Nat'l Transp. Safety Board, 508 F. Supp. 941, 944-45 (D.D.C. 1981) *but see* Schmidt v. U.S. Air Force, 2007 WL 2812148 (C.D. Ill) (Air Force major, discussed in the following para.).

[24] Cotton, *supra* at 27 citing Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 390, 4 U.S.P.Q.2D (BNA) 1454 n.8 (D.C. Cir. 1987).

[25] Chang v. Department of Navy, 314 F.Supp.2d 35 (D.D.C. 2004).

[26] *Id*.

[27] *Id*.

[28] Schmidt, 2007 WL 2812148.

[29] *Id*.

However, even if this Airman was an officer, it is unlikely that fact alone would significantly impact the analysis. The analysis would likely shift if the Airman was a general officer or involved in the DoD implementation of the ban on homosexual conduct, such as a commander who had recently initiated administrative discharge of someone under the ban. Yet this case is unrelated and releasing his nonjudicial punishment for this reason could open the door for requests for release in any administrative or nonjudicial punishment action taken in cases related to any homosexual conduct in the Air Force. Consequently, this Airman's case is easily distinguished from *Chang* and *Schmidt*. The same analysis would apply if he were given a Letter of Reprimand, was administratively demoted, or some other administrative action was taken against him.

Victims Who Are Not Distinct From Media

In this case, at least one of the victims is a Las Vegas media personality and has written on a blog about the incident recently. While it is likely the victims will publicly disseminate information regarding the nonjudicial punishment if released, that is an individual decision left to the victim. This does not provide any principled reason to treat victims differently based on their relationship with the media or their likelihood to further release information provided to them. If a victim is satisfied with handling of the case, it is less likely that any negative publicity or demand for official release would arise from an independent source. This resolution satisfies the letter and intent of the VWAP laws and regulations.

Release of Administrative Actions

In the same posted paragraph referenced in paragraph II(A)(2) above discussing the 2008 Air Force SORN, AFLOA/JAJM notes:

> [n]o similar SORN provision exists for lesser administrative dispositions such as LORs, LOCs, and LOAs. In those cases, disclosing that 'appropriate administrative actions were taken,' or that 'the commander decided not to impose nonjudicial punishment or prefer court-martial charges' is appropriate. Similarly a statement that 'no adverse administrative action was taken' may also be appropriate, depending on the circumstances.[30]

However, the 2008 Air Force SORN specifically listed "discharge proceedings" as included in the same system of records that could be released under the same analysis above as Article 15s.[31]

Conclusion

The release of minor disciplinary action is dependent on the nature of the disciplinary action, the presence of victims, and the facts of the case. If faced with a similar scenario at your base, you will need to conduct a review of the facts surrounding the offense and any disciplinary action, the privacy interest of Airman, the public interest in the release (including that of any victims), and balance the Airman's privacy interests against the public's interest. After considering the law, regulatory guidance from DoD and the Air Force and balancing the public interest and the privacy interest of Airman, you can better determine the appropriateness of the release of information relating to disciplinary action short of a court-martial. Even when a commander decides to resolve a case at lower level, the stakes still can remain high.

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[30] https://aflsa.jag.af.mil/AF/JUSTICE/LYNX/ons_vwap_disc.docx (AFLOA/JAJM/VWAP Field of Practice), "Disclosure of Case Disposition to Victims and Witnesses," posted 22 July 2009, last accessed on 23 September 2010.

[31] Federal Register, Volume 73, Number 236, December 8, 2008, "Courts-martial and Article 15 Records."

Home Ownership

Home ownership is the most significant financial obligation most legal assistance clients ever incur. When our clients face the worst case scenario of home foreclosure they desperately need whatever assistance we can provide. One resource for current military members is the Servicemembers Civil Relief Act (SCRA). With regard to pre-service mortgages, the SCRA limits the interest rate to 6% (Sect. 527), prevents self-help foreclosure, provides a stay of proceedings, and allows the court to adjust the obligation (Sect. 533). Clients who are facing financial strain regarding the sale of a home should also be aware of the Homeowner's Assistance Program, which can either compensate qualifying filers who sell their home for a loss, or actually purchase the home. Captain Scott Taylor's article highlights important considerations surrounding another legal tool our clients may need to consider: pre-foreclosure settlements. I encourage you to read his article and review the other resources on CAPSIL [search "SCRA" and "HAP"]. The Judge Advocate General said "out of a sense of obligation to our fellow Airmen, we ought to take it upon ourselves to seek out more training, to improve our legal assistance skills." A small investment of your time could reap massive benefits for a client in need.

Major Scott Hodges, Chief of Air Force Legal Assistance

Pre-Foreclosure Settlements

Advising military members how to get out of a bad mortgage in uncertain economic times

by Captain Scott A. Taylor, USAF

In today's traumatized housing market an increasing number of military homeowners are facing the prospect of selling homes worth less than they owe. Consequently, many service members are now considering pre-foreclosure settlements as they PCS. The job of a legal assistance attorney is difficult in navigating these waters, filtering out disinformation from predatory lenders, in order to guide clients through the current economic crisis. As we discuss the various issues facing legal offices advising potential Airmen facing foreclosure, we will focus on four primary areas. First, we will take a broad view of the pre-foreclosure landscape and discuss common terms and concepts. Second, we will discuss practical considerations that are a necessary by-product of pre-settlement foreclosures. Next, we will discuss the credit and tax implications of settling a mortgage for less than the amount owed. Finally, we will discuss the potential career implications that service members should keep in mind as they go through this process.

Pre-Foreclosure Terms and Concepts

The first thing to keep in mind is that it often makes good business sense for lenders to keep people in their homes. The foreclosure process is long and expensive. This means banks will work with homeowners. For the service member over-extended on an inflated mortgage, a **forbearance agreement** or a **loan modification** often will be the best choice if they want to stay in the home. A forbearance agreement allows the homeowner to delay or adjust their monthly payment for a short time to recover from a temporary setback. A loan modification changes the terms of the agreement for a short or extended period of time because it makes good business sense for the lender to do it. In

either case, the service member should be prepared to document how the financial hardship happened, and more importantly how the financial hardship will not reoccur.

The more likely scenario is a service member who gets PCS orders and is suddenly faced with selling an undervalued house. In this situation, the member is faced with three likely situations. He or she can ask the lender to accept a short sale, execute a deed in lieu of foreclosure, or let the bank foreclose.

A **short sale** is a concept that has been around a long time, but has just recently received attention in mainstream real estate transactions. It is where the lender agrees to accept less than what a borrower owes. The owner stays in the home during the process, and the buyer submits a bid directly to the owner. Then, the seller's agent submits qualified agreements to the bank. The preference is for at least three bids. The lender then either approves the highest of the qualified agreements, or further negotiates directly with the buyer. The buyer must be qualified to prevent sham deals or straw man deals in order to prevent fraud and collusion. A short sale benefits the lender as it is spared the time and expense of the foreclosure process.

A **deed in lieu of foreclosure** (DIL) is when the lender takes immediate possession of the property and forgives the debt. This is a faster process because the house is not placed on the market. For most civilians, the short sale is the better option because the homeowner gets to remain in the home for as long as possible until the closing. But for a service member on PCS orders who has already vacated the house, a DIL may be an attractive alternative.

Practical Considerations

The important thing to consider for both a short sale and a DIL is a **deficiency judgment**. Clients must read their contracts carefully. In both kinds of transactions, lenders are releasing a borrower from an instrument. It does not necessarily follow that they cannot turn around and sue the borrower for the deficiency that they suffered in doing so. Historically, lenders have not instituted suits very often, but if the economy improves, nothing would prevent them from doing so. Only language in the contract will protect the borrower.

In order to convince lenders to agree to these beneficial settlements, service members will have to write a hardship letter outlining their circumstances that justify the bank giving them assistance. A good letter lays out the facts of the hardship, making the service member come across as a living person, but without stretching the bounds of credibility. The letter should be supported with documents, notices, and anything else to help the lender get an accurate picture of what the service member is going through.

Service members should be prepared to have a frank and honest discussion about their personal finances before a lender will consider a pre-foreclosure settlement.

The service member will also have to provide the lender with a good deal of information to show his or her overall financial health. Examples of what lenders will expect to see are two years worth of taxes, two months worth of bank statements, and a budget showing how much the member pays for utilities and other expenses. Service members should be prepared to have a frank and honest discussion about their personal finances before a lender will consider a pre-foreclosure settlement.

Military members should be aware of so-called predatory lenders who mislead the public that refinancing or short sales with their firm is the way to go, when in fact these deals leave clients vulnerable to a multitude of liabilities. Members should select a real estate agent with experience not only with the local area, but also with short sales and deeds in lieu of foreclosure. There is a certification process that real estate agents can go through to handle these types of transactions, but there is no substitute for experience and reputation. Advise your clients to shop around and select their representative carefully. A seller should never pay a realtor directly. Banks pay realtors who know how to handle these transactions

very well, and they should never be compensated directly from the service member.

Credit Implications

There is no bright line rule for the time period it will take credit to recover from mortgage troubles. Fair Isaac and Company (FICO) drives much of a credit score. A credit score is an individualized report determined predominately by payment history, amounts owed, and length of credit history.[1] Many sources reference a report by FICO indicating homeowners should expect a drop of between 85 to 160 points for a short sale, deed in lieu of foreclosure, or a foreclosure, and reports that homeowners should expect a drop of between 40 to 100 points for a 30-day delinquent payment. FICO did not in fact publish the referenced report, but the numbers do serve to provide a loose guide to advise your clients with the caveat that everyone's FICO score is an individualized report and will not react the same way to similar events.[2] The important factor driving the impact to credit is delinquent payments. By the time most homeowners are in trouble and miss a payment, major damage has already been done to their credit. The biggest impact deriving from missed payments depends on three factors: frequency, recency, and severity. Often times, the damage from a pre-foreclosure settlement on a credit score comes not from the settlement itself but from the missed payments.

There are advertisements everywhere touting the benefits of a short sale or deed in lieu of foreclosure. The ads claim these options have less impact on your credit as opposed to a foreclosure. Like many issues, the best option depends on the facts of a particular circumstance. If a short sale or deed in lieu of foreclosure is a relatively quick process (and no homeowner should have a reason to expect a quick turnaround) then a homeowner will have the opportunity to create a record of paying bills on time and their credit can recover more quickly. However, if the process drags on, it can create a larger impact because of the missed payment every month.

If a service member does a short sale or deed in lieu of foreclosure, they are getting a benefit, in that they are settling the debt for less than what is owed. This event will not be reported by the mortgage company as "paid", but rather "settled", and will appear as a negative event on future credit reports. There is a "waiting period" associated with each type of pre-foreclosure settlement when attempting to obtain a federally backed loan in the future. A foreclosure typically has a seven-year waiting period from the completion date of the foreclosure.[3]

Often times, the damage from a pre-foreclosure settlement on a credit score comes not from the settlement itself but from the missed payments.

A deed in lieu of foreclosure sale or short sale has a waiting period that is dependent upon the loan-to-value (LTV) ratio. For example, if a borrower wants $130,000 to buy a house, and the house is worth $150,000, there is an LTV of 87%. This is especially important if a service member has over extended themselves on a loan to buy a house outside of their means, or else bought the most expensive house they could afford. If the LTV is 80% or less, a borrower can obtain another loan as soon as two years after the pre-foreclosure settlement.[4] If the LTV is 90% or less, a borrower can obtain another loan in four years.

In the current market, a real danger exists when a prudent homeowner makes a down payment of 20% for example, and then the housing market declines. If a service member takes out a loan for $160,000, but the house is worth $200,000, the homeowner would have an LTV of 80%. If the housing market where that service member was stationed was hit hard, and the service member received PCS orders, the LTV amount could change. When the service member tries to sell the house, if $160,000 is owed on the

[1] "What's in your FICO score." MyFICO. Fair Isaac and Company. http://www.myfico.com/crediteducation/whatsinyourscore.aspx.

[2] "Credit missteps–how their effect on FICO scores vary." MyFICO. Fair Isaac and Company. http://www.myfico.com/crediteducation/questions/credit_problem_comparison.aspx.

[3] Fannie Mae. "Selling Guide" Part B, Subpart 3, Chapter 5, Page 433. (Jan. 27, 2011), *available at* https://www.efanniemae.com/sf/guides/ssg/sg/pdf/sel012711.pdf.

[4] Fannie Mae. "Selling Guide" Part B, Subpart 3, Chapter 5, Page 434. (Jan. 27, 2011) *available at* https://www.efanniemae.com/sf/guides/ssg/sg/pdf/sel012711.pdf.

loan, and the house is now worth $170,000, this prudent homeowner would have an LTV of 94%.

Anything higher than a 90% LTV could result in a seven-year waiting period. If a borrower can document extenuating circumstances, the waiting period can be reduced to three years. Therefore, advise your clients to keep all documentation related to the sale or purchase of a home. Despite doing everything correctly, the prudent homeowner in the example above would be prevented from obtaining a home loan for at least a period of three years if not more.

Each of the three credit reporting agencies places a different emphasis on different items, which accounts for three different scores. Lenders do not see how a potential borrower's score was calculated, only the final product. A credit score above 680 will require very little review. A score between 640 and 680 will receive more attention from a lender's underwriters. A score below 600 will likely not qualify for a loan.[5] A borrower's score can additionally impact the borrower's interest rates, so it is in every service member's best interests to resolve their pre-foreclosure settlements in a timely manner to build up their credit for the future.

Tax Implications

Additionally, there will likely be tax implications in completing a pre-foreclosure settlement. For example, if a borrower has a $150,000 debt on a home, and settles that debt in a pre-foreclosure settlement for $130,000, they would have profited by $20,000. That $20,000 profit is not money in a service member's bank account, but it is a windfall in that the forgiveness of a debt is taxable income. Fortunately, the IRS allows a sale gain exclusion for a principal residence up to $250,000. Factors to determine a principal residence include the amount of time used, place of employment, where other family members live, address for tax returns, address used for bills, drivers license, and voter registration. To exclude the gain and avoid paying taxes on this windfall, a taxpayer must both own and use the home as a principal place of residence for two of the previous five years before the sale.[6] Additionally, a service member cannot have excluded gain on another property in the previous two years.

Service members can also find safety under the unforeseen circumstances rule. Unforeseen circumstances include a change in employment that leaves the taxpayer unable to pay their mortgage or reasonable basic living expenses. The unforeseen circumstance exception requires a change in employment location in excess of a 50-mile radius for the change to qualify. A PCS move in excess of 50 miles would qualify as an unforeseen circumstance. If a service member enters into a pre-foreclosure settlement on a rental property, they need to be prepared to pay income taxes on the deficiency amount that is forgiven by the lender. Rental properties are specifically excluded as excludable gain.

Career Implications

Service members seeking legal assistance might be concerned about how their declining economic status might adversely impact their career. Facing a housing crisis is not a criminal matter. Article 134 of the Uniform Code of Military Justice (UCMJ) covers dishonorably failing to pay a debt. According to the comments accompanying this section, more than negligence in nonpayment is necessary. To be dishonorable, a failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude towards one's

[5] "FICO Scores What They Are, What Affects Them & How Lenders Look At Them". Chicago Title.

[6] IR-2002-142 (2002) *available at* http://www.irs.gov/newsroom/article/0%2C%id=105042%2C00.html.

just obligations. Article 134 is intended for those service members who act with deceit and dishonesty, or those who have developed a callous disregard of their personal finances. For those service members who honestly get caught up in this economic downturn, not only should they be treated differently than those contemplated under the UCMJ, they should be provided the best legal assistance we can provide.

If this economic climate has taught us anything, it is that a housing crisis can happen to anyone. Service members should be advised to proactively keep their commanders informed of their situation and to work diligently and honorably in resolving their debt. In addition to keeping their leadership in the loop, it is important that service members stay in good communication with their lender and document everything.

Unfortunately, many service members may be reluctant to seek help for fear that doing so will expose their financial problems and jeopardize their security clearance.

Security Clearances

Another related and realistic concern for many service members is what effect a pre-foreclosure settlement will have on security clearances. The Department of Defense established adjudicative guidelines for all U.S. government civilian and military personnel who require access to classified information. The guidelines apply to both initial determinations as well as continued eligibility. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.[7] Several factors raising a security concern include but are not limited to: inability or unwillingness to satisfy a debt, a history of not meeting financial obligations, or high debt to income ratio.[8] There are, however, several conditions that can mitigate security concerns that include but are not limited to: the conditions resulting in the financial problem were beyond the person's control and the individual acted responsibly under the circumstances, the person has received or is receiving counseling and there are clear indications the problem is under control, and the individual initiated a good faith effort to resolve debts.[9] Unfortunately, many service members may be reluctant to seek help for fear that doing so will expose their financial problems and jeopardize their security clearance. But seeking help and taking action is precisely what may make the difference and allow members to keep their security clearance.

If this is just one more in a long line of debts, there may not be much assistance the legal office can provide. Legal assistance attorneys should steer these clients towards the financial counseling resources on base, hopefully before it is too late. For the service member who is facing a pre-foreclosure settlement because of the housing market, the State Department guidelines make it clear that those members who keep their commanders informed and try to resolve their debts diligently and honestly, should have little to fear. Each case is evaluated in the context of the whole person, but any doubts will be resolved in favor of national security and are considered final. When making a decision, adjudicators consider whether the member: voluntarily reported the information, sought assistance and followed professional guidance, and resolved or appeared likely to favorably resolve the security concern.[10] Moreover, commanders have a strong voice in this process, so early, frequent, and clear communication with leadership will be to the member's benefit.

Conclusion

For the service member who finds themselves under a financial strain in this housing market, there is help available. Whether it is a forbearance agreement, a loan modification agreement, short sale, or deed in lieu of foreclosure, as legal assistance attorneys we need to know the benefits and consequences of each option to best advise our clients and steer them clear of predatory lenders and other pitfalls. Above all else, legal assistance is about taking care of our fellow Airmen. This is an area where your assistance is much needed and much appreciated.

[7] DoD 5200.2-R, *Personnel Security*, Appendix 8, Financial Considerations, January 1987.

[8] *Id*.

[9] *Id*.

[10] *Id*.

Let's Make A Deal

How to Use Acquisition and Cross-Servicing Agreements

by Lieutenant Colonel Thomas W. Murrey, Jr., USAFR

Imagine the following scenario: you are the deployed staff judge advocate for an air expeditionary wing in the Middle East. Serving alongside you are military forces from several allied nations, including Romania and France. Two weeks into the deployment the Air Expeditionary Wing commander informs you that the French air force commander is asking if he can buy gasoline for their trucks. At the same time, U.S. forces need to find a way to acquire some electrical equipment. The Romanians have what we need, but in exchange they want transportation services. You are familiar with basic contracting procedures and know that the United States cannot just give away supplies or equipment. But you want to do everything you can to make the deployment a success. The commander wants an answer ASAP. Is there a way we can legally make this happen?

An International Barter System

In a deployed environment, the transfer of supplies with coalition partners often presents a major challenge. Situations arise where a commander needs to quickly obtain supplies from or provide supplies to a foreign military partner. Traditional methods of procuring or transferring supplies have proved time-consuming and cumbersome. Providing supplies under traditional procedures like the Foreign Military Sales Act can take months or even years. Likewise, obtaining supplies through the contracting process is also often slow and impractical in the AOR. However, a practical solution exists, though knowledge of the solution among military members is not widespread. The key to solving these problems may be an Acquisition and Cross-Servicing Agreement (ACSA). ACSAs effectively have created an international military barter system, allowing the United States to buy, sell, or trade supplies with foreign allies. Although the logistics squadron has primary responsibility for ACSAs, deployed judge advocates need to understand how the process works in order to help commanders quickly and successfully perform the mission.

On many occasions in the last 20 years, we have bartered accordingly with our coalition partners. During Operation SOUTHERN WATCH, the United States gave French allies access to our dining facilities. In return, the French provided us with

lights for our airfields. On the flip side, requests sometimes are made under an existing ACSA that cannot be honored. In one conflict, an ally requested bomb guidance kits from U.S. Forces. After a legal review, the request was denied, as bomb guidance kits were clearly excluded from transfer under the statute. Let's take a closer look at the legal basis for ACSAs, what these agreements can be used for, as well as the limitations that apply to their use.

Legal Authority

In 1980, Congress passed a statute creating acquisition and cross-servicing agreements. The need was created by troop reductions in Europe that forced the United States to increasingly rely on its NATO allies for logistical support. Originally this statute was known as the NATO Mutual Support Act, and was designed to simplify the transfer of supplies, services and support between the United States and NATO countries. However, the original law only allowed the United States to conduct these types of transactions with NATO nations and subsidiary organizations. As the mission of the United States military broadened, so did the need to expand the use of cross-servicing agreements.

Key Provisions

The NATO Mutual Support Act was amended in 1986, 1992 and 1994, giving the statute its present form. Located at 10 U.S.C. §2341-2350, ACSAs are a subchapter of Chapter 138, Cooperative Agreements with NATO Allies and Other Countries. The statute provides that the United States may provide "logistic support, supplies and services to military forces" in return for "reciprocal provisions of logistic support, supplies and services."[1] If a country is on the approved list, it is eligible to negotiate an ACSA with the United States. The approved list includes any country in NATO, a subsidiary body of NATO, the United Nations, any regional organization in which the United States is a member, and any other country designated by the Secretary of Defense within certain limitations.[2] Originally, the United States military could only conduct ACSA transactions with NATO nations. Today, the United States has agreements with nearly one hundred countries.

What Can Be Transferred?

Although the list of what can be transferred is broad, it is not infinite. Congress provided a definition of "logistic support, supplies and services" to include food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Such support also includes temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the United States Munitions List promulgated pursuant to section 38(a)(1) of the Arms Export Control Act [22 U.S.C. §2778(a)(1)].[3] Further guidance as to what is or is not considered appropriate logistic support, supplies or services can be found at DoD Directive 2010.9 and Air Force Instruction (AFI) 25-301.

Methods of Payment

Congress provided three methods to effect payment for supplies or services transferred under an ACSA: (1) reimbursement basis, (2) replacement in kind, or (3) an exchange of supplies or services of an equal value.[4] Using the example above, if the deployed AEW provides 600 gallons of fuel valued at $2,500 to the deployed French forces, the French may reimburse the United States with either (1) a cash payment of $2,500, (2) 600 gallons of the same type of fuel (replacement-in-kind), or (3) if requested by the United States military, other supplies or services valued at $2,500 (equal value exchange). The supplying country may only charge the receiving country what it cost the supplying country to obtain the transferred supplies, preventing profit making. If the United States purchased the gasoline for $2,500, it cannot charge the French $3,000 and make a profit. However, if the price of fuel has spiked and it would

[1] 10 U.S.C. §2342(a)(2).

[2] 10 U.S.C. §2342(a)(1).

[3] 10 U.S.C. §2350.

[4] 10 U.S.C. §2344(a).

cost $3,000 to replace the transferred gasoline, then the U.S. could charge $3,000.

Specifically, the statute provides that "the price charged by a supplying country for logistics support, supply and services procured…from its contractors for a recipient country shall be no less favorable than the price for identical items or services charged by such contractors to the armed forces of the supplying country".[5] Countries may charge the receiving country more if there are increased costs due to conditions such as delivery schedules or different delivery locations.[6] If the supplying country takes the supplies off their shelves, the supplying country may only charge the recipient what the supplying country paid for the item or their cost to replace the item. To avoid any disputes when the ledger is finally settled, the value of the supplies or support being transferred is determined before the transaction takes place.

The availability of ACSAs does not create a logistics free-for-all. Congress placed limitations on what can be transferred as well as dollar limits on how much can be procured by the U.S. military.

Limitations

The availability of ACSAs does not create a logistics free-for-all. Congress placed limitations on what can be transferred as well as dollar limits on how much can be procured by the United States military and how much can be transferred to other countries. For instance, the statute prohibits the transfer of the source, byproduct or other special nuclear material of which is subject to the Atomic Energy Act of 1954. Chemical weapons, with the exception of riot control agents, are also non-transferable. Congress also mandated that the military cannot trade logistics support, supplies or services to obtain an item whose acquisition is prohibited by law under 10 U.S.C. §2344.

Additionally, Department of Defense Directive (DODD) 2010.9 prohibits the acquisition or transfer of weapons systems, major items of equipment, as well as initial quantities of replacement parts and spares for major items of equipment. Some examples of this equipment include guided missiles, naval mines and torpedoes, chaff and chaff dispensers, bomb guidance kits, and chemical ammunition (with the exception of riot control agents). If general purpose vehicles and non-lethal equipment are being transferred and have not been designated as Significant Military Equipment on the United States Munitions List,[7] then the equipment can be leased or loaned on a temporary basis, as authorized by DODD 2010.9, paragraph 4.5.1.

Congress also placed a dollar limitation on the amount of logistical support, supply or services that the military may either obtain or provide in a year. The limits are different for NATO versus non-NATO countries and range from tens of millions of dollars to hundreds of millions of dollars. The deployed judge advocate will rarely see these limits come into effect, as they do not apply in the case of "active hostilities." Note however, there is a further exception regarding the monetary limitations if the military is supporting a humanitarian or disaster assistance operation or a United Nations Chapter VI or VII peacekeeping operation.[8]

To make sure bills do not go unpaid, credits and liabilities must be liquidated annually. Replacement in kind and exchange transactions must also be settled within twelve months of the transaction.[9] When the United States receives a cash payment for support it has provided, the Secretary of Defense may put the money into the appropriation, fund or account that incurred the liability or place the money into another appropriate fund or account.[10] This last provision gives the Secretary some flexibility in case

[5] 10 U.S.C. §2344(b)(1)(A)

[6] *Id.*

[7] *See* 22 U.S.C. §2778

[8] 10 U.S.C. §2347(c)

[9] 10 U.S.C. §2345.

[10] 10 U.S.C. §2346.

an appropriation no longer exists because of a new fiscal year.

One further limitation should also be understood. The statute prohibits the United States military from increasing supply inventories for the sole purpose of providing the additional supplies to our allies under an ACSA agreement.[11] This prevents the United States from becoming the *de facto* logistics provider for another country's military.

Today's overseas deployments frequently involve working closely with coalition partners. ACSAs provide a means by which both parties can help each other logistically.

Approval Authority

The Secretary of Defense has delegated to the combatant commanders the responsibility for negotiating and implementing acquisition and cross-servicing agreements. Typically, the authority to negotiate and sign an ACSA is further delegated by the combatant commander to the J-4 (logistics), usually a two-star flag officer. While the two-star has the authority to sign the agreement on behalf of the United States, the approval authority for our foreign partner varies from country to country. For instance, when an ACSA was negotiated with Bulgaria, the Bulgarian legislature had to approve the agreement because it mentioned taxes and customs relief.

When an Air Force unit uses an ACSA, the major commands are tasked with the responsibility of accepting, placing and approving the ACSA orders that occur in their area of responsibility. When an Air Force unit deploys, the commander of the deployed unit may ask for a delegation of this responsibility for the period in which they are deployed. The MAJCOM/LG can delegate ACSA authority to the deployed commander. These delegation letters are effective for 12 months or until the deployment ends, whichever comes first. Once the delegation is complete, the deployed commander may seek the required support and services from the host nation. This of course presumes that an ACSA exists between the host nation and the United States.

Equal-Value Exchanges

With a basic knowledge of acquisition and cross-servicing agreements, the solution to the AEW commander's dilemma posed in the first paragraph should become clear. If the United States has an ACSA with Romania and France (it does), then the transactions with our allies are possible. The French can purchase gasoline from us on a "reimbursement" basis, meaning the French will end up paying cash for their purchase. Alternatively, the French may repay us by returning to our supply system the same number of gallons of gasoline that we gave them, known as "replacement in kind." Likewise, we can provide transport to the Romanians, and in exchange they can give us some of their electrical equipment. If the value of the transport is equal to the value of the electrical equipment, then an "equal-value-exchange" has taken place.

Conclusion

Today's overseas deployments frequently involve working closely with coalition partners. ACSAs provide a means by which both parties can help each other logistically. Prior to deployment, judge advocates should have a basic understanding of these agreements. While the logistics squadron will have primary responsibility for implementation, legal advice could be required to determine if an ACSA is appropriate in a given scenario. Therefore, judge advocates should know the delegation authority, what may or may not be transferred, as well as the types of exchanges and repayments that may be made (reimbursement, replacement-in-kind, equal value exchange). Armed with this knowledge, JAG Corps members can ensure commanders have all options on the table to ensure mission success.

[11] 10 U.S.C. §2348

WOLFHOUND

A JAG IN THE 603D AOC COMBAT OPERATIONS DIVISION DURING OPERATION ODYSSEY DAWN

By Captain Thomas H. Marrs, USAF

The foreign LEGAD appeared visibly concerned: "My pilots have 20 minutes of gas left. I can't recommend they release their weapons on this target unless I know for sure it is a threat to the No Fly Zone (NFZ) or civilians. Your Intel guys won't release details about the target to me since it is 'U.S.-only' classified," the foreign-service legal advisor said to me. "Can you help?" I thought fast as I walked over to the Intel Targets Duty Officer, a very sharp Air Force captain named "Bill" with whom I'd formed a quick but very effective working relationship in the intense first 24 hours of kinetic strikes. "What do you have on this target?" I asked. Bill said nothing and showed me the information he had. Sure enough, it was clearly a threat to the NFZ. I gave the thumbs-up to the LEGAD and told him I couldn't disclose details, but he'd just have to trust me: "Your guys are clear to service this one." He studied my face for a few seconds then spoke with his commander. Minutes later, his two-ship of F-16s dropped two JDAMs[1] "down the chimney" and destroyed the target.

Working in the 603d Air and Space Operations Center (AOC), call-sign "Wolfhound," is truly a team effort. As the JAG on the floor I was not the one "pulling the trigger." Nor do judge advocates

[1] The Joint Direct Attack Munition is a guided air-to-surface weapon that uses either the 2,000-pound BLU-109/MK 84, the 1,000-pound BLU-110/MK 83 or the 500-pound BLU-111/MK 82 warhead as the payload. With the addition of a new tail section that contains an inertial navigational system and a global positioning system guidance control unit, JDAM improves the accuracy of unguided, general purpose bombs in any weather condition. *See* USAF Fact Sheet, Joint Direct Attack Munitions GBU 31/32/38, January 2006.

represent a single point of possible failure in a targeting decision. We provide advice—very necessary advice—but still a legal opinion like any other, with our bottom-line recommendation. Commanders and operators get to make the final call.

Forty-eight hours earlier, I had just finished rehearsing for an upcoming Article 6 visit with the rest of the Ramstein law center, cleaned my office, and was headed home for the weekend. I was about to leave when 3AF/JA called and requested me to augment the 603d AOC. My prior experience: as the Chief of Operations Law, I had exercised with the 603d a few weeks before, also logging a few days' experience sitting on the AOC ops floor next to the Chief of Combat Ops (CCO) during another exercise last fall. But nothing could have prepared me for working in Wolfhound Combat Operations Division (COD) during Operation ODYSSEY DAWN (OOD).[2] On the first day of OOD, I was assigned to Wolfhound as the day-shift COD JAG. My supervisor, Lieutenant Colonel Bruce Cox, 603d AOC/JA, attended meetings with targeting, strategy, coalition and leadership all day, so under his supervision, I was the primary JAG on the ops floor advising on all stages of the "kill chain."[3] During my first 48 hours, I had already reviewed and "greened up my chiclet" on (i.e., approved as legally sufficient) over 15 dynamic targets[4] ("DTs" or air strikes on targets of opportunity) and advised on several "strike coordination and reconnaissance" (SCAR) missions ("search and destroy" or kill-box missions), time-sensitive targets (TSTs),[5] and deliberate targets (pre-planned strikes).

Before I could give a recommendation and "green up my chiclet" on any given target package—whether it was a DT, SCAR mission, or TST—I had to review the target intel to quickly determine whether or not there were any Law of War concerns—i.e., military necessity, proportionality, distinction, and "chivalry" (preventing unnecessary suffering). Next, I had to verify that we had the proper authority to strike the target, which could have ranged from the SECDEF all the way down to the on-scene commander (OSC), i.e., pilot. Then I had to check that the target fit into our current ROEs, confirm that we had positive identification (PID), and that the collateral damage estimate (CDE), whether it was "formal" (i.e. intel vetted and pre-determined) or "field" (done visually through an aircrew's camera pod), was within our ROEs. All of this often had to be done in a matter of minutes—at least before the pilots on station ran out of gas or encountered hostile threats. Even if we had "formal" CDE and all the intel showed minimal concerns, I usually asked if the pilot could look through his camera pod "one last time" to verify PID and do one last "field" CDE check before striking the target. I knew that our highly-disciplined pilots and aircrews always followed strict procedures, but this last question always helped to ease my conscience before we engaged and "attrited" a target.

I was constantly running around the ops floor and badgering the Intel Targets Duty Officer ("Bill"—the cool-headed, reliable fellow Capt I referenced in the first paragraph), the Dynamic Targets Chief (Maj Christopher "Sammy" Breffitt—a highly-motivated, aggressive F-16 pilot who didn't mind fielding endless JAG questions in the middle of kinetic strikes), and often the Chief of Combat Ops (Lt Col Richard "Redman" Howard, a well-respected, experienced A-10 pilot from the 152d Air Operations Group who exhibited a near-constant, paradoxical state of nonchalance and razor-sharp focus)—to get an as-accurate-as-possible "picture" of the target and its surrounding environment.

We had real-time communications with the aircrews in the AOC, which helped, but early on I realized how totally dependent I was on the Intel guys, DT Chief, CCO, and aircrews to provide accurate, up-to-date info on the target almost up until the point of weapon release. Did anything change about the target environment since the picture was taken? Has the CDE changed? Did the proverbial "busload of nuns" pull up next to the target right before we "lit it up?" These were the questions that never went away,

[2] On 19 Mar 2011, coalition forces launched Operation ODYSSEY DAWN to enforce U.N. Security Council Resolution 1973 to protect the Libyan people from further attacks by their ruler, Muammar Gaddafi.

[3] Targeting consists of six distinct phases: Find, Fix, Track, Target, Engage, Assess. This method is commonly referred to as "F2T2EA" or colloquially as the "kill chain." *See* Air Force Doctrine Document (AFDD) 2-1.9, Targeting, 8 June 2006

[4] AFDD 2-1.9 identifies two basic types of targeting: deliberate and dynamic. *Deliberate targeting* is the procedure for prosecuting targets that are detected, identified, and developed in sufficient time to schedule actions against them in tasking cycle products such as the air and space tasking order (ATO). *Dynamic targeting* is the procedure for prosecuting targets that are not detected, identified, or developed in time to be included in deliberate targeting, and therefore have not had actions scheduled against them.

[5] Those targets requiring immediate response because they pose (or will soon pose) a danger to friendly forces or are highly lucrative, fleeting targets of opportunity.

and I just had to learn to trust the intel folks' and operators' judgment. No small feat for a skeptical lawyer drinking too much coffee in a highly-charged, operational environment. Needless to say, from day one I was immediately forced to learn a lot, and trust a lot of people I had never met before.

Within the first 48 hours, eight countries had commanders and liaison officers (LNOs) on the AOC floor, each eager to get his planes and aircrews in the fight, but none had access to our SIPR systems. All had limited intel and very limited communications, since no formal "coalition" had yet been formed. But the combined forces within it rose to the occasion, swiftly and almost flawlessly.

On the third day of kinetic strikes, I literally ran around the ops floor, meeting face-to-face with LEGADs and LNOs from seven different NATO countries who had shown up for the fight. I soon found that none had yet spoken with each other, or any U.S. personnel, about their individual ROEs or SPINS (special instructions for operators) for de-confliction purposes in the battle space. At the urging of 3AF and 17AF, I humbly suggested to each of them that it might be a good idea to meet together in a secure location to discuss our various restrictions. While I apparently surprised some by suggesting a sit-down meeting in the middle of combat operations, the general consensus was that it was a good idea.

I then contacted Colonel Christopher Lozo, 17th AF SJA (who hadn't slept for three days), letting him know all the multinational LNOs/LEGADs were willing to meet. He suggested that we gather in the conference room at 17AF HQ within the hour. Since no one had a big enough car and parking was limited, we all had to all walk over to the headquarters building, a gaggle of eight O-6 types in various flight suits and foreign insignia escorted by one O-3 JAG. At any rate, by that afternoon we had obtained basic ROEs and restrictions from all coalition countries in the fight thus far. In the next 18 hours, Major Frank Yoon, 3AF/JA (night shift COD JAG) and I took that information and developed a "Coalition ROE matrix" for de-confliction purposes, which was immediately made part of the SPINS. Over the next few days, Norway, Qatar and UAE forces showed up, so we met with them and added their ROEs to the de-confliction matrix as well.

I remain astounded at how well so many different countries (eventually 13) operating as an unofficial "team", could de-conflict their resources, set aside differences, and bring massive, coordinated, precision firepower to bear on hundreds of targets within a matter of hours. Each had its own differing ROEs, restrictions, force capabilities, weapon systems, training, languages, cultures, history—as well as domestic political considerations and national/institutional pride. Moreover, all this was done largely without integrated communications or sharing a secure network (at least in the first 36 hours or so).

As Wolfhound's day-shift advisor on ROE/LOAC during an operation with no clear battlefront and little or no coordination with friendly forces on the

ground, the spectre of innocent death and "civ cas" (civilian casualties) weighed heavily in the back of my mind. At times, the pressure, stress, anxiety and adrenaline far surpassed anything I've experienced in my two and a half years as a JAG or 6+ years in civilian practice. However, in spite of all my fears, I often felt like my presence was unnecessary. During an exhausting 15 days straight of 24-hour operations with the warfighters of Wolfhound Combat Ops during ODYSSEY DAWN, not once did I see morale, focus or concern for law or ethics fade. All told, I was personally in the kill chain on 24 dynamic targets, and advised on an additional 5 air-to-air engagements, numerous SCAR missions, TSTs, and deliberate targets (some of them "serviced" by coalition pilots) resulting in the destruction of numerous enemy tanks, vehicles, MLRSs, SSMs, SAMs, aircraft, naval vessels, bunkers, ammo storage facilities and C2 nodes, all with minimal collateral damage and zero confirmed reports of civilian casualties.

For any given air strike, I often found that any questions I had for the Dynamic Targets Chief or the Chief of Combat Operations had either been answered in advance or was alleviated on the spot. This was true for the rest of the kill chain, no matter whether the issue concerned collateral damage estimates, weaponeering or LOAC. Further, as the COD JAG, I quickly realized that mutual trust and respect with the guy in charge of the SPINS is crucial. While the operators officially own the ROEs and SPINS, they want to know from the advising JAG, in simple, non-capitalized terms, how and when they can employ their weapon systems to "attrit" (i.e., kill) bad guys.

That's where the SPINS come in. The SPINS are essentially the aircrews' "playbook," developed by the A3/J3 taking the current ROEs, applying them to the weapon systems and hardware, and putting it all in "operator-speak" for the pilots and aircrews. Our SPINS guy, Lieutenant Colonel Steven "Jane" Janeczko, an operator, was always remarkably receptive and patient when I approached him with nitpicky legal "adjustments" to the SPINS, as the ROEs changed and the battlespace evolved. On any given day, the lieutenant colonel would occasionally stop by and see how I was doing, check up on the latest ROEs to include in the SPINS, and make sure we were generally "synched up." I knew he was making sure our aircrews had clear instructions. Based on our coordination (as well as our top-notch Intel folks), not once did I feel uneasy about a target as our aircrews engaged it—or after it was "attrited."

I'll never forget the 180 hours I spent in the 603d AOC bunker as a Wolfhound Combat Ops JAG during OOD, and I hope I'm lucky enough to be able to do it again in the future. We all know that our pilots and aircrews who flew missions over Libya during OOD (and continue to do so in NATO Operation UNIFIED PROTECTOR) are the best in the world. I am here to tell you that Wolfhound Combat Ops—including warfighters of the 603d AOC, 617th AOC, and the 152d Air Operations Group—is without a doubt one of the most ethical, motivated, skilled, and disciplined teams of operators in the world.

Retention vs. Discharge

A GUIDE FOR ANALYZING FITNESS FAILURE CASES

by Lieutenant Colonel Jeremy S. Weber, USAF

The Air Force has placed renewed importance on physical fitness, emphasizing both a year-round culture and a more vigorous testing process. Fitness is now, according to Chief of Staff General Norton Schwartz, "a vital component of Air Force culture."[1] However, not every Airman has conformed to the new culture. For them, the consequences may be severe. Air Force Instruction (AFI) 36-2905 requires unit commanders to either initiate discharge proceedings against Airmen who repeatedly fail fitness assessments or to obtain an affirmative decision from the installation commander to retain the Airman. With failure rates running around 20 percent,[2] commanders and judge advocates can expect to face many difficult decisions about whether such Airmen should be discharged or retained.

Unfortunately, decision-makers and advisers have little guidance to rely upon in making these high-stakes decisions. The current AFI simply requires commanders to make a discharge or retention recommendation in cases of repeated fitness failures; it makes no effort to advise what types of cases are

[1] Technical Sergeant Amaani Lyle, *Air Force Officials Revise Fitness Program*, Air Force Print News Today, 9 June 2009, *available at* www.af.mil/news/story.asp?id=123153336 (accessed 9 Mar. 2011).

[2] In July 2010, pass rates stood at 77.9 percent. By October 2010, the pass rate increased to 82.6 percent. Technical Sergeant Amaani Lyle, *Airmen Embracing Fitness Culture*, Air Force Print News Today, 29 Oct. 2010, *available at* www.af.mil/news/story.asp?id=123228675 (accessed 9 Mar. 2011).

appropriate for retention and what kinds of cases counsel in favor of discharge. This article proposes a framework for analyzing fitness failure cases based on the development of the Air Force's fitness program. Ultimately, this analysis leads to the conclusion that retention should be the exception rather than the rule, and should only be granted after consideration of six factors designed to facilitate individualized deliberation of each case.

A Brief History of the Air Force Fitness Program

The Air Force has historically struggled to develop accurate measures of fitness. At its inception, the Air Force followed the Army's precedent of imposing physical fitness requirements only for service members in basic training. The new service's first physical fitness regulation consisted of only three paragraphs and assigned fitness responsibility to MAJCOM commanders without any further guidance.[3] Twelve years into the Air Force's history, a study found the overall state of physical fitness in the Air Force was poor and that the Air Force physical fitness program was "ineffective."[4]

The 1960s saw an Air Force program that required Airmen to complete five exercises a day and to pass an annual test along with meeting weight standards.[5] It wasn't until 1969 that the Air Force employed a true aerobic conditioning and testing program, focusing on an annual 1.5-mile run that served as the only measure of physical fitness in the Air Force for 23 years.[6] In 1992, in what one commentator called "one of the Air Force's all-time controversial decisions,"[7] the Air Force implemented a cycle ergometry test to measure military fitness. The test—which required an Airman to pedal on a stationary bicycle for 8 to 15 minutes—was widely derided both because it failed to accurately measure physical fitness and because it failed to establish an appropriate culture of military-minded fitness. Ultimately, the cycle ergometry program came to be seen as a step backward in emphasizing year-round personal fitness conditioning, but the intent was clear: the Air Force wanted a way to more accurately measure an Airman's aerobic conditioning.

In 2004, Chief of Staff General John Jumper announced bold initiatives to change Air Force fitness culture and toughen standards. General Jumper announced plainly: "The amount of energy we devote to our fitness programs is not consistent with the growing demands of our warrior culture. It's time to change that."[8] The Air Force imposed both a new emphasis on year-round fitness (requiring a unit physical training program and allowing duty time for physical training) and a new method of testing fitness (consisting of a 1.5-mile timed run, push-ups, sit-ups, and a body composition assessment).[9]

The fitness instruction that accompanied General Jumper's plan, AFI 10-248, required commanders to make a recommendation concerning administrative separation or retention if a member remained in a failing status 12 months or had four failing fitness scores in a 24-month period.[10] A September 2006 update to the AFI tweaked the fitness program slightly but left in place the requirement for a discharge or retention recommendation for Airmen who repeatedly failed their fitness assessments.[11]

Despite the tough standards in AFI 10-248, a discharge or retention recommendation was rarely necessary in practice. Failure rates were relatively low; in 2009, for example, only 7.45 percent of those tested failed the fitness assessment.[12] In addition, even when failures occurred, commanders largely failed to intervene. A December 2008 Air Force Audit Agency study found that 72 percent of Airmen did not receive any administrative action even when they failed fitness assessments two or more times.[13]

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[3] Major Richard T. Gindhart, *The Air Force Physical Fitness Program: Is It Adequate?*, Air Command and Staff College research paper, Air University, Maxwell AFB, Apr. 1999, at 14.

[4] *Id*. at 14-15.

[5] *Id*. at 15.

[6] *Id*.; Colonel Thomas F. Roshetko, *Air Force Fitness Culture: Are We There Yet?*, Air War College research paper, Air University, Maxwell AFB, Feb. 2008, at 4.

[7] *Id*.

[8] General John P. Jumper, *Focus on Fitness – Are You Fit to Fight?*, Tig Brief, Jan.-Feb. 2004, at 4-5.

[9] AFI 10-248, Fitness Program (1 Jan. 2004).

[10] *Id*. at para. 8.2.6.

[11] AFI 10-248, Fitness Program (25 Sept. 2006), para. 8.2.6.

[12] Kent Harris, *Many Airmen Expected to Fail New Fitness Test*, Stars and Stripes, 3 May 2010.

[13] Air Force Audit Agency Audit Report, Air Force Fitness Program, 11 Dec. 2008, *available at* http://www.foia.af.mil/shared/media/document/AFD-090708-053.pdf.

In fact in fiscal years 2009 and 2010, the Air Force discharged barely more than 200 Airmen each year for failure to meet fitness standards.[14]

A series of changes sought to remedy these deficiencies and toughen fitness standards. A new instruction, AFI 36-2905, came into effect in July 2010 and along with the two subsequent guidance memoranda, brought about several changes. It sought to eliminate corner-cutting on test standards by developing fitness cells to administer tests rather than placing this responsibility on units.[15] The new regulation aimed to promote a year-round fitness culture by requiring Airmen who fail to achieve an outstanding score to test twice per year.[16] The Air Force also imposed tougher scoring standards, requiring Airmen to not only achieve an overall passing score but to meet minimum standards in each individual component.[17]

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Overall, the Air Force has progressively moved to impose more vigorous standards, reflecting the increasing importance fitness plays in today's military environment. Commanders and advisors trying to decide what to do with Airmen who have repeatedly failed fitness assessments should keep in mind that fitness standards have been increasingly strengthened and emphasized for a reason. However, despite the increased emphasis on fitness, the Air Force has never been willing to adopt a zero tolerance policy toward failure to comply with fitness standards. Even the July 2010 instruction, which represented the most rigorous standards to date, allows for command discretion to account for individual circumstances.[18] The Air Force clearly wants decision-makers to account for individual circumstances.

A Proposed Framework for Analyzing Fitness Failure Cases

With the latest changes to the Air Force's fitness program, the goal of toughening fitness standards seems to have been achieved. Within the first four months of the new standards, 17.4 percent of Airmen tested failed their fitness assessments, more than double the previous failure rate.[19] While this failure rate was less than feared, it apparently caused some concern about the number of discharge actions these failures would cause. Just six months after the instruction's issuance, the Air Force issued a second update to AFI 36-2905, stating that unit commanders may initiate or recommend discharge only after the Airman has: received four failing scores in a 24-month period, failed to demonstrate significant improvement (in the commander's judgment), and received an evaluation from a military health care provider to rule out medical conditions precluding the members from achieving a passing score.[20] The Air Force thereby eliminated the mandatory discharge or retention decision for Airmen in a failing status for 12 consecutive months. It also significantly reduced the number of cases requiring a retention or discharge decision.

Despite the numerous changes in fitness instructions, the Air Force has never provided guidance as to when retention instead of discharge is appropriate. Perhaps the instruction's proponents did not wish to restrict command prerogative. While the restraint is laudable, it also raises the possibility of inconsistent approaches across the Air Force. Some general guidelines on which to base this decision might help further the overall goal behind the fitness program (ensuring a physically fit Air Force).

[14] Michael Hoffman, *Flunking PT Test Rarely Ends Air Force Career*, Air Force Times, 4 June 2010, *available at* http://www.airforcetimes.com/news/2010/06/airforce_pt_scores_side_060410w/.

[15] AFI 36-2905, Fitness Program (1 July 2010), para. 1.20.

[16] *Id*. at para. 2.11.

[17] *Id*. at paras. 2.1, 2.2; Attachment 14.

[18] For example, AFI 36-2905, para. 9.1.2. merely states that unit commanders "may" take administrative action against an Airman who fails a fitness assessment. Paragraph 9.1.2.1 states, "If adverse administrative action is not taken in response to an Unsatisfactory fitness score on an official FA, unit CCs will document in the member's fitness case file as to why no action is being taken." The introduction to Table A19.1 of the AFI also states, "Unit CCs exercise complete discretion in selecting responsive action(s)."

[19] Scott Fontaine, *4 in 5 Airmen Passing PT Test, Air Force Times*, 15 Nov. 2010.

[20] AFI 36-2905, Guidance Memorandum 2, para. 15.

The AFI does not state when or how often retention is appropriate, but some general direction can be gleaned from the instruction and its history. The latest culmination of decades of increasing emphasis on fitness stresses that fitness directly impacts the Air Force's ability to carry out its mission. The commander's intent introducing the instruction states unmistakably: "Being physically fit allows you to properly support the Air Force mission. . . . Health benefits from an active lifestyle will increase productivity, optimize health, and decrease absenteeism while maintaining a higher level of readiness."[21]

It should be evident, then, that the standards exist for a reason, and therefore retention should not be granted as a matter of routine.

It should be evident, then, that the standards exist for a reason, and therefore retention should not be granted as a matter of routine. Airmen who deviate from standards for issues such as drug abuse, academic standards, and mobility readiness are not expected to routinely be granted waivers to remain in the Air Force. Neither should Airmen who repeatedly fail to conform to fitness standards expect that they are owed additional opportunities. The fact that the AFI requires an affirmative retention or discharge decision by the installation commander implies that failure to meet fitness standards is a serious matter not to be routinely pardoned.

At the same time, the drafters of AFI 36-2905 were careful not to take such decisions out of the hands of commanders based on individual circumstances. The drafters of the instruction easily could have required that discharge proceedings be initiated every time an Airman fails four tests within 24 months. They chose not to do so. The most recent guidance memorandum stresses the role of commander judgment in this process, stating that an Airman may not be recommended for discharge unless the Airman has "failed to demonstrate significant improvement (*as determined by the commander*) despite the reconditioning period."[22]

Six Factors to Weigh

The trouble, of course, is determining what individual circumstances are relevant. In an effort to define which cases are truly deserving of retention, the following six factors should prove useful to aid in fleshing out the analysis:

1. Has the Airman demonstrated an overall upward trend during the period of failures that led to retention request?

This factor comes straight from the most recent guidance memorandum to AFI 36-2905, which states Airmen who have demonstrated significant improvement may not be discharged. An Airman who is significantly progressing toward a passing score is certainly more deserving of retention than one who has demonstrated no improvement, or even a downward trend, over the course of the four failures. The term "significant" improvement is not defined in the guidance memorandum, but given the increased emphasis on fitness and the need to enforce standards, any Airman who fails four fitness tests in a 24-month period should not expect to be retained unless he or she has made consistent, meaningful progress toward meeting standards in each component of the fitness assessment. Successive overall scores of 40, 55, 68, and 72.5 probably constitute significant improvement. Overall scores of 67, 69, 68, and 69 do not.

2. Does the Airman's most recent fitness assessment demonstrate the ability to meet Air Force standards (i.e., how close did the Airman come to meeting standards in the most recent assessment)?

This factor flows logically from the first factor. An Airman may have improved over the course of four fitness assessments, but if that improvement only brought the Airman to the point of an overall 55 score, then there is little reason to believe the Airman is close to meeting standards. All other things being equal, an Airman who came within two push-ups

[21] AFI 36-2905, Commander's Intent, page 6.

[22] AFI 36-2905, Guidance Memorandum 2, at para. 15 (emphasis added).

of passing his or her most recent fitness assessment should more likely warrant retention as opposed to an Airman who is still six inches over the maximum allowable waist measurement. In short, the commander and legal advisor should be asking the following question: "Based on the Airman's trend and most recent performance, what is the likelihood we are going to deal with another fitness failure?"

3. Is there evidence of any irregularities in the fitness assessment process that may have prejudiced the Airman?

Fitness assessment cells staffed with trained, unbiased employees have gone a long way toward eliminating the inconsistencies and corner-cutting that too often characterized the system that was in place from 2004 until July 2010. AFI 36-2905 also lays out detailed requirements for testing conditions that considerably help ensure all Airmen get a fair chance to pass their fitness assessments. Claims of improper or unfair testing conditions should be rare and viewed skeptically.

Nonetheless, no system or tester is perfect and irregularities can play into the retention versus discharge calculation. An Airman who can demonstrate that certain standards were enforced more strictly than normal, might receive consideration in favor of retention. For example, consider an Airman's fourth failure that occurs when he falls two sit-ups short of the minimum required, and the tester discounted two sit-ups merely because the Airman lifted two fingers off his chest during the sit-ups. While the tester's judgment may have been technically in line with established procedures, this would still seem to be relevant information that a commander should at least consider.

4. Was the Airman significantly affected by a change in Air Force standards? In other words, did the Airman previously meet standards, only to be temporarily set back by tougher standards or tougher enforcement of standards?

Fitness standards have become more stringent in recent years, most particularly by the July 2010 introduction of minimum standards in each category, a new scoring system, and unbiased fitness assessment cells. An Airman who consistently passed fitness assessments before July 2010 and has not passed since might warrant some retention consideration on the basis that the Air Force "changed the rules of the game" mid-stream, as long as the Airman is working to comply with the new environment.

Nonetheless, commanders should be careful not to give too much weight to this factor. While the minimum standards for each category do make passing tougher for some Airmen, for many people, the July 2010 categories actually *improve* fitness scores. Consider a 33-year-old female who achieves a 14:30 run time, a 35.5-inch abdominal circumference measurement, 15 push-ups and 30 sit-ups. Between September 2006 and July 2010, that performance would have earned her a failing score of 72.25. After July 2010, without improving her performance in any category, that Airman would now pass the assessment with an overall score of 76.5.

More importantly, though, it is difficult to grant much consideration to an Airman who was allowed to cut corners before and now complains that the testing standards are being enforced. It is no secret that one of the primary reasons more Airmen are failing their fitness assessments is the introduction of unbiased fitness assessment cells who do not face the same temptations that sympathetic co-workers who used to conduct the tests might have encountered. An Airman who benefitted from the problems with the system before July 2010 and now has struggled to adjust may deserve some consideration for the mid-stream change, but not much. On the other hand,

an Airman who is achieving similar performance in each category as before but has been affected by a change in actual scoring standards likely deserves more consideration.

5. Is there evidence that any temporary personal, professional, or medical issues impacted the Airman's ability to meet standards? If so, have those issues subsided such that the Airman can now be expected to meet standards?

This consideration is likely to yield the most relevant information in the commander faced with a decision to retain or discharge. Consider the following situations:

a) An Airman regresses on her fourth failure, after making improvement over her previous three tests. Closer investigation reveals that her fitness assessment took place on the morning after a major exercise that required her to work an 18-hour shift.

b) A female Airman consistently scored in the upper 80s until she became pregnant. After a particularly difficult delivery, she has struggled to lose her weight gained in pregnancy and regain abdominal strength. Her progress has been measurable, but slow.

c) An Airman previously scored in the upper 70s to low 80s but has progressively regressed since that time. The commander learns that the Airman has been caring for a terminally ill parent, leaving little to no time for exercising outside of duty hours.

In any of these situations, the commander will want to at least consider the personal situation of the Airman, as commanders always consider the total person in administrative or disciplinary actions. One consideration the commander should keep in mind, however, is that failure to meet standards cannot be excused indefinitely. An Airman who raises personal, professional, or medical issues as considerations for retention should also be able to present some assurance that those issues have subsided or will soon pass.

One other point bears consideration under this factor. An Airman's whole fitness history should be examined, not just the period of four or more failures. It is not uncommon to see fitness cases where Airmen have bobbed up and down around the passing line for years. When the Airman has consistently scored in the low to mid 70s since 2004 and yet claims that a temporary personal situation affected his ability to meet standards, obviously this claim should be viewed suspiciously.

6. Has the Airman's military service been particularly noteworthy such that he or she warrants another opportunity or discharging the Airman would deprive the Air Force of a particularly unique asset?

Of all the considerations detailed here, this one has the most potential for overuse. The Air Force is full of good people doing their jobs well. It is difficult to face the prospect of losing any Airman who is competent and committed to serving our country. The temptation always exists to excuse non-conformity with standards to retain a quality worker. Nonetheless, retention based solely on the fact that the person is a "good Airman" should be reserved for truly exceptional cases. This is especially true in a time when the Air Force is downsizing. It can be truly destructive for morale to allow non-conforming Airmen to remain in the Air Force while others who meet standards are made to exit.

Commanders have purposely been given discretion to retain non-conforming Airmen, and every case should be based on the totality of the circumstances.

The quality of an Airman's service is often difficult to measure, in a culture where even average Airmen receive glowing performance reports. In the fitness area, however, the standards are easily quantified in black and white. Everyone, barring a medical condi-

tion, can meet these standards—it may be harder for some than others, but they are achievable. It is a rare opportunity for an Airman to be able to know in numerical terms exactly where he stands at any given time, and exactly what he needs to do to make up any deficiency. An Airman who repeatedly does not take the opportunity to meet such an clearly defined standard should not be viewed too sympathetically. The quality of that Airman's service would have to be particularly outstanding in order to warrant continued service despite the repeated failure to meet standards.

Conclusion

As with many tests, no single factor in this analysis should be considered dispositive. Each request should be considered based on the totality of the circumstances. However, addressing these six factors should help frame the analytical process and encourage those involved to consider the whole picture—positive and negative—when evaluating these requests. In the absence of any specific guidance in AFI 36-2905 or other authoritative sources, legal offices will often be tasked to fill the gap. Only JA has a wing-wide perspective of each of these cases before they go to the installation commander, and JA is the organization that must execute or advocate for the discharge if discharge proceedings are directed. Legal offices should ensure that they are reviewing retention or discharge requests before they go to the installation commander.

When these issues arise, commanders and judge advocates should keep in mind that the Air Force has tightened up standards because of the increasing importance fitness plays in today's military environment. Commanders have purposely been given discretion to retain non-conforming Airmen, and every case should be based on the totality of the circumstances. However, Airmen have received fair notice of the need to meet fitness standards. If, after analyzing the six factors laid out here, an Airman's case does not present unusual circumstances, the judge advocate should recommend, and the commander should direct, that discharge proceedings be initiated.

BOOKS IN BRIEF

How to Try a Murder Case:

Pretrial and Trial Guidelines for Prosecution and Defense

(by Michael D. Wims, Jack B. Rubin & Charles Ambrose American Bar Association, 2011)

Review by Mr. Tom Becker, USAF

Back when dinosaurs roamed the Earth and Air Force members were accused of crimes that didn't involve computers, two of Air Force JAG's premier prosecutors were Mike Wims and Chuck Ambrose. Both went on to post-Air Force careers as major-case litigators trying high-profile murder cases: Wims as an Assistant Attorney General for the State of Utah, and Ambrose as an Assistant U.S. Attorney in Kansas City. They have drawn on their extensive experience and, in collaboration with veteran Baltimore criminal defense attorney Jack Rubin, authored a soup-to-nuts manual that is a must-have for any criminal trial lawyer's library.

Despite its title, this book is not just about murder trials. It's about preparing for and trying any case, no matter if someone has died or even bled a little bit. Along with extensive and intelligent discussions about homicide forensics and capital punishment are rock-solid commentaries on such foundational pretrial and trial topics as interviewing witnesses, charging decisions, voir dire, opening statements, and many more that are important in any criminal case.

How to Try a Murder Case is the kind of book that deserves to have permanently creased covers, dog-eared pages, and yellow sticky notes poking out everywhere.

Organizing the book much like a criminal case itself, the authors begin with a prosecutor's early involvement in the case and cooperation with investigators. They then take us through the pretrial stages, pleadings, and potential motion

practice, followed by the trial in all its stages, potential defenses, and, assuming conviction, sentencing. Along the way, Wims, Rubin, and Ambrose spend a lot of time and ink on mental responsibility and capital punishment issues, as these are of prime importance in murder cases in many jurisdictions. At the end are appendixes chock full of practical information and sample documents, including key court decisions, sample motions, state and federal statutes, and psychological assessments. This is as close to one-stop shopping as it gets in trial manuals.

Likewise, *How to Try a Murder Case* is an easy read, full of stories from the authors' courtroom experiences (including military cases) and frank commentary on the performances of celebrity lawyers in cases prominent in the popular culture. No turgid prose here—you'll fly through the pages. Moreover, like any good guidebook, you don't have to read the whole thing at one time or even each chapter in order. A good approach for anyone acquiring the book would be a fast skim to get acquainted with the organization and content, then a deeper study of individual chapters and appendixes as time permits or as they become relevant to the reader's trial preparation.

How to Try a Murder Case has a couple of limitations that bear discussion. These are observations, not criticisms, as I don't think the authors could have done anything different and still kept the book manageable. While the authors have made an admirable attempt to represent all jurisdictions, the principal focus is federal—Title 18, U.S. Code, Federal Rules of Criminal Procedure and Evidence, and U.S. Supreme Court and other federal case law. Citations to various state and military authorities are scattered throughout in footnotes and the appendixes, but the coverage is nowhere near comprehensive. As this is an American Bar Association publication, the ABA might consider soliciting practitioners in each state and the military to take responsibility for a jurisdiction-specific supplement, adding legal references and practice commentary. That said, a published supplement isn't required for a state or military practitioner to make use of *How to Try a Murder Case*. While a particular jurisdiction may not be thoroughly covered, the authors have clearly marked research gateways for lawyers to use in finding whatever they need in any jurisdiction.

Although billed as a manual for trial and defense, *How to Try a Murder Case* is, in its heart, a prosecutor's primer. There are many defense-oriented tips and materials, especially in the latter half of the book, but they are a shadow of the prosecution-oriented commentary. But that's okay. Some of the most reliable materials used by defenders across this country are prosecution manuals. States have federally funded prosecutor training programs that include resources devoted to maintaining complete and current prosecutor manuals, while state public defender programs have no such funding. Defenders still can use these manuals, discounting the pro-prosecution "spin" and focusing on the legal references.

While not putting prosecution and defense on equal footing as implied by the title, Wims, Rubin, and Ambrose have made a good faith effort and produced a valuable resource for lawyers on both sides of a criminal trial. *How to Try a Murder Case* is the kind of book that deserves to have permanently creased covers, dog-eared pages, and yellow sticky notes poking out everywhere. Criminal trial lawyers should seek to abuse their own copies at their earliest opportunity.

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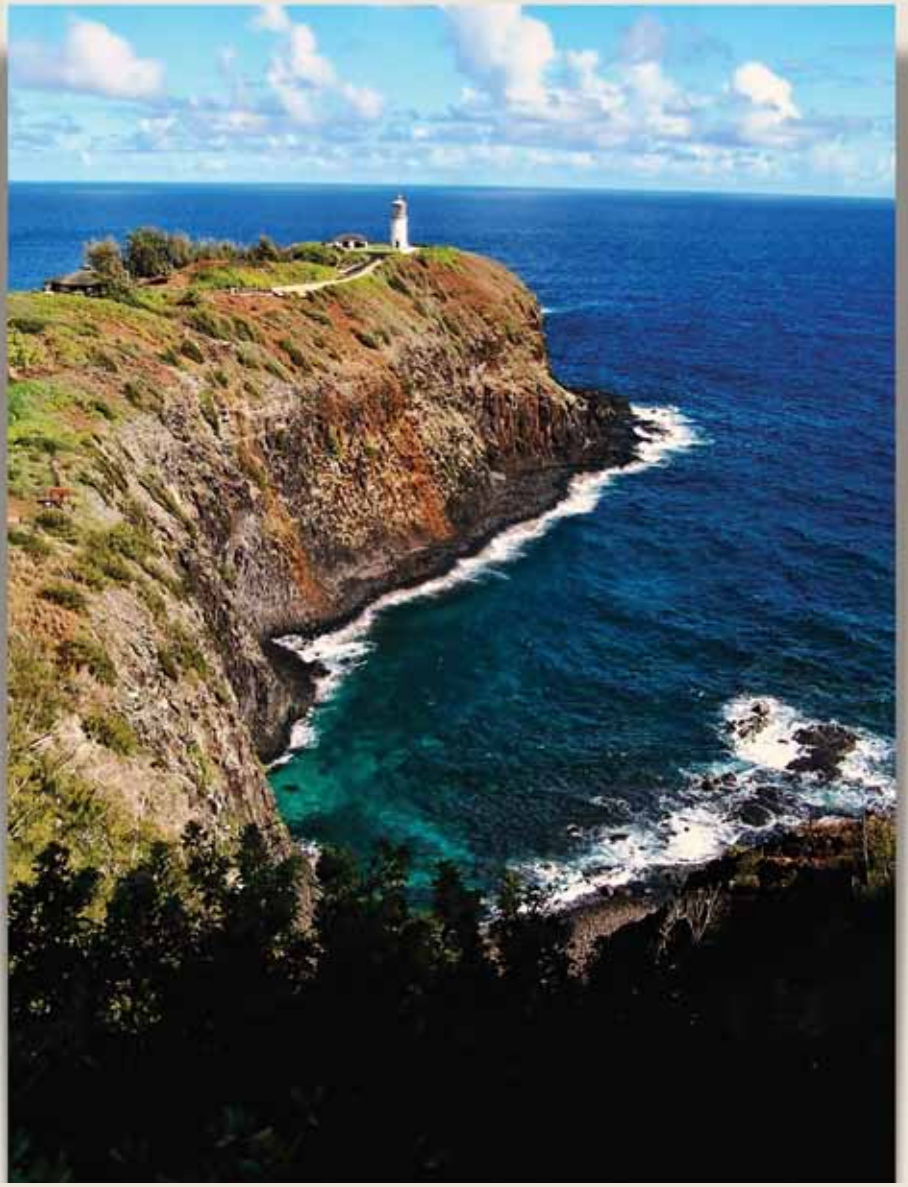
Where in the World?



Kilauea Lighthouse, Kauai

by Major Daniel J. Watson, USAF (currently stationed at Hanscom AFB, MA)

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 editors at ryan.oakley@maxwell.af.mil or kenneth.artz@maxwell.af.mil.

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Back: U.S. Air Force photo by Osakabe Yasuo - 730th AMS loads humanitarian relief supplies for Japan