# The Reporter

March 2006

OFFICE OF THE JUDGE ADVOCATE GENERAL

AIR FORCE RECURRING PERIODICAL 51-1, VOLUME 33 NUMBER 1

# The Reporter



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## FROM THE EDITOR

With this issue, *The Reporter* proudly introduces a new section devoted to JAG Corps Leadership Development (JCLD). This section contains articles focused on the many aspects of leadership in the JAG Corps. As we learned with *I LEAD!*, no leadership development tool is more valuable than the collective wisdom of the attorneys and paralegals in the JAG Corps. In this issue, Lieutenant Colonel Charlie M. Johnson shares her insight and guidance on the difficulties and challenges faced when passed over for promotion. Her candid and inspiring look at this issue provides wisdom from which we can all benefit. We encourage you to submit a short article on a leadership topic for publication in a future issue of *The Reporter*. Your stories and perspectives are critical to leadership development, no matter your grade or position. Please e-mail inputs to the Editor, subject: JCLD, at rebecca.vernon@maxwell.af.mil. The submission deadline for the June 2006 issue is 15 May 06.

Have you worked an interesting issue in a recent court-martial? Have you found a great technique or approach that could help other base level attorneys or paralegals? Write a short article about it and submit it to *The Reporter*!

Contributions from all readers are invited. Items are welcome on any area of the law, legal practice, or procedure that would be of interest to members of The Air Force Judge Advocate General's Corps. Send submissions to *The Reporter*, CPD/JA, 150 Chennault Circle, Building 694, Maxwell AFB, AL 36112, or e-mail Major Rebecca Vernon at rebecca.vernon@maxwell.af.mil. The submission deadline for the June issue is 15 May 2006.

*The Reporter* is published quarterly by the Air Force Judge Advocate General School for the Office of the Judge Advocate General, United States Air Force. Views expressed herein, unless otherwise indicated, are those of the individual author. They do not purport to express the views of The Judge Advocate General, the Department of the Air Force, or any other department or agency of the United States Government. *Contributions* from all readers are invited. Items are welcome on any area of the law, legal practice or procedure that would be of interest to members of The Air Force Judge Advocate General's Corps. Items or inquiries should be directed to The Air Force Judge Advocate General School, CPD/JA (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802). *Subscriptions*: Paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. *Citation*: Cite as [Author], [Title], *The Reporter*, [date], at [page number]. *Distribution*: Special, Air Force legal offices receive *The Reporter* from AFLSA/CCQ, Bolling AFB, D.C. 20332-6128 (Comm (202) 757-1515/DSN 297-1515).

# The Commandant's Corner...

## Colonel David C. Wesley

I'd like to begin my first Commandant's Corner by thanking the person primarily responsible for the currency and relevancy of the curriculum provided by the JAG School. During his tenure here, Col Mike Murphy made the first bold strokes in what has become a persistent and comprehensive effort to review and revitalize what we teach and the ways in which we teach it. It will be years before the full import is visible to the rest of our great Corps, but I can state with certainty: it all began with Col Murphy's confident and tireless efforts to carefully analyze the offerings of this fine School.

Now, the entire military justice curriculum has been revised and improved in ways that would startle even a recent JASOC graduate. This revolutionary approach to teaching the crucial advocacy skills and case management practices that define our primary role in the discipline of the force is challenging our newest attorneys in a variety of ways, all with the purpose of turning out counsel ready for the rigors of the courtroom and prepared for the other facets of the justice process.

Our paralegal faculty, under the superb leadership of CMSgt Jim Hobza, has won a victory more than two decades in the making: in March, the American Bar Association (ABA) site visit team voted to recommend our paralegal courses for accreditation. This important step is expected to result in accreditation of the CCAF paralegal degree program during the ABA Annual Meeting in August, providing the recognition our outstanding paralegal courses and instructors have long deserved.

Like much of the rest of our Corps, the JAG School stands to make some impressive changes as JAGC 21 continues to operationalize our forces and even more closely tailor skill sets to the needs of the commanders and Airmen we serve. We expect to expand the faculty substantially and add research and reachback capabilities that will provide world-class, real-time support to units around the globe. These exciting changes will enable even faster development of courseware and more effective utilization of Distance Learning, enabling us to push critically needed training at the right time to those who need it most.

In April, thanks to the outstanding support of the JAG School Foundation, we'll also begin distributing the first copies of the KEYSTONE Edition of *The Reporter*, which chronicles the first-ever worldwide gathering of our Corps, providing readers with an impressive array of articles and photos from that remarkable week in Colorado. Without the Foundation's timely offer of support, this sterling record would not have been possible; I thank them for a volume that will be a source of pride for thousands of judge advocates and paralegals and a powerful weapon in the School's teaching arsenal.

All in all, a fairly busy time at the School. As I type these words, we are hosting four courses: the Paralegal Apprentice Course, the Paralegal Craftsman Course, the Judge Advocate Staff Officer Course, and the Inter-Service Military Judges Seminar. Our elite faculty and administrative staff are working hard to ensure every student gets individual attention and a first-rate learning experience. You can be proud of their efforts to make our practice even better! It is a privilege to serve at the JAG School during this exciting time in the history of our Corps. Please come visit us soon—I bet you'll be pleased with the great things we're doing with your School!

*David C. Wesley, Commandant*

# Dunlap's Very Subjective Reading List for Air Force Judge Advocates

Brigadier General Charles J. Dunlap, Jr.

Is reading worth it? Absolutely! The legendary courtroom advocate Louis Nizer once said that reading five books about famous trials can equate to the experience of actually trying a case. More recently, a magazine reported some similar advice from Earl Nightingale, the "man who founded the self-help industry in the 1950s." Nightingale counseled: "Read for an hour a day —about 4 percent of your week—in any subject you want to master. In 3 years' time, you'll be an expert in the field."

Becoming an expert in the profession of arms ought to be the goal of everyone in uniform, but especially in the JAG Corps. Self-directed reading can help accomplish that goal. Accordingly, you will find below a book list that might help you gain that expertise. Most of these books are not law-related *per se.* Why? Well, besides the fact that I'm not smart enough to come up with a good law book list, knowing the law is often the easy part of being in the JAG Corps. What most junior (and many senior) JAG Corps people lack is a good foundation in the art of war. This list is largely aimed at rectifying that deficiency.

**Becoming an expert in the profession of arms ought to be the goal of everyone in uniform, but especially in the JAG Corps.**

Of course, to provide legal services in context, it is imperative that we know and understand our client. Achieving that kind of insight cannot wait for professional military education (PME) courses; in any event, PME will not alone suffice. Real military professionals make self-study of human conflict in all its dimensions a life-long enterprise. There is really no other way except personal initiative.

My list is certainly not the only one. The Chief of Staff recently established a reading list for all Air Force members. This is a good starting point for your professional reading program, and it can be found online at http://www.af.mil/library/csafreading/. Some of the books appear on my list as well—I'll mark them with an asterisk.* You may find this helpful in determining where to start. Another interesting source of recommendations is the National Defense University's reading list, which has links to the other services' lists. It is found at http://www.ndu.edu/info/ReadingList.cfm.

As the title suggests, this is a very subjective list. There is really no magic to it; it is a collection of books that I happen to find useful. The selections do reflect my view that many operations in the future will still find a small "footprint," where a JAG or paralegal will be functioning on staffs—perhaps as the only attorney or paralegal—and in situations where leadership ability will be sorely tested. Readability is a big qualifier as well. I've omitted many superb books (classics, in fact) solely because I thought they were too long or otherwise too difficult "reads" (even though several of the ones that made the list are challenging—for me anyway).

The list is designed to give you a broad intellectual foundation in military matters; it is not, for example, aimed at providing technical answers to a lot of specific problems. Be warned, however, that some reputed military classics are missing, *e.g.*, Michael Shaara's *The Killer Angels*—hey, I'm not a Civil War fanatic, so shoot me (only kidding!).

Although there are many books out there about Afghanistan and/or Gulf War II, there are only two to recommend at this point (***Air Power Against Terror*** *and* ***The Assassins' Gate***). Neither one is a definitive text, but it is probably too soon to expect a considered history to emerge. (While I do find Yossef Bodansky's, *The Secret History of the Iraq War* fun, it isn't sufficiently credentialed to recommend.) And there are more gaps based on my personal tastes (and, unfortunately, my limited knowledge!). Consequently, it would be a good idea to gather recommendations from other people as well.

*Brig. Gen. Charles J. Dunlap, Jr., is the Staff Judge Advocate, Air Combat Command, Langley Air Force Base, Virginia. Brig. Gen. Dunlap was selected for promotion to major general and reassignment as the Deputy Judge Advocate General, Headquarters U.S. Air Force, Washington, D.C..*

Please don't get intimidated by the number of books on the list. Believe it or not, I've considerably shortened the list from previous versions to make it more inviting. In any event, please keep in mind that I read these books over the course of *decades*. I hope you find *something* that catches your interest. In any event, here are some suggestions—in no particular order—just to get you started:

a. Xenophon, ***The Persian Expedition***, 1972 ed. Yes, I am referring to *that* Xenophon, the Greek guy. This is the granddaddy of expeditionary warfare after-action reports and is still astonishingly relevant. The chapter entitled "Xenophon Justifies Discipline in Emergency" is alone worth the price of admission. I guarantee you won't be sorry if you read this quite lucidly written book.

b. John Keegan, ***The Face of Battle***, 1976. This is widely regarded as one of the finest books on the combat experience ever written. Keegan, perhaps the greatest living military historian, examines several celebrated battles from the perspective of the common soldier. The more you can understand the complicated psychology of combatants, the better ops lawyer you will be. Here's a secret: read this book and you will be able to create fantastic prosecution arguments in barracks-larceny cases. Trust me on that!

c. Geoffrey Perret, ***A Country Made By War***, 1989 ed. For my money, this is the best one-volume military history of the United States. What I like about it is that it doesn't just traipse from battle to battle; it discusses the sociological, economic, and political impact of war on American life.

d. Guy Sajer, ***The Forgotten Soldier***, 1990. First published in 1967, this is the mesmerizing autobiography of a German soldier who served in almost continuous combat for three years on the Eastern Front. This is the story of brutal, total war, fanatically and desperately fought by intractable opponents. An amazing illustration of that which human beings are capable.

e. Thomas M. Coffey, ***Iron Eagle***, 1986. This biography of General Curtis LeMay is another "must read" for every Air Force officer. This often-misunderstood Airman in large measure shaped today's Air Force. That his devotion to strategic airpower helped keep hostile Soviets at bay for two decades of the worst of the Cold War is but one facet of this complicated man. Trivia quiz: who established auto hobby shops on Air Force bases? Read this book!

f. Colonel Harry G. Summers, Jr., ***On Strategy: A Critical Analysis of the Vietnam War***, 1982. This book is by far the most cogent study of what went wrong in the Vietnam conflict. This is not a history: rather, it is the classic Clausewitzean analysis of the war. Read this book, by the way, and you will have a working knowledge of Clausewitz, the most influential theorist in American military thinking. (Summers has also written *On Strategy II* wherein he extends his Clausewitzean analysis to the Gulf War.)

g. Harold G. Moore & Joesph Galloway, **We Were Soldiers Once...and Young: Ia Drang, The Battle That Changed the War in Vietnam,** 1993. Moor and Galloway present a brilliant and vivid account of the vicious 1965 battle in the Ia-Drang valley in Vietnam. (Among the participants in this battle was Norman Schwarzkopf.) I very much enjoyed this book, but I probably would not have included it but for the fact that it was the most frequently mentioned book about the Vietnam War among those senior officers from whom I solicited recommendations.

h. Gary D. Solis, ***Marines and Military Law in Vietnam: Trial by Fire***, 1989. Somewhat difficult to find, but well worth the effort, this is a rare account about JAGs in Vietnam. The comprehensive book is full of still-relevant lessons of how Marine lawyers coped in an authentic combat environment. An example? These JAGs conducted a court-martial in the near-darkness of an underground dug-out at the height of the siege of Khe Sanh. Put *that* in your computer and e-mail it, wirehead. (What's Khe Sanh, you say? Read Robert Pisor's, *The End of the Line*, 1982).

i. Daniel P. Bolger, ***Americans at War 1975-1986***, 1988. This book is especially important for ops lawyers because it focuses on the "era of violent peace" of the decade-plus reflected in the title. Covering operations such as the Mayaguez recovery, the Iranian hostage rescue attempt, Lebanon, Grenada, and the Gulf of Sidra, it addresses America's "little wars"—exactly the kind that I think JAGs will find themselves in the future. Loaded with charts, spreadsheets, and military terminology, the prospective ops lawyer can learn the lingo at his or her own pace. Master this book, and you're well on your way towards understanding the operator. I think it's more useful than the better known book by Max Boot.

j. Michael R. Gordon & General Bernard E. Trainor, ***The Generals' War***, 1995. This is the most interesting book I know about the *first* Gulf War. Subtitled "The Inside Story of the Conflict in the Gulf," the book lives up to its billing. These guys had fantastic sources and they used them well. This is an exceptional behind-the-

scenes account of how national security policy is made at the senior level, and how such leaders fight wars—political as well as military. Read this and you can overlook Bob Woodward's *The Commanders*.

k. Tom Clancy, ***Fighter Wing***. Although originally published in 1995, it was updated and reissued in 2000. Although even the revised version is getting a bit dated, it really is the best way for the nonexpert to get up to speed on weapons, aircraft, and employment systems of today's Air Force. Notwithstanding the title, it does cover bombers, AWACs, and more. This is one book I will always take on a deployment.

l. Richard Holmes, ***Acts of War***, 1985. This book, which nobody seems to have heard of, is subtitled "The Behavior of Men in Battle." I find myself looking to it for all kinds of information. You may not want to read the whole thing, but it makes a good reference.

m. Sidney Axinn, ***A Moral Military***, 1989. This is the best book that I've found to answer the thorny moral questions that lie behind the black-letter LOAC law. An easy read that you won't regret.

n. Col Harry J. Maihafer, ***Brave Decisions: Moral Courage from the Revolutionary War to Desert Storm***, 1995. What is so interesting about this book is that it relates not just the kind of physical courage required on the battlefield, but the sort of intellectual courage that is needed in the Pentagon and elsewhere. A very easy read and most worthwhile.

o. Michael Ignatieff, ***The Warrior's Honor: Ethnic War and the Modern Conscience***, 1997. This is a relatively short (190-page) book that compliments, in a way, Huntington's *Clash of Civilizations*. It provides insight into the "why" of the vicious ethnic conflicts we see today—and offers some ideas as to how to deal with them.

p. Mark Bowden, ***Blackhawk Down: A Story of Modern War***, 1999. This book offers a stunning account of the 1993 Ranger raid in Mogadishu, Somalia, that resulted in the deaths of 18 soldiers and hundreds of Somalis. It is a superbly-written and totally absorbing chronicle that puts you in the middle of the most intense firefight involving U.S. troops since the Vietnam War. Extremely well researched, it also has accounts of the battle from the Somali perspective. Some people are calling this the best nonfiction combat account ever written; you will not be able to put this book down.

q. Gary D. Solis, ***Son Thang: An American War Crime***, 1997. This book captures the story of a little-known series of trials of Marines in Vietnam charged with shooting 16 unarmed Vietnamese women and children. The author (yes, the same Solis who wrote *Marines and Military Law in Vietnam* discussed above) is a former JAG (now a law professor) who tells the story as lucidly and effectively as any lawyer-turned-novelist. Since the book is aimed at a general readership, it also serves as an easy to understand primer on international law as it relates to war crimes. As a side benefit, the book is an excellent presentation of the practical problems faced by young lawyers attempting to put together a high profile, complicated case in a war zone.

r. Roy Guttman & David Rieff, eds., ***Crimes of War: What the Public Should Know***, 1999. A terrific, kind of oddly shaped book loaded with photographs to illustrate various concepts in the law of war and humanitarian law (the book makes a distinction). Using an encyclopedia format, the book is a collection of very cogent and concise entries—some written by journalists—starting with "Act of War" and ending with "Willful Killing." This book covers an amazing range of issues—a perfect way to get introduced to every important concept in this area of the law in a relatively painless way. Exceptionally readable—this book is aided by the inclusion of first-person accounts discussing points raised in recent conflicts.

s. Steven Pressfield, ***Gates of Fire: An Epic Novel of the Battle of Thermopylae***, 1998. A book along the lines of *The Killer Angels* but better in my opinion. Here's what David Hackworth says about it: "A must-read by warriors—past, present and future—for within the pages of this magnificent book are the secrets of developing the critical warrior ethic and what combat leadership, discipline, superior training techniques and the Brotherhood of arms are all about." I could not agree more—I am very, very high on this book; it's my all-time historical fiction favorite. Runner-up: Nevil Shute's, *A Town Like Alice*, 1950. If you dismiss this as a romance novel, you lose the chance to enjoy a fantastic story of human courage and perseverance.

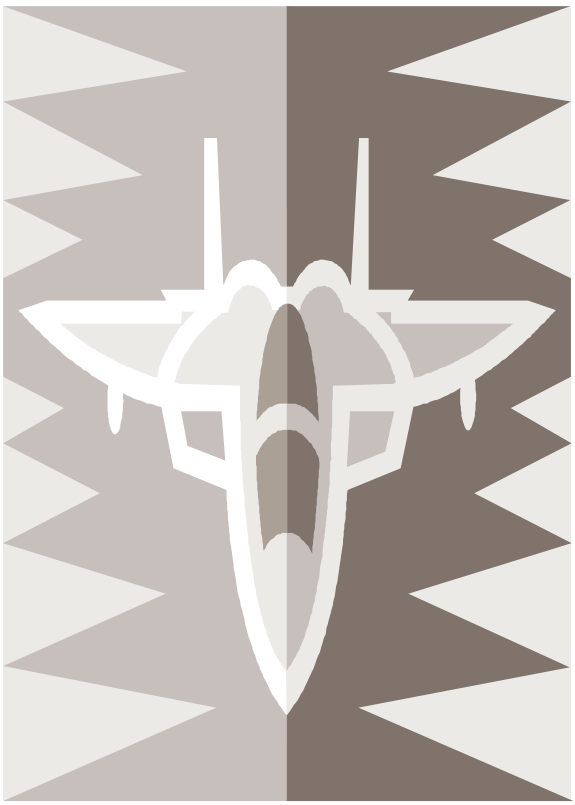
t. Tom Clancy, with Chuck Horner, ***Every Man a Tiger***, 1999. This is an interesting and, in some ways, troubling book. It gives very good insight into the thinking of the quintessential fighter pilot (not necessarily a compliment in this context). I have met General Horner and he is a much better guy than you might conclude from the book. Still, this is a "must read" for Air Force officers. It's the story of the air

war in the first Gulf war as told by the man who led it. As a result, it contains lots of "inside" stories. I think it is extremely readable (it does have a Clancy flavor), though some civilian reviewers found the jargon a bit bewildering.

u. Wesley K. Clark, ***Waging Modern War***, 2001. If you think of Clark not as a one-time presidential candidate, but as a four-star commander in one of the most politicized and complicated wars in history, you'll enjoy this fascinating book about the war in Kosovo that is sadly under-read. It really illustrates the politics and other factors endemic to modern warfighting. It also discusses the role of law and lawyers in today's conflicts.

v. David F. D'Alessandro, ***Career Warfare: 10 Rules for Building a Successful Personal Brand and Fighting to Keep It***, 2003. I generally think these kinds of self-improvement books are silly restatements of the obvious. This 216-page volume is not brain surgery, but happens to reflect a lot of my personal philosophy. Tough and no-nonsense. Not pretty!

w. Phillip S. Meilinger, ***Airpower: Myths and Facts***, 2003. This is a tiny—but powerful—book. It provides factual answers to common misperceptions about airpower, including issues about civilian casualties resulting from strategic bombing during World War II. It is only 132 pages and downloadable for free at http://www.maxwell.af.mil/au/aul/aupress/Books/Meilinger_myths/Meilinger_myths_B91.pdf



x. Bill Gilbert, ***Airpower: Heroes and Heroism in American Flight Missions 1916 to Today***, 2003. Think of this unheralded volume as the "lite" version of Stephan Budiansky's book of a similar title that appears on the CSAF's reading list. It is a relatively short (270-page) unpretentious book that gives you a lot of air power history in an eminently readable way.

y. Douglas C. Waller, ***A Question of Loyalty: Gen. Billy Mitchell and the Court-Martial that Gripped the Nation***, 2004. This rendition of the Billy Mitchell court-martial is the best I've seen. It is *not* a "celebratory" volume, as it portrays Mitchell—warts and all. Still, it gives you a lot of early airpower history in a format that is exceptionally "accessible" to everyone. What makes it particularly important for the JAG Corps is the discussion of the then-extant military justice system, much of which still resonates today: The case involved the media, Congressional interest, etc., etc. Sound familiar?!?!

z. Gwynne Dyer, ***War: The Lethal Custom***, 2005. This book reminds me of another recommended book, Richard Holmes' *Acts of War*, in that it delves into the psychology of war. While not really light reading, it is not a turgid academic tome either. It offers a very fascinating look at warfare in human history.

aa. David McCullough, ***1776***,***** 2005. This is a book that ought to be read by *every* American, so I'd recommend it as a "must have" for your family library. You will find it extremely well written (the author, incidentally, didn't use a computer in writing it!), not too long, and easy to read. Recommend you put this one at the very top of your to-do list.

bb. Edward Lengel, ***General George Washington: A Military Life***,***** 2005. I was thrilled to see this one on the Chief's list. As you may know, there are a number of good new books about Washington and the Revolution, but this is—by far—the very best for military professionals. It was written for general audiences, but is also a bona fide professional biography that includes discussion of Washington's imperfections. There are many nuggets to mine in it of particular relevance to the JAG Corps (*e.g.*, lots of observations about the role of discipline). Perhaps most important is that it represents Washington as *the* model of the *commitment* that military service demands.

cc. Benjamin Lambeth, ***Air Power Against Terror: America's Conduct of Operation Enduring Freedom***, 2005. This is the only recommendation I have concerning airpower in recent operations. Lambeth presents a very revealing book that lays out many behind-the-scenes issues, and has a relatively robust discussion/critique of the role of JAGs in combat operations. An absolute "must read" for anyone deploying to work in an air operations' center. It's actually available free if you want to download a 456-page book (may also be free to USAF people—check with RAND). *See* http://www.rand.org/pubs/monographs/MG166.

dd. George Packer, ***The Assassins' Gate: America in Iraq*****,** 2005. This is another book in the "only recommendation" category (despite scores of books about Iraq). A controversial yet intriguing look at the U.S. involvement in Iraq. Though military operations are discussed, the focus is really on the strategic level.

ee. Andrew Bacevich, ***The New American Militarism: How Americans Are Seduced by War***, 2005. This one offers a very original, if occasionally histrionic, look at contemporary civil-military relations by a respected retired Army combat vet turned university professor who is, despite the suggestion of the title of his book, no pacifist. My recommendation would be to read the 23-page appendix on "The Theory of Civilian Control" in Eliot Cohen's very fine book *Supreme Command: Soldiers, Statesmen, and Leadership in Wartime* before engaging Bacevich's controversial effort (which is only 288 pages). Civil-military relations are frequently misunderstood, and it is often JAG Corps people who need to set the record straight as to the legal architecture. The Bacevich book will help you connect a lot of dots, even if you find you differ with some of it.

That's the "short" list! Again, *don't think you have to read everything*. I was really just trying to make sure I offered you plenty of options. Of course, no list would be complete without mention of the JAG Corps's ***I LEAD!***—a superb volume that we all must read.

Too busy to read? Well, re-order your priorities because it really is important. Many of these books are available in paperback so you can carry one with you to utilize those spare moments waiting for a meeting or a flight. Here's another tip: I know that ***1776*** and the *Washington* book are available—unabridged—on audio CDs. (Check your base and local libraries.) In fact, I listened to them myself while running; you might wish to listen to them as you work out or commute. (By the way, ***1776*** is read by the author—something that is not always the best idea, but works extremely well with this book.) It isn't easy, but you can—and *must*—find the time.

Anyway, in the strongest terms I recommend that you begin your own reading program. The JAG Corps must be ready to provide not only world-class legal service, but all-aspect counselorship on any subject. The methodologies of legal thinking, and mastery of the forensic arts, are "weapons" that we can lock onto any target your commander selects, *but you must build the intellectual infrastructure to be ready to do so*. Reading is a vital part of that process, so get started soonest. Good luck and good reading!

**The JAG Corps must be ready to provide not only world-class legal service, but all-aspect counselorship on any subject.**

# PRACTICUM

*Colonel William A. Druschel*

## ARTICLE 32 INVESTIGATIONS MAY BE CLOSED TO THE PUBLIC ONLY WHEN SUPPORTED BY A FACTUAL BASIS

Whether to close an Article 32 investigative session is a discretionary matter for the investigating officer (IO). The exercise of discretion is not unfettered. In *MacDonald v. Hudson*, 42 C.M.R. 184 (1970), the Court of Military Appeals held because an Article 32 investigation is not a trial within the meaning of the Sixth Amendment, the proceedings are not required to be public. The Court upheld the discretionary decision of an Army IO to close investigation proceedings to the public. The opinion was the basis for R.C.M. 405 (h)(3), which grants the convening authority or the IO discretion to close a proceeding to spectators or to restrict access.

Ordinarily, Article 32 proceedings should be open to spectators. There may be legitimate reasons, however, to restrict or deny public access. These reasons may include: to encourage complete testimony from a timid or embarrassed witness; to protect the privacy of an individual; to protect an accuser's due process rights; or simply to accommodate a lack of space. *See* the Discussions to R.C.M. 405(h)(3) and 806; AFI 51-201, *Administration of Military Justice,* par. 4.2.1. Nevertheless, in *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (1997), the Court of Appeals for the Armed Forces reinforced the presumption that an Article 32 proceeding should be open to the public unless there is a reason to close the proceeding "that outweighs the value of openness." This balance is echoed in AFI 51-201, which provides in paragraph 4.1.2. that a proceeding may be closed "when the interests of justice outweigh the public's interest in access."

The Air Force Court of Criminal Appeals recently applied the standard in *United States v. Davis*, 62 M.J. 645 (19 January 2006), holding that an IO's closure of an Article 32 proceeding during the testimony of two witnesses violated the accused's right to an open proceeding because the IO's decision was without a basis in fact. The Court found that the military judge's failure to dismiss the charges and allow for a reinvestigation under Article 32 was an abuse of discretion, but ultimately concluded that the error was harmless.

Airman First Class Davis was convicted of three specifications of battery and acquitted of rape and indecent assault. The charges related to his conduct towards three women, two of whom he assaulted and battered (AC and LG). He was also charged with the rape and indecent assault of one of the victims and the rape of another woman. Prior to the Article 32 investigation, the accused's defense counsel interviewed two of the women and claimed that neither of the women showed any embarrassment or timidity in discussing the events forming the basis for the charges. Prior to the Article 32 hearing, the defense counsel learned the IO intended to close the proceeding during the testimony of AC and LG and the defense counsel objected. The IO followed through with his intention, without speaking to the witnesses and despite the lack of any indication that either victim would be reluctant to testify in an open proceeding. After the witnesses testified, the defense counsel submitted written objections to the IO regarding the partial closure. Defense counsel asked the IO to reopen the proceeding to take AC's and LG's testimony in an open forum. The IO declined the request explaining in his report that he closed the proceeding during the two witnesses' testimony "due to the sensitive and potentially embarrassing nature of the testimony and to encourage complete testimony" and "to encourage testimony by timid or embarrassed witnesses."

At trial, defense counsel renewed his objection in a motion to dismiss. The military judge found the IO's decision to close a part of the proceeding was unsupported by the facts, but declined to provide any relief "because there was no articulable harm." The judge concluded the only available remedy was a writ of mandamus to the Court of Criminal Appeals. On appeal, the defense argued the military judge erred in not dismissing the case and ordering a new Article 32 investigation.

The Court conducted a two-step review of the military judge's denial of the motion: (1) an examination of the judge's finding that the IO's actions were improper; and (2) an inquiry into the soundness of the judge's finding that no prejudice to the accused resulted. On the first point, the Court agreed with the military judge that the closure was unjustified and a violation of the accused's general right to have an open proceeding. According to the Court, the IO's decision lacked any "factual basis to support it." The Court acknowledged that closing the proceeding may have been called for if necessary to obtain the witnesses' testimony; however, the IO merely decided "prospectively, that the witnesses would be timid or embarrassed," which although "well-intentioned, was insufficient to abridge the . . . right to an open Article 32 hearing."

On the second point, the Court held that as a violation of Davis' substantial pretrial rights, he was entitled to relief at trial without having to show prejudice. The Court disagreed with the notion that a writ of mandamus was the only means to relief. The accused "should have had his right to a public pretrial investigative hearing enforced by the military judge." The Court found the judge's failure to do so an abuse of discretion.

Even so, the Court went on to hold that Davis was not entitled to have the findings or sentence overturned as a matter of right, but only if he was materially prejudiced by the violation. The Court could find no prejudicial effect. In terms of pretrial preparation, there was no evidence that the defense's efforts were impeded or that the witnesses' testimony would have changed if they had testified in an open session. AC and LG consistently recited their allegations several times during the military justice process. Further, defense counsel had both witnesses' written statements and interviewed the witnesses prior to the Article 32 investigation, as well as cross-examined them at the hearing. At trial, defense counsel effectively cross-examined the witnesses in great detail, leading to an acquittal on the rape and indecent assault allegations. The defense conducted a limited cross-examination on the assault charges and, based on evidence relating to the assaults, the Court was satisfied that the error did not contribute to the conviction and was harmless.

The *Davis* case presents several considerations. For IOs, Article 32 proceedings, including examination of witnesses, should always be open to the public unless the IO has a reasonable and informed basis to close the proceedings. This should be the practice even if the charges are alleged sexual offenses and the witness is the victim of the offenses or is a child. In these cases the IO should consider whether the witness' statements or demeanor or other circumstances strongly suggest that the witness will not testify fully without closing the proceedings. If the IO closes all or a part of the proceedings to the public or limits who may be present, the IO should document his or her reasons for doing so in the IO's report, giving the "specific, articulable reasons" (AFI 51-201, *Administration of Military Justice,* para. 4.1.2).

Government representatives should be mindful of the rules and ensure that IOs understand and follow them. If an IO closes a proceeding over objection, without apparent cause, defense counsel should raise the matter at trial by appropriate motion and, as the Court noted, also consider pursuing mandamus under the All-Writs Act, 28 U.S.C. § 1651, "given the Constitutional significance of open proceedings."

## FORFEITURES AND SPECIFICITY

Under R.C.M. 1003, forfeitures are an authorized punishment and, unless a sentence imposes total forfeitures, the sentence must state the exact amount to be forfeited each month and the number of months the forfeiture will last. The discussion to R.C.M. 1107(d)(2) places a limit on forfeitures, in that forfeitures should not exceed two-thirds pay per month "[w]hen an accused is not serving confinement."

The Court of Appeals for the Armed Forces held in *Warner v. United States*, 25 M.J. 64 (1987), that a sentence may not include total forfeitures when confinement is not also adjudged. Warner was sentenced to total forfeitures, reduction to E-1, and a BCD, but not to any confinement. Based on R.C.M. 1107(d)'s discussion, the Court stated that two-thirds is the maximum amount of forfeitures that may be imposed when an accused is not sentenced to confinement. The Court amended Warner's sentence to forfeiture of two-thirds pay at the grade of E-1 until execution of the discharge.

The Court raised in a footnote, but left open, the question of whether the phrase "when an accused is not serving confinement" is limited only to sentences that do not include confinement or extends to a sentence that includes confinement completed. Arguably, the Court's language supporting its holding in the case is broad enough to cover both situations: "The legislature has indicated that a servicemember in active duty status should receive at least a third of his pay; and the collection of total forfeitures from one serving actively may even raise constitutional issues." Such a broad reading of *Warner* was recently adopted by the Court in *United States v. Stewart*, No, 05-0381/AF, ___ M.J. ___ (25 Jan. 2006). The Court characterized *Warner* as having "held . . . that a servicemember released from confinement and still in a duty status may not be deprived of more than two-thirds of his or her pay."

Stewart was convicted of unlawful entry, indecent assault, and committing an indecent act, for which he was sentenced to reduction to E-1, 15 months confinement, and forfeiture of all pay and allowances. He was not sentenced to a punitive discharge. The convening authority approved the adjudged sentence.

At the end of his confinement, Stewart returned to paid duty, and DFAS continued the total forfeitures for approximately four and a half more months. At that point, DFAS determined Amn Stewart should have been subject to two-thirds forfeitures after his release from confinement. DFAS reduced the prospective forfeitures to two-thirds and additionally credited Stewart one-third of the amount of forfeitures that occurred from the end of his confinement to DFAS' ac-

tion. Forfeiture of two-thirds pay continued for almost five months, until the convening authority remitted the uncollected portion of the sentenced forfeitures.

On appeal, Amn Stewart argued he should not have been subject to any forfeitures after his confinement ended. His position was that the post-confinement forfeitures were improper because the court members who determined his sentence did not specify partial forfeitures as punishment in addition to the total forfeitures; and, therefore intended forfeitures to run only during his confinement. The government argued the sentence to total forfeitures was automatically transformed into forfeitures of two-thirds pay and allowances upon his release from confinement and return to duty, absent the members specifically having provided otherwise.

In deciding the issue, the Court started with the proposition that when a court-martial sentence includes total forfeitures after confinement, the most the affected accused will be subject to after confinement is two-thirds. The Court then went on to address whether a sentence as Amn Stewart's that imposes "forfeiture of all pay and allowances," without further detail, continues at the two-thirds level after confinement. The Court concluded that it does not. The Court held sentencing an accused to total forfeitures will "run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement." By "duty status," presumably the Court meant paid duty. According to the Court, when partial forfeitures after confinement are intended, the sentence must "specify the amount and duration." The Court's rationale for its holding was that, without adequate specificity, an accused would be subjected to a sentence that is "ambiguous" and "uncertain."

The upshot of *Stewart* is that sentencing worksheets and instructions on sentencing may need to be approached with increased care and detail to ensure the actual sentence adjudged reflects what the members intended. Correspondingly, if trial or defense counsels want members to consider the continuation of forfeitures after confinement, counsel will need to incorporate that point into their sentencing arguments and request appropriate instructions. Consider the following scenarios:

*A sentence to total forfeitures without any specification as to duration and no confinement or punitive discharge.* It is doubtful that any forfeitures may validly be executed. Under *Warner* the total forfeitures could arguably be amended to the permissible maximum of two-thirds pay per month, but the duration boundary present in *Warner*—execution of the discharge—is not present. Moreover, the sentence may contravene the rule in *Stewart* of specificity in both amount and duration. Only partial forfeitures not greater than two-thirds are permissible, but using two-thirds as a default does not reflect a specified intent of the members. To avoid the problem, the members should be instructed and the sentencing worksheet should reflect that if no confinement is imposed, they may not adjudge total forfeitures but only partial ones that must be stated in whole dollar amounts along with the number of months the forfeitures are to run.

*A sentence to total forfeitures specified as to duration and no confinement or discharge.* This presents a better case for upholding forfeitures. Relying on *Warner*, the forfeitures would seem to be two-thirds for the number of months specified in the sentence. Given *Stewart*, however, that result is not guaranteed. Again, emphasizing specificity before sentencing takes place should remove the uncertainty.

*A sentence to total forfeitures without any specification as to duration and a BCD or DD but no confinement.* Essentially the same as the previous scenario.

*A sentence to total forfeitures and confinement but no discharge.* These were the facts in *Stewart*. Applying *Stewart*, the forfeitures will cease when the confinement ends. If a trial counsel believes that post-confinement forfeitures are appropriate, he or she should request a special instruction from the court on the point and argue for those forfeitures in the sentencing argument. Any post-trial forfeitures will be enforceable only to the extent they are specific.

*A sentence to total forfeitures, confinement, and discharge*. Post-confinement forfeitures should not be an issue. As the Court put it in *Stewart*, "Where a punitive discharge is adjudged and proved, the servicemember is discharged upon release from confinement and the concern addressed by [this case] does not arise."

### SEALED RECORDS: GETTING AN ORDER PERMITTING EXAMINATION

On October 14, 2005, the President signed Executive Order 13387, amending the Manual for Courts-Martial and adding a new R.C.M. 1103A on sealed exhibits and proceedings. The new Rule provides that if a military judge orders "exhibits, proceedings, or other matter" in a record of trial sealed, they may not be examined except pursuant to the Rule. An "examination" of sealed materials includes "reading, viewing, photocopying, photographing, disclosing, or manipulating the[m] . . . in anyway." Any examination of sealed materials prior to authentication of the record of trial requires an order from the military judge based on good cause shown. Any examination after authentication requires an order from the judge upon a showing of good cause at a post-trial Article 39a session directed by the convening authority.

In a court-martial involving sealed records, if trial counsel anticipates needing to include sealed material in the record of trial to be forwarded to the convening authority for action on the findings and sentence, trial counsel should consider requesting an order from the military judge at the end of the trial and before the judge and any circuit defense counsel or defense counsel depart. Doing so may prove much easier and faster than securing an order later.

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## CAVEAT

*Paula B. McCarron*

### IF IN DOUBT, ASK FOR DEFERMENT OR WAIVER OF FORFEITURES

Trial practitioners and those advising convening authorities should take note of two striking points from the Air Force Court of Appeal's opinion in *U.S. v. SSgt Ian Byington*, ACM 35917, (Sept. 30, 2005). In this unpublished case, the appellant alleged ineffective assistance of counsel and errors in the SJAR resulting from his misunderstanding of whether his active-duty spouse and her children were his dependents for the purpose of deferment and waiver of forfeitures under Articles 57a and 58b, UCMJ.

The Air Force Court found that appellant's counsel had briefed the appellant of his post trial and appellate rights, including waiver and deferment in favor of his dependents. Although the appellant averred his counsel failed to explain who qualified as his "dependents" for that purpose, the Air Force Court noted that counsel and the appellant tactically rejected a request for deferment or waiver in order not to compromise a RTDP request. Satisfied with this tactical decision, the Court found the assistance to have been effective.

Similarly, the Court found that although the SJAR copied the omission of dependents from the PDS submitted at trial, several references to the appellant's wife and stepchildren found in the SJAR and in the record adequately presented the information to the convening authority without prejudice to the appellant. Ultimately, counsel on both sides should remember that 37 U.S.C. § 401(a) and (b)(1) define spouses and stepchildren as dependents for R.C.M. 1101(d)(3) purposes.

### TWO PLUS TWO DOES NOT ALWAYS EQUAL FOUR

The Air Force Court of Appeals recently addressed the issue of aggregating values for larceny of military property to reach the greater than $500 sentence enhancement. In the case of *U.S. v. SSgt Ferrell II*, ACM 35581, (Aug. 23, 2005), the Court examined, *inter alia*, appellant's claim that his guilty plea to a second specification of larceny of Palm Pilots and accessories of a value in excess of $500 was improvident because it incorrectly aggregated the value of the items. The record reflected clearly that these items were taken at different times and on no one occasion did the value of military property exceed $500. Rejecting the government's argument for waiver due to failure to raise the issue at trial, the Court looked to the facts recited in the providency inquiry and the stipulation of fact and determined it could not approve the findings as correct in law and in fact. Seeking to cure this error, the Court reassessed the sentence, but determined that the military judge would have adjudged the same sentence even absent the improvident plea. Since the SJAR reflected the maximum sentence that could have been adjudged under the enhanced offense, the Court ordered a new SJAR to give the convening authority the benefit of an informed and accurate recommendation from the SJA in deciding clemency.

# ADMINISTRATIVE LAW

## KEEPING UP WITH THE AIR FORCE CIVILIAN DRUG TESTING PROGRAM

*Lieutenant Colonel James H. Dapper*

On September 15, 1986, the President of the United States directed each agency in the Executive Branch to establish a program to test employees in sensitive positions for the use of illegal drugs. Exec. Order No. 12564, *51 Fed. Reg. 32,889 (1986).* This Executive Order gives the Department of Health and Human Services (HHS) the responsibility for ensuring its proper implementation. In 1990, the Air Force accordingly drew up a HHS-approved program including random testing of personnel performing sensitive duties, testing based on reasonable suspicion of all employees, consent testing and post-accident testing. Despite continued evolution of the HHS guidelines, the Air Force Civilian Drug Testing Plan has remained the guiding authority for civilian drug testing. Several attempts to replace it with an AFI were launched in the 1990s but failed. By the fall of 2004, revision of Air Force guidance was clearly needed to address several major changes in the way we combat drug abuse among our civilian employees.

In the past year, with AF/JAA assistance, the Air Force Drug Testing Program Manager wrote a draft AFI for civilian drug testing. This draft has entered the coordination and approval process. Because of the unique authority for this program, the new AFI must gain not only AF and DoD approval, but will ultimately require HHS approval prior to its publication.

Given the anticipated length of the AFI approval process, the Surgeon General published a policy memorandum in the fall of 2004 outlining three major changes. First, the rate of random drug testing increased from 50% of end strength per year to 100%. Second, based on HHS-mandated changes, all specimens submitted to HHS-certified laboratories must now undergo a specimen validation test (SVT). The SVT addresses the concern raised by unobserved collection that a donor may attempt to adulterate, substitute or dilute his or her urine specimen. Lastly, the AF now requires that all civilian-produced urine specimens be tested for use of the following drugs: marijuana, amphetamine/methamphetamine, cocaine, opiates, and phencyclidine (PCP).

In recent months, Air Force audits of the Civilian Drug Testing Program revealed that coordination between Drug Demand Reduction experts and personnel specialists at several bases was insufficient. As a result, these bases did not have a clear understanding of the Program or a well-defined list of testing designated civilian positions. For example, some aircraft mechanics were subject to random testing while others were not. While this lack of consistency can cause employment law problems, the larger issue centers on the danger to the public health and safety or national security that could result from the failure of an employee to adequately discharge his or her duties. Bases should ensure that lists of testing designated positions are kept up to date. Personnel specialists play a key role in this.

JAG Corps personnel and Demand Reduction experts must also work diligently to ensure adherence to the procedures mandated by HHS. Confusion in this area sometimes arises when one focuses on the military drug testing program to the exclusion of the Civilian Program. The Civilian Drug Testing Program differs from military drug testing in several key respects. First, the Civilian Drug Testing Program relies on unobserved collection. Second, the new specimen validation measures ensure employees do not try to defeat tests by adulterating, diluting or substituting specimens. Another difference lies in how the selection for testing takes place. Not all civilian employees are subject to random drug testing. Federal Courts have ruled the government may only randomly test employees who perform duties that directly affect national security, public health or safety. As opposed to the military program, medical review officers routinely contact donors to discern whether drug testing positives result from legitimate, prescribed use of medications. Finally, as expected, the disciplinary consequences and administrative processes applicable to civilian employees differ greatly from those faced by Airmen who use illegal drugs.

**JAG Corps personnel and Demand Reduction experts must . . . work diligently to ensure adherence to the procedures mandated by HHS.**

While for the most part, the Civilian Drug Testing Program has enjoyed great stability since its inception in 1990, diligence and teamwork remain keys to its continued effectiveness. When was the last time your base did a careful inventory of civilian positions and asked whether they should be subject to random drug testing? How familiar is your legal staff with the ins and outs of civilian drug testing? Please don't wait until the new AFI is published to invest effort in this program.

## DUE PROCESS

*Lieutenant Colonel Christopher C. Lozo*

Sometimes we spend so much time concentrating on individual trees that we fail to recognize the forest. This can happen to JAGs when we focus so closely on individual regulations and statutes, and parse the language so closely that we fail to recognize the bigger issues of fairness, justice, and due process.

Over the past several months, we have noticed an increasing number of cases where regulations and statutes have been interpreted so narrowly as to deny an Air Force member due process. In its simplest statement, due process is "notice and an opportunity to be heard." That concept grounds virtually all of our civil (and criminal) practice, and must never be overlooked.

"Notice" implies that the member be informed of the nature of the action against him, as well as any evidence, both inculpatory and exculpatory, that is not otherwise privileged. One's "opportunity to be heard" can ring hollow without being provided the basis and evidence in support of the hearing.

Ideally, providing defense counsel with discovery ought to be like showing a full house when playing poker . . . something you're proud to do and which will cause your opponents to fold their hand. If you're not proud to share your discovery with defense, you may have a weak hand and may need to rethink your strategy. However, there is no place for "bluffing" in the discovery process. . . you always have to show your hand early in the process.

Apart from notions of fairness and justice, there are sound practical reasons why JAGs should ensure all persons receive proper due process. First of all, these actions are reviewed up the chain of command, where both senior commanders and senior attorneys will review the case files. For a package requiring action by the SecAF (e.g., administrative discharge, promotion propriety action, etc.), it is not uncommon for it to go through five separate reviews. If one of these levels of review stops the action for due process concerns, it can result in unacceptable delays in the process. In certain cases (especially promotion propriety cases), it can result in an undeserving person being promoted.

In addition to the various levels of review these actions go through, Air Force members have a right to apply to the Air Force Board for Correction of Military Records. This Board has plenary authority to correct "errors or injustices." They very carefully scrutinize whether an individual applicant received proper due process, and if they believe that there was an "error or injustice," they have the power to promote, reinstate, order back pay, or order virtually any remedy necessary to ensure fairness and justice. The Board is proactive, and operates like a court of equity using equitable principles. If they don't think the applicant got a fair shake, they will not hesitate to overturn the decision. It is no victory to have today's discharge action overturned three years from now because the respondent was not provided with all the evidence against him.

Finally, we JAGs are responsible for ensuring not only "actual" fairness, but "perceived" fairness. If our fellow Air Force members do not view our administrative processes as being fair, instead of those processes enhancing good order and discipline, they may have the opposite result, undermining respect for authority and disrupting good order and discipline. One of our responsibilities as JAGs is to "preserve command prerogatives" and assist commanders in fostering high morale. Ensuring our members receive full and proper due process is an integral part of supporting commanders and maintaining good order and discipline.

# TRIAL NOTEBOOK

## THE FOURTH AMENDMENT, THE "PLAIN VIEW" DOCTRINE, THE "AUTOMOBILE EXCEPTION," VOLUNTARY CONSENT, AND THE DOCTRINE OF INEVITABLE DISCOVERY: A MOVING CASE STUDY

*Lieutenant Colonel J. Robert Cantrall*

Consider these facts. A young Airman's car breaks down. Being the intelligent young man that he is, he calls a tow truck to take his car to the dealership for repair. Once he gets the car to the dealership, the tow truck driver, who also happens to be a mechanic for the dealer, immediately notices that he can't fix the car that day. Since the car has to stay at the shop overnight, the mechanic offers the Airman the chance to secure anything in the car. The Airman does not avail himself of this opportunity and returns to base. Thus begins our moving story regarding the Fourth Amendment exceptions to the warrant requirement.

Our case, *United States v Owens*, 51 M.J. 204 (C.A.A.F. 1999), will detail several of the exceptions, and exceptions to exceptions, contained in the convoluted area of search and seizure jurisprudence. While search and seizure is frequently discussed, it is rarely fully understood. However, in order to protect your client's rights, protect the record, and ensure justice is done, it is critical for trial practitioners to understand this complex area of law.

Before we can begin a discussion of this complex set of rules, it is essential to understand the relevant facts of *Owens*. Picking up where we left off, Airman Owens' legal problems really began the next morning when the repairman opened the car's doors and hatch in order to identify the problem and complete the repairs. While doing his work, the mechanic noticed an unusually large number of stereo components in Airman Owens' car. Additionally, these components were expensive brand components and the wiring had obviously been cut. The repairman, understanding the unusualness of this situation, called the local police to come investigate the equipment.

When a police officer arrived, the repairman invited him into the repair area of the dealership. The officer looked into the car through the open doors and windows, and plainly saw several pieces of stereo equipment in the trunk, back seat, and rear floorboards. He too noticed that the wires for all this equipment were cut very close to the back of each piece of equipment. The officer was aware of several recent car burglaries in the local community, so he picked up six to eight pieces of equipment and wrote down their brand names and serial numbers. This concluded the first "search" of Airman Owens' car by a police authority.

When the officer returned to his office, he was told that the local Air Force base Security Police[1] also had information about several car burglaries on base. The officer called the Security Police and determined that some of the equipment in Airman Owens' car could be items stolen from base. The officer then accompanied two members of the Security Police to the car dealership. Once there, they got permission from the repairman to look into the car. When they did, they all saw the brand name "Fosgate" on at least one piece of stereo equipment without having to pick-up or otherwise move any of the suspect items. Because this name matched the name of some equipment stolen from base, the Security Police determined that Airman Owens' was involved in the theft of equipment from base. This concluded the second "search" of Airman Owens' car.

The Security Police returned to base and briefed Airman Owens' First Sergeant on the facts of the case and asked him to bring Airman Owens over to their office. The First Sergeant complied and took Airman Owens to the Security Police building. Airman Owens was then informed that the security police were investigating the larceny of stereo equipment and that they had information that the stolen equipment was in Airman Owens' car at the car dealership. They also told him that they had already identified some of the equipment as being from the base thefts and that he was a suspect in the thefts. The Security Police did not ask Airman Owens any questions but did ask for permission to search his car. Airman Owens voluntarily agreed to the search of the car and signed an Air Force Form 1364, Consent for Search and Seizure.

Airman Owens, his First Sergeant, a civilian policeman, and the two Security Police then went to search Airman Owens' car at the dealership. Once there, the Security Police began to remove and inventory the contents of his car. After about 12 minutes, and after the Security Police removed ten items from the car, one of the Security Police told Airman Owens he could terminate the search at any time. Airman Owens said he wanted the search ended and the Security Police immediately terminated their activities. This ended the third "search" of Airman Owens' car.

The local police then took over the case since the car was off base. He told Airman Owens that he would seize the car and try to get a search warrant for it because he had reason to believe that the car con-

tained evidence of criminal activities. He also told Airman Owens that the car had been used in a felony and thus could be seized and possibly forfeited. Finally, he told Airman Owens that if Airman Owens consented to the search of his car, there would be no need to seize the car. Airman Owens then agreed to the search of his car and signed the form authorizing a search. The local police completed the search and inventory of the remaining stereo items in Airman Owens' car and took those items into their possession. This completed the fourth "search" of Airman Owens' car.

When this case went to trial, Airman Owens contended that all the searches of his car were invalid for numerous reasons. However, after hearing all the evidence in the case and considering the arguments of counsel, the military judge admitted the evidence. This evidence was the basis for Airman Owens' subsequent conviction for larceny.

### Application of the Fourth Amendment

Any analysis of a search and seizure issue begins with the Fourth Amendment to the Constitution. As we all know, this Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched and the persons or things to be seized.

This provision is further applied to the military by Military Rule of Evidence (MRE) 311(a). This Rule states:

> (a) Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:
>
> > (1) *Objection*. The accused makes a timely motion to suppress or an objection to the evidence under this rule; and
> > (2) *Adequate Interest*. The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to the members of the armed forces.

According to a plain reading of the Fourth Amendment, searches by the police only violate that provision if their actions constitute an *unreasonable* search. In other words, any action which does not constitute an unreasonable search does not violate the rights of the property owner. An unreasonable search is generally one conducted without proper consent, or which has not been authorized by a valid search warrant, or for which there is no recognized exception to the warrant requirement.[2] If that were the extent of our analysis, the searches in our case would clearly have violated the Constitution since none of them was conducted pursuant to a search warrant. Since we know that the searches were admitted by the military judge, we need to look for applicable exceptions to the Fourth Amendment and see how they applied to this case.

The Supreme Court has interpreted the Fourth Amendment to protect legitimate expectations of privacy rather than simply places.[3] Additionally, the Fourth Amendment does not protect an individual's subjective expectation of privacy, rather it only protects those expectations that society is prepared to recognize as "reasonable."[4] For, as stated by Chief Justice Burger, "if the intrusion by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause."[5] Additionally, the Supreme Court has said a person's expectation of privacy in an automobile is significantly different from the traditional expectation of privacy in one's residence.[6] However, a lesser expectation of privacy in one's car does not remove the expectation of privacy altogether in that car.[7] Accordingly, we can conclude that while the Fourth Amendment does apply to a car, its application is limited, at best. With this framework, we now analyze the search of Airman Owens' car to determine whether each "search" violated the Fourth Amendment or MRE 311.

### First and Second Searches

As you will recall, the first "search" of Airman Owens' car was the action by the civilian police officer looking through the open doors and windows into Airman Owens' car after being invited into the repair area of the car dealership.[8] Clearly, a "seizure" is not at issue here because merely looking into the car and recording the serial numbers did not meaningfully interfere with Airman Owens' possessory interest in the items.[9] Therefore, the only question was whether

looking into the car constituted a search. In *Texas v. Brown*, 460 U.S. 730 (1983), the Supreme Court stated that an officer's mere observation of an item left in plain view generally involves no Fourth Amendment search.[10] This "plain view doctrine" is familiar to most trial practitioners and police officers, and allows police officers to immediately seize suspicious objects if they are lawfully engaged in an activity in a particular place.[11] This rule is based on the concept that the owner of an automobile has no legitimate expectation of privacy shielding the portion of the interior of an automobile which may be viewed from outside the vehicle by either an inquisitive passerby or diligent police officers.[12]

The "plain view doctrine" is somewhat complicated in our case because the police officer in question was not in his normal location, namely patrolling on the street or some other public place. Rather, he was in the repair bay of a private car dealership. The key factor though is that he was there at the express invitation of a repairman who was an authorized agent of the dealership. Thus, the officer was lawfully engaged in an activity in that particular place. Additionally, since the doors and hatch were open, all persons lawfully in the repair area could plainly see into the car and view the stolen property. Simply looking into the car did not constitute a constitutionally invalid search within the meaning of the Fourth Amendment.

Our officer, however, didn't stop at looking into the car. He then reached into the vehicle, picked up several items, and wrote down the names and serial numbers of the items. Thus, his actions arguably constituted a different search within the meaning of the Fourth Amendment.[13] This fact alone, however, does not mean that his actions were unreasonable and violated Airman Owens' rights. In fact, the police officer's actions did not violate Airman Owens' rights because, when he picked up the items, he had the consent of the agent of the car dealership to do so. The Court in *Owens* concluded that, since the repairman had common authority over the car to repair it and had only allowed the police officer to look and reach into those areas the repairman had to go in order to do his job, the repairman had the authority to allow the police officer to search those areas as well. Furthermore, since the repairman was Airman Owens' agent and consented to the search, the police officer effectively had consent to search the car as if Airman Owens himself had consented to the search.[14]

But what if the repairman did not have the authority to consent to the search? Would the search be valid anyway? In this circumstance the police officer's search was still valid within the meaning of the Fourth Amendment because he relied upon the consent of someone apparently authorized to permit the search. Based on the facts as the policeman knew them, he could reasonably conclude the repairman had the authority to permit the search.[15] The repairman was in possession of the car and was in the process of accomplishing the repairs. The stolen stereo equipment was in the location the repairman was authorized to be to conduct the repairs. As such, any reasonable police officer would conclude that the repairman had authority to consent to a search of those areas opened up by the repairman to complete the repairs. Thus, even if the repairman did not have the actual authority to consent to the search, the actions of the police officer were based on the apparent authority of the repairman and thus did not violate Airman Owens' Fourth Amendment rights.

Now, for the tricky part. Even if the repairman did not have the authority to consent to the search, and even if the police officer could not reasonably conclude that the repairman had the authority to consent to the search, and even if the plain view doctrine did not justify the search; the police officer's actions were still justified by the automobile exception to the Fourth Amendment warrant requirement. This requirement stems for the Supreme Court's ruling in *Carroll v. United States*, 267 U.S. 132 (1925).[16] In the *Carroll* case, the Supreme Court held that when a police officer has probable cause to believe that a vehicle carries contraband, the vehicle can be searched without warrant.[17] However, this probable cause must be based on "objective facts that could justify the issuance of a warrant by a magistrate."[18]

This exception is one of the oldest and most established exceptions to the warrant requirement. In fact, Congress has considered this difference in privacy interests between warrantless searches of dwellings, and vessels, wagons, and carriages reasonable since the first Congress.[19] This exception to the warrant requirement of the Fourth Amendment is grounded upon the mobile nature of automobiles and is necessary to prevent the vehicle from being moved out of the jurisdiction where the warrant is being sought.[20]

As stated above, while the Supreme Court recognizes the right to privacy in automobiles, the ready mobility of an automobile justified a lesser protection of those interests.[21] Additionally, each person has a lesser expectation of privacy in their car than they would in their home or office.[22] Or, as Judge Gierke so succinctly stated in Owens, "there are two constitutional bases for the automobile exception: (1) mobility, and (2) reduced expectation of privacy."[23] This exception has been written into the Military Rules of Evidence as MRE 315(g)(3)[24] ("A search warrant…is not required…for a search based on probable cause when

an operable vehicle is to be searched, except in the circumstances where a search warrant or authorization is required by the Constitution of the United States, this Manual, or these rules").[25]

Applying the analysis for the automobile exception to our facts demonstrates its applicability to our case. First, the property searched was, in fact, an automobile. Additionally, probable cause based upon sufficient facts to justify the issuance of a warrant existed to search the car based on the information provided by the repairman (numerous pieces of stereo equipment with the wires cut close to the back of the pieces) and what the officer saw in plain view through the open doors.

Lastly, the fact that the car itself was not capable of movement does not mean that the automobile exception does not apply to this case. Rather, courts look at the character of the property rather than the actual mobility of the property when determining whether the automobile exception applies.[26] Thus, even though the car itself was immobile, the police still had the authority to search it without a warrant because a car is characterized by its mobility.[27] While the motor may not operate, it still has wheels and is light enough to be picked up and moved by another vehicle or moved by some other means. Thus, it is not an immobile structure such as a house or outbuilding. Accordingly, the warrantless search provisions of *Carroll* applied and the police actions were proper.[28]

While this result may at first seem convoluted, any contrary result would be absurd. Imagine the situation where, the police find a car on the side of the road. Before they could search the vehicle, they would have to try to start it to determine if the automobile exception applied to their case. In order to do so, they would have to try to get the keys or open up the hood and see if the vehicle was startable. In doing so, they have already expanded the scope of the possible search from the passenger compartment to the area under the hood. Then, if the car did not start, they would have to seize the vehicle, impound it, and wait for a magistrate to determine if the vehicle could be searched.

This procedure could take considerable time, thus denying the owner possession of the car for an extended period. As such, it would ignore the Fourth Amendment's dictate that any search be limited in scope and duration to the greatest extent possible.[29] Thus, in our case, when the police officer saw evidence of criminal activity in plain view in the car, he had probable cause to believe that a crime had been committed and that the evidence of the crime was in the car, and the automobile exception gave him authority to search the car.

This same analysis applies to the search by the Security Police. They "searched" an automobile based upon information in plain view under authority given to them by the repairman. Thus their actions also did not violate Airman Owens' Fourth Amendment rights.

### Third Search

At this point in Airman Owens' tale, the government had some evidence that he had committed an offense (based on the civilian police officer's and Security Police's findings in Airman Owens' car), however, the government did not possess the evidence contained in his car. Thus, when the Security Police returned to base, they decided to ask Airman Owens for consent to search his car. As you will recall, Airman Owens gave them his consent; however, the volutariness of this consent was later contested at trial. Our analysis of his consent begins with MRE 314(e)(4) which defines voluntary consent. It states:

> To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.

The government has the burden of proving that the consent given by the suspect was freely and voluntarily given by clear and convincing evidence.[30] Voluntariness of consent is determined by the totality of the circumstances.[31] "In evaluating the totality of the circumstances, courts should consider, among other things, such factors as the accused's age, education, experience, length of military service, rank, and knowledge of the right to refuse consent, as well as whether the environment was custodial or coercive."[32]

The military judge, after hearing the facts, determined that Airman Owens voluntarily consented to the Security Police's proposed search of his car. The uncontradicted evidence was that Airman Owens was never detained, or placed in either custody or under apprehension by the Security Police. Nor did the Security Police ever question him about the theft allegations. Additionally, there was no evidence that he was threatened or somehow placed in fear by the investiga-

tors. Furthermore, he clearly understood that he could limit the scope or terminate the search and, in fact, he later terminated the search. Finally, he was advised of his rights and, after this advisement, did not hesitate to give his consent. The military judge also determined that Airman Owens was not the subject of a "softening-up" preamble to the request for consent to search, nor was he presented with a "fait accompli" and was thus merely acquiescing to the Security Police request. These facts led the military judge to conclude by clear and convincing evidence that Airman Owens' consent was voluntary and thus the fruits of the Security Police search of Airman Owens' car were admissible at trial.[33]

However, even if the military judge determined that Airman Owens' consent was not voluntary, the Security Police still had probable cause to search the car based on the information uncovered by the civilian policemen.[34] Therefore, even if Airman Owens' consent to the Security Police was not voluntary, the Government did not violate his Fourth Amendment rights because they had lawful authority to enter his car – namely, the automobile exception. Accordingly, the evidence seized by the Security Police investigators was admissible at Airman Owens' trial.

### Fourth Search

We then turn to the final search of Airman Owens' car by the civilian policeman after Airman Owens terminated his consent given to the Security Police. Remember, the civilian policeman still had authority to search the car based upon the automobile exception. Additionally, even if the consent form signed by Airman Owens was improperly obtained,[35] the doctrine of inevitable discovery would still apply and permit the admission of the evidence obtained by the civilian policeman. The doctrine of inevitable discovery holds that if the prosecution proves by a preponderance of the evidence that, when an otherwise illegal search was conducted, the government agents possessed evidence that would have inevitably led to the discovery of the evidence, and that the evidence "would inevitably have been discovered in a lawful manner had the illegality not occurred," then the evidence is admissible.[36]

Based on the information properly obtained by the Security Police and his own plain view observations of additional stereo items in the car, the civilian policeman would certainly have continued the investigation into Airman Owens' car. Even if Airman Owens was unwilling to, or involuntarily gave his consent, the facts detailed above demonstrated that the civilian policeman was going to impound Airman Owens' car until he could obtain a warrant. In fact, that is what he specifically told Airman Owens he was going to do unless Airman Owens consented to the search. It is clear that said warrant would have inevitably led to the discovery of the stolen stereo equipment in Airman Owens' car because the equipment would have been secured in the car in a secured police compound. Accordingly, the preponderance of the evidence clearly indicated that the Government was going to continue pursuing the investigation of Airman Owens' car and thereby obtain the evidence ultimately seized by the civilian police officer. Therefore, his actions in telling Airman Owens to consent or have his car impounded did not violate Airman Owens' Fourth Amendment rights and the evidence could properly be used against Airman Owens at trial.[37]

### Conclusion

As you can clearly see from this case, what started out as a simple call from a car repairman to local police, turned into a massive, litigated issue at trial upon which an accused's guilt or innocence turned.[38] If the trial and defense counsel were not so fully versed in the facts of their case and prepared to argue all the points of contention, and the military judge did not provide extensive findings of fact and conclusions of law, Airman Owens' trial would have been a lot simpler, but also lacking in due process. This case is just another telling example of the maxim that the answers to evidentiary issues are frequently more than just a simple yes or no. Behind every door, there is often another issue lurking, giving each side the opportunity to present their case in the best light for their client. It behooves every trial practitioner to learn all the ins and outs of these various rules and research these issues prior to trial in order to present a compelling case to the ultimate finder of fact.

It is also essential that all parties to the case establish a strong factual background and for the military judge to publish extensive and specific findings of fact to justify his decision.[39] As Major Walter Hudson so astutely pointed out, "search and seizure law has so many exceptions to its requirements that defense counsel can never rest simply on arguing that the government has failed to met its burden, but that the particular exception it may be replying on does not apply.[40]

## ENDNOTES

[1] The Security Police are now referred to as Security Forces; however, since they were known as Security Police at the time of this case, the previous name will be used in this article.
[2] Arizona v. Hicks, 480 U.S. 321, 325-26 (1987); California v. Carney, 471 U.S. 386, 390 (1985); Illinois v. Andreas, 463 U.S. 765, 771 (1983); Cady v. Dombrowski, 413 U.S. 433 (1973) (*citing* Camara v. Municipal Court, 387 U.S. 523 (1967)).
[3] *Andreas*, 463 U.S. at 770-71. *See also* Cardwell v. Lewis, 417 U.S. 583 (1974).
[4] Minnesota v. Olson, 495 U.S. 91 (1990); Oliver v. United States, 466 U.S. 170 (1984); United States v. Knotts, 460 U.S. 276 (1983).
[5] *Andreas*, 463 U.S. at 771; *see also* Maryland v. Macon, 472 U.S. 463, 469 (1985) ("a search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."); United States v. Jacobsen, 466 U.S. 109 (1984).
[6] South Dakota v. Opperman, 428 U.S. 364, 367 (1976) ("warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.") (citations omitted); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).
[7] Pennsylvania v. Labron, 518 U.S. 938 (1996); New York v. Class, 475 U.S. 106 (1986); *Carney,* 471 U.S. at 391.
[8] As we know, there was no "search" by the repairman since he was asked to go into the car. Additionally, the Fourth Amendment does not require exclusion of anything he found because he is a private citizen and not a police officer.
[9] *Hicks*, 480 U.S. at 325; Maryland v. Macon, 472 U.S. 463, 469.
[10] *Brown*, 460 U.S. 739, n.4 (*citing* Katz v. United States, 389 U.S. 347) (1967)).
[11] *Brown*, 460 U.S. at 739.
[12] *Id*. at 740.
[13] *Class*, 475 U.S. at 115.
[14] United States v. Matlock, 415 U.S. 164, 171 (1974) (the Government can rely upon third party consent to a search if it can "show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.")
[15] United States v. White, 40 M.J. 257, 259 (C.M.A. 1994), *quoting* Illinois v. Rodriguez, 497 U.S. 177, 188 (1990). However, it should be noted that the *Rodriguez* holding is limited to mistakes of fact and not mistakes of law. *See* United States v. Salinas-Cano, 959 F.2d 861 (10th Cir. 1992) and United States v. Whitfield, 939 F.2d 1071 (D.C. Cir. 1991).
[16] *See also* Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. Chadwick, 433 U.S. 1 (1977).
[17] *Carroll,* 267 U.S. at 153-54.
[18] United States v. Ross, 456 U.S. 798, 806 (1982)
[19] *Ross*, 456 U.S. at 805-06.
[20] *Id.* at 806, *quoting Carroll*, 267 U.S. at 153.
[21] *Carney*, 471 U.S. at 390.
[22] *Id.* at 391 (*citing Opperman*, 428 U.S. at 367).
[23] *Owens*, 51 M.J. at 209, citation omitted.
[24] United States v. Bogan, 13 M.J. 768, 772 (A.C.M.R. 1982) (MRE 315(g)(3) "merely codifies in general terms the automobile exception however it might be interpreted by the federal courts at any given time.") .
[25] While the Military Rule recognizes the automobile exception in the military and the applicability of the exception to non-government owned vessels and aircraft, the Drafters Analysis of the Rule provides a note of caution when seeking to apply this exception to larger vehicles. *See* Drafters' Analysis of MRE 315 (g), Manual for Courts-Martial, 2002 ed. at A22-30. *See also* MRE 311 (g)(4) which states, "For the purpose of this rule, a vehicle is 'operable' unless a reasonable person would have known at the time of the search that the vehicle was not functional for purposes of transportation." The analysis to this language specifically states that an accused cannot prove the car was inoperable and thus defeat an otherwise valid search. Rather the fact of operability is irrelevant, the real test is whether the searching official,"knew or should have known that the vehicle was operable."
[26] Michigan v. Thomas, 458 U.S. 259, 261 (1982) ("when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle even after it had been impounded and is in police custody") (*citing* Chambers v. Maroney, 399 U.S. 42 (1970). *See also Carney*, 471 U.S. at 394-95 (warrantless search of a motor home did not violate the Fourth Amendment where the motor home was capable of use of the roadway and was found in a place not regularly used for residential purposes); Texas v. White, 423 U.S. 67, 68 (1975) ("police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant"); United States v. Evans, 35 M.J. 306 (C.M.A. 1992) (warrantless search of car justified even though appellant had already been taken into custody); United States v. Claypool, 46 M.J. 786 (C.G. Ct. Crim. App. 1997). Additionally, several federal circuits have held that police officers do not need to "determine 'the actual functional capability of a vehi-

cle' when the alleged immobility is not apparent." *Owens,* 51 M.J. at 209 (*citations omitted*).

[27] In fact, one could argue that this is the important holding of *Owens* because it removed any doubt left in MRE 315(g) concerning the requirement for the vehicle to be "operable" or for the investigator to determine the operability of the vehicle before the exception applied to the search in question.

[28] *See also* United States v Richter, 51 M.J. 213 (C.A.A.F. 1999).

[29] *See Class* 475 U.S. at 118 (*citing* United States v. Place, 462 U.S. 696, 722 (1983)); *Chambers*, 399 U.S. at 52.

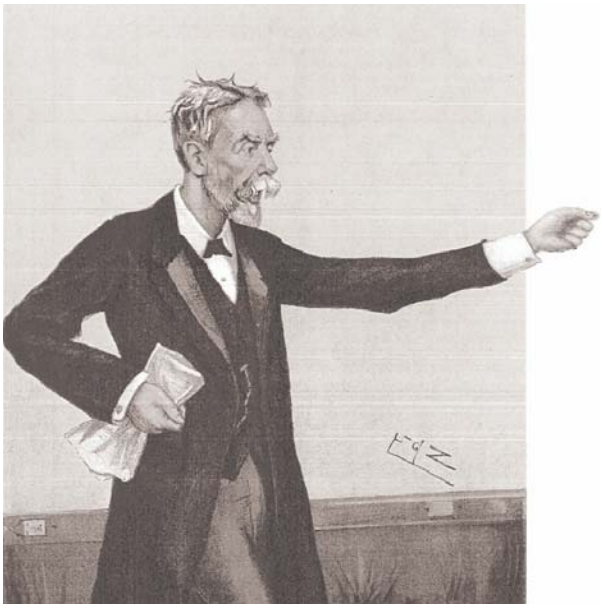
[30] United States v. Radvansky, 45 M.J. 226, 229 (C.A.A.F. 1996), *citing* Florida v. Royer, 460 U.S. 491, 497 (1983) and United States v. Murphy, 39 M.J. 486 (C.M.A. 1994); MRE 314(e)(5).

[31] *Id.* at 229. *See also* Ohio v. Robinette, 519 U.S. 33 (1996); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

[32] *Id*. at 229, *citing* United States v. Goudy, 32 M.J. 88 (C.M.A. 1991); *Bustamonte*, *supra.*

[33] It would be impossible to outline all the cases detailing the factors going into the consent equation. Some of these cases include United States v. Avery, 40 M.J. 325, 329 (C.M.A 1994); United States v. Burns, 33 M.J. 316, 321 (C.M.A. 1991); United States v. Goudy, 32 M.J. 88 (C.M.A. 1991); United States v. White, 27 M.J. 264 (C.M.A. 1988); United States v. Middleton, 10 M.J. 123 (C.M.A. 1981).

[34] *Thomas*, 458 U.S. at 261-62; *White*, 423 U.S. at 68-69; *Chambers,* 399 U.S. at 52.



[35] At trial, the military judge determined that Airman Owens' consent was mere acquiescence to authority and thus not voluntary. For the sake of this discussion, I will assume that the ruling is correct. *See* Bumper v. North Carolina, 391 U.S. 543 (1968). The policeman's statement that he would seize the car and his threat to forfeit Airman Owens' car unless Airman Owens consented to the search make a compelling case for mere acquiescence by Airman Owens. *But see* United States v. Wright, 52 M.J. 136, 142 (C.A.A.F. 1999) ("the majority of courts hold consent to be voluntary where the police tell the suspect that if he does not consent, they will 'obtain' or 'seek' a search warrant, provided probable cause for a warrant actually exists.") (citations omitted*)*.

[36] Nix v. Williams, 467 U.S. 431 (1984); United States v. Kozak, 12 M.J. 389 (C.M.A. 1982); MRE 311 (b)(2).

[37] United States v. Loving, 41 M.J. 213, 245 (C.A.A.F. 1994); *Kozak,* 12 M.J. at 393-94.

[38] This case also involved an issue of the search of Airman Owens' dorm room. A military magistrate, based upon the evidence obtained from Airman Owens' car, authorized the search of Airman Owens' room. I have omitted a discussion of the legal basis for that search because the focus of this article deals with automobiles.

[39] *See also* Maj Walter M. Hudson, *The Fourth Amendment and Urinalysis: Facts (and More Facts) Make Cases*, 2000 ARMY LAW. 17, 27-28, May 2000, discussing the case of *United States v. Richter*, 51 M.J. 213 (1999), a case announced by CAAF the same day as the case in question.

[40] *Id.*

# JAG Corps Leadership Development

## PASSED OVER . . . BUT NOT PASSED OUT

*Lieutenant Colonel Charlie M. Johnson*

There is a segment of the military population that exists in the shadows. Several times a year we talk about this group "behind-closed-doors" or in hushed hallway banter. Most people hardly even notice this group. We don't talk about them in open forums. There are no workshops, seminars, or summits to address their issues. To what group am I referring? The "passed over" professional officer.

Every year significant percentages of officers are passed over for promotion to the next higher grade. Most are devastated. Many become angry and bitter. Some lose interest in their careers, while others quietly internalize their disappointment and continue to humbly serve in an exceptional manner. The focus of this article is two-fold. First, it highlights how promotion selection board results affect the non-selected officer. Second, it provides insight and guidance on how to lessen the impact of the disappointment. The passed over professional belongs to a diverse group of officers from different races, genders and generations. Some in this group have impeccable records (the "right" jobs, advanced degrees, timely completion of developmental education, and extensive deployment experience). Others (with non-competitive records) have not completed developmental education or simply have not performed well. A small portion have had disciplinary problems.

The passed over professional can appear invisible to most. The "non-select" to promotion list is not public information and is not posted on the Air Force Personnel Center (AFPC) website. It is a "need to know/ official use only" document that is not widely disseminated. Hence, most people don't realize which officers have not been selected for promotion "on time."

Passed over officers typically fall into two broad categories. Some passed over professionals are very visible in that their outward behavior demonstrates their overwhelming disappointment. We all know him or her. They are anti-social and rarely smile. When at work, they close their doors. Their uniforms tend to be excessively worn and their shoes are dull. They are bitter and would leave the Air Force immediately if they were retirement-eligible. Instead, they stay and make everyone around them miserable. This category also includes the passed over professional who talks incessantly about the disappointment. They will talk to anybody who will listen—any time, any place. They have lost their focus at work and are easily distracted. They wonder if there was anything they could have done differently. They study the list of officers who were selected for promotion and try to "compare" themselves with these fortunate officers. Although these types of passed over professionals exist, most officers fall in another category.

The largest category is the silent majority. This passed over professional is the consummate military officer: humble, dedicated, giving, and optimistic. He or she walks with perfect military bearing, tackles new challenges without hesitation, volunteers free time to help others, and continues to significantly contribute to the mission. They don't expect sympathy and have come to terms with the disappointing news and strive to continue to excel. These trained professionals are critical to the military.

To be passed over for a well-deserved promotion is very difficult to bear. It hurts deep down. When your supervisor delivers the disappointing news, you interpret this news as "you're not good enough," "you're not smart enough," "the Air Force doesn't value your contributions," or "you're no longer a part of the team." The simple fact of the matter is that the law provides quotas for each grade and not everyone can be promoted. Boards promote those whose records indicate they are "best qualified" for promotion. Unfortunately, not every "fully qualified" officer can be promoted. The old adage is that promotion selection boards run out of quota long before they run out of quality. Accordingly, as reflected in the legislative history of the Defense Officer Promotion Management Act, an officer's promotion passover should not be considered a stigma or adversely reflect upon the officer's quality of service. Hence, you, the passed over professional, should not interpret the board results as a personal attack on your self-worth or value to the military.

Your first step after receiving the unpleasant news is to take some leave. Don't, however, use this time to wallow in self-pity. Surround yourself with positive upbeat people—perhaps your church family, long-time friends, relatives, and understanding colleagues. It's

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permissible to be disappointed at first, but eventually you have to snap out of it! Assess your options and move out smartly.

Educate yourself. Visit the AFPC website. Did you know you are entitled to receive nonselection counseling and a records review? Military branches are required to make available counseling and records reviews for officers who are not selected for promotion in the primary zone and above the primary zone. Is there something in your records that you can appeal? Are you eligible to meet a special selection board? Are you eligible for selective continuation? What are your chances for being promoted above the primary zone? Before you make any decisions about your next steps, you should have the benefit of the answers to all of these questions.

You should also ask yourself, "Do I still want to continue serving my country and can I do so without harboring bitterness or anger?" If your answer is yes, you should also seek out a seasoned senior mentor (preferably one who has actually sat on a promotion board) and ask for honest feedback, advice, and guidance. Keep in mind that there are other types of 'promotion' that do not involve a grade increase. Have you considered requesting a transfer to that job that you have always coveted or a location you'd really like? You know, that job that you wanted but were told it wasn't a 'promotable' job. How about that family-friendly duty assignment: shorter duty day, less commuting time, and situated in a prime location (Hawaii, for example)? There is something else you can do. "Give something back." Tell your story to the young folks. Help mentor them about the positives and negatives of a military career based upon your personal experiences. Giving back will help you to heal.

If you just can't 'snap out of it' and no longer desire to contribute, regrettably it may be time to do something else with your career. Only you can make that decision. You are not the only person, however, who can lessen the impact of the disappointing news. Your co-workers and superiors also can help.

Co-workers and superiors can lessen the impact of the unpleasant news. A passed over professional is not a leper. You should not shun them in the hallways after the selection for promotion list has been released. If you have never been passed over, under no circumstances should you say to a passed over professional that you know how they feel. Why? Because you really don't. For most there is truly a sort of grieving process at this particular time and we all know every individual handles grief differently. Don't give them false hope. If you know their records aren't strong and will probably not improve before the next board, you should not tell them you think they'll be picked up by the next board.

Here's what you can do and should do, even if it makes you feel a bit uncomfortable. Offer to listen to the passed over professional and most importantly, actually *listen*. Tell him you are sorry to hear about the disappointing news. Remind him of his strengths and contributions to the mission. If you are a senior officer who has been passed over earlier in your career, your advice is critically important. You are a role model. You can truly identify with the passed over professional because you share the common experience. You are also absolute proof that a passed over professional can overcome a temporary set back and continue to do great things in the Air Force. If you are the supervisor who has the task of delivering the bad news, you need to be actively engaged. Deliver the news as soon as possible (in private, of course). It really does make a difference to the passed over professional to receive the news in an expeditious manner. It gives them time to 'digest' the news and react appropriately in public. Watch them and assess what help they may need; time off, less stressful taskers, counseling, etc. Be accessible to them. The Air Force has invested a lot of time and training developing officers to be the assets that they are. During this time of disappointment for the passed over professional, superiors and co-workers must do all that they can to "take care of their wingman."

How can I, the writer, give such candid advice to passed over professionals, their co-workers and superiors? How do I know so much about how the passed over professional feels? I was passed over for promotion to lieutenant colonel in 2000. I didn't give up and neither should any other officer.

# Payment of Fines and Fees to the Environmental Protection Agency and States

Lieutenant Colonel Barbara B. Altera[1]

***Can my Air Force facility pay this environmental fine (penalty) or fee (service charge)?***[2]

This question continues to be one of the most often asked questions within the environmental area. At the same time, it is one of the questions that Air Force personnel too often fail to ask. Although the requirement to pay certain fines and fees is clear, other fines and fees cannot be paid (i.e., there is no legal basis to allow payment). Furthermore, payment of still other fines and fees is unsettled and a case-by-case analysis is required.

The information in this article, including the table, is intended to be a starting point for attorneys faced with a fine or fee issue. Given the complexity of many fine and fee issues, *starting point* is emphasized. Additional research will be necessary for many fine and fee issues. Furthermore, there may be other issues that also must be addressed, such as supplemental environmental projects (SEPs),[3] interest, back fees,[4] penalties for a late fee,[5] and the reasonableness of the fee.[6]

When responding to an enforcement action that involves a fine and/or some type of settlement agreement, installations must get appropriate coordination before paying the fine or entering into the agreement. Appropriate headquarters coordination (AFLSA/JACE), through the major command (MAJCOM), is required prior to payment of any fine and prior to signing an agreement (such as settlement agreements and consent agreements). Certain fines require additional coordination that AFLSA/JACE will obtain (such as coordination with the Department of Justice for Clean Air Act fines).

With respect to fees, the table specifies whether there is a waiver of sovereign immunity to allow payment of fees. This information, however, clears only the first hurdle--whether there is a waiver of sovereign immunity. The next hurdle that must be addressed is whether the fee satisfies the three-prong test that is used to determine whether the fee is, in fact, a tax (which must not be paid). Even if both of these hurdles are cleared, the installation may have a local dispute regarding the amount of the fee. Before refusal to pay a fee based on immunity, illegal tax or a similar reason is relayed to the state, the Air Force requires SAF/IEE coordination.

The table below and its accompanying explanatory notes summarize the extent of the waivers of sovereign immunity regarding payment of fines/ penalties and fees for some of the major environmental law statutes.

| Statute (waiver provision, if any) | Fines* to EPA? | Fines to States? | Pay Fees? |
|---|---|---|---|
| Clean Air Act (CAA 118(a); 42 USC 7418(a)) [a] | Yes[b] | No[c] | Yes |
| RCRA – SW & HW Mgt (42 USC 6961) [d] | Yes | Yes | Yes |
| RCRA - USTs (42 USC 6991f) | Yes[e] | Yes[f] | Yes |
| RCRA - Aboveground Storage Tanks[g] | No | No | No |
| Clean Water Act (33 USC 1323) | No | No | Yes |
| Clean Water Act (33 USC 1344(t)) | No | No | No[h] |
| Safe Drinking Water Act (42 USC 300j-6) | Yes | Yes | Yes |
| TSCA - Lead-Based Paint (15 USC 2688) [i] | Yes | Yes | Yes |
| CERCLA (42 USC 9620) | Yes[j] | No | No under CERCLA[k] |
| Defense Environmental Restoration Program (DERP) (10 USC 2701(d)) | No | No | Yes[l] |
| EPCRA[m] | No | No | No |
| Pollution Prevention Act | No | No | No |
| Endangered Species Act (Administered by USFWS)[n] | No[o] | No | No |

## EXPLANATORY NOTES

a. While there is a waiver of sovereign immunity in CAA § 118(a) (General compliance), there is no waiver of sovereign immunity in § 118(c) (Government vehicles) or §118(d) (Vehicles operated on Federal installations). Furthermore, the waiver in 118(a) cannot be "read into" § 118(c) or 118(d). Therefore, there is no authority under the CAA for EPA or states to impose fines or collect fees associated with a vehicle inspection and maintenance (I/M) program if the program is a "CAA 118(c) program" or a "CAA 118(d) program."

Background on 118(c) and 118(d) Requirements: The EPA implemented the CAA provisions related to state vehicle I/M requirements for federal government (fleet) and federal employee vehicles at 40 CFR § 51.356. The Department of Justice (in a 29 Jul 98 letter to the EPA Acting General Counsel concerning "Federal Agency Compliance with the Clean Air Act Vehicle Inspection and Maintenance Requirements", available on the Defense Environmental Network & Information eXchange (DENIX) at https://www.denix.osd.mil/denix/DOD/Working/CAASSC/Airschif/schiffer.html) called into question EPA's assumption that there is a waiver of immunity that allows states to impose discriminatory I/M requirements on federal fleet and federal employee vehicles. Furthermore, DoJ stated that the express waiver of immunity in section 118(a) does not extend to CAA sections 118(c) and (d). DoJ also stated that EPA's regulation incorrectly requires States to regulate federal facilities by including I/M requirements in State Implementation Plans. The DoJ concluded that the EPA I/M regulation is invalid to the extent that it exceeds the waiver of sovereign immunity in section 118(a) and, therefore, states cannot rely upon the regulation to assert jurisdiction over the federal government

As of late 1999, the EPA had taken initial steps to resolve the I/M sovereign immunity issues by drafting a rule to clarify how states can regulate federal facilities under CAA Section 118(a) and to establish a new 40 CFR Part 93 to implement Sections 118(c) and (d) with respect to federal facilities. To date, the EPA has not formally proposed an amendment to the existing I/M rule nor formally proposed a new 40 CFR Part 93. Notwithstanding, both DOJ and EPA have stated that federal facilities in I/M program areas must comply with all non-discriminatory state I/M requirements established under CAA 118(a).

In summary, if faced with an issue concerning fines or fees associated with a vehicle I/M program, determine whether the state program is a "CAA 118(a) program," a "CAA 118(c) program," or a "CAA 118(d) program." If it is a "CAA 118(a) program, fines and fees might be payable. Due to the confusion concerning vehicle I/M programs, MAJCOM and JACE coordination is highly encouraged for I/M issues.

b. IAW 16 Jul 97 DoJ (Office of Legal Counsel) opinion, EPA has authority to assess penalties against federal facilities. Opinion is available at http://www.usdoj.gov/olc/cleanair_op.htm.

c. The Air Force position is that the CAA does not waive sovereign immunity for payment of state-imposed fines. However, uncertainty exists regarding payment of state-imposed CAA penalties and varies by federal circuit. See 17 Jul 02 SAF/IEE Memo, "Air Force Policy of the Payment of Fines and Penalties for Violations of the Clean Air Act (CAA)" at https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/ENVLAW/CAAFines2002Policy.pdf.

6th Cir: DoD will pay IAW Court of Appeals opinion
9th Cir: DoD may negotiate and settle penalty assessments
11th Cir: DoD will not pay
All other circuits: Coordinate through JACE with DoJ

Coordination with AFLSA/JACE and DoJ is required for all state-imposed air penalties.

d. No RCRA waiver for private suits seeking monetary damages: The U.S. Court of Appeals for the First Circuit held that the Resource Conservation and Recovery Act (RCRA) does not waive sovereign immunity for a private suit to recover monetary damages for cleanup of past oil contamination. Marina Bay Realty Trust L.L.C. v. United States, No. 04-1909, 2005 U.S. App. LEXIS 7603 (1st Cir., May 3, 2005). The First Circuit held that "there is no express waiver of immunity for private suits seeking monetary damages [in RCRA]." *Id.* At *13. The court stated that, "[a]t most, there is an ambiguity regarding a waiver, and such an ambiguity must be construed in favor of immunity." *Id.* At *14 (citing McLellan Highway Corp. v. United States, 95 F. Supp. 2d. 1, 16, 17 (D. Mass. 2000)). The First Circuit also stated, "And, private monetary damages are not similar enough to 'any injunctive relief, administrative order or civil or administrative penalty or fine' to be covered by the 'including but not limited to' language in the statute." *Id.*

e. Prior to the passage of the Energy Policy Act of 2005 (see subparagraph f immediately below), DoD paid RCRA-UST penalties (fines) to EPA in accordance with a 14 Jun 00 DOJ opinion, available at

http://www.usdoj.gov/olc/ustop2.htm.

f. On 8 Aug 05, President Bush signed into law the Energy Policy Act of 2005 (H.R.6, which is available on the Thomas Legislative Information website at http://thomas.loc.gov/). The Act expanded the RCRA UST section to require federal facilities to pay fines and penalties. Specifically, section 1528 of the Act amended the UST federal facilities provision (Section 9007 of the Solid Waste Disposal Act; 42 U.S.C. § 6991f) to read as follows:

> In General—each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any underground storage tank or underground storage tank system, or (2) engaged in any activity resulting, or which may result, in the installation, operation, management, or closure of any underground storage tank, release response activities related thereto, or in the delivery, acceptance, or deposit of any regulated substance to an underground storage tank or underground storage tank system shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting underground storage tanks in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local underground storage tank regulatory program. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local law concerning underground storage tanks with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State law concerning underground storage tanks, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction. The President may exempt any underground storage tank of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of 1 year, but additional exemptions may be granted for periods not to exceed 1 year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

Review of and Report on Federal Underground Storage Tanks (text not included here).

g. While RCRA contains UST provisions and a specific waiver of sovereign immunity for UST requirements, RCRA does not contain provisions that govern aboveground storage tanks. Consequently, RCRA and its waiver of sovereign immunity do not apply to ASTs, and no state RCRA program can purport to regulate federal entities with regard to ASTs because such regulation would be broader in scope than RCRA. However, a state may have the authority to regulate federal ASTs under another authority, though the authority must be identified and there must be a waiver of sovereign immunity for the requirements, fines, or fees at issue.

Because there is no environmental statute that specifically regulates ASTs, all AST issues require a thorough, state-by-state analysis to determine whether the state AST requirements fall under the state's RCRA authority or another authority. If under RCRA, there is no waiver of sovereign immunity for any AST requirements and, therefore, no basis for payment of fines or fees. If state AST requirements are derived from another authority, there may be a waiver, though the waiver may not include fines. For example, the CWA waiver of sovereign immunity (33 USC § 1323) does not include payment of fines/penalties but does include fees.

h. Of the two waivers in the CWA, the 404(t) provision is less known. This provision states the following:

> Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

Note that the scope of this provision is confined to "navigable waters." Consequently, a state that has a broader definition of "navigable waters" than the federal statute cannot impose its requirements to the extent the water body in question is not a "navigable water" within the meaning of federal law.

With respect to fees, this provision does not provide a clear, unequivocal waiver for fines or fees. The U.S. District Court for the Northern District of California, applying the test in DOE v. Ohio, reached this conclusion, finding there to be no waiver of sovereign immunity to State-imposed fees. State of California v. United States, Case no. C-98-0792 WHO, affirmed 2001 U.S. App. LEXIS 468 (cert. denied, 122 S. Ct. 806 (2002)). The DoJ brief before the Supreme Court addresses this at http://www.usdoj.gov/osg/briefs/2001/0responses/2001-0038.resp.pdf.

i. When addressing a LBP fine or fee issue, consider (as relevant) that authorized state programs under 15 USC 2684 are more limited than the waiver because states may get approval to administer and enforce only those requirements concerning LBP training and certification (in § 2682) and the lead hazard information pamphlet requirements (in § 2686). Also, the federal LBP regulations (HUD's at 24 CFR part 35; EPA's at 40 CFR part 745 ) apply to the sale or lease of target housing, which the Environmental Appeals Board found not to apply to the residency occupancy agreements that are signed for military family housing (see the Navy's Kingsville NAS case, TSCA Appeal No. 99-2, 17 Mar 00). To the extent a state's LBP laws apply only to sales and leases, they will not apply to military family housing (MFH). Furthermore, state laws may be more stringent than the federal law, but they cannot be broader in scope; consequently, state LBP laws that purport to apply to MFH would be broader in scope and not enforceable against federal facilities.

j. Generally, the Air Force pays stipulated penalties for violations of clean-up agreements (such as interagency agreements or federal facility agreements). There are two caveats to this statement. First, the Air Force may invoke dispute resolution under the standard FFA to contest the imposed penalty. Second, in accordance with 10 USC § 2703(f) (copied below), the Air Force will pay fines/penalties using DERA money after receiving specific congressional authorization.

> **Payments of Fines and Penalties.—** None of the funds appropriated to the Environmental Restoration Account, Defense, for fiscal years 1995 through 2010, or to any environmental restoration account of a military department for fiscal years 1997 through 2010, may be used for the payment of a fine or penalty (including any supplemental environmental project carried out as part of such penalty) imposed against the Department of

> Defense or a military department unless the act or omission for which the fine or penalty is imposed arises out of an activity funded by the environmental restoration account concerned and the payment of the fine or penalty has been specifically authorized by law.

k. There is no waiver under CERCLA to allow payment of reasonable service charges (fees). Therefore, fees that may be paid to state and local government agencies respecting Air Force CERCLA response actions are limited to those authorized by DERP and covered under a DSMOA (see note k). Other services may have a policy that allows a fee for service agreement with states regarding CERCLA cleanups, but the Air Force's current policy generally is to utilize DSMOA.

l. The DERP at 10 USC § 2701(d) authorizes the DoD to "enter into agreements on a reimbursable or other basis with any other Federal agency, with any State or local government agency, or with any Indian tribe, to obtain the services of the agency to assist the Secretary in carrying out any of the Secretary's responsibilities under this section." Under the authority of the DERP, DoD created the Defense-State Memorandum of Agreement (DSMOA) Program. Fees may be paid to state and local agencies respecting our CERCLA response actions when authorized by DERP and covered under a DSMOA. Such fees are limited to amounts that are reimbursement for the types of services identified in the DSMOA and Cooperative Agreements, where Cooperative Agreements are two-year plans describing planned services and amounts.

m. There is no waiver of immunity under the Emergency Planning and Community Right-to-Know Act. Executive Order 13148 (2000) makes EPCRA applicable to federal facilities. Fees may be payable under a different law.

n. While there is no waiver of sovereign immunity in the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 – 1544, federal facilities are subject to the ESA because they fall within the definition of "person."

> The term 'person' means an individual, corporation, partnership… or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State… or any other entity subject to the jurisdiction of the United States. § 1532(13).

Responsibility for promulgating ESA regulations and enforcing the ESA fall on the Secretary (16 USC § 1540(e)), where "Secretary" means the Secretary of the Interior [US Fish and Wildlife Service] or the Secretary of Commerce [National Marine Fisheries Service (NOAA Fisheries)], with the Secretary of Agriculture involved when activities include the importation or exportation of terrestrial plants. § 1532(15).

Generally, the Air Force will consult with the appropriate US Fish and Wildlife Service office because the USFWS addresses issues concerning endangered and threatened terrestrial species, freshwater fish, and plants while the National Marine Fishery Service addresses endangered and threatened saltwater fish and marine mammals.

o. While the USFWS and the National Marine Fisheries Service have the authority to impose specified criminal and civil penalties on a federal employee for ESA violations (16 USC § 1540), they do not appear to have authority to impose fines against federal facilities because there is no federal facilities provision and no legislative history that would indicate a clear congressional statement of intent allowing interagency penalties. Based on the analysis set forth in DoJ OLC

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*The thoroughness of this table and addition of explanatory notes reflects input from a number of environmental attorneys. Special thanks for their review and/or comments is extended to James Cannizzo (Lt Col, ret., former REC), Lt Col Joe Miller (HQ ACC/JAV), Major Rick Pakola (AFLSA/JACE), Marc Trost (JACE), Dave Vecera (JACE), Lauryne Wright (formerly in JACE), Maj Mitzi Weems (Deputy REC, Central Region), Maj George Konoval (Deputy REC, Western Region) and B.K. Schafer (GSA). The author also gratefully acknowledges the efforts of Lt Col John Smith (JACE), Lt Col Teresa Hollingsworth (HQ AMC/JAV), Lt Col Willis (Army Legal Services Agency), Pamela Morris (Navy Sr. Counsel, Environment), David Buxbaum (Army Southern Regional Environmental Counsel) and John Hoertz (AFCEE Air Program Manager) in addressing the complicated state I/M issues and coming up with a DoD position.*

*This guidance document will be posted on AFLSA/JACE's website and updated as appropriate. If you have any corrections or have comments on major issues that should be addressed, please contact the author directly at (1-888-610-7419).*

opinions (e.g., 1992 Office of Special Counsel for Immigration Related Unfair Employment Practices Opinion; and 1989 Nuclear Regulatory Commission Imposition of Penalties on the Air Force Opinion), legislative history may indicate congressional intent when federal facilities are encompassed as a "person" yet there is no federal facilities provision. The relevance of legislative history in determining a clear congressional statement to allow the federal government enforcement authority against federal facilities is also discussed in the UST opinion cited in note d.

Note that legislative history is relevant to determining interagency authority in a "clear statement" analysis. In contrast, legislative history is not relevant when a waiver of sovereign immunity provision is analyzed by the judiciary under a *Department of Energy versus Ohio* analysis to determine whether there is a clear and unequivocal expression of congressional intent to waive sovereign immunity for a state or local authority to impose penalties and fines against a federal facility. *See* Dep't of Energy v. Ohio, 503 U.S. 607 (1992).

# Mission Possible: Judge Advocate Support to the Inspector General

Major Dawn M.K. Zoldi

The Judge Advocate General's (JAG) Corps mission is to provide full-spectrum legal services that support Air Force people, operations, readiness and modernization.[1] A mission closely entwined with ours, but not widely understood, is that of the Inspector General (IG). The IG, through its Complaints Resolution Program, resolves problems that affect the Air Force mission and people. When necessary, IGs accomplish this effort through objective fact-finding in the form of IG complaint analyses and investigations that look to the concerns of complainants and the best interests of the Air Force. *IGs rely on JAGs for critical support throughout all phases of the Complaints Resolution Process.* This article explains the IG Complaints Resolution Process, highlights JAG roles throughout, and introduces several tools available to assist JAGs in fulfilling their responsibilities.

**What is an appropriate IG matter?** Any individual can submit an IG complaint if they reasonably believe inappropriate conduct has occurred, or a wrong or violation of law, policy, procedure or regulation has been committed.[2] However, not all allegations fall within the IG's purview. Often a complainant's assertions will fall more appropriately under the purview of command or other agencies. AFI 90-301, *Inspector General Complaints Resolution,* Table 2.9, *Matters Not Appropriate for the IG Complaints Resolution System*, contains a helpful but non-exhaustive list of such agencies. Normally the following should not be included as part of an IG investigation: command matters, matters typically addressed through other established grievance or appeal channels (unless there is evidence that those channels mishandled the matter or process.) and UCMJ offenses.[3] On the other hand, IGs (not commanders) must investigate allegations involving "The Big Three": Reprisal, Restriction and Improper Mental Health Evaluation (MHE) referrals.[4] IGs also routinely investigate fraud, waste and abuse as well as allegations relating to abuse of authority.

**What is the process IGs use to resolve complaints?** IGs use a three-phase process to resolve complaints: Phase 1, Complaint Analysis (always required); Phase 2, Investigation, and Phase 3, Quality Review. During complaint analysis, the IG preliminarily reviews the complainant's assertions and evidence to: determine what action, if any, is required; attempt to properly frame the allegation; and determine the appropriate disposition (referral, transfer, dismissal, assistance or investigation).[5] An investigation occurs when either the preliminary evidence indicates there was wrongdoing or where the IG cannot rule out such wrongdoing without further investigation. Only an Appointing Authority, usually the wing commander, can direct an IG investigation by appointing an investigating officer (IO) in writing.[6] The investigative phase includes: pre-fact finding (preparation), fact-finding and report writing. A quality review occurs after every investigation to ensure completeness, compliance with regulations and objectivity, and always includes a legal sufficiency review.[7]

**How do JAGs fit into the IG complaint resolution process?** JAGs at all levels play a critical role in the Complaints Resolution Process. In any given investigation, a minimum of two JAGs will be involved: a Legal Advisor (Phases 1 and 2) and a Reviewer (Phase 3). During the Phase 1 complaint analysis that occurs prior to an IG investigation, the Legal Advisor assists the IG in properly framing allegations.[8] During Phase 2, the investigative phase, the Legal Advisor helps the Investigating Officer (IO) craft an Investigation Plan (IP), formulate a Proof Analysis Matrix (PAM) and review draft interview questions.[9] During the investigation, the Legal Advisor assists the IO with issues that arise, such as: necessity for rights advisement, propriety of third-party presence during interviews, properly handling new or additional allegations and search and seizure of evidence. After the completion of every investigation, as part of Phase 3 quality review, a JAG Reviewer, who is a different JAG than the Legal Advisor

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to the IO, will conduct an independent legal sufficiency review of the IG case file.[10] If the case involves allegations relating to an O-6 subject, the "Big Three," or where the Appointing Authority has written an addendum, the Major Command (MAJCOM) or higher-level law office will provide an additional legal review.

**Who is the "right" JAG to assist the IG?** With the right training and mindset, any JAG can be the "right" JAG to assist the IG. AFI 90-301 levies specific requirements for the JAGs involved in the Complaints Resolution Process. The Legal Advisor to the IO must not be the JAG who will ultimately conduct the post-investigation legal sufficiency review or the supervisor of the Reviewer.[11] At a minimum, the assigned Legal Advisor must be familiar with AFI 90-301, the *SAF/IGQ IO Guide,* the *SAF/IGQ JAG Guide to IG Investigations* and IGDG 7050.6, *Guide to Investigating Reprisal and Improper Referrals for Mental Health*, 6 February 1996. From the IG's perspective, JAGs that have investigative or litigation experience make the most helpful Legal Advisors. The Reviewer must be familiar with AFI 90-301 and the *JAG Guide to IG Investigations.*

**Are there any special considerations about IG cases?** IG cases involving the "Big Three" and O-6 or senior official subjects receive high visibility. In such cases, in addition to MAJCOM oversight, the Secretary of the Air Force, Complaints Resolution Directorate (SAF/IGQ) and Department of Defense IG provide additional quality reviews. Such complaints have unique reporting requirements.[12] All complaints, regardless of the nature of the allegation, alleging O-6 misconduct (even if handled by a CDI) must be reported to SAF/IGQ immediately through the MAJCOM, Forward Operating Agency (FOA) or Direct Reporting Unit (DRU) IGs.[13] Additionally, a copy of any material collected addressing allegations of misconduct by a Colonel, Colonel-select, or GS/GM-15 must be provided to SAF/IGQ.[14] Only SAF/IGS handles and investigates complaints against O-7 selects (and above) and civilian equivalents.[15] If there is an allegation against an O-7 select or above, the IG will not investigate, but rather will immediately report that allegation to SAF/IGS through MAJCOM, FOA or DRU IGs.[16]

**What tools are available to JAGs to better assist IGs?** There are numerous resources and training opportunities available for JAGs to gain a better understanding of IG issues. SAF/IGQ conducts the Installation Inspector General Training Course (IIGTC) six times per year. IIGTC, open to all active-duty, Reserve, and Air National Guard (ANG) JAGs, provides a comprehensive overview of all essential aspects of IG investigations, including the critical JA role throughout the IG Complaints Resolution Process. In addition to IIGTC, SAF/IGQ sponsors IO Courses and Information Release Workshops, upon request. SAF/IGQ has produced several helpful guides, including: the new *JAG Guide to IG Investigations*, February 2006; *Investigating Officer's Guide*, June 2005 and *Commander-Directed Investigation Guide*, 1 April 2001. To access these guides, course information, statutory/regulatory references, and other valuable IG resources, visit the SAF/IGQ website at https://www.ig.hq.af.mil/igq/.[17]

In providing full-spectrum support to the IG, JAGs across the Air Force support our people, operations and mission-readiness. You know the rules; you have the tools—now *let's roll!*

## ENDNOTES

[1] AFDD 1-1. *Leadership and Force Development*, 18 February 2004.
[2] AFI 90-301, *Inspector General Complaints Resolution,* 8 February 2005, para. 1.45.6.
[3] AFI 90-301, para. 1.44. and Table 2.9.
[4] *See* 10 U.S.C. § 1034, as implemented by DoD Directive (DoDD) 7050.6, *Military Whistleblower Protection*, 23 June 2000 and Public Law 102-484, Section 546, *National Defense Authorization Act for Fiscal Year 1993*, 23 October 1992, as implemented by DoDD 6490.1, *Mental Health Evaluations of Members of the Armed Forces*, 1 October 1997. *See also* AFI 90-301, Chapter 3, Sections 3C-E.
[5] AFI 90-301, para. 2.12. when a complainant's assertions raise the possibility of reprisal, IGs use a special Reprisal Complaint Analysis (RCA) format per AFI 90-301, Attachment 20. For further discussion of complaint dispositions, *see* AFI 90-301, para. 2.14 and Tables 2.11 and 2.16 (referral); para. 2.19 and Tables 2.12 and 2.17 (transfer); para. 2.20 and Tables 2.13 and 2.18 (dismissal); para. 2.22 and Tables 2.15 and

2.19 (assistance).
[6] AFI 90-301, para. 2.35.
[7] AFI 90-301, paras. 2.58. and 2.61.1.
[8] AFI para. 2.36.2. Framing allegations is the single most important factor in analyzing a complaint. Allegations framed during the complaint analysis focus the entire investigation.
[9] AFI 90-301 directs the appointed IO to meet with their legal advisor before initiating the investigation. The JAG legal advisor must help the IG train the IO. AFI 90-301, para. 2.36.2. The *SAF/IGQ Investigating Officer Guide (IO Guide)* is a mandatory training tool per AFI 90-301, para. 2.36.1. The IP is the IO's roadmap and outlines the: issues for resolution, preliminary facts including a chronology, applicable regulations, evidence required and administrative considerations related to the investigation (such as travel required). AFI 90-301, para. 3.26.4. Attachment 7 to AFI 90-301 provides a sample IP. The PAM is the IG version of a proof analysis. It provides a construct for identifying the evidence needed to prove or disprove an allegation. For a sample reprisal PAM, see Attachment 3 to *SAF/IGQ JAG Guide to IG Investigations*.
[10] For legal review requirements, *see* AFI 90-301, para. 2.61.1.1.1. 2.61.1.1.6; See also *SAF/IGQ JAG Guide to IG Investigations*, Attachment 4, *Judge Advocate (JA) Primer: "Legal Sufficiency Review" for Inspector General (IG) Investigative Case Files* and Attachment 5, *Sample Legal Review.*
[11] AFI 90-301, para. 2.61.2.
[12] *See* AFI 90-301, paras. 3.18; 3.29; 3.35; 3.10; 3.3.
[13] AFI 90-301, para. 3.8.1.
[14] AFI 90-301, Table 3.3, Rule 1.
[15] AFI 90-301, para. 3.2.1.
[16] AFI 90-301, Chapter 3, Section 3A and Table 2.10, Rule 1.
[17] The WEBFLITE HQ AF/JAA page also contains helpful information related to IG investigations, including the SAF/IGQ JAG Guide to IG Investigations https://aflsa.jag.af.mil/AF/GENERAL_LAW/LYNX/jagguideto_ig.doc.


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