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The Reporter

The Judge Advocate General's Corps

Training

Legal Assistance

Military Justice

Teaming

Foundational Leadership

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Foundational Leadership starts with you...

MILITARY JUSTICE

2 **Installation Status of Discipline Briefings**
A must read for your military justice team

6 **Guilty Plea/Member Sentencing Cases**
A former military judge talks about effective advocacy

10 **The CRD is Dead**
Explaining why the case ready date metric went away

11 **Preparing for Article 32 Hearings**
Best practices and tips to ensure an effective investigation

TRAINING

52 **Putting the Horse Before the Cart**
Determining the training our JAG Corps needs

54 **Changing Your Mindset**
Understanding how the enlisted promotion system works

TEAMING

16 **Playing in the Mud**
A JAG-paralegal team learns about effective leadership

LEGAL ASSISTANCE

14 **The Dirty Dozen**
Paralegals make history as they learn to prepare wills

FIELDS OF PRACTICE

20 **On Solid Ground**
How to acquire low cost interests in real property

22 **Commanders' Rights in Privatized Housing**
What you need to know to brief your boss in a brave new world

29 **Hello Mali!**
Adventures of a first-time AIB legal advisor in Africa

36 **The Art of Cyberwar**
Regional experts discuss the threat posed by Chinese hackers

43 **Living in the Gray**
Challenges of contingency contracting in the combat zone

BOOKS IN BRIEF

57 **Pacific Alamo:**
The Battle for Wake Island

59 **Fighter Pilot:**
The Memoirs of Legendary Ace Robin Olds

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Message from the Commandant

Colonel Holly M. Stone

"Foundational leadership recognizes first and foremost that you cannot lead others until you lead yourself. You lead yourself with a firm foundation in our core values and guiding principles."

Lieutenant General Richard C. Harding
The Judge Advocate General

At Keystone, General Harding used the image of a greek temple to illustrate the enduring values, guiding principles, and professional skills that encompass Foundational Leadership. Four columns represent the key initiatives and practice areas the JAG Corps seeks to strengthen in the immediate future: military justice, teaming, legal assistance, and training. With this vision, *The Reporter* is pleased to bring you a diverse range of informative and practical articles that reinforce the guiding principles of the four pillars.

Continuing our focus on the military justice revival, Col Gordon Hammock addresses the reasons for terminating the "case ready date" metric. Next, Col Kenneth Theurer and Lt Col Tom Posch tell us how to run an effective status of discipline meeting, while Maj Jeanette Skow shares her wisdom on conducting Article 32 pre-trial investigations. Further, Lt Col Grant Kratz, a former military judge, provides an outstanding primer to trial counsel on how to try guilty plea/member sentencing cases.

Our Air Force Chief of Legal Assistance, Maj Scott Hodges, reports on the first-ever Will Preparation for Paralegals Course. Highlighting the teaming pillar, Capt Aaron Jackson discusses lessons he and paralegal SSgt Sammie Harris learned during their challenging deployment to the Panamanian jungle. CMSgt Steve Wallace provides his phenomenal perspective on what you may not know about enlisted performance reports and promotion boards. Focusing on training, Mr. Tom Becker discusses the first-ever Academic Needs Assessment.

Also in this edition, Maj Mike Safko writes about serving as a short-notice legal advisor on an accident investigation board in Mali, West Africa. Captains Seth Dilworth and Paul Stempel highlight the threat Chinese hackers pose to national security in cyberspace. Next, Mr. Ronald Schumann expertly covers the considerable rights commanders still have in privatized base housing. And last but not least, Maj Theresa Love gives us an invaluable article confronting the challenges of contingency contracting in the warzone in "Living in the Gray."

As General Harding has emphasized, "Foundational Leadership is an enduring concept. It doesn't stop with four columns. It isn't over when we think we have all the columns perfected, because our environment continues to change." As we constantly sharpen our legal skills throughout our Corps, *The Reporter* aims to support Foundational Leadership with every issue.

BEST PRACTICES:
Installation Status of Discipline Briefings

by Colonel Kenneth M. Theurer and Lieutenant Colonel Tom E. Posch, USAF

As we've recognized in the past, maintaining discipline and administering military justice is a team sport requiring cooperation among multi-functional players. As base legal professionals, we are expected to provide advice on disciplinary issues and to administer all aspects of the installation military justice program. Commanders depend on and work closely with first sergeants who ensure the enlisted force understands the commander's policies, standards, and objectives. At the same time, unit commanders execute military justice actions in reliance on the advice and assistance of judge advocates and paralegals.

One particularly effective means of assessing military discipline, conducting training and promoting a responsive military justice program is the installation status of discipline (SOD) meeting. Done correctly and in timely fashion, this meeting of military justice professionals may be the single occasion to bring all team players together on the installation.

Together, commanders, first sergeants and legal office personnel should be thought of as one military justice team comprised of interdependent professionals that are accountable to each other for maintaining fair, effective and timely discipline. A team that performs well invariably is one that cares about its output, sets goals, monitors its performance, and is comprised of members who desire to learn from each other as well as from their collective experiences. With these principles in mind, let's examine the how to effectively conduct a status of discipline briefing, beginning with its purpose.

Purpose

The overall purpose of the SOD is to provide a comprehensive assessment of good order and discipline and a measure of the health of the military justice system. However, the SOD is more than a status report and serves other important purposes that together buttress its overall purpose to provide an assessment. The SOD is an opportunity for commanders across the installation from a broad spectrum of professional backgrounds to examine and discuss their past execution of military justice actions against the goals of fair, effective, and timely administration of discipline. It allows commanders to identify and learn about problem areas or trends (e.g. sexual assault, drug abuse, and alcohol-related misconduct). As legal professionals with military justice as our core competency, a significant part of our duties is education. Commanders can be expected to learn from each other and from you. And, it's your opportunity to build confidence in your military justice leadership team.

As a starting point, make no assumptions about the experience of your teammates. Or, that time spent as a commander, first sergeant, or in a leadership position, somehow lends itself to an innate ability to demand accountability, correct undesirable behavior, and to administer consequences. In today's Air Force, it is not unusual to encounter a squadron commander who has never served nonjudicial punishment. The same may be true of your wing commander.

Fundamentals

At least once every quarter, and at a predictable date, time and location, commanders, first sergeants and the staff judge advocate should meet

to discuss completed military justice actions. Often this is conveniently accomplished by meeting periodically after the conclusion of the wing stand-up. The key to scheduling a SOD is lending regularity to the meeting, and having adequate time for a meaningful discussion of recently completed disciplinary actions. If the meeting is not held at regular intervals, or held too long after the completion of an action, its purpose is diminished. It's a fact of life that the passage of time can reduce what should be an engaged, training and mentoring opportunity to a terse, matter-of-fact after-action report that fails to achieve its intended purpose. Worse, delay and irregularity has great potential to signal indifference, in like manner as untimely or arbitrary disciplinary processes degrade discipline.

The SOD should be chaired by the installation commander and attended by the group and squadron commanders, command chief, and first sergeants. In the case of dual-wing installations that report to separate MAJCOMs, consideration can be given to conducting separate SODs, each chaired by the respective wing commander, and attended by each wing's group and squadron commanders. This offers the advantage of focusing mentoring discussions within the chain of command and allows for attention to be directed to unique trends within each wing; however, cross-feeding installation courts-martial results and base-wide discipline trends is necessary if separate SODs are conducted.

In the case of installations with civilian-led units, care must be taken to adhere to the fundamental legal distinction between commanders and civilian leaders with respect to UCMJ matters and command authority: military justice actions must be exercised by a military officer authorized to command. While commanders may consult civilian leaders on matters of military discipline, only commanders are responsible for exercising disciplinary authority under the UCMJ, and must exercise this legal authority unconstrained by accountability to civilian leaders on the installation. It is for this reason that SOD discussion of discipline actions taken against Airmen assigned to civilian led units are the prerogative of the imposing commander and commanding officers within the chain-of-command. And, of course, the fact that one or more units on an installation are civilian led is not a compelling reason to dispense with the SOD.

First Sergeants often provide invaluable background information on Airmen, their potential for rehabilitation, and the success or failure of past disciplinary actions and responses. History is replete with examples of the critical importance first sergeants have played in enhancing a unit's state of discipline.

> There is no individual of a company, scarcely excepting the captain himself, on whom more depends for its discipline, police, instruction, and general well being, than on the first sergeant. This is a grade replete with cares and with responsibility. Its duties place its incumbent in constant and direct contact with the men, exercising over them an influence the more powerful as it is immediate and personal; and all experience demonstrates that the condition of every company will improve or deteriorate nearly in proportion to the ability and worth of its first sergeant.[1]

Principal advisor to the commander on all issues related to the enlisted force, the value of a first sergeant at the SOD cannot be understated.

Finally, Staff Judge Advocates should capitalize on this training opportunity by bringing along a select group of military justice JAGs and paralegals. This group may include chiefs of military justice or adverse actions, and NCOIC of military justice. Most important, JAGs and paralegals must look for opportunities to bring along other legal office professionals, especially new military justice

[1] Letter from Major General Jacob Brown to the Secretary of War, 1825, American State Papers, Military Affairs, Volume 3, p. 111.

Know why a commander chose a particular disposition and punishment, and why a metric was, or was not, met.

paralegals, to garner a "macro" level appreciation for how their duties directly affect a commander's disciplinary decisions and actions. Junior members of the legal office staff, by whose efforts the timeliness and effectiveness of many military justice actions depend, cannot help but garner an understanding of their critical importance to the military justice team by observing the SOD. The SOD is a great opportunity for the commanders to get to know the professionals on the law office staff on whom they depend to execute their military justice responsibilities.

Preparation

An important responsibility of the staff judge advocate is to facilitate the SOD by preparing the material for commanders to brief and to provide needed legal guidance, or factual basis for a particular charge or punishment.

Before the SOD convenes, the SJA should review the briefing with the military justice staff to ensure that discussion of a particular case will not adversely affect the processing of companion cases—i.e. pending cases or cases in progress—involving Airmen who were, for example, co-actors or who may be called to testify in future cases. Care should be taken in the timing and selection of cases for presentation to avoid conflicting potential court-members. Each offender should be listed by grade, offense, and punishment, and not identified by name. This isn't to say that anonymity is required: just because a case is so notorious that the offender is easily identifiable, standing alone, is no reason to exclude it from the briefing. In fact, these are the cases that are most appropriate for discussion given the impact cases with notoriety often have on good order and discipline.

The pre-brief with the legal office staff should include a discussion of cases that were on the margin between disposition by court-martial or nonjudicial punishment, and those where nonjudicial punishment was decided upon as an appropriate disposition rather than a lesser administrative action such as a letter of reprimand. Know why a commander chose a particular disposition and punishment, and why a metric was, or was not, met.

The pre-briefing is also a good opportunity for your justice team to assess how it's doing. If you didn't meet a metric, understand why. The junior office personnel stand to benefit from seeing the macro picture up close even if they did not prepare the briefing.

Conducting the SOD

The most important thing that legal office professionals bring to the SOD are principles of discipline. Without a macro-level message to deliver, you cannot be prepared for the discussion that should occur. Among several important principles, choice of forum should not be a matter of expediency. Discipline should not defer to status or position. Military justice action can serve either the dual or singular purposes of rehabilitation or punishment, to include punishment for punishment sake. Not all misconduct is, or should be, "recoverable." The goal of disciplining Airmen who commit misconduct is to hold them accountable and deter others from doing likewise. In all cases, commanders must consider the full range of options to address misconduct and to impose punishment appropriate to the offense and the offender.

As a best practice, the meeting should state its purpose, which can include a statement like the following:

> "The purpose of the Status of Discipline is to assess the installation good order and discipline as well as the efficiency and effectiveness of our military justice processes. Commanders are expected to examine and discuss completed military justice actions against the goals of fair, effective, and responsive discipline."

At a minimum the briefing should include a synopsis of recently completed court-martial, nonjudicial punishment and administrative discharge actions, as well as a report on the status of the installation's processing metrics compared to the Air Force standard. The synopsis must show "discovery to action" processing for each. We will do better when commanders feel accountable for celerity in military justice. It's also important to educate commanders on how well the installation's processes compare to those of other installations in the MAJCOM as well as the MAJCOM as a whole. Commanders usually want to know this information and the best way to show it in a way that they will appreciate is by showing it from the "discovery to action" metric vantage point. It provides a meaningful measure of how well your installation is meeting military justice standards for effectiveness. It is important to include rates-per-thousand data based on race and gender even if the data suggests these are not areas of concern; and, including this information is critical if it is. Misconduct that was disposed of through administrative action—e.g. counseling or reprimand—though not formally tracked in most cases, can be included in the SOD brief.

We will do better when commanders feel accountable for celerity in military justice.

Some installations may use the SOD to brief recurring trends such as DUIs, alcohol-related crimes, urinalysis, and government travel card abuse, among others. Including this information does contribute to an overall assessment of good order and discipline, but it should not predominate the SOD and thereby detract from the case-by-case examination of military justice actions against the goals of fair, effective, and timely administration of discipline.

Commanders should brief incidents and explain the reason for the choice of forum and the punishment imposed. If a nonjudicial punishment action was initiated and then found inappropriate, it should be briefed, to include whether the reason for the dropped action was rooted in the factual insufficiency of the evidence, or matters in extenuation or mitigation. The SOD is a great vehicle to distinguish between matters considered by the commander verses the weight given to such matters that were considered. As a general rule, just about anything may be considered, but the attention an item deserves should depend on the importance it has to maintaining good order and discipline, acknowledging that some matters may be considered and outright rejected as influential on the commander's decision.

As the facilitator, the SJA should encourage commanders to explore the margin between disposition by court-martial, nonjudicial punishment, and lesser action, that they considered. Other margins include suspension of punishment, vacation of suspended punishment, and the threshold for administrative discharge if legal sufficiency had already been met by past instances of misconduct. Commanders should articulate whether a particular offense denotes a trend, whether discipline was responsive, and in the time since imposition, effective in rehabilitating the offender or deterring other Airmen. In the case of nonjudicial punishment actions, commanders should be prepared to brief why a metric was or was not met. And, SJAs should do the same in the case of trials by courts-martial.

Conclusion

Bottom Line—SOD briefings make commanders feel accountable for military justice actions in their units because they are accountable. Together, legal professionals, the commanders we assist and advise, and the first sergeants who are entrusted to maintain a mission-ready enlisted force are an inter-dependent team on which good order and discipline depend. The key elements to conducting a status of discipline include preparation, communicating with commanders and first sergeants, and maintaining these relationships. Following these practices will help installation leaders assess military discipline, conduct training and promote a responsive military justice program.

GUILTY PLEA/MEMBER SENTENCING CASES
The Only Thing Relaxed Should Be The Rules

by Lieutenant Colonel Grant L. Kratz, USAF

Over the past four years on the bench, I have noticed a marked increase in guilty pleas with members sentencing (GPMS) cases. This trend appears to be true both with and without pre-trial agreements. Such scenarios, where the members do not make findings, but are being asked to impose a sentence, create unique challenges which require a return to the basics for those presenting evidence in such forums. Intelligent use of voir dire and opening statements, along with confident presentation of evidence and responding to member questions, will go a long way to assisting, educating, and persuading the members in GPMS cases. Based on my time in the courtroom, I offer the following tips for counsel to consider in their preparation and presentation.

Voir Dire: Don't Lose Them Before You Get Them

Members are smart folks. Don't insult them. This is a new and strange forum they are thrust into, most of them for the first time. By the time the bailiff calls court to order, your panel has been on telephone standby (hopefully not for too long) before being thrust into a group of strangers, paraded into the courtroom, placed under oath, and then in a very public forum, required to answer probing, sometimes very personal questions. In fact, the judge's instruction to them is that unless they are told otherwise, they are required to answer all questions. Given those circumstances, what impression of counsel is given when counsel ask questions such as "would you all agree that people make mistakes?" After many, many post-

trial discussions with court members, I assure you, it's not a favorable one.

AF Rule of Court 3.1(f) provides, in part "Counsel should not purposefully use voir dire to argue the case or to present factual matters which will not be admissible." The discussion following R.C.M. 912(d) includes a similar directive. The same discussion section states "[t]he opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges."

Counsel should not purposefully use voir dire to argue the case or to present factual matters which will not be admissible.

Use voir dire for that purpose, not to argue, elicit meaningless agreements or state the blatantly obvious. Such questions insult the intelligence of the members, waste their time, and detract from your credibility.

Your integrity in following the rules, and the respect you'll get from the members in not insulting them (especially when opposing counsel just might) translates into a more professional and efficient presentation. It also increases your credibility with members and the military judge. In a recent court, I was struck by the impact of counsel for one side feeling that it was necessary to apologize to the members for having a substantially longer questioning of members. The apology was followed by a series of generic, empty questions, neither tailored nor calculated to ascertain issues of potential bias. Rather than minimizing the issue, the apology highlighted it. There is considerable value of succinct voir dire geared towards substantive matters, as opposed to "would you all agree that people make mistakes?"

Don't waste members' time or squander your credibility with lengthy, generic, and redundant questions. Ask about the issues expected to arise in the court and that genuinely relate to the matter at hand (such as potential bias). Leave the advocacy for the next step.

Opening Statements—in a Sentencing Case?

Ask for them! The one and only area where members have suggested to me that they actually *want* to hear more from the attorneys is in opening statements for GPMS cases. Members feel like they are jumping onto a fast-moving train in unfamiliar territory. They don't know the parties to the trial have been in court for the majority of the day hearing why the accused is guilty, and why the accused believes he/she is guilty. But once the members have survived voir dire, we expect them to jump onto that proverbial train and immediately start absorbing evidence without any framework or introduction. Our members, the vast majority of whom have never been in a court-martial forum before, deserve (and whether they know it or not, expect) more.

Before leaving the bench, I began offering opening statements to counsel for both sides in GPMS cases. After the initial perplexed response from counsel, I found that counsel appreciated the opportunity to provide the members with this transition from member selection to evidence and I received extremely positive feedback from members. In fact, most members, when asked, marvel that we would even consider starting "the trial" without opening statements and told me that they expected opening statements. After all, they watch all of the crime shows too, and that's how they think all trials start.

As you prepare for trial, I encourage counsel to request that the military judge allow opening statements. Then use them as an opportunity to lay out the roadmap for what the members are about to see. Give the members the context so that when they hear the evidence, they know what to do with it.

Use Evidence!

Opening statements are only valuable if you have evidence to talk about. Early in my time on the bench, after a GPMS case, a member asked me whether "the government was allowed to introduce evidence in sentencing." I was struck by the question, and it solidified what I had been thinking for some time: our members are smart people and they crave information. In GPMS cases, govern-

ment counsel have the distinct tendency to "coast" and not present information to the members that is critical to a fair and appropriate sentence. Sources for evidence in sentencing abound, for example:

- **Commanders, first sergeants and supervisors** with rehabilitative potential evidence;
- **Playback of the providence inquiry** to the members (probably THE most underutilized aspect of sentencing evidence out there);
- **Witnesses** to testify about the offense itself, the facts and circumstances of it.

Matters in aggravation from the victim, family, or unit. Counsel should beat the bush to find this information, because the members deserve and expect it. Moreover, it will give you something to talk about in opening statements.

No Right to Surprise

Members are busy people and want to get things done. They are generally tolerant of brief delays, but dislike unnecessary and avoidable setbacks. For example, there is no entitlement to the element of surprise in an unsworn statement. When defense counsel stands up and offers the unsworn statement for the first time in open court without having previously provided it to the prosecution, trial counsel may object. At a minimum, time will be wasted discussing the issue. Many judges are going to give the government time to review said document.[1]

In at least one such case, I've had members ask me post-trial whether defense counsel is "allowed to do that" (referring to submitting the unsworn for the first time there in open court at the last minute.) I explained that there was nothing "wrong" with that procedure, but it was clear that the members may have felt that the ensuing delay necessitated by that approach was unnecessary, and perhaps even unfair. Again, this goes to your credibility, professionalism, and the overall impression given to the panel. Defense counsel should seriously consider whether giving the unsworn statement to the prosecution at the last minute really provides any tangible benefits. Little is gained tactically, and there is something to be lost from the members—including their patience.

Being Seen and Not Heard

One time a lieutenant colonel friend of mine came to my court to watch the proceedings. He watched a session of voir dire, opening statements, and some witness testimony. During a recess, he came back to chambers and we discussed his impressions of what he had seen. One of the counsel was far better prepared and had all of the right questions, but was by nature quiet and reserved; and this flowed through to his presentation. The other counsel did not suffer from shyness, but was arguably less prepared and on less-firm ground with respect to substance.

Surprisingly, my friend commented that the quieter attorney was far less credible and persuasive than the confident (but substantively less prepared) attorney. Even when I highlighted that the other attorney had the better legal points and preparation, my friend let me know that all of that didn't matter because the attorney's reticence made it look like he didn't know what he was doing or didn't believe in his case. The teaching point is that it really is not just what you say, but how you say it. Here are some ways to accomplish that.

It is not just what you say, but how you say it.

Check Your Volume

Ensure that no member has to struggle to hear what you are saying. Know the acoustics in your courtroom. Talk to your court reporter. Nobody in that courtroom knows better than the court reporter what the best volume level is for counsel, and where the audio dead zones are in the courtroom. Ask the court reporter "am I too loud or am I too soft-spoken?" Listen to the response.

[1] By contrast, providing the unsworn statement to trial counsel in a timely fashion rarely, if ever, changes the government's approach.

Court reporters are experts on what plays well in the courtroom. Use them.

Take charge!

Be assertive. If you are government counsel, memorize the oath for the members. It's not long, and it is a huge indication of your credibility and confidence when you can just walk up to the members, direct them to raise their right hands, and administer the oath while looking them in the eyes.

When any witness enters the courtroom, immediately take charge. Direct them in an assertive voice to the witness stand. Ask them to raise their right hand, and administer that oath (also from memory) in a bold, self-assured voice. I've seen many occasions where the oath is administered so quietly that there was no chance that the members heard it; it almost appeared like a private discussion between counsel and the witness. The oath is important and it's critical for members to see and hear it done professionally.

Make that Service Dress Your Costume!

If you are quiet outside of the courtroom, let the service dress be your Superman costume. When you put it on to go into court, find your inner advocate. Shed that shyness and turn up the volume. Call it unfair, call it superficial, but to be effective, it's not enough to know your stuff, *you must look like you know your stuff.* Of course, the reverse can also be true. But assertiveness and volume may assist you where substance is weak.

Call it unfair, call it superficial, but to be effective, it's not enough to know your stuff, you must look like you know your stuff.

Take Member Questions Seriously

Members crave information. When they ask questions, give heed to them. Bear in mind that in our system, members can request evidence. RCM 913(c)(f) specifically mentions presentation of evidence requested by members. Obviously, member-requested evidence and their questions are subject to the same admissibility rules, but the objection to a member question should never be "they are stuck with the evidence as we presented it." Sometimes obtaining such evidence would result in an undue delay, in which case that's the appropriate objection. But keep in mind that the members are the fact-finders in this case, as such, they are entitled to ask for more information. If substantial additional information is presented (though the situation would be rare), counsel could ask for additional argument.

If a court member's questions or evidence sought by the panel highlights the need for additional evidence from your case, ask to re-open. The worst that can happen is that the judge denies your request. If the evidence is reasonably available, however, I believe most judges would allow the evidence to be presented to the factfinder.

Conclusion

In GPMS cases, neither party should relax in terms of their presentation to the court members. Trial advocacy must flex to the circumstances and counsel need to ensure that the members are educated, informed, and persuaded on behalf of the respective clients. Based on my experience as a military judge, I believe that if followed, these suggestions will strengthen your case, as well as your advocacy skills and in the process justice will be better served.

The CRD is Dead

by Colonel Gordon R. Hammock, USAF

In the 18 June 2003 Edition of the TJAG Online News Service, The Judge Advocate General announced the "elimination of the case ready date (CRD) metric." But, to paraphrase Mark Twain, the reports of its death have been greatly exaggerated—until now. Yes, CRD is dead.

Not all metrics are created equal. While CRD survived beyond its obituary through its continuing mention in both AFI 51-201 and AFI 51-202 and by a data field in AMJAMS, it never lived up to its original intentions or expectations. Consider evaluating the performance of a military justice program by assessing its processing of Article 15 actions. We instinctively know that meeting the goal of "completing 80% of all NJP actions from offer to SJA review within 20 days" is a more concrete and meaningful measure than meeting the goal of "offering 90% of all NJP actions within 10 days of the 'case ready' date."

Why is this true? Some would argue that because it was "eliminated" in 2003 and later "deemphasized" in 2007, it naturally became less important. However, that is not the whole story. The reason this metric landed in the ash heap is simple—flexibility may be the key to airpower, but it is not the key to a useable or useful metric.

In AFI 51-202, one page is devoted to defining the "case ready date" (CRD). It provides that the CRD is the date the commander received the report of investigation, or notice of the positive urinalysis, or notice of financial misconduct…unless you need more information, then, under paragraph 5, it can be some other date. In short, the case ready date is a fixed point in time—unless it's not. In fact, it is a movable target which can be adjusted by a commander, investigator, attorney or paralegal at will, with ease, and without explanation.

"The CRD has always been either a true test of integrity or a true test of creativity," said one unnamed former Chief of Military Justice. "Those offices who fail to meet this metric are either unbending in their interpretation of the definition or lack the creativity to understand the advantage of having a lengthy definition."

It is especially telling that, while this metric was tracked closely by senior officials, we all met it with ease. However, since it has been "deemphasized," no MAJCOM has met the original goal.

And, with all the time we save not divining a CRD, we can focus on our new Article 15 metric—tracking the entire process from "discovery to SJA review." This new metric comprehensively measures the collaborate process among the investigator, legal office and commander by examining the entire life cycle of the Article 15—from discovery to SJA review—as a single metric.

As Lieutenant General Harding observed, "The demise of CRD, which will soon be reflected in updated AFIs, will be better for our commanders, our Corps and our Air Force. Our new unitary metric reminds us that good order and discipline is enhanced when we act as a team, with deliberate celerity, to execute a process that embraces both timeliness and quality."

Preparing for Article 32 Hearings

Best Practices and Tips for Success

by Major Jeanette E. Skow

When a government representative is well-prepared procedurally, logistically and substantively for an Article 32 hearing, the likely result is an equally prepared investigating officer (IO) who will manage an efficient hearing and make a fluid transition to writing an organized report. What follows are several best practices and tips for being that well-prepared government representative.

Coordination with Defense Counsel

Many aspects of the military justice process work more effectively and efficiently with frequent communication between trial and defense counsel. Although the days of "dry docketing" are gone, there are still many reasons to start having discussions about the Article 32 hearing with defense counsel well before preferral.

First, early coordination is essential to setting the soonest available hearing date. While the official hearing date is set by the IO after he or she is appointed by the Special Court-Martial Convening Authority (SPCMCA), the reality is that the hearing date has often been previously coordinated between the government and defense. The government should not delay preferring charges because it is known upfront that the defense counsel will not be available for some time—the defense can formally request a delay from the IO. However, knowing the probable date all parties will be ready to proceed can assist you in finding a qualified IO who will also be available at that time.

Second, early coordination with defense counsel will ensure witness requests can be acted upon immediately. Under R.C.M. 405(f)(9), the accused has the right to call witnesses at the Article 32 hearing. The government is charged with producing such witnesses if they are deemed available. The sooner you know which witnesses the accused intends to call, the earlier you can coordinate with a military witness' commander or directly with a civilian witness to facilitate their appearance at the hearing.

Third, communicating with defense counsel early can also alert you to unique issues they tend to raise at the hearing. While you may not get a resolution to all issues in advance of the hearing, both the government representative and the IO can accomplish some preliminary tasks. For example, if the defense gives you notice of an objection, the IO has the opportunity to research all sides of the issue before the hearing. In addition, defense counsel may intend to request a verbatim transcript of one or more witness' testimony. This request can be addressed by the staff judge advocate and/or the IO before the morning of the Article 32 hearing. It will also allow you time to secure an adequate location and a court reporter to take testimony in the event the request is approved.

Organization of Key Documents for the Investigating Officer

When an IO is prepared and well organized, an Article 32 hearing is much more likely to run effectively and efficiently. The government representative plays a big role in the IO's preparation and organization in several ways. The overarching theme is to provide the IO with key documents *as early as possible*.

Another good practice for preparing the IO for the Article 32 hearing is to provide two important lists: a witness list and an exhibit list.

As soon as the SPCMCA appoints the IO, attach the Report of Investigation (ROI) to the appointment letter and transmit it to the IO immediately. This is particularly important when the ROI is very lengthy, when the IO is relatively inexperienced or when there are complex or extraordinarily numerous charges. This lead time will allow the IO to read through the evidence in advance of the hearing, conduct any preliminary research and identify any areas he or she will follow up on during the investigation.

You should also provide the IO with additional evidentiary materials in advance of the hearing. For example, there are some cases in which an ROI was not accomplished or was not completed prior to the preferral of charges. In those instances, the evidence may only consist of sworn statements, a police report, a drug testing report, bank records, etc. There may also be evidence of uncharged misconduct you would like the IO to investigate. When you provide these items to the IO, consider presenting them in an organized way such as in a tabbed binder or electronically with logically named files. The more information the IO has in advance of the hearing, especially in the form of well-structured files, the less time the IO will spend right before or during the hearing trying to get organized.

Another good practice for preparing the IO for the Article 32 hearing is to provide two important lists: a witness list and an exhibit list. While each of these lists may be moving targets up until the actual hearing, having this information in advance—even if tentative—will give the IO a rough roadmap of the hearing and will enable him or her to manage the time, location and other logistics of the hearing accordingly. These lists will also give the IO the ability to organize his or her notes for the day of the hearing and even start the shell of the report of investigation.

There are many ways a government representative can assist the IO in executing an efficient and effective Article 32 hearing—and ultimately produce a thorough and timely report of investigation.

Witness Logistics and Communications

With the current tempo of operations, it is not uncommon that a witness for the government or defense is not collocated with the site of the Article 32 hearing. For example, military witnesses, particularly law enforcement special agents, might be deployed or stationed at a base halfway around the globe.

Civilian witnesses, particularly military dependents, may also reside at a location other than the site of the Article 32 hearing. Recognizing there may be some controversy about the legal availability of a witness, the government representative needs to plan for facilitating witness travel to the hearing or providing an alternate means of communication during the hearing. If a witness is ultimately declared available and will proceed with testifying, then the government will already be several steps ahead of the process.

There are several things to consider when preparing for an Article 32 hearing when a witness may testify from an alternate location. If the courtroom is not equipped to accommodate remote testimony, ensure a facility is reserved in a timely fashion and is equipped to handle conferencing via telephone or video conferencing (VTC) equipment. You may only need to move a portion of the hearing outside of the courtroom. In either case, working as many of these details in advance of the hearing will maximize the IO's focus on the substance of the hearing, as opposed to trying to work out logistics that could have been previously accomplished.

Attention to Detail

This is a concept we should all be practicing. This is particularly true when preparing for Article 32 hearings. Many, if not most, of the best practices and tips mentioned in this article can be executed working with the case paralegal. For example, you can organize key documents such as ROIs, other evidence, and exhibit and witness lists for transmittal to the IO. The case paralegal is an ideal choice for these tasks, as often time he or she maintains the original copies of certain evidence and is intimately familiar with all the documents.

Well beforehand, be sure your team secures the location and equipment for the hearing, as well as prepares the courtroom on the day of the hearing. In addition, your case paralegal is a great liaison between you and the witnesses for arranging travel and remote testimony, as well as interfacing with other legal offices when coordination is necessary for telephonic or VTC testimony.

Finally, the case paralegal can also be the point of contact for the IO. Much like the case paralegal interfaces with a military judge before and during a court-martial, the case paralegal can ensure the IO's travel and billeting accommodations are arranged, if necessary. Your paralegal can also ensure there are adequate office space, supplies, and computer resources available at the IO's disposal during and after the hearing.

Conclusion

There are many ways a government representative can assist the IO in executing an efficient and effective Article 32 hearing—and ultimately produce a thorough and timely report of investigation. The key elements to that end include coordinating early and openly communicating with defense counsel, providing the IO with key documents as early as possible, planning for alternate forms of witness testimony at remote locations, and maximizing the use of one of our greatest resources, the case paralegal. Following these best practices and tips will assist the commander in the swift administration of military justice, while also protecting the accused's right to a speedy trial.

The Dirty Dozen

Paralegal Will Drafting, Training, and Foundational Leadership

by Major Scott A. Hodges, USAF

Twelve paralegals from all ten MAJCOMs, who affectionately referred to themselves as the "dirty dozen," attended the first Will Preparation for Paralegals Course (WPPC) at the Air Force JAG School in September 2010. These paralegals, and the course they attended, broke new ground, highlighting the Foundational Leadership pillars of legal assistance, training and teaming.

Legal Assistance Today

Last year, the Air Force JAG Corps prepared 62,124 wills for Airmen, essential civilians, retirees and their dependants. Wills consistently make up about half of the total legal assistance appointments in the Air Force. The vast majority of these wills were prepared by an attorney using a locally produced will worksheet. This past February, the Legal Assistance Website (LAWS) was released for worldwide use. One significant aspect of the LAWS is that clients can access and complete a will worksheet online, which the legal office can access online as well.

By allowing the legal office to remotely access the client's worksheet, the website creates the ability to draft wills before the client ever steps into the legal office. Under this new paradigm, the attorney fully utilizes the office time with the client to provide legal advice on complex issues as opposed to spending a majority of the time engaged in data entry. To further maximize this potential efficiency, TJAG decided that the JAG Corps would train its paralegals to draft simple wills and thus put paralegals directly into the will production process.

Training

The Academic Development Division and the Legal Assistance mission at The Judge Advocate General's School worked together to develop the course training standard and course objectives to meet TJAG's vision to begin the paralegal will drafting initiative. The course aimed to prepare paralegals to first determine whether a client's will would fall into their purview, and then draft it from a will worksheet. The goal was for graduates to be able to draft a will with minimal supervision and minimal corrections.

In his civilian capacity, Lt Col Fred Davies, the staff judge advocate for the Eastern Air Defense Sector, Air National Guard, runs an estate planning law firm in Syracuse, New York. He was the primary instructor at the two estate planning courses offered by The JAG School in 2008. Even though he only received a few weeks of notice, Lt Col Davies agreed to come and lend his expertise to help teach paralegals how to draft wills. Lt Col Davies, TSgt Darby Grant, paralegal instructor and NCOIC of Air Force Legal Assistance, and I, made up the course cadre.

The course started with a fire hose of substantive law. We taught paralegals the law that they needed to understand to draft a basic will, such as, what property is typically probated under a will, how the law treats minors, how to disinherit, and how to create testamentary trusts.

Next, we delved into more complex areas, such as, estate tax and complex trusts. While the course aimed to prepare paralegals to draft basic wills,

they also had to understand enough about estate planning to be able to spot the will clients who exceed the scope of legal assistance. The course provided an opportunity for the paralegals to utilize DL Wills to draft wills and health care documents, on their own, for different types of clients.

Teaming

With formal training and academic experience in their tool kits, the "dirty dozen" returned to their offices. TSgt Wayne Freeland, Barksdale AFB, drafted an amazing thirty-five wills in the first month after returning to his office. Members of the "dirty dozen" not only taught the paralegals in their office how to draft wills, but also passed on some advanced estate planning information to the attorneys in their offices. All twelve paralegals were able to directly contribute to the preparation of wills in their offices. One staff judge advocate remarked that if he had another paralegal or two trained to draft wills, that they would be drafting 85-90% of the office's workload.

The WPPC and paralegal will drafting initiative exemplified focused in-residence training so that paralegals could team with attorneys to enhance the providing of wills, arguably our most important Legal Assistance service. This is what Foundational Leadership is all about: Developing critical skills and capabilities to ensure we can provide core services in the most efficient and proficient manner possible.

The success of the Dirty Dozen is now causing a sea change in the JAG Corps. TJAG has recently directed that all 7-level paralegals will attend a will drafting course at the JAG School. The second class occurred in mid-December with successive classes being held monthly until all 7-level paralegals are trained. The Dirty Dozen led the way in reshaping how the JAG Corps provides legal assistance.

The Judge Advocate General addresses the "Dirty Dozen"

Lt Col Fred Davies, the staff judge advocate for the Eastern Air Defense Sector, ANG

Students learn the ins and outs of drafting wills

Playing In the Mud:

Lessons Learned in the Panamanian Jungle

It was an impressive endeavor requiring the joint efforts of two REDHORSE squadrons and over one hundred additional personnel from various Air Force, Army, Navy, and Marine units.

by Captain Aaron L. Jackson, USAF
In collaboration with Staff Sergeant Sammy D. Harris Jr., USAF

It's 0545 as we step outside our tent and onto a wooden boardwalk designed to keep us out of the inescapable mud that surrounds our temporary home. Within thirty seconds we are dripping with sweat before even starting morning PT. My feet slip just enough on the rain-soaked walkway to remind me that failing to take caution with each step could start my day face down in the muck. Thousands of bugs circle overhead, the variety and uniqueness of which can only be found so close to the Equator. Howler monkeys begin filling the early morning air with their distinctive and vicious bellows. Equally strange sounds echo in the darkness providing a constant reminder of where we are on this deployment. Welcome to the jungle.

Just a few months earlier, I was nestled behind stacks of USSTRATCOM contracts, when the staff judge advocate stepped into my office and humorously provided the seven words that began my journey: "Are you familiar with the song 'Panama'?" I had been hungry to deploy since I first stepped foot onto Offutt Air Force Base half a year earlier, and this was my opportunity. Two months later, here I am: crunching my way down a newly graveled road with my teammate and paralegal, SSgt Sammy D. Harris.

The Mission

We were called to deploy together as the legal team in support of New Horizons Panama 2010, an international humanitarian exercise designed to strengthen our relationship with the Government of Panama and build lasting friendships with the local populace. By the time the last muddy boots boarded the planes heading home from this campaign, civil engineers had built infrastructure supporting two clinics and four schools in the impoverished Darién province—a sparsely populated area of Panama commonly referred to by local citizens as the "forgotten region." In two other locations across the country, medical and dental personnel provided healthcare assistance to over one thousand grateful Panamanian citizens. It was an impressive endeavor requiring the joint efforts of two REDHORSE squadrons and over one hundred additional personnel from various Air Force, Army, Navy, and Marine units.

Shortly after meeting SSgt Harris, I realized that we shared many similarities. He was a young Airman, eager to experience the service, sacrifice, and adventure of a first deployment. Like me, SSgt Harris jumped at the chance to join the New Horizons exercise, willing to rapidly deploy in the hopes of honing and broadening his skills as a professional in the JAG Corps. We were both excited

about the lessons to be discovered during our time in the rain forests outside Meteti, Panama.

Unlike the standard JAG deployment, our arrival was not welcomed with hardened facilities, electricity, air conditioning, or a chow hall. For this four-month exercise, the Government of Panama had provided us with a clearing on the side of a small hill surrounded by jungle. Creating our temporary home required leveling the dirt, laying several hundred meters of electrical and plumbing lines, creating a communication network, erecting a tent city, and surrounding our location with triple-strands of concertina wire. Only the first of these had been accomplished by the time of our arrival.

One valuable aspect of this particular exercise was the opportunity to experience every stage of a deployment: from mobilization to build-up, sustainment, and redeployment.

One valuable aspect of this particular exercise was the opportunity to experience every stage of a deployment: from mobilization to build-up, sustainment, and redeployment. In each segment of the exercise, numerous issues emerged, requiring the skilled analysis of a legal team. However, this was not the original plan.

Broadening Our Reach

"So you're the JAG? You weren't supposed to show up until next month." These were some of the first words uttered to me upon stepping off the plane and onto Panamanian ground. Unbeknownst to me at the time, the planning team had not anticipated the necessity for an in-theater JAG so early in the deployment. Leadership was not even scheduled to arrive for another few weeks. Therefore, it came as quite a surprise when the legal team showed up on their doorstep. Nobody was quite sure how to handle our unplanned arrival.

This realization might have prompted a "call us when you need us" attitude. However, rather than opting for the figurative corner of the room, we decided to make the best of the situation and engage in any way we could. As a result, our first days in country were not spent in the office but off-loading cargo at the Panama Canal. Our conversations with individuals working around us soon revealed several legal risks in our approach to port operations, requiring me to return to my skills in the law. Shortly thereafter, we found ourselves working in exciting fields of practice we had never expected to engage in as a JAG on this exercise.

Impact Through Action

What did we intend to accomplish on this deployment? How did we intend to represent the JAG Corps? SSgt Harris and I had discussed our goals prior to arriving in the Darien. These conversations led us to coin the term "Impact Through Action." This jointly created mantra that would frame our deployment was quickly put to action.

SSgt Harris and I knew exactly what to do as we realized the state of the camp on that first day. Whenever a legal issue reared its head, we were on it immediately. And as soon as that problem was resolved, we returned to the heat and rain assisting in any way we could. Demonstrating our value to a couple hundred civil engineers might prove a bit difficult, but I knew we were up to the challenge

Building Relationships

SSgt Harris and I worked with the base medical crew to off-load equipment and organize the Med Tent. We supported services troops building the dining facility MWR tent, exercise gym, and billeting tents. We helped the Combat Communications Squadron out of Tinker Air Force Base set up their communications system, including a satellite dish. We cut ourselves on concertina wire with the Security Forces Squadron to secure the perimeter. We spent numerous hours with the structures crew building the wooden boardwalks that connected our tent city and kept us all out of the muck. We swept, we mopped, and we cleaned. No job was too big or too small for the legal team.

Respect is earned, trust is established, and friendships are forged, not by working behind a desk, but by getting out and knowing your client's business

To begin with, these efforts provided both of us with a much deeper appreciation for the roles of the greater Air Force. Each day brought new and interesting lessons in previously unknown areas of our military. Airmen were eager to teach us their areas of expertise and welcomed our daily efforts. By the end of the deployment, SSgt Harris and I had worked with nearly every individual at the base camp at least once and had developed a much deeper appreciation for the contributions of Airmen from many career fields.

But beyond developing skills outside our comfort zone, SSgt Harris and I were building relationship by working one-on-one with the men and women that formed the New Horizons Panama 2010 team. Discussions of arc angles, appropriate sand-cement-water mixtures, and proper storage temperatures of various fuels would almost inevitably turn into talks of hometowns, football teams, and families. And in these moments, something much larger than a skill was being created.

Legal Assistance and Trust

"You guys have just about touched every piece of this deployment," said a Security Forces master sergeant one particularly hot and humid summer day, "It's just amazing." The trust we built drastically amplified our ability to help people, as was quite evident through the number of legal assistance clients. Where past exercises boasted a number of legal assistance visits that could be counted on one or two hands, our time in the Darien produced nearly 100 clients with issues ranging the full spectrum of legal assistance.

On several occasions, after a long overdue and often embarrassing issue was resolved, Airmen admitted that they never would have approached the JAG office had it not been for the relationships built prior to their visit. Then they would always thank us with a parting, "I'm sure I'll see you out there tomorrow." These moments reminded me of a fact that transcends the Darien; respect is earned, trust is established, and friendships are forged, not by working behind a desk, but by getting out and knowing your client's business. Once you build that trust, people will come to you and seek your advice.

Knowing Your Client's Business

Commanders rely on their JAGs to see beyond the horizon—to discover and resolve issues before they take shape in the distance. Being able to provide this level of legal analysis demands an instinct only fostered by a heightened sense of the surrounding environment. I quickly learned that, as a JAG, we can only see so far while behind a desk or air-conditioned tent.

Applying this philosophy to our daily grind yielded several saves by the legal office throughout the exercise. On one particular occasion, a simple conversation resulted in identification of a serious issue with our redeployment strategy. Resolving this potential issue required direct discussions with the director of an agency within the Government of Panama, something we initiated immediately. After successfully gaining the sought-after documentation, we waited for the moment when it might come in handy. That instant emerged a month and a half later, when use of the document rescued our redeployment team from a lengthy halt in operations. Leadership was impressed by our ability to find and resolve problems before they emerged. When asked how SSgt Harris and I were able to perform in this manner, I immediately recalled our conversation 45 days earlier—impact through action.

Changing Perceptions

"*But JAG's don't lead*." I have heard these mistaken words before, but they hit me especially hard when uttered by the New Horizons commander during our final feedback session. Throughout the long conversation, he lauded our performance but urged us to consider transitioning to career fields that would provide "real" leadership opportunities. While I appreciated the attempted compliment, my response to him was simple, "Sir, Sammy and I are proof that the JAG Corps leads." SSgt Harris and I sought to erase this stigma during our time in the Darien and provide a true perspective of the JAG Corps. I believe we succeeded. We did so by approaching this situation as JAGC members do best, by helping Airmen, by listening to them, and by showing them we care.

By the close of New Horizons Panama 2010, SSgt Harris and I had gained the professional experiences originally anticipated and tirelessly earned. But beyond the practical knowledge amassed throughout our time in Panama, SSgt Harris and I discovered something far beyond our expectations. Deeper lessons were found hidden beneath the foundation of this particular deployment that will remain with us throughout our careers in the JAG Corps. These nuggets, however, were not rooted in the law. They did not come from our hours of legal research hunkered down. We found them simply by slogging through the same mud as our fellow Airmen.

On Solid Ground

HOW TO ACQUIRE LOW COST INTERESTS IN REAL PROPERTY

by Mr. Greg D. Whitt, AFMCLO/JAK

CONUS-BASED JAGS AND CIVILIAN ATTORNEYS ARE FREQUENTLY ASKED who holds the proper approval and signature authority for acquiring low cost interests in real property. If this is the first time you are hit with this issue you might be thinking: What is a low cost interest in real property and why does my commander want to acquire one? Does the installation commander have any authority in this process? Here is a basic overview of this common type of land acquisition and explanation of the current approval levels you may need to pass through.

Legal Authority

Under 10 USC § 2663 (c), the Secretary of the Air Force can authorize the acquisition of land if it is determined that the acquisition would serve the interests of national defense or to correct risks to life health or safety. Land acquired in the interest of national defense must cost no more than $750,000, exclusive of administrative costs and the amounts of any deficiency judgments, while land acquired to correct risks to life, health or safety, must cost no more than $1,500,000, exclusive of administrative costs and the amounts of any deficiency judgments.

Air Force installations typically use this statutory authority to make minor acquisitions of real property in fee simple. This authority is also used to establish or renew lesser interests in property such as leases, licenses, permits, rights of entry, grants, or easements to temporarily use the real property of a private party or another federal, state or local government entity.

Air Force Instruction (AFI) 32-9001, dated 27 July 1994, provides additional guidance on acquiring real property for Air Force use. Specifically, Chapter 3 discusses the acquisition of leasehold interests. Chapter 5, discusses acquisition of other lesser interests in real property, such as special licenses for temporary rights of entry, licenses, or permits for uses such as surveys, field training exercises, testing sites for communications adaptability, and testing water wells. Acquisition of permits and licenses from other government agencies are subject to the restrictions in Chapter 5, paragraph 5.3.

Approval Authority

Authority vested in the Secretary of the Air Force under 10 USC § 2663 (c) has been re-delegated since the issuance of AFI 32-9001, with the initial delegation to the Assistant Secretary of the Air Force (Installations, Environment, and Logistics) in SAFO 700.4, paragraph 7, dated 17 September, 2002. However, approval authority was ultimately re-delegated in May 2003 from the Assistant Secretary of the Air Force to the Air Force Real Property Agency (AFRPA) Director and Deputy Director.

This change also permitted delegation of the authority by the AFRPA Director to the major command civil engineer (MAJCOM/CE). The AFRPA Director exercised this delegation of power in September 2003 by delegating the authority to acquire an interest in land costing or valued at less than $200,000 (exclusive of administrative costs and the amounts of any deficiency judgments) to MAJCOM/CE. AFRPA also authorized MAJCOM/CE to delegate approval authority to the installation commander for the acquisition of rights of entry for environmental surveying, testing, and monitoring. Rights of entry acquired under this authority are limited for a term of five years and at an annual cost not to exceed $5000.

Has Authority been Re-delegated?

Installation JAGS and civilian attorneys should contact their MAJCOM/CE and JA to determine if authority has been re-delegated to the installation commander to acquire rights of entry for environmental surveying, testing, and monitoring. Air Force Materiel Command (AFMC) JAGs and civilian attorneys should note that, in December 2004, AFMC civil engineering re-delegated authority to the installation commanders (except for Rome Laboratory) to acquire interests in land for the sole purpose of acquiring environmental rights of entry for surveying, testing, and monitoring not to exceed five years at an annual cost not to exceed $5000. Copies of the authority re-delegation letters may be found on the Air Force Materiel Command Law Office website[1] under the Industrial Facilities Support division (AFMCLO/JAK) "Real Estate and Leasing" subheading.

Summary

The appropriate approval signature levels for acquiring low cost interests in real property can be determined as follows:

- **Go to the AFRPA director or deputy director**, if (1) the acquisition is needed to correct a risk to life, health, or safety and the cost is greater than $200,000 and not more than $1,500,000, exclusive of administrative costs and the amounts of any deficiency judgments, or (2) the acquisition is in the interest of national defense and the cost is greater than $200,000 and not more than $750,000, exclusive of administrative costs and the amounts of any deficiency judgments;

- **Go to MAJCOM /CE** if (1) the acquisition is needed to correct a deficiency that is life-threatening, health-threatening, or safety-threatening and the cost is less than $200,000, exclusive of administrative costs and the amounts of any deficiency judgments, or (2) the acquisition is in the interest of national defense and the cost is less than $200,000, exclusive of administrative costs and the amounts of any deficiency judgments;

- **Remember that installation commanders <u>only</u>** have the limited right to acquire environmental rights of entry for environmental surveying, testing, and monitoring not to exceed five years at an annual cost not to exceed $5000, and that is *only if such authority has been delegated by* MAJCOM/CE. If delegation has not been made to the installation commander, then MAJCOM/CE remains the appropriate approval authority.

Special Note

Judge advocates should be aware that AFI 32-9001, SAFO 700.4, and the re-delegation letters of authority have not been updated to reflect the current legal authority (Title 10 United States Code § 2663). Materials may still contain an outdated reference to 10 USC § 2672 which was repealed and replaced by Title 10 USC § 2663 in 2006. Additionally, office symbols referenced in the delegation letters have changed since these letters were issued. This article uses the current or successor approval authority offices and their office symbols. AFRPA has advised to keep using the previous re-delegations of authority to acquire minor or low cost interests in land until such time as they are updated or reissued.

[1] The Air Force Materiel Command Law Office website is *available at* https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/lo/index.htm.

COMMANDERS' RIGHTS
in Privatized Housing

by Mr. Ronald G. Schumann, Esq, with Mr. Ian Lange

YOU ARE THE NEW STAFF JUDGE ADVOCATE AT AN INSTALLATION that has just had its base housing taken over by a private enterprise under the Military Housing Privatization Initiative.[1] Some of the housing areas are under proprietary jurisdiction, separate from the main installation and without fencing or guards. Other units are within the wire, under exclusive federal jurisdiction. The wing commander wants you to brief her on the do's and don't's of dealing with the project owner. First, she wants to know about her search authority within the privatized homes. Can misbehaving housing occupants be barred from base? Also, since the operational readiness inspection (ORI) is coming up, can the project owner be directed to mow the lawns one more time? And last but not least, can the base use "fallout money" available before the end of the fiscal year, to upgrade the privatized quarters. Where do you start? Who can you call for help? What is your advice?

Overview

These are just some of the questions commanders are asking. The answers are not always easy. Privatized housing developments on military installations occupy a legal gray area, where command rights and authority fit somewhere between "just like base housing" and "just like downtown."[2]

Air Force housing privatization transactions are carefully structured so as not to impair the commander's authority with regard to the health, welfare, safety, and security of persons on the installation.[3] However, notwithstanding the model lease language,[4] commanders' rights relating to privatized developments and occupants can be more restricted than in traditional government-run MILCON family housing areas with respect to: (1) searches of privatized housing quarters; (2) debarment of housing occupants from the installation; (3) spending appropriated funds on housing; and, (4) limits on command "direction" to the project owner.

Military Control?

Does the military still control the land in question? This is the single most important issue in determining the extent of a commander's authority. To find the answer you must ask follow-up questions, including, but not limited to:

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[1] 10 U.S.C. §§ 2871-2885; *see generally* the http://www.afcee.af.mil/resources/housingprivatization/index.asp, last accessed on Oct. 8, 2010.

[2] *See generally*, Captain Stacie A. Remy Vest, USAF, *Military Housing Privatization Initiative: A Guidance Document for Wading through the Legal Morass*, 53 A.F. L. Rev. 1 (2002).

[3] There is a "model lease" template currently posted on the Air Force Center for Engineering and the Environment (AFCEE) website, http://www.afcee.af.mil/resources/housingprivatization/index.asp, last accessed on Oct. 8, 2010. Condition 27, uses the following language preserving command authority:

1.1. Nothing contained in this Lease shall be construed to diminish, limit, or restrict any right, prerogative, or authority of the Commander over the Leased Premises relating to the security or mission of Basename AFB, the health, welfare, safety or security of persons on Basename AFB or the maintenance of good order and discipline on Basename AFB, as established in law, regulation, or military custom.

1.2. Anything contained in this Lease to the contrary notwithstanding, the Commander has the right at all times to order the permanent removal and barment of anyone from Basename AFB, including but not limited to tenants, if he or she believes, in his or her sole discretion, that the continued presence on Basename AFB of that person represents a threat to the security or mission of Basename AFB, poses a threat to the health, welfare, safety, or security of persons occupying Basename AFB or compromises good order and/or discipline on Basename AFB.

1.3. The Leased Premises and Leased Premises Improvements located thereon are subject to periodic inspection by Basename AFB security personnel in conjunction with their official duties. The Lessee will cooperate in these inspections to the extent required to ensure that law enforcement activities are not hindered and that Basename AFB security requirements are met.

1.4. The Lessee, its officers, agents, employees, independent contractors, and subcontractors must obtain identification passes from Basename AFB security police before admission to Basename AFB. Vehicles of such personnel also must be registered with and issued temporary passes by Basename AFB security police before they may be driven onto Basename AFB. Such vehicles are subject to inspection by Basename AFB security police, and, before temporary passes will be issued, drivers must present evidence that they comply with the minimum insurance requirements of the state in which their vehicle is registered.

1.5. The Government retains the right to refuse access to Basename AFB, including the Leased Premises, by the Lessee, its officers, agents, employees, independent contractors, and subcontractors during a national emergency or for other compelling reasons as determined by the Commander in his sole discretion.

1.6. Except as provided in Condition 27.1, nothing in this Lease shall be construed to diminish, limit or restrict any right of the Lessee under this Lease, or the rights of Tenants as prescribed under the Tenant Leases or Applicable Laws.

[4] *Id*.

There has not yet been a litigated case of note challenging commander authority to issue search authorizations or warrants in privatized housing. This does not mean such cases do not exist…

- Is the land in question leased to the project owner, or was it conveyed in fee? Did the Air Force "lease the dirt" to the project owner while using a quitclaim to convey the improvements as typically the case, subject to specified conditions?

- What is the jurisdictional status of land: exclusive, concurrent, or proprietary? Or, is it a mix?

- What are the contents of the AF Ground Lease with the project owner? Did the Ground Lease (or related document) specifically reserve the commanders' rights or note whether the housing area would still be under "military control"? Typically this is done at Lease Condition 27.

- What are the locations of the units? Are they "within the fence" or off-base? Are they severed or non-severed from the rest of the installation, especially the operationally sensitive parts?

- What is the "waterfall"[5] status? Do any non-DOD affiliated civilians live in the units? If so, to what extent? "Waterfall" refers to provisions in a lease giving the project owner the right to rent to non-DOD personnel if project occupancy levels drop below a specified threshold for a specified period of time. There are various waterfall tiers, with active-duty military at the top and general public at the bottom.

- What are the balance of rights and due process considerations? It is the Air Force position that privatization does not change the situation in any way, which is reflected in the contract documents (lease and related materials). However, parties who are not signatories to the contract documents (and are arguably not bound by their terms) may disagree. Therefore, careful consideration of relevant precedents is absolutely necessary when advising commanders.

Search Authority in Privatized Housing

Searches of persons subject to the Uniform Code of Military Justice are still authorized under MRE 315(c)(1). However, authorization for a search of a privatized home requires that the unit be "property situated *on a military installation*, encampment, vessel, aircraft, vehicle, or any *other location under military control*, wherever located," (emphasis added).[6]

Whether a given location is "under military control" is a question of fact. Among the factors of possible relevance are: (1) whether the unit is severed or off the installation, and (2) whether there are other indicia of military control, such as guarded or guardable gates, installation signage, military law enforcement patrols, or predominantly military neighborhoods. It could, for example, be more difficult to establish "military control" if units are rented to civilians with no DOD connection. This might be of particular concern if a project is "deep into the waterfall," and has become predominately civilian occupied.

There has not yet been a litigated case of note challenging commander authority to issue search authorizations or warrants in privatized housing. This does not mean such cases do not exist, but if they do, they have been decided on very narrow facts, generating neither recorded opinions nor

[5] E.g., the "model lease" template states at Condition 19.10:

> If the occupancy of the Project falls below ninety-five percent (95%) (exclusive of any housing units not available due to scheduled demolition, repair and maintenance) for any consecutive three (3) month period (calculated in accordance with accepted industry standards), the Lessee shall have the right to offer vacant housing units to Other Eligible Tenants in accordance with the Rental Rate Management Plan and the Unit Occupancy Plan. Notwithstanding the above, the Lessee, with the prior written consent of the Government, may offer vacant housing units to Other Eligible Tenants on terms stated in such written consent.

[6] *See* Manual For Courts-Martial, United States, Mil. R. Evid. 315(c)(3).

widespread notice. The most likely explanation is that prosecutors are taking a very conservative approach, so as not to risk generating potentially adverse precedents. Searches of privatized homes would, however, be analogous to searches of government-leased hotel rooms or other temporary lodging facilities. This area of military law has been reviewed in an excellent article in *The Army Lawyer*,[7] contending that the terms of a lease with the military member can be pivotal in establishing that an "essential military character" is retained in privatized homes.[8]

Recent provisions in Air Force-required clauses for use in leases between the project owner and the military tenant help reinforce both "military control" and the essential military character of a project.[9] Examining the actual signed tenant lease is essential, as other projects may lack such tenant lease terms or use differing terms. If there are factually inadequate indicia of "military control," search authority for privatized quarters will not come within MRE 315(c)(3). Consequently, a search of such quarters may need to be authorized and conducted by civilian authorities, just as would be required for other privately-owned, off-base housing units. The civilian authority could be either a federal magistrate or a state judge, depending on the matter and subject of the investigation and the jurisdictional status of the location.

Federal courts and magistrates always have jurisdiction when the investigation relates to a federal crime, including UCMJ offenses. This jurisdiction is based on authority over the subject matter[10], and is independent of the location to be searched or items to be seized, so long as they are within the limits of the United States, including special and maritime jurisdiction. Conversely, if the pertinent issue is not a federal matter, and the investigators are proceeding under the Assimilative Crimes Act,[11] a federal court would only have authority to authorize a search or seizure if the place in question is under exclusive or concurrent federal jurisdiction.[12]

The terms of the lease with the project owner (including the reservation of commanders' rights generally found in Condition 27 of the model lease may be relevant.[13] If so, the application for a warrant or other search authority should include an extract of the pertinent terms whenever possible. If other indicia of military control, such as military-provided law enforcement, gates, guards, and signs are present, they should likewise be supported by applicable documents (e.g., an extract from the operating agreement) or declarations.

If jurisdiction is expected to be an issue, government counsel should be prepared to prove jurisdictional status with deeds and original cession documents. To obtain these documents consult your civil engineer, and work with your MAJCOM legal office and the Air Force Real Property Agency (AFRPA), if you have questions. While a local jurisdictional map, normally will be enough to support a warrant application, supporting documentation will be necessary if there is a challenge to the map's accuracy. Commanders should understand these matters concern the Fourth Amendment's constitutional guarantee against *unreasonable* searches or seizures. Accordingly, it is important to remember that the circumstances of an individual search are just as important as the valid search authority.

Debarment Authority

Commanders have general debarment authority under 18 USC § 1382 (1994) and supporting case law.[14] In exercising their statutory right to bar, commanders are required to consider whether the area in question is sufficiently "under military control." This analysis is similar to the one required in the search authorization area, though it has developed through a different line of decisions. As reflected in typical lease terms, the intent of the contracting

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[7] Major Allison Martin, USA, *How Far Can They Go: Should Commanders Be Able to Treat Hotel Rooms Like an Extension of the Barracks for Search and Seizure Purposes?* The Army Lawyer, June 2004 at 1-19.

[8] *Id* at 18.

[9] *See Solicitation No. AFCEE-08-0001, APPENDIX M, Mandatory Tenant Lease Clauses, B* Mandatory Clauses for Active Duty Military Tenants, Installation Commander's Rights Not Impaired, *available at*: https//www.fbo.gov/index?tab=documents&tabmode=form&subtab=core&tabid=b802 e6d0d51d32a4dad96883c9c10etf.

[10] U.S. Const. art. 3, § 2.

[11] 18 U.S.C. § 13 (1996).

[12] 18 U.S.C. § 7 (2001).

[13] *See supra*, note 1.

[14] *See also*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

parties is that the commander's ability to bar, and the enforceability of existing debarment orders, will not be affected by the lease of the property. Non-parties to the lease, however, are not necessarily bound by that declaration. Furthermore, it remains a fundamental rule of law that federal jurisdiction cannot be created by contract.[15]

One leading case on the concept of "military control" is *Holdridge v. United States*[16], which dealt with the argument of debarred, religiously-motivated peace activists that the government had failed to prove its "exclusive right to possession" of a gated, fenced Air Force installation. The activists contended there was no proof that the public right to use roads traversing what later became a missile site was extinguished upon condemnation of the roads. The court noted that the condemnation documents granted fee simple absolute title to the United States, and reserved only limited ingress and egress rights for present occupants, and only for a very limited time. There were no other public rights reserved. Distinguishing other cases in which differing facts implied an easement for public usage, the Eighth Circuit held that the government had established exclusive possession. In deciding *Holdridge*, the Eighth Circuit carefully distinguished the circumstances of that case from those of *United States v. Watson*.[17] In *Watson*, the District Court held that the public still had a right to use a road that had become part of a military installation under exclusive federal jurisdiction. The public right of access arose because, without it, the inhabitants of a nearby town would be cut off from major highways and the rest of the state. The court also noted that the public had, in fact, continued to use the road in question following the government's attainment of fee title.

Under the *Watson* facts, the court held that proof of exclusive criminal jurisdiction was not sufficient to justify a finding that a violation of a debarment order amounted to a criminal trespass. There had to be absolute ownership, or exclusive right to possession of the road. Even though the U.S. Government owned the road in fee, the public still had a limited right of access, and therefore the Government lacked the exclusive right to possession. As a result, the court concluded the United States held the road subject to a public right of ingress and egress and violation of a debarment order did not constitute criminal trespass.

Take particular note whenever installation access has been given to the public.

Both *Holdridge* and *Watson* ought to be carefully considered, and government counsel should be prepared to argue two points. First, counsel should argue for a narrow interpretation of *Watson*; limited to its unique facts, where a public right of continued usage was implied by practice and circumstances that would otherwise result in a landlocked town. Second, to the extent the court is inclined to give a broader interpretation to *Watson*, counsel should argue that the government nevertheless meets the requirements set forth in *Holdridge*. The argument is that the project owner, its subtenants, and invitees are present on the land only at the invitation of, and with the express permission of, the United States. Thus, government control has been maintained, notwithstanding privatization. For the privatized housing area itself, where the project owner both owns the units and has the right to possession, this may be very difficult (perhaps impossible under a broad reading of *Watson*) to prove in practice.

Take particular note whenever installation access has been given to the public. Careful attention must be paid to the holding of the Supreme Court in *Flower v. United States* and the cases that followed. In Flower, the Court held that First Amendment rights protected leafleteers who were peacefully distributing on a publicly accessible street within an "open-post" military installation. Therefore, debarment of the leafleteers from that portion of the installation was invalid, as the right to orderly exercise First Amendment rights is a corollary of the right to be present. By contrast in *United States v. Albertini*, the Court took a different view when the defendant had initially been lawfully barred from an Air Force base on ground

[15] Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991).

[16] Holdridge v. United States 282 F.2d 302 (8th Cir. 1960).

[17] United States v. Watson, 80 F.Supp. 649 (E.D.Va. 1948).

that he had destroyed Government property.[18] The Court held that such a debarment continued to apply, even during a subsequent open house to which the general public was invited.

The debarment subject's procedural due process rights must always be considered. Even where a debarment right does exist, an installation commander must still balance the legitimate interests of the debarment subject against those of the military. For example, if a limited debarment (e.g., allowing transit only to/from quarters) can be effective, it may be advisable. The precise interplay between the commander's right to bar, and a private individual's property rights (e.g., enjoyment of a residential lease) is an unresolved question. The potential for claims of technical taking should be noted, though the limited size of the damages makes litigation unlikely. Debarment has not, thus far, been a significant issue for most privatized developments, but this could change at some point in the future.

The commander's authority to spend appropriated funds for privatized homes is very limited.

Fiscal Law Considerations

The commander's authority to spend appropriated funds for privatized homes is very limited. Judge advocates must take care that commanders avoid violations of the Anti-Deficiency Acts[19] and other fiscal statutes. The general rule[20] is that the government cannot spend appropriated funds on private assets (e.g., privatized housing developments or units). However, an exception to the rule may be appropriate when the following criteria are met:[21]

- The expenditure is incident to and essential for the effective accomplishment of an authorized purpose of the appropriation sought to be charged.
- The expenditure amount is reasonable.
- The expenditure is for the principal benefit of the government.
- The interests of the government are protected.

The *first notable exception* is appropriated funds payments for movement of household goods to or from privatized quarters. However, such use is only appropriate to the extent authorized[22] under the Joint Federal Travel Regulations (JFTR).[23]

A second exception may occur when there is a legitimate military need for something (e.g., necessary security enhancements) that is not the project owner's responsibility under the lease, but does fall within an appropriation.[24]

A third exception may occur for things that, while within the footprint of the leasehold, are for the benefit of the larger installation or the Air Force mission. For example, there may be a need for a road that, while crossing the privatized project, is intended to serve the general base population by relieving traffic congestion. In such a situation, the lease may need to be modified to allow government encroachment unless the action is otherwise justified by a retained government right under the lease. Furthermore, environmental cleanup and restoration for preexisting conditions (i.e., conditions not caused by the project owner) would normally come within this exception.[25] However, support for recycling programs normally would not, unless required by another obligation such as a preexisting settlement agreement. Thus, if a local ordinance or "tipping" contract requires recycling, this would normally be the responsibility of the project owner or its waste hauling contractor.

[18] United States v. Albertini, 472 U.S. 675 (1985).

[19] 31 USC §§ 1341(a), 1342, 1517(a).

[20] III Principles of Federal Appropriations Law 13-214, GAO-08-978SP (Sept. 2008) (Hereinafter "Red Book"), and cases cited therein. *See also*, Purpose Statute, 31 USC § 1301(a).

[21] III Red Book, *supra*, at 13-216.

[22] *See* SAF/GCA Memorandum, subject "Waiver Request for Partial Dislocation Allowance (PLDA)(Nov. 8, 2010), *available at*: http://www.afcee.af.mil/shared/media/document/AFD-080523-079.pdf.

[23] 41 CFR Chs. 300-304.

[24] *See* III Redbook, *supra*, at 13-218, and cases cited therein.

[25] 10 USC § 2701.

Opportunities to modify a privatization lease are extremely limited, and require bilateral agreement…

A fourth exception exists for utilities retained by the government, but located within a privatized housing leasehold.[26] In some instances, work to benefit a utility may fall within both this exception and the third, such as when a water tower within the privatized leasehold provides pressure and reserve capacity to parts of the base outside the privatized tract.

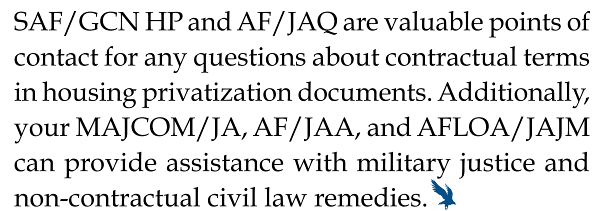
Contractual Considerations

Installation commanders cannot treat a project owner like the base housing office. Although the commander (through the Base Housing Management Office) provides day-to-day asset management, the project is owned and managed by the project owner, and monitored by the AFCEE Portfolio Manager. Administrative issues are dealt with under the Management Review Committee (MRC) rules set forth in the Operating Agreement attached to the lease with the project owner. Although the base commander (or a designee) is a member of the MRC, it is not a decision making body.

It is imperative that commanders avoid violating the project owner's contractual rights and terms under the lease. Although the project owner has rights similar to those enjoyed by a Federal Acquisition Regulation (FAR) contractor, privatization leases do not have a FAR-type "changes" clause allowing for unilateral modifications by government, including the installation commander. Violation of lease terms (such as undue command "pressure" on the project owner), renders the government vulnerable to costly claims and lawsuits—jeopardizing the project's finances and schedule. Furthermore, these violations can potentially subject the requestor to Anti-Deficiency Act liability.[27] Opportunities to modify a privatization lease are extremely limited, and require bilateral agreement (often with the concurrence of third-party financers) and approval of SAF/IEI, unless the change is very minor, and within a prior delegation of authority.

Conclusion

Housing privatization issues can be challenging, but remember you are not alone. Air Force attorneys dealing with housing privatization issues should be aware of their projects' status and documentation, which can be found online.[28] SAF/GCN HP is the point of contact for any questions about contractual terms in housing privatization documents. Additionally, your MAJCOM/JA, AFLOA/JAJM, and AF/JAA can also provide assistance with military justice and non-contractual civil law issues.[29] When a commander calls for your advice, regardless of your past experience with privatization issues, don't shoot from the hip. Take a closer look and ask for help. The issues at every base are different.



SAF/GCN HP and AF/JAQ are valuable points of contact for any questions about contractual terms in housing privatization documents. Additionally, your MAJCOM/JA, AF/JAA, and AFLOA/JAJM can provide assistance with military justice and non-contractual civil law remedies.

[26] 10 USC § 2872a (2008). Utilities within a housing privatization tract may or may not be themselves privatized at various stages of a project. The lease with the project owner should address responsibilities for provision of various utilities. Under the current statute, *supra*, the project owner must reimburse the Government for the cost of Government-furnished utilities.

[27] *See* 31 U.S.C. § 1341 *et seq* (2010) and 31 U.S.C. § 1517 (2010); Attempts to impose command-directed "changes" on the project owner have fiscal and contractual consequences similar to those for constructive changes involving Federal Acquisition Regulation (FAR) based contracts. Although the Air Force has treated its housing privatization projects as "Non-FAR real estate transactions" instead of FAR-based procurements, an authoritative ASBCA decision has held that similar leases are nevertheless contracts for the procurement of services or property. The Board found the lessee helped the Air Force meet temporary housing needs by furnishing housing on a priority basis at specified rates. Therefore, the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, applies, despite the Air Force's characterization of the lease as a real estate transaction. *Visicon, Inc.*, ASBCA No. 51706, 02-2 BCA ¶31,887 (2002). Generally, leases are considered contracts and personal property that are subject to the CDA. *Visicon, Inc., supra*, (*citing Forman v. United States*, 767 F.2d 875, 879, n.4 (Fed. Cir. 1985)).

[28] This information and documentation is available via account access on the Air Force Portfolio and Asset Control and Evaluation System (AFPACES) website *available at*: https://www.afpaces.com.

[29] *See generally*, "*The Commander and Privatized Housing*," *posted at*: http://www.afcee.af.mil/shared/media/document/AFD-080922-034.pdf, last accessed Oct. 8, 2010.

Hello Mali!

The Adventures of a First-Time AIB Legal Advisor

by Major Michael W. Safko, USAF

WITH ALL ENGINES OUT AND NO RUNWAY IN SIGHT, the Bombardier DHC-8/Q200 supporting U.S. AFRICOM missions, fell from the skies over Mali, West Africa, crash-landing in a remote field on 19 November 2009.[1] Fortunately there were no fatalities. However, all nine persons onboard suffered injuries and one passenger was hurt severely. The aircraft on lease to Air Force Special Operations Command (AFSOC) was destroyed beyond repair with a cost estimate of seven million dollars, making the incident a Class A mishap.[2] What caused the crash? Put simply, the aircraft ran out of fuel.

The Aircraft Investigation Board (AIB) I served on as a Legal Advisor (LA), convened pursuant to Air Force Instruction (AFI) 51-503, ultimately determined that the pilots failed to refuel at their last stop prior to the mishap and also failed, while airborne, to "divert to a suitable alternate airport" in time to avoid crash-landing.[3] Here is the behind-the-scenes account of my first AIB, and the amazing support I received from fellow JAGs and paralegal team members along the way.

Last year, an article in *The Reporter* discussed the extraordinarily successful work of the Aircraft Investigation Board Field Support Center (AIBFSC), noting its handling of roughly half of Air Force mishap investigations over the last few years.[4] Yet even with a thriving AIBFSC, there is still a need for judge advocates and paralegals to

[1] Executive Summary, Aircraft Accident Investigation Board Report, Class-A Mishap, Bamako, Mali, Nov. 19, 2009, http://usaf.aib.law.af.mil/DHC-8_Mali_19Nov09.pdf. For an article based on the AIB, see Bruce Rolfsen, *Spec Ops Pilots Refuse Fill-Up, Crash-land Plane*, A.F. Times, May 3, 2010, at 26.

[2] Class A mishaps are those that cause damages to government and other property in an amount of $2 million or more; involve destruction of a Department of Defense (DOD) aircraft; or result in a fatality or permanent total disability. *See* U.S. Dep't of Def., Instr. 6055.07, Accident Investigating, Reporting and Record Keeping (Oct. 3, 2009) [hereinafter DODI 6055.07]. Memorandum from the Undersecretary of Defense for Acquisition, Technology, and Logistics, subject: Revision to Cost Thresholds for Accident Severity Classification (5 Oct. 2009).

[3] Executive Summary, *supra* note 1.

[4] Kenneth G. Caldwell, *Aircraft Investigation Field Support Center*, The Reporter, Fall 2009, at 40.

prepare themselves to serve as the LA and recorder, respectively, for an AIB. Readiness in the field for these critical roles can be tested at any moment under a variety of circumstances. One possibility is there may be situations when the AIBFSC is unable to provide either JAG or paralegal support due to other commitments. More likely is where the convening authority selects someone from within the command to support a particular mishap investigation. This is what happened in my case.

JAG-Paralegal Training

A critical preparation piece for JAGs and paralegals is attendance at the Aircraft Accident Investigation Course (AAIC) held annually at the Judge Advocate General's School at Maxwell AFB, AL. Indeed, this training is a prerequisite to serving as an AIB LA in accordance with AFI 51-503, paragraph 3.3.2. Like many others before me, I dutifully attended this course in 2003 but did not get a chance to put the knowledge immediately to use. Then, in September 2009, I attended AAIC as a refresher. I had no idea that I would soon get tapped to serve as an AIB LA on a "high-interest"[5] mishap. As important as AAIC is, my experiences while serving on my first AIB made me realize there are many issues, not all of them legal, that come up during the course of accident investigations that are not covered by either formal training or the governing directives.

There are many issues, not all of them legal, that come up during the course of accident investigations that are not covered by either formal training or the governing directives.

Things Happen Fast

Within 24 hours after the crash, the AFSOC staff judge advocate informed me that the Convening Authority, AFSOC/CV, was assembling an AIB team to travel to the crash site as soon as practicable and I would be the AIB LA. The remainder of the day became a blur of making travel arrangements on the fly, contacting the other AIB member selectees, and out-processing. To my surprise, I was treated like I was deploying and required to complete several pre-deployment checklist items.[6] Not surprising, considering the destination, was the fact that I needed several immunizations—most notably, yellow fever and other preventive medications. These out-processing requirements ate up most of the time leading up to my departure. Luckily, I had the weekend to pack and to prepare my family for the fact that I would not be home for Thanksgiving dinner—but bound for West Africa instead.

Have Go-Kit, Will Travel

One of my most important pre-departure tasks was determining what professional gear I needed to bring. I grabbed the "go kit" a.k.a. "JAG in a bag" from our office, shuffled through its contents, and quickly realized it was inadequate to meet the specific requirements of an AIB LA. The basic inventory included a laptop computer, digital recorder, an inexpensive digital camera, along with a small portable printer. Coworkers from my office threw together other supplies including pens, markers, highlighters, Post-it notes, a working stapler, and paper. I was unable to obtain other useful items prior to my departure such as plug adapters (I did manage to later purchase them from a street vendor in the chaotic downtown of Bamako). Without question, the greatest deficiency in the kit was the absence of AIB-specific resources. I added the compact disc provided during AAIC, but I knew I needed more. In desperation, I sought "reach-back support" from the AIBFSC deputy who happened to be at my location, Hurlbert Field, Florida, finishing work on a different AFSOC AIB. He created a CD for me that included AIB resources, instructions, and templates; these would prove invaluable throughout the investigation. The importance of having an adequate "go kit," designed specifi-

[5] *See* U.S. Dep't of Air Force, Instr. 51-503, Aerospace Accident Investigations para. 7.5 (5 Apr. 2000) [hereinafter AFI 51-503] for a discussion of "high-interest" mishaps. Initially, this incident was not treated as a "high-interest" mishap because it did not appear to meet any of the specific criteria detailed in para. 7.5. However, once the cause of the crash became clear, it was determined the incident should be treated as a "high interest" mishap because it met the criterion of "likely to generate high public, media, or congressional interest" outlined in AFI 51-503, para. 7.5.1.

[6] One unusual requirement was taking the Automated Neuropsychological Assessment Metrics (ANAM) test to establish baseline data for comparisons should I somehow suffer traumatic brain injury (TBI) on my excursion. For a brief discussion of the test, *see* Cindy Fisher, *New Test Measures Cognitive Changes in Deploying Troops*, Stars and Stripes, Feb. 7, 2009, *available at* http://www.stripes.com/article.asp?section=104&article=60523.

cally for AIBs, available *prior* to the need arising cannot be overstated.[7]

By Monday, 23 November 2009, the AIB appointment letter was signed and a majority of the team was ready to travel. Our team included the board president (O-6 navigator); pilot member (O-4); medical member (O-3); recorder (E-7); and me. The board president, pilot member and I travelled together to Mali, while our other two teammates met up with us later at our follow-on location. Most team members had official passports; I only had a U.S. passport, which was still sufficient to enable me to travel internationally to Mali without delay. It did, however, require me to pay the visa fee for Mali, which was about $38 U.S. dollars.

The importance of having an adequate "go kit," designed specifically for AIBs, available prior to the need arising cannot be overstated.

Before being appointed as the AIB LA, I knew little about Mali, a landlocked nation almost twice the size of Texas, or its capital of Bamako, one of the fastest growing cities on the continent with a population of 1.8 million living on the Niger floodplain. Present-day Mali traces its rich cultural heritage through three ancient empires that controlled trans-Saharan trade.[8] Around 1880, Mali fell under French control, becoming part of French Sudan, and would be subject to colonial rule until finally gaining full independence in 1960. Among the world's ten poorest nations, approximately half the Malian population lives below the poverty line.

Austere Location Adventures

Traveling along with the Safety Investigation Board (SIB) team, we landed at Bamako-Sénou Airport on the night of Tuesday, 24 November 2009. Upon deplaning, I discovered that contrary to what I was accustomed to, other travelers in the cramped terminal did not share the same concept of forming an orderly line. Rather, the crowd merged ahead as if gaining general admission to a rock festival, filling spaces as quickly as they appeared. I soon realized the importance of the country specific information available on the U.S. Department of State website[9] which warned that "petty crimes, such as pick pocketing" were common in packed, urban areas. By the time we wrestled our way through the airport crowds and found ourselves standing outside in the midst of several assertive beggars, one of our team members realized his government-issued Blackberry was "missing" from his belt. Despite our immediate efforts to locate the device, it never surfaced. To be fair, it is difficult to discern whether it was lost (dislodged from his belt accidently) or stolen by a petty thief. Interestingly, this would not be our only experience of this sort.

A few days later, as we were leaving an outdoor restaurant, I noticed my government-issued digital recorder was "missing" from my backpack. We spent half an hour looking for it everywhere in the area—around our table, in the parking lot, in our vehicle. Just as we were about to give up and backtrack to our previous location, our local driver spoke to one of the restaurant employees. The employee eventually led us to a back alley where he motioned for us to wait. Suddenly, he disappeared and to my relief, came back less than a minute later with the digital recorder in hand. I promptly expressed my gratitude to the gentleman for "finding" my digital recorder. Again, we didn't know how it happened. Regardless, I considered myself lucky that the item "reappeared," especially considering I had just recorded some important interviews that would have been difficult to reconstruct.

For the duration of our stay, we were lodged in a comparatively nice hotel in Bamako. Working out of one of the hotel's conference rooms, noticeable limiting factors impeded our productivity at times. Probably the most frustrating was the intermittent

[7] The AIBFSC is probably the best resource for ideas and appropriate materials for developing the "go kit." Our AIB pilot member brought with him a useful resource, Richard H. Wood & Robert W. Sweginnis, Aircraft Accident Investigation (2d ed. 2006).

[8] Background Note: Mali, U.S. Department of State, *available at* http://www.state.gov/r/pa/ei/bgn/2828.htm.

[9] *See* U.S. Department of State, Bureau of Consular Affairs website for Mali *available at* http://travel.state.gov/travel/cis_pa_tw/cis/cis_962.html.

Internet connectivity. Valuable time was spent getting connected to the Internet to check and compose e-mail or to conduct research only to have the connection terminate, often at the most inopportune moments. Local electrical service and sporadic blackouts also remained unpredictable. In one instance, a power surge plunged the entire hotel in darkness and blew out the motherboard in my new personal computer. My laptop became an expensive paperweight until our return to the U.S.

During our first night in country, after I determined no privileged or deliberative information would be discussed, we received the basic in-brief from the Interim Safety Board (ISB) regarding facts known at that time. This mainly included information about location of the wreckage, route and method we would take the next day to reach the accident site, and information about our hotel, the local area and the safe places to eat in town.

Getting to the accident site the next morning was no easy task. Although the site was only 60 miles from Bamako, the trip would take us over three hours each way. Although the main road leading out of the cramped city center was paved and in decent condition, once we turned off in the direction of the mishap site, the roads turned to rudimentary dirt trails equipped to handle little more than the goat-drawn carriages that were prevalent in the area. Due to our difficult commute, the AIB, SIB, and some of the ISB members all convoyed out to the site at the same time. We loaded ourselves into four Toyota SUVs and began to make our way through the strange, crowded, and dusty streets of Bamako. Because there are very few traffic lights in the city, travel in and around appears utterly chaotic to the new visitor. Zigzagging cars, trucks, buses, mopeds, and bicycles aggressively merged and threw themselves into oncoming traffic. It took awhile to get used to, but this method of transportation seemed to work as I saw very few serious accidents during the time I was there.

The AIB team was seated in the second SUV roughly 15 minutes into the trip, when our driver suddenly veered away from following the "lead" SUV to take a separate route. This immediately caught our attention because we did not know what our driver's intentions were—and since he did not speak English, we could not ask him.[10] We did know, based on discussions prior to our departure, that only one of the drivers knew how to get to the accident site—and he was not our driver. Scanning our unfamiliar and unsettling surroundings, we had no idea what lay in store for us. The first thought that crossed my mind was our current predicament would make a great slide in that Force Protection online training we take every year.

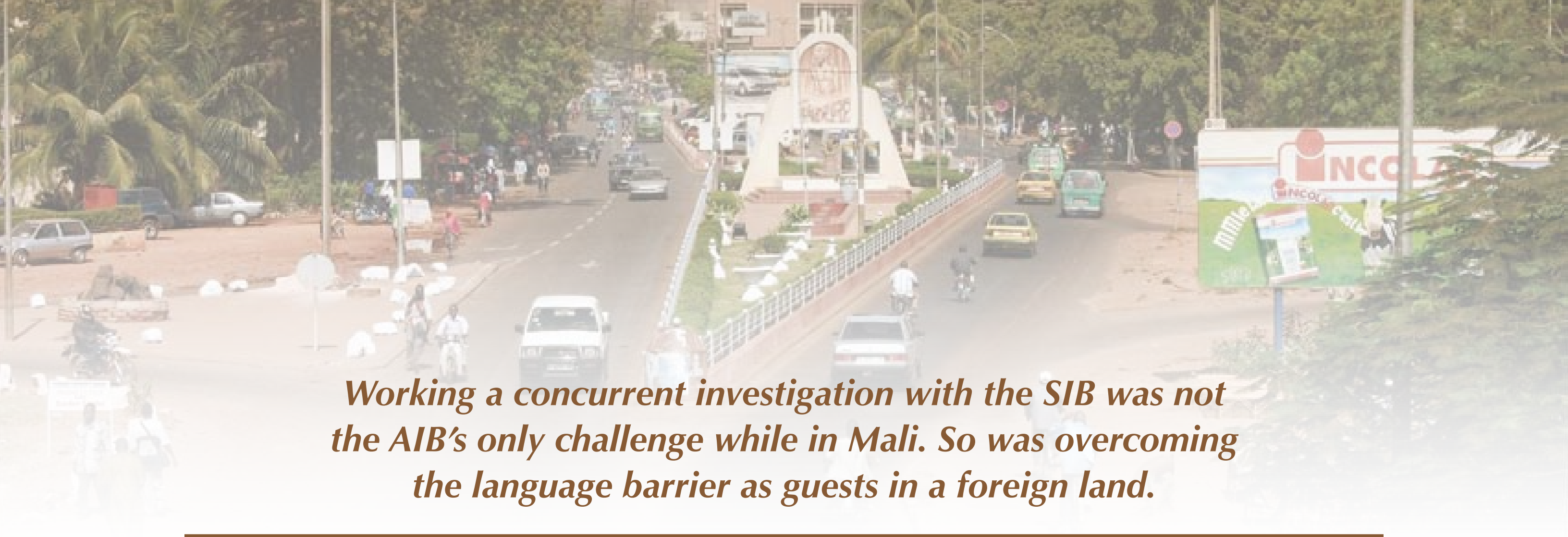
Finally, our team managed to figure out that our driver had become impatient with the traffic and thought he could take a "short cut" to avoid the traffic and still catch up with the lead convoy vehicle. By the time reality hit, making it painfully obvious that his plan had failed miserably, the drivers made contact via their cell phones and eventually all the vehicles met up on the outskirts of town. After what seemed an eternity of watching the drivers angrily curse each other out in their native language, we got on the road again. This was just the beginning of our eventful trip out to the site.

Halfway to our destination, the occupants of one SUV decided it wasn't mechanically sound enough, due to problems shifting gears, to make it any further. The vehicle was deposited with a roadside mechanic and the occupants and gear from that vehicle were evenly packed in the remaining vehicles. Coincidentally, the air conditioner then went on the fritz in our SUV, making us aware of the outside temperature rising over 90 degrees Fahrenheit. Nonetheless, as we drove along, I was fascinated with the sparse, self-contained villages dotting the rugged landscape located miles from any other civilization.

Concurrent Investigations

Eventually, our team reached the isolated crash site, which was located in the middle of a pur-

[10] Of interest, our driver was from Timbuktu, a place I had often heard referenced in conversation but never really knew its actual location.



Working a concurrent investigation with the SIB was not the AIB's only challenge while in Mali. So was overcoming the language barrier as guests in a foreign land.

ported peanut farm. However, we never laid eyes on any peanuts or any farmer. Our main challenge at the crash site was steering clear of the SIB team. Because both investigations were on the scene at the same time, I found it necessary to keep the teams completely separated to avoid the AIB members from overhearing privileged or deliberative information, including any discussion between ISB and SIB members about interviews conducted under the grant of privilege that would be impermissible in the AIB. We recognized the SIB had the lead to work in areas they believed necessary. Our team investigated places away from those locations until the SIB vacated them.

A similar balancing act with the SIB was a major theme throughout the early stages of our inquiry and beyond. Consistent with their mandates, the SIB and AIB were in Mali to conduct concurrent investigations to the maximum extent appropriate. Unfortunately, this type arrangement can lend itself to an AIB being on location without access to relevant information, especially if the SIB is unable or unwilling to give access to evidence and/or release witnesses. As a result, lulls or periods of low productivity can develop. We discussed these issues with the SIB early on and formed a workable, albeit less than perfect plan to maximize the AIB's productivity as much as possible. Using an accountability method, the SIB graciously permitted the AIB to retrieve evidence for review during the early stages of our concurrent investigation.

Additionally, with the notable exception of the mishap aircrew, the SIB quickly released witnesses to the AIB once its interviews were complete. As an example of this in practice involved interviews with a qualified DHC-8/Q200 aircrew (not from the mishap). The SIB boarded the aircraft, interviewed the two pilots individually, departed the aircraft and immediately released them to the AIB. The AIB, in turn, boarded the aircraft and conducted its own interviews. Despite the great working relationship, the AIB was frustrated at times with some of the methodologies the SIB undertook, such as extending the confidentiality privilege to every single witness it interviewed, which is not consistent with established guidance.[11]

Working a concurrent investigation with the SIB was not the AIB's only challenge while in Mali. So was overcoming the language barrier as guests in a foreign land. We conducted an interview with a Mali Civil Aviation member through an interpreter, who then produced a summarized version of the witness' testimony for his signature. Moreover, much of the key documentary evidence we poured through was in French, the official language in Mali.[12] This included, of all things, the transcripts from the Air Traffic Control tower. Because none of the AIB members understood French, we used interpreters at various points in our investigation to help us understand the content of some documents.

Another troubling issue from the early phases of the investigation had to do with whether the most severely injured passenger on the mishap

[11] *See* U.S. Dep't of Air Force, Instr. 91-204, Safety Investigations and Reports para. 3.4.4. (Sept. 24, 2008). "Promises of confidentiality will only be given as needed to ensure forthright cooperation of the witness and may not be given on a blanket basis to all witnesses."

[12] Bureau of Consular Affairs, *supra* note 9.

aircraft suffered from a "serious personal injury" as used in paragraph 7.5.1 of AFI 51-503. If so, then the mishap would have been considered a "high interest" mishap.[13] The problem was that "serious personal injury" was not defined in the instruction.[14] To gain a better understanding, we went to the Department of Defense Instruction (DODI) to see that Class A mishaps include those involving "permanent total disability."[15] Thus, "serious personal injury" would include injuries that result in permanent total disability.[16] Our medical team member reviewed this guidance and matched it up against the injuries suffered. The determination was that, although the passenger was severely injured, he did not have a serious personal injury, as it is used in the AFI.

Handling the Wreckage

The complexities in handling the aircraft wreckage came as one of the biggest surprises to me. This quickly became an issue for the AIB to manage. Shortly after the site visit, the SIB transferred custody of the aircraft wreckage, in writing, to the AIB board president.[17] Due to the limited information the AIB had at the time, the board president decided it was best to maintain custody of the wreckage until later in our investigation. Paragraph 10.5 of AFI 51-503 requires the AIB to transfer the wreckage, when it is no longer needed for the investigation, to the "host installation commander or designee." The host installation commander for this purpose was the Commander, 27th Special Operations Wing (27 SOW) and there was no designee selected.

Obviously, it did not make sense to transfer custody of the wreckage to anyone else at that time. Yet the wreckage could not remain at its current location. Despite the field being isolated, and the surrounding area being sparsely populated, local inhabitants were aware of the crash and managed to travel to the site out of curiosity to view the wreckage. Many onlookers were young children. This posed a huge safety concern for our team.

DHC-8/Q200 Wreckage

Generally, a mishap involving the removal and storage of wreckage of a military aircraft is a relatively straightforward matter. However, the DHC-8/Q200 was a nonstandard aircraft on lease to AFSOC in support of AFRICOM missions. Consequently, it was also insured. Several entities—including the military, the owner, and the insurer—all had competing interests in the custody and disposition of the wreckage. This created a number of questions: who was responsible for moving the wreckage? Who would pay for the move and subsequent storage costs? And moreover, what location should it be moved to? These were not easy issues to muddle through. A complicating factor was that the AIB did not have access to the contract to determine what issues, if any, it covered along these lines. In the meantime, there was a continuing need for the aircraft wreckage to be secured at the crash site.

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13 AFI 51-503, para. 7.5. This label impacts things like release of information, timelines on review, distribution of the report and required briefings by the AIB.

14 This was true for the version of AFI 51-503 in effect at the time of this AIB. A new version of AFI 51-503, dated May 26, 2010, is now in effect.

15 DODI 6055.07, E2.1.3.1, *supra* note 2.

16 Permanent total disability is defined as "Any nonfatal injury or occupational illness that, in the opinion of competent medical authority, permanently and totally incapacitates a person to the extent that he or she cannot follow any gainful occupation . . ." DODI 6055.07, E7.1.2.2.

17 AFI 51-503, para. 10.5, *supra* note 5.

Three things were crucial to providing me with the tools to adjust accordingly: my AAIC training, the reach back capability to the AIBFSC and, most importantly, a partnership with a proven paralegal.

The AIB team was in the best position to handle matters involved with the wreckage due to our proximity to it. Although there was a U.S. military presence on-scene when we conducted our site visit, replacement forces were later brought in to provide security until removal efforts commenced, supplemented by Mali army personnel. Due to our presence in-country, we briefed the incoming members on force protection and rules of engagement.

In this particular case, the insurer took responsibility for moving the aircraft to another secure location and paid for the storage. Even with that, it was necessary to be mindful of the need to avoid alteration of the main aircraft components and ensure control and access over the wreckage remained due to the military's continuing legal hold on the aircraft in accordance with paragraph 10.7 of AFI 51-503.

These complex coordination efforts were time consuming for the AIB board president and, to a limited extent, detracted from his main responsibility to investigate the cause of the accident. Our time in Mali culminated with the AIB president briefing the U.S. Ambassador in country prior to departure. The AIB interaction on this diplomatic front would continue long after we left Bamako.

The Power of the Paralegal

The contributions of our AIB recorder, MSgt Jay Watson, to our overall success cannot be overstated. For starters, his experience in five prior AIBs was a great comfort to me. There were many times when issues would come up that were not covered in either AAIC or the AFI. My mantra to MSgt Watson became, "have you seen this before and, if so, how was it handled."

From Mali, our investigation continued on to Stuttgart, Germany. MSgt Watson's initiative in obtaining a rental vehicle, making billeting arrangements, and organizing office space and computer support enabled our team to immediately "hit the ground running" at this new location.

Aside from the technical expertise he brought to the AIB team, MSgt Watson worked many other issues behind the scenes to assist our efforts. For instance, he coordinated long-distance transcription assistance from a total of five different court-reporters.[18] He also helped research the "serious personal injury" issue. MSgt Watson even utilized FLITE's People Finder to locate JAGC French speakers for much needed translation services.

Returning Home

After Mali and Germany, our investigation continued on to other CONUS locations including Cannon Air Force Base, New Mexico, and Denver, Colorado, before heading back to Hurlburt Field, Florida. Yet my time spent in Africa was, by far, the most interesting. Although I could not anticipate many of the odd issues, both legal and non-legal, that came up, three things were crucial to providing me with the tools to adjust accordingly: my AAIC training, the reach back capability to the AIBFSC and, most importantly, a partnership with a proven paralegal. Looking back, I feel extremely fortunate that my first AIB experience involved such a challenging investigation of a seemingly unfathomable mishap in a far-flung foreign land—Mali.

[18] Due to the holiday season, it was necessary to utilize the services of multiple court-reporters, including three enlisted court-reporters.

by Captain Seth W. Dilworth and Captain Paul A. Stempel, USAF

黑客 (Hacker)

As the Air Force takes on an expanding role in deterring and defending against foreign cyber threats, judge advocates find themselves increasingly responsible for providing cyber law expertise.

CHINESE HACKERS TARGET American systems like clockwork. As General Keith B. Alexander testified during his Senate confirmation hearing as the first leader of U.S. Cyber Command, our top government institutions—including the White House and Pentagon—are probed hundreds of thousands of times daily.[1] In 2006, Chinese hackers extracted an estimated 20 terabytes of data from government computers.[2] Private companies also are not immune from attacks. Earlier this year, Google moved from China to Hong Kong after tracing threatening cyber activity,[3] which affected at least 20 other U.S. corporations, to servers in China.[4] As the Air Force takes on an expanding role in deterring and defending against foreign cyber threats, judge advocates find themselves increasingly responsible for providing cyber law expertise.

Understanding the Issues

To address this growing need, The Judge Advocate General's School recently launched its first cyberlaw course. The three-day curriculum included lectures on computer and network basics, cyber operations law, and current threats in cyber warfare. Air Force JAGs can now earn cyberlaw LLM's. *The Air Force Law Review* likewise tackled the issue by publishing a master edition on a range of cutting edge cyber law issues.[5]

To provide context to the rapidly expanding field of cyber law, it is helpful to look more closely at the cultural environments in which hackers operate. Chinese hackers and cybercriminals operate in an unique cultural and legal milieu. Understanding what might be called the "Chinese hacker culture" puts the threat in context and adds clarity to the myriad of thorny legal issues confronted in cyberspace.

Current Events

In recent years, American cyber attack victims have included an illustrious group: the U.S. State Department (2005), the Pentagon's NIPRNET (2006), the US Naval War College (2006), a nuclear weapons laboratory at Oak Ridge National Lab in Tennessee (2007), the White House (2008), and NASA (2008).[6] In one instance, hackers linked to China reportedly acquired information on NATO troop movements in Afghanistan; in another, the Joint Strike Fighter program was reportedly compromised.[7]

[1] *See* Evengy Morozov, *Battling the Cyber Warmongers*, Wall Street Journal, May 8, 2010, *available at* http://online.wsj.com/article/ SB10001424052748704370704575228653351323986.html?mod=WSJ_latestheadlines. *See also*, Advance Questions for Lieutenant General Keith B. Alexander, USA Nominee for Commander, United States Cyber Command: Hearing Before the Senate Armed Services Committee, 111th Cong. (2010), *available at* http://armed services.senate.gov/statemnt/2010/ 04%20April/Alexander%2004-15-10.pdf.

[2] Fictional stories of hackers exfiltrating US government data have also found their way into Chinese fiction books and online fiction sites.

[3] The term "cyber activities," rather than "cyber attacks," avoids the unsettled legal question of whether certain harmful cyber activities rise to the level of "attacks" under the law of armed conflict and other international legal authority. For discussion of the applicability of terms like "attack" and "activities" in the cyber domain, see Todd Huntley, *Controlling the Use of Force in Cyberspace: the Application of the Law of Armed Conflict During a Time of fundamental Change in the Nature of Warfare*, 60 Nav. L. Rev. 1 (2010).

[4] Searches using the Google China search engine, Google.cn, are now routed to the Google Hong Kong webpage, Google.hk. Google cites Chinese censorship as a primary reason for the change. *See* Google's official blog at http://googleblog.blogspot.com/2010/03/new-approach-to-china-update.html.

[5] *See* the 2009 Cyberlaw Edition of the A.F. L. Rev.

[6] For a thorough timeline of cyber events, *see* US-China Economic and Security Review Commission, *Capability of the People's Republic of China to Conduct Cyber Warfare and Computer Network Exploitation*, Oct. 9, 2009, 67-74, *available at* http://www.uscc.gov/researchpapers/2009/ NorthropGrumman_PRC_Cyber_Paper_FINAL_Approved%20Report_16Oct2009.pdf.

[7] Jack Goldsmith, *Defend America, One Laptop at a Time*, N.Y. Times, July 1, 2009, *available at* http:// www.nytimes.com/2009/07/02/opinion/02goldsmith.html?_r=1&scp=2&sq=joint%20strike%20fighter%20HACKER%20CHINA&st=cse.

While individual hackers can and do pose a threat to U.S. security, recent reports suggest substantial organization within the Chinese hacker community. Last year, researchers discovered a cyber espionage network called Ghostnet, which was targeting computers in the foreign ministries and embassies of many Asian countries, as well as news media and non-governmental organizations. A virus linked to Ghostnet infected at least 1,295 computers in 103 countries. The same virus gave temporary control of the infected computers to Ghostnet hackers with accounts in Hainan, China.[8]

More recently, researchers uncovered a cyber espionage network that compromised systems primarily based in India.[9] This network, originating in Chengdu, China, acquired information from the Indian government, the United Nations, and the office of the Dalai Lama, including access to his personal e-mail. Perhaps the most striking security compromise gave hackers information from the Indian government regarding NATO troop movements in Afghanistan. These security breaches reflect the global impact of such attacks.

One issue presenting a challenge is attribution: when, if ever, can the victim of a cyber attack attribute responsibility to the host government of the hacker?

The rapid increase in cyber threats present judge advocates with numerous novel legal issues, such as the definition of a cyber "weapon" and whether harmful cyber activities constitute "attacks" under the law of armed conflict.[10] Likewise, traditional JAG work in communications law, intelligence oversight, and information security law has been complicated by related cyber issues. One issue presenting a challenge is attribution: when, if ever, can the victim of a cyber attack attribute responsibility to the host government of the hacker?

Attribution

In 2008, the U.S.-China Economic and Security Review Commission held a hearing on Chinese cyber threats, bringing together experts from throughout the national security community. The Commission's report from the event concluded that "determining the origin of cyber operations, and attributing them to the Chinese government or any other operator, is difficult. Computer network operations provide a high degree of plausible deniability" to the Chinese government.[11] To the extent that uncertainty obscures questions of attribution in the cyber world, how are legal advisors to proceed?

Under international law, a state can be held responsible for the actions of a non-state actor if it can "effectively control" the non-state actor.[12] Officers with the People's Liberation Army Academy of Military Sciences elaborated on this point in 2007, explaining to an American delegation that attribution of hackers to the Chinese government would require that "the source… be clearly identified."[13]

In the *The Air Force Law Review*, Major Arie J. Schaap argued that a more appropriate attribution rule in the cyber realm would allow for attribution where a state merely acquiesces to cyber attacks on foreign targets, despite having the means to prohibit and prevent such activity.[14] So conceived, if the Chinese government were to take a purely permissive stance on hacking, and if it demonstrated the capacity to prevent hacking originating within its sovereign territory, the argument might be made that the Chinese government could be held responsible for hacking originating in China. However, as discussed below, China has at least presented itself as neither purely permissive nor capable of preventing hacking.

[8] Munk Centre for International Studies, University of Toronto, Tracking GhostNet (2009).

[9] Munk School of Global Affairs, University of Toronto, Shadows in the Cloud (2010).

[10] *See* Huntley, *supra* note 3.

[11] US-China Economic and Security Review Commission, "China's Proliferation Practices, and the Development of its Cyber and Space Warfare Capabilities," May 2008 at vi, *available at* http://www.uscc.gov/hearings/2008hearings/transcripts/08_05_20_trans/08_05_20_trans.pdf.

[12] Major Arie J. Schaap, *USAF Cyber Warfare Operations: Development and Use Under International Law*, A.F L. Rev 64 (2009).

[13] *China's Approach to Cyber Operations: Implications for the United States: Hearing before the House Committee on Foreign Affairs*, 111th Cong. (2010) (statement of Larry M. Wortzel, Commissioner, US-China Economic and Security Review Commission), *available at* http://www.internationalrelations.house.gov/111/wor031010.pdf.

[14] Schapp, A.F. L. Rev. 64 (2009), at 146.

Steps to criminalize hacking and publicize the prosecution of high-profile hackers creates at least a colorable argument that the Chinese government does not seek to permit hacking by non-governmental Internet users. Furthermore, reported attacks by Chinese hackers on Chinese business interests, many of which are closely connected to local government and party officials, suggests an inability to prevent some forms of non-governmental hacking.

It is perhaps too easy to argue that non-governmental hacking by private Chinese citizens cannot easily be attributed to the state, or that hacking by the People's Liberation Army can be attributed to the state. A more concrete and vexing attribution problem arises when one looks more closely at the gray area between state and non-state in China's sprawling military industrial complex. As part of its drive to modernize the PLA, the Chinese government has sought in recent years to draw on resources found in the civilian population. In 2003, for example, the Sixteenth Party Congress announced the policy of *yujun yumin*, or locating military potential in civilian capabilities.[15] As a result, determining where the Chinese government ends and the civilian sector begins is an increasingly imprecise undertaking.[16]

Chinese universities are a case in point. Recently, researchers affiliated with major Chinese universities have published a number of articles on cyber security, including several examining vulnerabilities in U.S. infrastructure. One article, entitled "Cascade-Based Attack on the U.S. Power Grid," looks at how an attacker might cause power grid failures in the United States.[17] Another article, "Research of Attack Taxonomy Based on Network Attack Platform," introduced a network attack platform capable of launching virus, Trojan Horse, and other cyber attacks.[18]

The status of personnel at universities is likewise a complicating factor. The Information Security Engineering Institute at the Shanghai Jiaotong University (SJU) is currently headed by Mr. Peng Dequan, former Director of the Science and Technology Commission of the Ministry of State Security, one of China's principal foreign intelligence services.[19] Though the revolving door between the academic and military communities is by no means unique to China, it does demonstrate the difficulties one would have clearly identifying the source of Chinese cyber capabilities. Mr. Peng's position as head of SJU drives this point home, given that the recent hacker attacks on Google were traced to computers at SJU.[20]

If the university system and military industrial complex were not complicated enough, perhaps the best example of the difficulties of accurate attribution in China is the eight million member militia spread throughout the country, which researchers call "an operational nexus" between Chinese military operations and civilian information security professionals.[21] Directly accountable to the State Council and Central Military Commission, militia units are comprised of civilians from commercial firms in fields critical to national defense, including software design and telecommunications.[22] Local militia units in Ningxia, Henan, and Guangdong provinces have published online material describing unit missions, which include network, information, electronic, and psychological warfare.[23] These militia units have sought out individuals with foreign languages and cultural skills, suggesting a mission not limited to territorial China.[24]

Attribution of Chinese cyber attacks likely will become increasingly difficult for US officials. As we have seen, there are no clear lines distinguish-

[15] James Mulvenon and Rebecca Samm Tyroler-Cooper, "China's Defense Industry on the Path to Reform" (citing Fortifying China: The Struggle to Build a Modern Defense Economy (Ithaca: Cornell University Press, 2009), at 9), U.S.-China Economic and Security Review Commission, Oct. 2009, at 5.

[16] This blurring of lines between military and non-military is consistent with longstanding Chinese military strategy, with its emphasis on unorthodox, asymmetrical warfare. Ralph D. Sawyer, *The Tao of Deception: Unorthodox Warfare in Historic and Modern China* (2007), 97-134. Exploiting enemy weakness to overcome relative deficits in strength has been central to Chinese military planning as far back as the early Han dynasty, and was central to Mao Zedong's theory of guerilla warfare. *Unrestricted Warfare*, a book published in 1999 by the People's Liberation Army, applies this longstanding approach to modern informational and cyber warfare, suggesting that blurred lines are by design.

[17] Larry M. Wortzel, *supra* at 5 and 10.

[18] *Id.*

[19] *Id.* at 48.

[20] David Barboza, *Hacking Inquiry Puts China's Elite in New Light*, N.Y. Times, Feb. 21, 2010, *available at* http://www.nytimes.com/2010/02/22/technology/22cyber.html.

[21] Larry M. Wortzel, *supra* at 33.

[22] *Id.* at 33, 35.

[23] *Id.*

[24] *Id.* at 35.

ing military from non-military actors in China. While this blurry line plays a role in how hackers operate, cultural factors also influence the world of the Chinese hackers.

Chinese Hacker Culture

Hacker War, a novel published online in 2008 by a number of Chinese e-publishing websites, offers a window into the often inaccessible world of Chinese hacking. The protagonist, Chen Yonghao, hears the call to arms after the accidental NATO bombing of the Chinese embassy in Belgrade, Yugoslavia. Rather than taking up traditional weapons, however, Chen organizes a group of citizen hackers through an Internet chat room — and the Chinese Hackers Union is born. The Union then launches a series of patriotic cyber attacks against those believed to be most responsible for the bombing: the United States government. The White House website is hit first. Chen hacks in and defaces the website, causing the site to be shut down as repairs are made. News of the hack quickly spreads, earning Chen and the Union respect and fame throughout the Chinese Internet community.

In China, hackers have remarkably easy access to information guiding their activities.

Scores of books similarly lionizing patriotic Chinese hackers have been published online in recent years, one indication that hackers increasingly enjoy an esteemed position in modern Chinese Internet culture. Hacker novels with names like *Hacker Legend* and *I Am A Hacker* are commonplace, putting Chinese netizens a click away from a fictional tour through the computer systems of the Pentagon, White House, and other popular U.S. targets. Perhaps recognizing the emergence of the hacker hero phenomenon, the Chinese government has recently ramped up efforts to reframe the issue and brand hackers as mere criminals. Recent headlines – including those in publications closely monitored by the Chinese government – tell of prominent hackers brought to justice by an increasingly tech-savvy Public Security Bureau.[25] But for all the efforts of the Chinese government, hacking continues to be a growth industry in China, and its reach is global.

A culture of underground hackers feeds off easy access to and continual encouragement from websites and hacker fiction. In China, hackers have remarkably easy access to information guiding their activities. Four major search engines in China, Baidu, Google China, Google US, and Yahoo!-China, all produce links to hacker websites with a simple search of "黑客," the most common Chinese term for "hacker."[26] These hacker websites include discussion forums where hackers compare accomplishments and describe how to hack certain networks. With easy access to such information, new hackers can learn how and what to hack and receive encouragement for doing so.

Online novels are a wildly popular phenomenon in China and a major growth industry.[27] At times earning $10 per thousand characters typed, online authors of hacker fiction can be expected to keep pumping out their product, and legends of heroic hackers storming the distant walls of American network infrastructure will proliferate.

Chinese Law

While China is not a member of the European Union Convention on Cybercrime, new laws passed in 2009 by the Chinese People's Congress do appear to reflect an effort by China to adopt the core principles of the Convention.[28] The Convention requires that member states criminalize certain forms of cyber activity, including unlawful access, interfering with data or systems, unlawful interception, and computer fraud or forgery.[29]

[25] *See* Xinhua Net, *China detains two hackers for stealing deposits at ROK banks*, Aug. 7, 2009, *available at* http://news.xinhuanet.com/english/2009-08/07/content_11843475.htm.

[26] These search engines each have a Chinese website. Even before Google's withdraw from China, Baidu had the country's largest market share. See David Barboza, *Baidu's Gain from Departure Could Be China's Loss*, N.Y. Times, Jan. 13, 2010, *available at* http://www.nytimes.com/2010/01/14/technology/companies/14baidu.html.

[27] Aventurina King, *The Chinese Novel Finds New Life*, WIRED, Aug. 17, 2007, *available at* http:// www.wired.com/techbiz/media/news/2007/08/online_novels?currentPage=all.

[28] This may be an effort by China to ensure that it cannot be accused of "harboring hackers" under international law; the new laws do a good job of insulating China from attribution for hack attacks by private Chinese citizens. The analogy between hacking and terrorism is a prime area for further exploration. As far back as 2002, the People's Daily, a media mouthpiece for the Chinese Communist Party, described hacking as "web terrorism." US-China Economic and Security Review Commission, *supra* at 38.

[29] Lt Col Graham H. Todd, *Armed Attack in Cyberspace: Deterring Asymmetric Warfare With An Asymmetric Definition*, A.F. L. Rev 82 (2009).

Two new Chinese laws criminalize illegal acquisition of computer system data or control of computer systems and prohibit supplying programs or tools for the purpose of illegal control of computer systems.[30] Conceivably, the new law prohibiting the supply tools for the purpose of intrusion into computer systems could be the tool used to shut down many of the easily accessible chat forums and hacker fiction websites that provide instructions on how to hack systems of foreign governments. There is some anecdotal evidence that the Chinese government could be in the early stages of a crackdown on certain types of unlawful cyber activity;[31] the Chinese government, for its part, claims to have "nabbed" just over 1,000 hackers under the new criminal laws, though such reports are difficult to verify.[32]

China's well known restrictions on free expression likewise permit the government to restrict hacker websites and literature. Under Article 225 of China's Criminal Law, Chinese publishers are prohibited from publishing materials without first acquiring a license through the General Administration on Press and Publication (GAPP).[33]

In addition to licensing restrictions, GAPP works with the Central Propaganda Department to regulate the content of publications. The Regulation on the Administration of Publishing (2001) empowers officials to punish authors and publishers for a number of infractions, including the vague prohibition on published material that "harms national security or national interests."[34] A web search conducted from China for the Tiananmen Square Massacre produces a webpage with an error. Other taboo topics include the Dalai Lama, political independence of Taiwan, and ethnic conflict in Muslim regions of China. The Chinese government censors this material in the name of national security and national interest. However, hacker websites and hacker fiction that glorifies cyber attacks of the U.S. government remain largely unfiltered.

Chinese law enforcement has used this regulation to crack down on Internet books with unapproved content in the past, such as the 2007 sting resulting in the removal of over 300 online books featuring pornographic content.[35] Together, China's cybercrime and publishing laws equip law enforcement with strong tools to address hacking and other cyber threats. While the Chinese government possesses the legal tools to do so, it does so infrequently. One could argue that the smothering censorship applied to certain subject matter—such as the Dalai Lama or Taiwanese independence—and the relatively limited restrictions on hacker Internet discussion forums, websites, and even e-books, implies a tacit endorsement of Chinese hacker activities.

These uncertainties raise strategic questions of the first order: does China "harbor" hackers? Should the language of the War on Terror be applied in a future War on Cyber Terror? How could China demonstrate to U.S. satisfaction that it does not "harbor" hackers? Would an international organization tasked with cyber inspections—akin to the current nuclear watchdog regime—help resolve these issues?

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[30] Yan Jie, *New Laws Close in on Hackers*, China Daily, Feb. 2, 2010, *available at* http://www.chinadaily.com.cn/ bizchina/2010-02/02/content_9411956.htm.

[31] Tania Branigan, *China closes training website for hackers*, The Guardian, Feb. 8, 2010, *available at* http://www.guardian.co.uk/world/2010/feb/08/china-closes-hacking-website.

[32] *See* Jie *supra,* note 30.

[33] Article 225 of Criminal Law of the People's Republic of China, *available at* http://www.cecc.gov/pages/ newLaws/criminalLawENG.php. *See also* Regulations on Publication Administration available at http://english.gov.cn/laws/2005-08/23/content_25588.htm.

[34] Congressional-Executive Commission on China, Annual Report (2010), at 57 (citing Regulations on the Administration of Publishing [Chuban guanli tiaoli], issued 25 December 01, effective 1 February 02, art. 15), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_house_committee_prints&docid=f:61507.pdf.

[35] Agence France-Presse, *China punishes nearly 350 porn websites*, Aug.14, 2007, *available at* http:// newsinfo.inquirer.net/breakingnews/infotech/view/20070814-82553/China_punishes_nearly_350_porn_websites.

The beginning of an answer may lie in what is known as the United States-China Joint Liaison Group (Liaison Group). Having evolved over the decade-plus since President Bill Clinton met with Chinese leaderships to establish stronger bilateral relations, the Liaison Group today serves as a primary vehicle by which the United States and China coordinate bilateral law enforcement operations on issues like transnational crime and intellectual property infringement. Headed by the U.S. Department of State and the Chinese Foreign Ministry, the Liaison Group has helped the two sides resolve a number of cases, including an anti-intellectual piracy operation over $500 million.[36]

The Liaison Group could help resolve one type of attribution problem in particular: where the United States has been cyber-attacked and China wants to avoid responsibility (e.g., war). Through the Liaison Group, China can help the United States verify that, though the attacks originated in China, they were done by rogue elements or otherwise non-state citizen hackers. The Chinese side of the Liaison Group could get the Public Security Bureau to arrest the hacker and hand him over to the FBI, thereby verifying that no "armed attack" justifying American retaliation had occurred. Whether it takes the form of the Liaison Group or some other vehicle of coordination, the United States and China would do well to take quick steps to institutionalize a joint fight on cyber threats, thereby reducing the types of uncertainties and suspicions that have been the prelude to conflict throughout history.

Conclusion

Hacking is now popular sport in China. The hacker hero is alive and well in Chinese popular culture and fiction. How the emergence of a Chinese hacker culture will influence the frequency and severity of Chinese hacker attacks remains to be seen. At the very least, Chinese hackers have an increasingly rich library of hacker fiction from which to plot their next attacks. Recent cyber attacks worldwide reflect a need to understand where these attacks originate. As we continue to develop technology, organization, and skills necessary to combat cyber threats, it is ironic that we rely ultimately on the Chinese philosopher Sun Tzu, who counseled in *The Art of War* to "know your enemy."[37] Doing so will better enable the Air Force to win the fight in cyberspace.

[36] Jason Weinstein, *Department of Justice, Statement before the United States House of Representatives*, Dec. 9, 2009, at 7, *available at* http://www.justice.gov/criminal/cybercrime/11-09-09_DAAG-WEINSTEIN-TESTIMONY.pdf.

[37] Sun-Tzu, The Art of War.

Living in the Gray

Legal Facts And Fictions of Contingency Construction Contracting and Project Splitting in the Combat Zone

by Major Teresa G. Love, USAF

Judge Advocates are taught from day one the importance of "getting to yes." Nobody wants to be the fly in the ointment of accomplishing the mission, especially in the combat zone. However, in the area of fiscal law, we are in many ways constrained by the plethora of statutory, regulatory, and policy guidance placed on the military by Congress and the Executive branch. Consequently, JAGs must also understand that the Constitutional system of checks and balances plays a more pronounced role in fiscal law than perhaps any other area of our practice.[1]

Divining Congressional Intent

Congress holds the "power of the purse" under Article I, section 9, of the Constitution, which states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Just how tight are the purse strings? And how much oversight and control does Congress actually exercise in the combat zone? "Loose constructionists" in the combined joint operating area (CJOA) will argue that Congress simply does not have time to concern itself with the minutiae of war execution. They strongly believe the military is given a pot of money and a pat on the back by Congress to go forward and do great things. And since the underlying fiscal regulations were not written with contingency operations in mind, they may take them with a grain of salt (or sand).

In contrast, others are paralyzed with fear of endorsing a document within which future auditors may find a fiscal violation, no matter how miniscule. With the specter of the Anti-Deficiency Act looming large, they will only be satisfied once after they have obtained an advanced decision from Congress shedding more light on a contentious, murky area of the law.

So, what is the right answer? The truth is somewhere between both extremes. The task for the fiscal lawyer is to find the place in the gray that not only meets the letter of the law, but also follows the spirit and intent of Congress. In recent years, Congress has uncovered multiple instances of freewheeling fiscal behavior that exceeded its intent. In many cases, Congress' answer has been to discipline the military—sometimes including the outright removal of obligating authority. Accordingly, "What would Congress do?" is not a bad motto to have posted by one's computer.

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[1] Major Brian A. Hughes, "Uses and Abuses of O&M Funded Construction: Never Build on a Foundation of Sand," Army Law. 2 (Aug. 2005).

Fast Times Under the Reres Doctrine

In the early 2000s, after hearing the pleas for relief from the fiscal constraints placed on the military, an Army Deputy General Counsel attempted to forge a bold new "doctrine." Taking an extremely liberal view of how much discretion Congress has given the military to use its allotted Operations and Maintenance (O&M) dollars, Mr. Reres devised a policy[2] that the Department of Defense (DOD) ended up adopting wholesale—a decision with lasting consequences.

The "Reres doctrine" had its genesis in a legal brief by a deployed staff judge advocate who opined that because a construction project in the contingency area of the Middle East was so vastly different from building barracks in garrison, O&M funds and their corresponding Unspecified Minor Military Construction (UMMC) thresholds simply could not have been the source that Congress intended for the military to use. After all, how can we build airstrips and helipads and housing for the troops under such dire conditions?

This legal opinion spread like wildfire and created its own precedent. First, the Army Corps of Engineers embraced it and, eventually, the Army as a whole. However, as appealing and practical as this doctrine seemed to those in theater, it had no fiscal legitimacy. "Bunkers, anti-tank revetments, and helipads all fall within the statutory definition of 'military construction,' and the notion of an operational exception to the statutory framework was simply manufactured out of whole cloth."[3]

But sensing the utility of this new way of thinking, the Department fully embraced the Reres doctrine.[4] By doing so, DOD, as an agent of the Executive branch, promulgated its own authority, snatching the power of the purse from the Legislative branch. Ultimately, this contrived exception was the primary mechanism through which the military built much of the infrastructure required to prosecute OPERATION IRAQI FREEDOM. Army engineers constructed "dozens of base camps and Logistical Support Areas (LSAs), hundreds of helipads, C-130 airstrips, and unmanned aerial vehicle landing strips, and improved hundreds of kilometers of roads and pipelines."[5]

However, only months after the DOD formally adopted these liberal practices that had been in effect for years, Congress drove a stake through the heart of the Reres doctrine,. Determining that it was losing its Constitutional oversight, Congress issued its legal objections to DOD's position:

> To circumvent [the statutorily-mandated MILCON process], DOD created a class of construction activities for which it deemed operation and maintenance funds could be expended. Effectively, without benefit of legal authority or regulation, the statutory definition of "military construction" was obviated for certain types of construction projects…. DOD asserts that if Congress opposed the practice, then Congress would amend the law. The conferees disagree with this pronouncement, which effectively obviates the law and turns an alleged practice into de facto law. Even more troubling to the conferees is the lack of information and/or notification to Congress about this practice despite repeated requests.[6]

Now the fiscal lawyer, when making tough calls, frequently fields the frustrated client's question: "We've been here for X number of years and we're just now finding out we can't do this? *How did they do it in Iraq? How did they do it in Afghanistan*?" The answer starts by understanding that much of the past construction and infrastructure was built on the quicksand foundation of the Reres doctrine.[7]

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[2] Memorandum from the Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep't of Army, to Assistant Secretary (Financial Management & Comptroller), subject: Construction of Contingency Facility Requirements (22 Feb. 2000).

[3] Hughes at 11.

[4] Memorandum from the Under Secretary of Defense, (Comptroller), subject: Availability of Operation and Maintenance Appropriations for Construction (27 Feb. 2003).

[5] Hughes at 12, citing Colonel Gregg F. Martin & Captain David E. Johnson, *Victory Sappers, V Corps Engineers in Operation Iraqi Freedom, Part I: The Attack to Baghdad and Beyond*…, ENG'R, July-Sept. 2003, at 5, *available at* http://findarticles.com/p/articles/mi_m0FDF/is_33/ai_110805494/?tag=content;col1.

[6] H.R. REP. NO. 108-76 (2003).

[7] FY 2003 Emergency Supplemental, Pub. L. No. 108-11, § 1901(d), 117 Stat. 559, 587 (2003). Pub. L. No. 108-136, § 2808(c)(1), 117 Stat. 1392, 1723 (2003).

The Limits of CCA

Under 10 U.S.C. 2804, Contingency Construction Authority (CCA) is an authorization for the Secretary of Defense to use O&M funds for projects that would otherwise require MILCON funding. Congress clearly placed limits on this authority by requiring SecDef to make a determination that deferral of a project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security or national interest. The Act requires the Secretary to submit a report in writing to Congress justifying the rationale for a project. In 2008, Congress began requiring DOD to notify it seven days prior to beginning a CCA project.[8] The development of this chronology evidences the Legislative branch's strong desire to know how the DOD is spending appropriations in contingency areas.

These examples demonstrate the type of oversight that Congress wants to assert on the Executive branch. It is the role of the fiscal lawyer to ensure that the intent of Congress has a permanent place at the table of analysis. In Afghanistan today, the United States is in need of increasing amounts of infrastructure to support its presence. More and more construction is on the horizon. It is imperative to figure out, in the absence of a liberal Reres-type doctrine, what the military can and cannot fund legally. Right now, the strict reading of statutory and regulatory authority shows there are serious constraints on what to build and how we will be able to build in the future.

Life, Health, and Safety Waivers

Congress allows the DOD to use O&M funds up to $1.5 million when the military can show that there is a deficiency in a facility that poses an "imminent threat to life, health, or safety." Through time, commanders on the ground have stretched the definition as far as possible to maximize funding. The statute itself does not provide much guidance.[9] If the DOD needs a construction project that exceeds $750,000, it is supposed to plan for the project in advance and program it into the MILCON budget, or seek CCA funding for the project if it is truly urgent in nature. DOD can only use the $1.5 million UMMC threshold in the rare case of when there is a narrowly-defined "deficiency" that threatens life, health, or safety (LHS). Fixing faulty wiring or an unstable foundation would clearly pass this test. But installing additional anti-terrorism/force protection (ATFP) measures to facilities may not.

Perhaps no area of fiscal law in the CJOA today is more contentious than project splitting.

In July 2004, the Senate expressed "great concern and skepticism over the Department's use of life, health, and safety as a justification for many un-programmed minor construction projects," including correcting ATFP issues, such as adding protection from mortar and rocket attacks.[10] In response, the Senate Appropriations Committee issued new guidance that the LHS exception is "intended solely for urgent projects whose sudden emergence could not have been anticipated and which pose so immediate a threat to the life, safety, or health of personnel that their correction cannot wait until the next appropriation cycle. The exception is not intended as a catch-all provision."

Additionally, the Senate also noted that while DOD had been justifying its use of the LHS waiver based on the need to correct ATFP "deficiencies," its rationale was inadequate. Rather, DOD should have been able to foresee the need for such facilities and program them, either through MILCON or through CCA.[11]

Project Splitting

Perhaps no area of fiscal law in the CJOA today is more contentious than project splitting. There is no dispute it is illegal. But just what project

[8] FY 2008 National Defense Authorization Act, Pub. L. No. 110-181, § 2801, 122 Stat. 20 (2008).

[9] *See* 10 U.S.C. 2805 (c)(1). Except as provided in paragraphs (2) and (3), the Secretary concerned may spend from appropriations available for operation and maintenance amounts necessary to carry out an unspecified minor military construction project costing not more than—

(A) $ 1,500,000, in the case of an unspecified minor military construction project intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening; or

(B) $ 750,000, in the case of any other unspecified minor military construction project.

[10] Summary of Committee markups on the FY05 Military Construction Act, http://www.hqda.army.mil/rio/priorsum/2005appmsum.htm (July 15, 2004).

[11] *Id*.

splitting actually consists of, however, is much more debatable. Project splitting is defined as dividing a project up into increments in order to get those increments (and, hence, the entire amount to be constructed) under the UMMC threshold of $750,000 (or $1.5 million, if a LHS waiver is in place). In other words, the planned acquisition of, or improvement to, a *real property facility* through a series of minor incremental construction projects is prohibited.[12]

What is a Real Property Facility?

Congress has defined "facility" as "a building, structure, or other improvement to real property."[13] Service regulations further define the term. The Army defines a real property facility as a building, utility system, or land, or structures such as airfield pavements, roads, firing ranges, and athletic fields.[14] Army Regulation (AR) 420-1, *Army Facilities Management*, defines "facility" as including "any interest in land, structure, or complex of structures together with any associated road and utility improvements necessary to support the functions of an Army activity or mission."

By adding the term "complex of structures" to the notion of a single structure or building, the Army created the notion of a "project" consisting of not one building, but a series of buildings. The term "complex of structures" adds another element to the picture. It helps to define what the scope of a project should consist of. And, a project's scope—how a project is defined—is critical to the determination of whether it can be split up. As such, the fiscal lawyer must determine what components of our "complex of structures" are required in order to support the "functions of the mission."

Indeed, when determining what the *scope* of a project is, one must consider what it would take for the project to be "complete and usable." The DOD Financial Management Regulation states that "a military construction project includes all construction efforts, or any contribution authorized by law, necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility or improvement as specifically authorized by law."[15] AR 420-1, paragraph 3-43c, cautions: "Projects will be developed to show the full scope of work without circumventing the prescribed approval levels."

Building a Base

As the CJOA's need for construction project increases, JAGs are under intense pressure to find ways to fund projects without the crutch of a Reres-type doctrine. There is extreme temptation to "find a way" for funding. One way of doing so, endorsed by some "creative" (and no doubt, well-meaning) attorneys, is to take the series of structures needed to accomplish a mission and split them up into individual "complete and usable" facilities.

Suppose the Air Force needs to bed down approximately 1,000 Airmen at an austere location–currently consisting only of dirt. The typical plan is to build a variety of support structures: wooden B-huts or metal relocatable buildings, a dining facility (DFAC), containerized latrines, shower, and shave units, HESCO sand barriers for force protection, guard towers, and secure entry control points to the location. Additionally, we will need to provide a helicopter landing zone, and a place to park convoy vehicles. The base needs to be properly secured, with an adequate communication infrastructure.

[12] DOD FMR, Vol 3, Chap 17, Accounting Requirements for Military Construction Projects, para. 170102.L.9.

[13] 10 U.S.C. § 2801(c)(1).

[14] U.S. Dep't of Army, Pam. 415-28, *Guide to Real Property Army Category Codes*, para. 1-5d (2006) [hereinafter DA, Pam. 415-28].

[15] U.S. Dep't of Def, FMR, Vol 3, Chap 17, Accounting Requirements for Military Construction Projects, para. 170102.L.2 (1996) [hereinafter DOD FMR, Vol 3, Chap 17].

Issues will arise: do we need to install a power grid or just run the location on generators? Should we store our potable water in bladders, or construct wells with reverse osmosis water purification units (ROWPU). Do we need office buildings, ranging from simple B-hut structures to more advanced tactical operations centers? What type of sewage system do we need to get rid of our waste and gray water?

Complete and Usable

Ultimately, what determines whether a project is complete and usable? In our hypothetical, all of the above-listed structures (except perhaps the Morale-Welfare-Recreation (MWR) structure) are required in order to make a "complete and usable" facility (in this case, the forward operating location is the series of structures that constitute the facility). While it is not imperative for a soldier to have a DFAC in which to eat, our scoped "made-to-order" forward operating base (FOB) contains a DFAC. In other words, hot meals are considered standard fare for today's soldier. As such, including a DFAC is critical for the FOB to be complete and usable. Though it may be standard fare for a FOB to have an MWR facility and a gym, for the sake of being as "austere," yet as realistic, as possible, we can exclude MWR facilities, as the FOB can reasonably operate and be "complete" without them.

Funding

The typical FOB is going to cost in the neighborhood of ten million dollars. That cost is obviously well above the UMMC threshold of $750,000 (or $1.5 million in the case of an LHS waiver). Suppose the unit will be arriving in a matter of two to three months, and commanders tell you there is not enough time to wait on money to become available. MILCON money is out of the picture—it would have been pre-planned and requested far in advance. What can we do to get the job done?

One option would be to request CCA funds from higher headquarters. We can use CCA funds—and in fact, *must use* CCA funds for minor construction projects that exceed $750,000. We request these funds through Army headquarters, which in turn requests them of the combatant command, which holds the moneys. The DOD must notify Congress seven days prior to beginning the project.[16]

Furthermore, we have to certify to Congress that: (1) The construction is necessary to meet urgent operational requirements of a temporary nature involving the use of Armed Forces in support of a contingency operation; (2) The construction will not be carried out at an installation where the United States is reasonably expected to have a long term presence; (3) The United States has no intention of using the construction after the operational requirements have been satisfied; and (4) The level of construction is the minimum necessary to meet temporary operational requirements.[17]

However, recent Army-level guidance relied on a liberal reading of regulations. Instead of taking the full amount of the FOB as the cost of the project in need of funding, the Army divided up the FOB into individual projects. To do this, the Army conducted the "interdependent-interrelated" analysis found in Army Regulation 420-1, *Army Facilities Management*, which stated: "Interdependent projects must be combined into one project for approval purposes. Interrelated projects may be approved individually." Under this rationale, you look to see what buildings you need—e.g., a gym and a DFAC—and determine that the gym can be used completely separately from the DFAC. Therefore, the gym and the DFAC are merely interrelated, not interdependent (dependent on each other for each to be deemed to be complete and usable).

But the problem with the interdependent-interrelated analysis is that from the start of the project we define our "need" (requirement) as the forward operating base itself, not a DFAC at an austere location, an electric grid at an austere location, and an office building at an austere location. The project is the entire FOB. To divide our need into individual parts because we want to be able to fund it through UMMC is nothing short of project

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[16] FY 2008 National Defense Authorization Act, Pub. L. No. 110-181, § 2801, 122 Stat. 20 (2008).

[17] Military Construction Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417 § 2808(a); 112 Stat. 4724 (2009).

splitting.[18] DA Pam 420-11, *Project Definition and Work Classification*, para. 1-7.n.(5), states:

> The following may constitute a statutory violation and is prohibited. (a) Planned acquisition or improvement of real property facilities through a series of minor construction projects. (b) The subdivision of a construction project to reduce costs to a level that meets a statutory limitation or the splitting or incrementing of the costs of a project to reduce costs below an approval threshold….

When a complete base is required for the mission to be fully functional, the entire complex of structures should be characterized as one "project." The General Accounting Office (now Government Accountability Office) has confirmed this view. Their cases have pointed out that the construction of a single "complete and usable facility" may involve the construction of several interrelated buildings, structures, or other improvements to real property. The key factor in these cases is that a single building, structure, or other improvement could not satisfy the need that justified carrying out the construction project.[19] The *Donley* case discusses another GAO decision where a complex of structures built for the purpose of one mission should have been characterized as a single project.

> …in B-159451, Sep. 3, 1969, we stated that the construction and renovation of a number of separate facilities at the Grand Hotel in Nha Trang, Vietnam, constituted a single project to produce a complete and usable Field Force I headquarters. Thus, when multiple interrelated buildings, structures, or other improvements are being constructed to meet a need for a single "complete and usable" facility, they typically will constitute one construction project.

Commanders, as advised by their legal counsel, must use good judgment consistent with the definition of a minor construction project.[20] Clearly interrelated[21] facilities constructed during the same time frame at one location should not be considered separate projects.[22] In *Bill Alexander*, the engineer had classified "clearly interrelated" facilities in the Honduras as separate projects. These projects included facilities such as airfields, site preparation, cantonment areas, water pipelines, terrain reinforcement, roads, water wells, a command bunker, showers, a vehicle wash rack, a dining facility, electrical distribution system, a helipad, a hospital, a post exchange, and a sewer line. The GAO was not pleased that the military split up its known requirement into numerous separate projects. The opinion found that splitting these projects up as the military did was inappropriate, as the individual structures were "interrelated" (interdependent, using Army terminology) and should have been considered as one facility. Although GAO opinions are advisory only—and therefore not binding precedent—following them is critical to getting as close as possible to Congress' intent.

Relocatable Buildings

Another contentious issue is that of the purchase and construction of relocatable buildings (RLBs). RLBs are containerized units, frequently called "containerized housing units," or CHUs, in the Iraq theater. An 8 February 2008 memorandum from the Office of the Assistant Secretary of the Army for Installations and Environment (OASA) defines RLBs as:

> …An arrangement of components and systems designed to be transported over public roads with a minimum of assembly upon arrival and a minimum of disassembly for relocation. A relocatable building is designed to be moved and reassembled without major damage to floor, roof, walls, or other significant structural modification.[23]

[18] If a DFAC were being constructed at a previously existing FOB, it can more easily be considered to be "merely interrelated" to another facility. Because infrastructure already exists at the FOB, our "need" is not for an entire FOB, but for an individual building. Timing is essential.

[19] *The Hon. Michael B. Donley*, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991).

[20] *The Hon. Bill Alexander, House of Representatives*, B-213137, Jan. 30, 1986 (unpub); B-213137, June 22, 1984, 63 Comp. Gen. 422.

[21] The GAO uses the term "interrelated" here as the Army would today use the term "interdependent."

[22] *Id*.

[23] Memorandum from the Office of the Assistant Secretary of the Army: Installations and

Since our presence in Afghanistan is deemed to be "temporary," we do not want to construct facilities that appear permanent. This creates a significant challenge in housing servicemembers. Ironically, brick and mortar material is a much less expensive medium to use in building facilities in Afghanistan than is wood (the opposite of what we would typically observe in CONUS). But it seems that this fact has not been conveyed to Congress. As a result, we spend an inordinate amount of money on wooden "B-huts" to house troops and offices – facilities that have a life expectancy and safe usage of only three years, when we could be using brick and mortar. Brick and mortar is a significantly less expensive material in Afghanistan, given that wood must be trucked in from locations that have trees, while material used to make concrete masonry facilities is intrinsic to Afghanistan. On this issue, an Air Force civil engineer wrote:

> The larger problem is that the temporary nature of these structures may send the wrong message to our coalition partners, as well as our enemies, about our commitment to win. One could argue that an American force that builds structures like Southwest Asia (SWA) huts is not committed to fight a long counterinsurgency or commit to a national support effort. Beyond the question of appearances, there are many other valid reasons to build structures that endure.[24]

The use of local materials could resolve issues of availability, suitability, pest control, fire protection and protection from indirect fire, while also addressing economic stimulus through procurement of materials and labor, and the issue of eventual transition of facilities to the host nation.[25] The problem is, under the Sand Book standard (CENTCOM Reg 415-1), brick and mortar construction is not permitted in the CJOA. Exceptions have been granted on a minimal basis. When there is an enduring population, brick and mortar construction can be used. But those populations are few and far between due to our desire to have a minimal footprint in the CJOA.

U.S. Navy Seabees direct a crane while moving a relocatable building in Kandahar, Afghanistan

Most of the time, an RLB arrives in theater prebuilt. It comes complete with four walls, a ceiling and a floor, along with a heating/air conditioning (HVAC) unit. Indeed, it is a "system" in and of itself. RLBs are designed to be moved around as needed, like building blocks or a Rubik's cube. The engineers stack them up and make what appears to be dormitories out of them—however, woe to the person who calls them a dormitory. The reason why we avoid using those terms—albeit semantics—is that the more these stacked structures (the individual RLB systems) look like buildings or dormitories, the less likely it is that they will pass the sniff test of being a much larger —and much more expensive—"system."

The most enticing thing about using RLBs as the solution to the problem is that, assuming the construction portion of the project (the foundation) does not exceed twenty percent of the overall cost of acquiring the RLBs, we can classify the RLB containers as "personal property."[26] Consequently, these items do not "count" toward the overall UMMC threshold for purposes of the overall construction project. Hence, the military is able to tie a bunch of RLBs together into a multi-million dollar project and only be subject to the $750,000 threshold as to the construction portion of the project. This seems to solve the problem. However,

Environment, Subject: Delegation of Authority—Relocatable Buildings (Feb. 8, 2008) [hereinafter OASA Memorandum].

[24] Lt Col Joseph D. Tyron, "*Theater Construction Management System: Time to Raise the Standards*," Eng'r, Jan-Mar 2008, pg 51.

[25] *Id*.

[26] U.S. Dep't of Army, REG. 420-1, *Army Facilities Management*, para. 6-14b. (1) (2009) [hereinafter AR420-1].

On more than one occasion, a JAG is likely to hear words to the effect of, "If they really wanted it to be read the other way, they should have been more clear."

turning back to the issue of "system," we have another analysis we have to conduct.

What is a System?

The DFAS manual states that a system is a "combination of components/items which work together to perform a function or to satisfy an approved requirement."[27] The investment-expense threshold determines what we are allowed to fund when it comes to systems. According to the Defense Finance and Accounting Service, though we do not have to attribute the cost of "movable" equipment such as RLBs to the overall cost of a project, we do have to determine whether we are, in effect, creating a "system."

The position taken thus far is that, while one individual RLB constitutes a "system," stacking RLBs on top of one another to make what appears to be a dormitory does not make the final product a system in and of itself. The rationale is that each RLB individually can still function on its own – there is no centralized HVAC unit, and the electricity, though wired on one continuous wiring system, *could* be individually wired to each building if needed (it is done the way it is out of "mere convenience"). Never mind that there is a common stairwell, a common walkway, an economy of scale electrical wiring, and, in the newer RLB structures, a common latrine at the end of each hall. Never mind that the individual RLB depends on the RLB unit below it for its foundation.[28]

Nonetheless, JAGs are told to get the job done. Since we are unable to build brick and mortar facilities due to their appearance of permanency, and since wooden B-huts are poorly ventilated, cold in the winter, and a fire hazard, in addition to being more expensive than RLBs, we redefine the meaning of "system." The OASA memorandum states:

> Relocatable buildings that are classified properly as personal property will be purchased with Operation and Maintenance, Army (OMA) funds or Other Procurement, Army (OPA) funds depending on the Expense-Investment Threshold contained in law for capital equipment purchase (current threshold is $250,000 for OMA purchases). The determination of system cost for this purpose will be based on the cost of the completely assembled building and not on the separate components.[29]

This definition gives the fiscal lawyer serious angst. After all, what is the "completely assembled building"? What are the "separate components"? The resulting push is for lawyers to find that the "completely assembled building" consists of the four walls, ceiling, floor, HVAC and window of the individual RLB. The "separate components" are the walls, ceiling and floor, etc. The end result (the final structure), then, is not the "completely assembled building" and the "components" are not the individual RLBs, stairwells or hallways.

This is one way to read the memorandum. But is it the right way? It would seem that the intent of the Secretary of the Army's designee might very well be otherwise. Should we read the letter in this more liberal way? If we read it differently, we would not be able to construct the RLB structures the way that we have been, because each one, as a large "system," will exceed the $500,000 investment/expense threshold. As it stands, the direction given, is to read the guidance liberally, despite what one may believe the author's intent is. On more than one occasion, a JAG is likely to

[27] DFAS-IN Manual 37-100-08, Appendix A, Expense/Investment Criteria, Encl. 1, para. F.1., Aug. 2010.

[28] It is interesting to note that, when RLBs have been built to constitute a three story structure, the Army Corps of Engineers has been forced to decide whether to comply with real property safety codes, such as installation of fire escapes and sprinkler systems. If these items are added to the structure, it is likely that the construction portion of the RLB project would exceed 20 percent of the cost of the project, which would classify the RLBs themselves as "real property," sending the funded cost of the project skyrocketing. Additionally, the more "connected" the individual RLBs become (with common sprinkler systems and fire escapes), the more likely it is that the entire structure that they compose *should* be considered as a system.

[29] *See* OASA Memorandum , *supra* note 23.

hear words to the effect of, "If they really wanted it to be read the other way, they should have been more clear." This is an unfortunate dilemma that tests the fiscal lawyer's integrity.

A second issue regarding RLBs is the fiction surrounding the permanency of the RLB requirement. Army Regulation 420-1, *Army Facilities Management*, paragraph 6-14, Personal Property Relocatable Buildings, states that the general policy behind RLBs is that they are "to fulfill a short-term, urgent requirement due to transitory peak military missions, deployments, military contingency operations, disaster relief requirements, or pending approval and construction of real property facilities via normal military construction programs." Furthermore, the short term requirement must have an approved exit plan to dispose of the building(s). The OASA memorandum adds:

> Relocatable buildings purchased under this authority will be for temporary operational requirements to support contingency operations. Relocatable buildings will not be used to meet a permanent requirement.[30]

The requirement for an "exit plan" brings great consternation to the engineers and judge advocates in theater. Apparently, because the requirement for these RLBs is "short-term" and "urgent," we must use them and have a plan to get rid of them. Indeed, part of the definition of the RLB is that it is to be used for not more than six years. RLBs may be used beyond six years only with approval from OASA.[31] Additionally, the OASA memorandum states that this authority may be used to meet short-term requirements, normally three years or less, but no more than six years for facilities "due to peak military missions, deployments, military contingency operations, or disaster relief requirements."[32]

We know that AR 420-1 applies to our situation because it is specific to deployments and military contingency operations. We also know that RLBs can only be used for six years before we must dismantle them, and have an exit plan to go along with it. However, just when we believe we have a way ahead on using RLBs, we discover the following sentence in an ARCENT memorandum delegating the authority to approve RLBs: "Approved relocatable buildings in contingency areas may be used for [the] duration of the operation."[33]

What is a fiscal lawyer to do? To comply with the spirit of the regulation, we must go ahead with an "exit plan" that essentially states that the structure will be dismantled at the six-year point. But this seems disingenuous, as the engineers know that, at that point (if anyone is even auditing the buildings for the purpose of enforcing the requirement six years after the structure is built), they will simply ask for an extension. Additionally, given the confusing sentence in the policy letter stating that the buildings may be used for the duration of the operation, frustrated clients may ask the fiscal lawyer why they need to do an exit plan at all!

The Fog of Fiscal Law

To many, the law governing contingency construction contracting in the combat zone seems vague, confusing, and contradictory. Accountability can be equally muddled. Differing interpretations of the law may appear both overly restrictive and stretched beyond all reason. But what is clear as that you will be working side by side with those in need of critical projects. They will be relying on you to figure out a way to get the job done. Under sometimes intense pressure and ever-increasing complexity, today's JAGs must square what the operational commanders want with Congressional intent—trying to make the right calls while living in the gray.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

Putting the Horse Before the Cart

THE ACADEMIC NEEDS ASSESSMENT AS A BLUEPRINT FOR JAG TRAINING

by Mr. Tom G. Becker, Academic Director, The Judge Advocate General's School

What does the JAG Corps' traditional method for determining its attorneys' training needs and priorities have in common with a Mickey Rooney-Judy Garland musical? If you know these movies, you know that whenever Judy and Mickey were faced with a hard problem, they decided on the spot, "let's put on a show!" and, son-of-a-gun, that's what happened. They quickly got the gang back together and pulled off the impossible each and every time through a combination of scrappy ingenuity, raw talent and undeniable enthusiasm. But there was no script in place until they were already on stage and no forethought or rationale beyond reacting to the challenges immediately in front of them.

Aside from breaking into spontaneous songs, the JAG Corps has set its attorney training needs pretty much the same way, sparked either by informal consensus or in rapid response to something bad that happened in the field. That's not to say a "let's put on a show" attitude and approach doesn't work miracles in a pinch. But there has been no actual needs assessment of what skills we need to train to JAG Corps members, beyond a general belief that our training has been useful. And there is a big difference between training to what we want and training for what we need.

Determining the Training We Need

Compare that to how JAG Corps paralegals have determined their training needs and priorities. Like all Air Force enlisted career fields, our paralegals have a formal process called the Utilization and Training Workshop, or U&TW. The U&TW exists because enlisted career progression and promotion competition are directly tied to training. Hence, the paralegal career field needs the U&TW to make sure they are training on the right things.

While JAGs don't test for promotion, a formal training needs assessment is no less important and long overdue. As one judge advocate attending a recent Horizons event said, "JAGs have always done what they're trained to do; it should be the other way around." In other words, the horse needs to pull the cart—JAGs should be trained on the skills they need for their jobs. This means we have to find out what those ever-evolving skills are and the knowledge needed to achieve

While JAGs don't test for promotion, a formal training needs assessment is no less important and long overdue.

them before we decide what to train. How do we do that? This brings us to our current project, the Academic Needs Assessment (ANA). The particular type of needs assessment we're conducting is a Knowledge and Skills Assessment (KSA).

How the ANA and KSA Came To Be

This ANA came about from a recommendation of the JAG School Advisory Group at its last meeting in April 2010. TJAG accepted the recommendation and directed the ANA on 4 May 2010. The JAG School, in consultation with the TJAG Action Group (TAG), developed a proposal, which TJAG approved. The approved proposal provides for a KSA—the simplest type of needs assessment and the one best suited for training programs—using methods set out in *A Practical Guide to Needs Assessment* (*2nd Edition*), by Kavita Gupta, Catherine M. Sleezer, and Darlene F. Russ-Eft.

The KSA uses three methods of data collection—the focus group, a survey, and interviews of selected persons. The multiple data collection methods are a hedge against inadvertent bias and overreliance on just one kind of information. The participants in each method will be different for the same reason. The goal of each method is the same: a prioritized list of skills needed by judge advocates at each general career stage—entry level, mid-career, and senior.

After we're done with data collection, we'll analyze what we have to identify any gaps in skills and knowledge that may be addressed by JAGC training solutions. Those last eight words are an important qualifier. If an identified deficiency is something that can't be trained, so be it. Or if the deficiency can be addressed by a training solution, but is outside of JAGC expertise, that's something we'll have to talk about with another provider. But if the gap is amenable to a training solution from the Corps, we'll make recommendations on how to fill it.

The Way Ahead

Our final deliverable will be a report to the JAG School Advisory Group at its next meeting in Spring 2011. We anticipate the Advisory Group will incorporate the results in its annual recommendations to TJAG.

In partnership with the TAG, we completed the first piece of the ANA-KSA at Keystone 2010 with a focus group of 28 judge advocates and paralegals. We have their products but we're keeping them closely held as we don't want to inadvertently influence the other data collection methods. As I write this, we're planning the survey. Watch this space for our future progress!

Thanks to all the JAGs and paralegals that have participated so far and those who will help complete this important project. Our goal is to create a clear blueprint that ensures our training programs are building the right mix of skill-sets our members need in a complex and constantly changing operational environment. Working together we can jettison Mickey and Judy as our training consultants, and put the horse and cart together in the right order.

Changing Your Mindset

Understanding Enlisted Performance Reports and Enlisted Promotion Boards

by Chief Master Sergeant Steven L. Wallace, USAF

Have you ever taken the time to think about who will read the Enlisted Performance Report (EPR) you are about to write? I mean actually read it—pull it out, look it over and critically evaluate the content and context of your words. What do you think about as you craft each bullet? Do you consciously put yourself in the mind of future readers and think about how they will (or will not) interpret your words?

I'm here to tell you—most raters don't put themselves in the mind of the reader. How do I know? In January of this year I sat on the Senior Master Sergeant Promotion Board. Over a period of three weeks, I read and scored more than 800 promotion records from six career fields consisting of more than 8,000 EPRs and a similar number of decoration citations. Let's just say, I've done some EPR and decoration reading in my time and I'm convinced most raters never think beyond the EPR in front of them.

It's not that raters aren't well intentioned, they're just misguided. Why? The raters (including many of you) write EPRs for a JAG Corps audience. But enlisted promotion boards are comprised of members from different career fields and historically those career fields have not included paralegals. As far as anyone can tell, I was the first JAGC board member in more than 20 years.

To write meaningful, effective EPRs you must change your mindset. The only way to do that is to gain a full understanding of the link between EPRs, Enlisted Promotion Boards and the Senior Noncommissioned Officer's (SNCO) Promotion Record.

Anatomy of an EPR

EPRs have two fundamental components: *ratings* and *words*. Have you ever considered who those components are for? *Ratings* are intended to give visual feedback to the ratee on areas where they are performing well, as well as areas where they need to improve. But what about the *words*? We don't write bullets to say, "You need to work on improving your writing skills." That would duplicate the purpose of the ratings. Instead, we document, in *words*, the ratee's past accomplishments for others to read. But, who are these other readers?

Let's take a staff sergeant paralegal as an example. You write his EPR. After you discuss the *ratings* with him, do you discuss the *words*? Do you read each bullet to the staff sergeant before he signs the EPR? Of course not. The only group of people that will read and critically evaluate the *words* you write today are future Enlisted Promotion Boards. Other individuals may read the EPR, but they will not be tasked to evaluate the EPR. That's a critical distinction.

Anatomy of an Enlisted Promotion Board

Enlisted Promotion Boards are made up of three members: two chief master sergeants and one colonel. The enlisted members of the board are chosen based on the number of master sergeants eligible for promotion in each career field. For instance: If a board is going to evaluate records

from six career fields, the two career fields with the most master sergeants eligible for promotion will be tasked to provide a Chief to serve as a board member. That's how our Corps "earned" a seat on this year's board—out of the six career fields we had the second highest number of eligibles. That won't always be the case. Enlisted Promotion Board composition changes constantly as career fields grow, shrink, or merge. To be safe, write EPRs that can be read and interpreted by a board member from any career field.

Board members score each record separately, without discussion, by giving it a numerical value between 6 and 10. That number is then multiplied by a factor of 15 to determine the final board score. As an example:

Member 1: 8.5 x 15 = 127.5
Member 2: 8 x 15 = 120
Member 3: 7.5 x 15 = 112.5
Board Score = 127.5 + 120 + 112.5 = 360

Members never discuss the records unless there's a split in scores of more than one point. In the above example, if Member 3 scored the record as a "7" instead of a "7.5", it would have created a split between Members 1 and 3. At that point, all three members would discuss the record to resolve the split.

This highlights a very important point: most records will never be discussed during the board, thereby leaving non-JA board members on their own to interpret your words! I know what you're thinking—this is all good info, but I don't rate master sergeants, I only rate staff sergeants and tech sergeants. Keep reading.

Anatomy of a SNCO's Promotion Record

The SNCO's Promotion Record consists of three parts:

1. **EPRs**—A copy of every EPR closed out within the last 10 years. That could mean 10 EPRs—it could mean 15 or more.

2. **Awards and Decorations**—A copy of every decoration and award received throughout the SNCO's entire career (hint: since the record contains all decorations but only EPRs from the last 10 years, consider putting significant accomplishments of junior Airmen [BTZ, Levitow Award, ALS Distinguished Graduate, etc.] in their PCS decoration citation. That way, the accomplishment will make it in front of future Enlisted Promotion Boards whereas the same info contained only in an EPR, may not).

3. **SNCO Evaluation Brief**—This is a one-page document containing personal information to include: date of rank, off-duty education, Community College of the Air Force (CCAF) and Senior Noncommissioned Officer Academy (SNCOA) correspondence completion. CCAF and SNCOA are commonly referred to as the two "squares" a SNCO must fill to be competitive. Additionally, there must be a list providing every duty title (and location) held over the last 10 years.

Board members will read the brief, thumb through the decoration citations (reading some, skimming others) and finish by thumbing through the EPRs (again reading some, skimming others). Once done, the member will close the record and write down a score. It's that simple; there is no checklist. If there are no split scores, the members will not discuss the record. A board member might spend 10 minutes looking at a record, they might spend 30 seconds. Since EPR bullets make up the "meat" of the record, deliberate thought should go into writing them for board members to digest quickly; without having to pause to decipher words, acronyms and phrases.

Connecting the EPR, Enlisted Promotion Board and the SNCO Promotion Record

Now that you've got an overview of each primary piece of the process, putting them together should reveal the most overlooked, obvious fact about a promotion record (revealed with some simple math). Here's what I mean: Each record contains every EPR closed out within the previous 10

years. That means each record will contain 10, or more, EPRs. The first time a SNCO record goes before a promotion board, the record will contain, on average, two master sergeant EPRs. So (here comes the math part): 10 total EPRs minus two master sergeant EPRs = 8 EPRs. Those eight EPRs represent 80% of a SNCO's first promotion record. To put it to you as succinctly as possible: 80% of the EPRs evaluated by an Enlisted Promotion Board to determine if a master sergeant is ready to become a senior master sergeant will be the JNCO EPRs you are writing today! Do you see why you need to change your mindset now?

Once a master sergeant becomes eligible for promotion to senior master sergeant, 80% of their record has already been written—you can't go back to change it. Of course, the percentage will go down each year but it will be several years before SNCO EPRs make up the majority of a SNCO promotion record. If you take nothing else from this article, remember this—promotion to senior master sergeant starts at staff sergeant, not master sergeant. Before closing, let me give you two additional tips on writing effective EPRs.

Instead of regurgitating metrics, try crafting bullets that focus on how the ratee impacted the mission—timely discipline for commanders.

First, don't use JA-specific acronyms, no matter how common they are to us. Let me give you the #1 example: "TJAG." We all know (and love) "TJAG." Saying it, and writing it, is as normal to us as "CTK" is to a crew chief. (Don't know what that means—that's my point). Consider a future board member, perhaps a CMSgt from FM, with minimum JA interaction. Will he, while reading 10 (or more) EPRs, instinctively understand what "TJAG" means? Will he take the time to decipher it? Let's look at it another way. Is "TJAG" really needed to provide context in an EPR bullet? Normally, when we put "TJAG" in an EPR, it's to denote a high level of recognition received by the ratee (i.e. "coined by TJAG"). Wouldn't a more commonly *recognized* non-career field specific phrase more clearly express the true level of recognition? Why not just write, "coined by JA 3-star?" What chief or colonel in the Air Force wouldn't immediately understand the level of recognition received? Board members have a lot of info to digest in a short amount of time so eliminate words and acronyms that don't transcend career fields.

Second, our metrics are not valued outside of the JAG Corps. Similarly I doubt many of us can properly evaluate, understand, and (most importantly) attach a value to metrics from the flight line. For instance, a crew chief EPR may contain a bullet saying he contributed to the unit's 90% aircraft MC rate. What does that say to you as an external reader? Before you answer, put yourself in the shoes of an Enlisted Promotion Board member—you have 500 other crew chief records to look at, they are all filled with "firewall 5s" and they all contain a variation of that exact same bullet. Within that context, what does that metric tell you about that ratee? Now compare that scenario with a non-JA board member reading a bullet about Article 15 processing times. What are you really telling them? Instead of regurgitating metrics, try crafting bullets that focus on how the ratee impacted the mission—timely discipline for commanders. That's what will resonate with board members, not metrics they don't understand or value. Focus on the mission and your ratee's impact, not the metric.

Closing

I hope this article has given you a better understanding of EPRs, Enlisted Promotion Boards and SNCO Promotion Records. When I brief on this subject I routinely exceed my allotted time because there are always lots of questions. That's understandable; there are lots of nuances to these processes. But the nuances can be mitigated by taking a practical approach. If you really want to ensure your subordinates are competitive for promotion now and in the future, you must make a conscious effort to change your mindset. To do that, simply think about the *words* you choose and the people who will *evaluate* them.

PACIFIC ALAMO:

THE BATTLE FOR WAKE ISLAND

by John Wukovits (New American Library 2003)

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

In the dark days following the December 7, 1941 Japanese attack on Pearl Harbor, Americans received a continuous stream of bad news. In the Pacific theater, the Japanese military inflicted defeat after defeat on the United States and her European allies. In the midst of this distressing time, a handful of Marines and civilians gave America her first victory of World War Two as well as a much-needed boost in morale. *Pacific Alamo: The Battle for Wake Island* tells this story of one of the proudest moments of American military history. Many Americans knowledge of the battle comes from the 1942 Hollywood movie, *Wake Island*, which was made before America knew the details of the struggle, and was thus full of factual errors. Wukovits book remedies this problem, providing the reader with remarkable detail and insight into this World War II battle.

Wake Island is located 2,300 miles southwest of Hawaii. Technically not an island but a coral atoll, it consists of three closely linked islands (Wilkes, Wake and Peale) that resemble a letter V lying on its left side. Before the outbreak of war, Wake Island served as a refueling and rest stop for the Pan-American Airlines trans-Pacific clipper, as well as a military outpost. The U.S. Navy recognized the strategic importance of the island and began various construction projects. To perform the construction, the Navy contracted with the Morris-Knudsen Company of Boise, Idaho. Morrison-Knudsen sent approximately twelve hundred civilian construction workers to the island. At about the same time, the Marine Corps increased the size of the island's garrison to approximately four hundred and fifty, while also deploying a Marine fighter squadron to operate from the island's airfield. The Marines and the civilians rarely interacted, sometimes going about their respective tasks as if the other was not on the island. This was the situation at Wake Island on December 7, 1941.

After the Japanese attacked Pearl Harbor, they attacked American forces in the Philippines and Guam. Since Japanese forces were located only a few hundred miles away in the Marshall Islands, Marines on Wake Island knew that an attack on their location was imminent and they prepared accordingly. Beginning December 8, the defenders were subject to daily aerial bombardments, which killed Marines, civilians and virtually decimated the Marine fighter squadron. On December 11, a Japanese task force appeared off the coast of Wake. By the use of camouflage and nerves of steel, the Marines refused to return fire in order to lure the Japanese fleet to within range of its artillery batteries. When the Marines finally opened up, the stunned Japanese suffered heavily. The ambush sank a Japanese destroyer, the first Japanese surface ship sunk in the war, and damaged several other ships. Then, as the Japanese fleet fled back to its base in the Marshalls, fighter aircraft from Wake sank another Japanese destroyer. For a couple of weeks in December 1941, Wake Island served as testament to American courage and determination, providing the home front with a thin silver lining to what had been a very large, dark cloud. Unfortunately for the men on Wake, a relief force sent to rescue them was recalled. Then, on December 23, the Japanese returned with an overwhelming armada that captured the atoll after a day-long struggle.

The book relies on first-hand accounts of both American and Japanese survivors of the battle, adding a personal dimension to the tale. The author interviewed numerous participants and then wove their experiences into the narrative, giving the reader the unique perspective of the men who fought this battle. Wukovits inclusion of the perspectives of Japanese participants is a rare commodity for World War Two books, and makes his work a much more enjoyable read. In some cases, he describes both sides of the firefight, relaying the viewpoint of both the attackers and the defenders. The final battle for Wake Atoll was actually two battles, the battle for Wilkes Island and the battle for Wake Island. By using personal accounts, the author recreates the battle almost shot by shot, giving the reader the feeling of being there. This approach allows the reader to comprehend the "fog of war" as it happened on Wake, such as the Wilkes Island defenders astonishment when they were ordered to surrender, even though they had annihilated the Japanese force that landed on Wilkes.

The twelve hundred civilians on Wake presented the military commanders on Wake with a dilemma. Although the civilians could provide much-needed manpower in the coming fight against the Japanese, there were problems: they lacked military training, there was a shortage of weapons, and there was a concern over how the Japanese would treat the civilians if they were captured while engaged in combat. Because of the desperate nature of their situation and the uncertainty of their status, each civilian was allowed to decide the issue for himself. Approximately two to three hundred civilians chose to fight alongside the Marines, serving artillery pieces, manning posts, and eventually engaging in close combat with the enemy. The rest hid in the bush on the atoll, sitting out the battle and eventually surrendering to the Japanese. After the battle and the surrender of the garrison, the book tracks the Wake Island defenders time in Japanese prison camps, where they suffered inhuman conditions and numerous atrocities.

For decades after the battle, anytime a Wake Island survivor entered a room full of Marines, the report of "Wake Island Marine on deck" would call the room to attention. Such was the honor and respect for the survivors of that battle. Military history enthusiasts will enjoy the book, and judge advocates will enjoy reading about the handling of the issue of civilian contractors on the battlefield, an issue that survives to this day.

FIGHTER PILOT:

THE MEMOIRS OF LEGENDARY ACE ROBIN OLDS

"If you are a fighter pilot, you have to be willing to take risks."
~Robin Olds

by Robin Olds with Christina Olds and Ed Rasimus (2010 St. Martin's Press; New York)
Reviewed by Captain Jason S. DeSon, USAF

WHY READ THE MEMOIRS OF A FIGHTER PILOT? Any Air Force judge advocate or paralegal stationed with the "Wolf Pack" at Kunsan Air Base is probably familiar with Robin Olds. Then-Colonel Olds' leadership of the Wolf Pack in Vietnam still resonates among the Airmen assigned to the 8th Fighter Wing today. *Fighter Pilot* offers the JAG Corps not only a unique case study on Air Force leadership, but also an insight into the mindset of our fighter pilot clients.

Heritage

For judge advocates and paralegals coming to Kunsan, this book should be mandatory reading if for no other reason than the history of the Wolf Pack itself. For those assigned to other fighter wings, it is equally instructive. As officers and supervisors, *Fighter Pilot* offers us a unique example of "leading from the front" that can be adapted to either an entire legal office or individual sections. For JAGC members, it offers us the chance to stand and walk in the shoes of a combat aviator so we can better tailor the advice we give, or the arguments we make, to our fighter pilot commanders and supervisors.

Candor

Fighter Pilot is written as an autobiography, although the book was finished posthumously with the help of his daughter Christina Olds and fellow fighter pilot and author, Ed Rasimus. The narrative details the exploits of the famous ace from his time at West Point through his exploits in World War II, the post-war jet age, Vietnam, the Air Force Academy, and retirement as a Brigadier General. The narrative is sometimes difficult to follow as General Olds relays many of his war stories as though he is speaking to a fellow pilot. Yet readers receive an honest account of events as the General does not shy away from detailing his own rebellious nature made famous by his out-of-regulation handlebar mustache seen on book's front cover (which gave birth to the infamous "Mustache March" AF tradition). "The mustache became my silent last word in the verbal battles I was losing with higher headquarters on rules, targets, and fighting the war," General Olds writes.

Courage

The two major highlights of *Fighter Pilot* are General Olds' descriptions of his action in World War II and Vietnam. Perhaps this is because the reader feels the General's enthusiasm for these periods in his life. Flying the P-38 *Lightning* and the P-51 *Mustang* in the European theater, General Olds scored several victories. He describes several of his missions in detail, including his air support of the Normandy invasion. During the post-war period, the General served in several stateside and overseas assignments, but did not see combat during the Korean War. The reader senses that the author throttles back in his retelling of this period. This is probably due to the fact that the General was not in combat in these post-war years while holding several desk jobs. It would not be until he took command of the 8th Tactical Fighter Wing (TFW) at Ubon Royal Thai AFB in Thailand that he would see combat again, this time in the F-4 *Phantom* II. It is during this period, that the reader gets a true picture of General Olds' leadership style and his enduring fighter pilot mentality.

General Olds literally "led from the front" while commanding the 8th TFW. When he took command, General Olds told his pilots that he would rely on them to train him and as he improved he would work his way up to flight lead. He noted when he first arrived that "it was pretty obvious they [his pilots] had little respect or time for wing commanders." He added, "Well, why should they? None of the commanders flew much; therefore they knew little about the missions." He then challenged his pilots by constantly saying he would eventually be better than them. This allowed him to interact with his troops on a personal level and he learned everything he could about every part of their organization. He was out in front in less than two weeks. And he stayed in front for several missions. Only when he was ordered to no longer lead missions did General Olds (knowing full well that command did not want him flying combat sorties into North Vietnam at all) take to wingman positions. When he knew that his fifth victory would mean a ticket home, he intentionally avoided engaging MiGs, so he could stay in combat.

Pushing the Envelope

While not recorded in the book, General Olds was once quoted as saying, "If you are a fighter pilot, you have to be willing to take risks." This prevalent, but unspoken theme certainly resonates in our practice. This willingness to "push the envelope" can place a judge advocate in a precarious situation when an operator wants the lawyer to give them the green light, despite clear risks. When some pilots don't hear the answer they are looking for, they may want to cut the JAG out of the loop entirely. Ultimately, we must remember that we do not make the decisions…our commanders do. As General Ron Keys, a former JFACC once observed, "The commander needs to remain a risk taker. The legal advisor can inform him of the risks and let him know what the law is, but the commander must still be the one to take the risk…Some of these decisions, though legal, are going to require some pain."[1]

A related theme in *Fighter Pilot* is General Olds' disdain for any rule that interfered with accomplishing his mission: winning the war. Perceived obstacles in his path included intel's policy of keeping critical information away from the pilots so the enemy wouldn't find out we knew their tactics, restrictive rules of engagement, and tankers that refused stay past their bingo to refuel an F-4 about to flame out. Consequently, he was willing to circumvent the rules on more than one occasion. After a mission in a new F-4D, he ordered his maintenance troop to rig the plane so that it could carry the more effective *Sidewinder* missiles instead of the new (and notoriously ineffective) AIM-4 *Falcon* missiles. While the change was against the rules, it was eventually instituted fleet wide. As judge advocates, we may see this action as sacrilege. Yet the fighter pilot sees it as heroic. We may not be able to condone this action, but maybe we can help accomplish the mission by finding ways to enable our commanders.

"Fighter Pilot is not just a description, it's an attitude; it's cockiness, it's aggressiveness, it's self confidence," writes General Olds. "It is a streak of rebelliousness and competitiveness." This description is important for judge advocate's to understand, especially when General Olds says, "A fighter pilot is a man in love with flying." General Olds lived this mantra while serving in Vietnam. In fact, he actually flew more missions than he was supposed to and hid that fact to avoid being sent home early. He wanted to stay in the sky, no matter what.

Make no mistake: this attitude is still alive and well today. For example, I was recently having a drink in the *Olds Room* at Kunsan Air Base with a pilot who had just served as a board member in a fitness discharge. Without sugarcoating it, the pilot hated the experience and felt it was hardest thing he had to do. He couldn't wait to get back to his aircraft. As he explained, the chief concern for the aviator is anything that keeps him or her out of their aircraft. That is instructive on how to argue to our rated board or court members. Reading *Fighter Pilot* gives us an idea of how this mindset comes into being. It's almost like telling a lawyer that they will not practice law or be in a courtroom.

[1] See Maj Randon H. Draper, *Interview with a JFACC: A Commander's Perspective on the Legal Advisor's Role*, THE JAG WARRIOR, Autumn 2002.

Leadership Advice

When General Olds describes his taking command of the 8th TFW, he provides a plainspoken summation of what he learned as a wing commander:

> *Know the mission, what is expected of you and your people. Get to know those people, their attitudes and expectations. Visit all the shops and sections. Ask questions. Don't be shy. Learn what each does, how the parts fit into the whole. Find out what supplies and equipment are lacking, what the workers need. To whom does each shop chief report? Does that officer really know the people under him, is he aware of their needs, their training? Does that NCO supervise or just make out reports without checking facts? Remember those reports eventually come to you. Don't try to bullshit the troops, but make sure they know the buck stops with you, that you'll shoulder the blame when things go wrong.*

Moreover, the General advises on how to inspire and motivate your people:

> *Correct without revenge or anger. Recognize accomplishment. Reward accordingly. Foster spirit through self-pride, not slogans, and never at the expense of another unit. It won't take long, but only your genuine interest and concern, plus follow up on your promises, will earn you respect. Out of that you gain loyalty and obedience. Your outfit will be a standout. But for God's sake, don't ever try to be popular! That weakens your position, makes you vulnerable. Don't have favorites. That breeds resentment. Respect the talents of your people. Have the courage to delegate responsibility and give the authority to go with it. Again, make clear to your troops you are the one who'll take the heat.*

There are several elements of this advice that we notice in the more successful commanders and supervisors we serve with. But these principles do not just apply to wing commanders. They apply to SJAs, DSJAs, LOSs, OICs, and NCOICs. Are we taking the time to visit our sections or even other sections in our legal office? Does the OIC sit down with the NCOIC to learn about the details of their job? Are we supervising (by checking work product, correcting it if needed, and training to prevent the error again) rather than just signing off on the work? And most importantly, are we fostering spirit through self-pride?

Discipline

One last lesson is found in General Olds' discussion of discipline. As commandant at the Air Force Academy, he was responsible in part for the discipline of the cadets. But this was not just punitive discipline; this was discipline in the bigger sense. "Discipline to reach true teamwork is crucial—the MOST important part of being an officer," the General writes. He acknowledges that it seems odd to think of a "maverick fighter pilot instilling discipline" yet he did so in his own way. The General defines discipline as doing "the right and proper thing under many different circumstances." In the air, it was the discipline to call off an engagement at the right time. On the ground, it was the discipline to get the plane airborne every day. "Nothing is accomplished without team spirit and a focused work ethic," he states.

This is the team spirit that drove the Wolf Pack under his tenure and it is the same spirit that drives the Wolf Pack today. So the question the reader is left with is, what can we do foster this same team spirit? How do we get our fellow JAGs and paralegals to accept and strive for that gold standard? Maybe the answer is to look at the career of one rebellious fighter pilot, pull chocks, and fly lead.

Contributors

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Mr. Ronald G. Schumann (B.A., Syracuse University; J.D., University of California, Los Angeles; LL.M, George Washington University Law Center) is an Attorney-Adviser, currently serving in the Contract Law Division of the Air Force Material Command Law Office, Wright-Patterson Air Force Base, Ohio. He has over 30 years of acquisition law experience.

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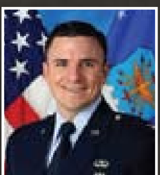

Captain Aaron L. Jackson (B.S., United States Air Force Academy; J.D., University of Oklahoma) is the Chief of Adverse Actions at the 55th Wing, Offutt AFB, Nebraska. He is responsible for providing legal advice to the wing commander and subordinate commanders on all adverse action matters, to include administrative discharges, demotions, and flying evaluation boards.

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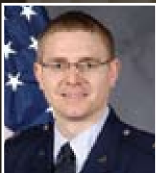

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Chief Master Sergeant Steven L. Wallace is the Command Paralegal Manager for US Air Forces Europe (USAFE), Ramstein Air Base, Germany. As the Command Paralegal Manager, he plans, manages, and directs the overall training, assignment, and development of all paralegals and civilian legal support personnel within USAFE.

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Training

Legal Assistance

Military Justice

Teaming

Where in the World?

"Top of the Fjord" Norway

by Major John Page, USAF

Taken from 3 AF/JA's visit to Stavanger. Pulpit Rock has a vertical drop of 1,998 feet over the Lysefjord.

"Former UN Headquarters" Croatia

by Major Jason Keen, USAF

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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