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The Reporter

The Judge Advocate General's Corps

Cyber Awareness:

Pinning Down Clouds:
Taming the Wild West of Cyberspace

Searching and Seizing Electronic Devices:
What Do We Need to Know?

Inside:

TJAG's New Foundational Leadership Pillar

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Lieutenant General
Richard C. Harding
The Judge Advocate General of the Air Force

Major General
Steven J. Lepper
Deputy Judge Advocate General of the Air Force

Colonel Kenneth M. Theurer
Commandant
The Judge Advocate General's School

Lieutenant Colonel
Mark B. McKiernan
Major Sam C. Kidd
Major Andrew R. Barker
Senior Master Sergeant
Donna M. Bridges
Ms. Hannah E. Carter
Editors

Captain Simone V. Davis
Ms. Thomasa T. Paul
Illustrators/Editors

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Message from

The Commandant

Building leaders is about building your professional strengths to maximize your leadership potential. We've been working this for some time but it's time to recognize its importance by elevating it to the status of a foundational leadership pillar.

Lieutenant General Richard C. Harding
The Judge Advocate General

In this edition of *The Reporter,* you can see that we have added a new focus area as a result of TJAG's introduction of the new Foundational Leadership pillar: Building Leaders. In addition to an excerpt of TJAG's February 2013 webcast, an article on the GATEWAY Course by Lt Col Mark McKiernan and an article by Maj Andrew Barker on professional responsibility for supervisory attorneys are the first two articles to be published under this new heading. I encourage each of you to submit articles for publication in future issues of *The Reporter* on the topic of Building Leaders.

Another special feature of this edition is the inclusion of an enlightening article by Capt Jun Okamoto, a Japan Air Self Defense Force judge advocate, on some of the statutory and constitutional limitations placed on the JASDF and how understanding these limitations is important for U.S. forces engaged in bilateral operations with the JASDF. Additional featured articles by Col Dawn Zoldi and Capt William Toronto explore two areas of the law where the rapid growth of technology is creating new and unique legal issues: domestic use of remotely piloted aircraft and the governing of cyberspace.

The Military Justice section of this issue begins with Maj Lisa Richard providing practitioners with "what we need to know" regarding searching and seizing electronic devices. Maj Christopher Goewert and Capt Andrew Norton team up to dispel four commonly held beliefs about sexual assault. Lastly, Mr. Bradley Richardson writes on extraordinary relief at C.A.A.F.

Maj Scott Van Schoyck and MSgt Elena Lund's article on how fundamental teaming is to the success of Air Reserve Technician paralegals is an excellent introduction to this month's Teaming pillar topics. In addition, MSgt Charles McQueen educates us on the role of teaming in the deployed environment.

Legal Assistance is still a vital practice area and we will continue to feature articles on Legal Assistance topics. This edition includes articles by Capt Virginia Mack on partnering with local United States Citizenship and Immigration Services offices and Capt Rodney Glassman on challenges faced by judge advocates married to civilian attorneys. Finally, an article by Capt Anna Magazinnik, SSgt Porshia B. Reynolds, SSgt Joseph Rosenstiel, SrA Danny Riddlesprigger and A1C Brittney Guzman illustrates how a proactive Legal Assistance program can positively impact more than just the client who seeks help.

We conclude this edition with a review of retired Major General William Cohen's *Secrets of Special Ops Leadership: Dare the Impossible—Achieve the Extraordinary* by Captain Jason DeSon.

The Intersection of Technology, Privacy, and Security

Domestic Use of United States Air Force Remotely-Piloted Aircraft

By Colonel Dawn M.K. Zoldi, USAF

...[W]e lose ourselves when we compromise the very ideals that we fight to defend. And we honor…those ideals by upholding them...

- President Barack Obama

A fully armed MQ-9 Reaper taxis down a runway in Afghanistan. (U.S. Air Force photo/SSgt Brian Ferguson)

The use of Remotely Piloted Aircraft (RPAs) by the U.S. Air Force can be a controversial topic. There are those who believe the men and women who wear the Air Force uniform are piloting RPAs[1] to hover over backyards and spy on Americans. This could not be further from the truth. Ours is a nation of laws, and the rule of law is integral to Air Force RPA operations—operations which are fundamental to our nation's security and defense.

There is currently discussion in many circles about the assimilation of RPAs into our national airspace, in particular about the use of RPAs by law enforcement and its impact on personal privacy. The 2012 FAA Modernization and Reformation Act fast tracks processes for such assimilation with a 2015 deadline. However, without additional legal parameters, many states are jumping into the fray and legislating how RPAs will or will not be used on their "turf." The majority of state bills introduced thus far require a judicial warrant before RPAs could be used for law enforcement purposes. This is a good point of contrast from the intended use of RPAs by the Department of Defense (DoD). It is not the DoD's mission to conduct "law enforcement" operations. In fact, the Posse Comitatus Act, found at 18 U.S.C. 1385, restricts direct military assistance for law enforcement purposes except as authorized by the Constitution or Congress.

When the Air Force flies RPAs in the United States, it generally does so for proficiency training in preparation for overseas operations. Occasionally, the Secretary of Defense approves operational missions supporting civil authorities during crisis situations. These situations range from providing real-time imagery of damage after a hurricane and the search and rescue of individuals such as lost hikers to acts of domestic terrorism. These missions all have their own specific approval authorities, guidelines, and limitations to ensure they are conducted according to federal law, executive orders, and regulations that balance and safeguard governmental interests and personal privacy protections.

Unlike in the civilian or commercial sector, the rules for employing DoD assets to acquire airborne domestic imagery (DI) are plentiful. This is true whether it involves a training mission on a DoD test range or a mission in support of civil authorities, such as natural disaster relief efforts. Air Force compliance is not optional. These are all considered lawful orders which must be followed. From them, I want to highlight three key points:

- Unlike in the civilian sector, all missions and operations involving DoD RPA or other airborne DI collection capabilities must be properly authorized pursuant to law, policy, or regulation;
- Once authorized, all RPA missions and operations must be conducted in accordance with the law; and
- All RPA missions and operations are subject to both internal and external scrutiny.

There is currently discussion in many circles about the assimilation of RPAs into our national airspace, in particular about the use of RPAs by law enforcement and its impact on personal privacy.

These three key points suggest one general theme: **capability does not equal authority**. Here is the analogy—just because you own a car, it doesn't mean you have a license to drive it. You have to pass tests, be certified by the state, and follow the rules of the road before you get the green light to go.

As stated earlier, the rules for RPA use are considerable. The rules tell us whether the Air Force can participate in the mission, whether Air Force participation requires a request from an outside agency, which agencies can make the request (and at what level), what Air Force capabilities, if any, can be utilized, as well as who can approve Air Force participation in the mission, and under what

[1] What some refer to as "drones," I will be referring to as RPAs. Words matter. In 2010, the Air Force officially changed the term "Unmanned Aerial Vehicles" (UAV) to "Remotely Piloted Aircraft" (RPA) when it formally institutionalized RPA pilot training and designated RPA pilots as rated officers. That means they have a career aviation status. This change in terminology was—and is—significant in that it recognizes that these vehicles are not "unmanned," but rather are piloted, albeit "remotely," by trained aviators.

Conducting physical surveillance with RPAs on specifically identified U.S. persons is also prohibited, unless expressly approved by the Secretary of Defense. AFI 14-104, *Oversight of Intelligence Activities*, adopts this same language verbatim in the context of RPA training.

constraints. They address the authority to act, collect, process, view, analyze, retain, and distribute DI. With few exceptions, most notably training, approval authority for the majority of typical airborne DI requests resides well beyond the local commander. Generally, most domestic missions using RPA must be approved by the Secretary of Defense.

Commanders have wide latitude in how they train with their assets on DoD property and in DoD-controlled airspace.

Several regulations directly address RPA operations. A September 2006 Deputy Secretary of Defense (DepSecDef) Memorandum titled *Interim Guidance for the Domestic Use of Unmanned Aircraft Systems*, which still remains in effect, provides general guidance across the spectrum of potential RPA operations. It requires SecDef approval to use RPA for specific missions. These missions include Defense Support to Civil Authorities (DSCA), Military Support of Civilian Law Enforcement Agencies, counterdrug operations, and National Guard use of DoD RPAs for governor-requested state missions. It is worth noting that in all of these operations, DoD provides support to civilian agencies and does not collect information on U.S. persons for our own use. Even if we wished to retain the information provided to the civilian agency, it would still require compliance with Intelligence Oversight (IO) requirements.

The 2006 DepSecDef Memo also addresses RPA training. In support of privacy protections, DoD has limited the manner in which the Services train RPA pilots for the performance of their overseas missions—training that is critical to mission readiness and to our national defense. According to my operator colleagues, such training provides a set of standardized foundational skills necessary to effectively perform overseas missions, reduces risks to friendly forces and civilians during such employment, and builds the standardized habit patterns (aka muscle memory) necessary to rapidly respond in extremely dynamic environments. This is no different than the training required for manned aircraft. The need to train is airframe agnostic.

In most cases, training is conducted in airspace over and near federal installations and at training ranges that have been set aside for that purpose. Commanders have wide latitude in how they train with their assets on DoD property and in DoD-controlled airspace. However, training with RPA collection systems that will be operated outside of DoD-controlled airspace requires notification to the Chairman of the Joint Chiefs of Staff (CJCS). Conducting physical surveillance with RPAs on specifically identified U.S. persons is also prohibited, unless expressly approved by the Secretary of Defense. Air Force Instruction 14-104, *Oversight of Intelligence Activities*, adopts this same language *verbatim* in the context of RPA training. These limitations on training are significant insofar as the ability of a Service to train and exercise is statutory, derived from the Service Secretaries' authority to organize, train and equip its members under 10 U.S.C. 8013(b).

Portions of the 2006 DepSecDef Memo have also been codified in Department of Defense Directive (DoDD) 3025.18, *Defense Support to Civil Authorities*, which was recently amended in September 2012. This directive governs DoD's provision of temporary support to U.S. civilian agencies for "domestic emergencies, law enforcement support,

Military Assistance to Civil Disturbances (MACDIS) is the employment of U.S. military forces to control sudden and unexpected civil disturbances when local authorities are unable or decline to control the situation.

and other domestic activities, or from qualifying entities for special events." The DoD DSCA directive specifically addresses RPA use in paragraph 4.o:

> No DoD unmanned aircraft systems (UAS) will be used for DSCA operations, including support to Federal, State, local, and tribal government organizations, unless expressly approved by the Secretary of Defense. Use of armed UAS for DSCA operations is not authorized.

DoD counterdrug policy also directly addresses RPA use. Although counterdrug operations are not considered a form of DSCA, they do provide support to other agencies in the form of either detection and monitoring or aerial reconnaissance missions. Specifically, the Chairman, Joint Chiefs of Staff (CJCS) Instruction 3710.01B, *DoD Counterdrug Support*, states that the Geographic Combatant Commanders (GCCs) of U.S. Northern Command (USNORTHCOM), U.S. Southern Command (USSOUTHCOM), and U.S. Pacific Command (USPACOM) can approve RPA use for aerial reconnaissance; otherwise, SecDef is the approval authority.

...no direct guidance exists on use of RPAs for protection of the people, places, and things under a commander's control.

Even where current guidance does not directly address RPA use, determining approval authorities, restraints, and constraints is not overly difficult. For example, defense support to civilian law enforcement agencies and civil search and rescue (SAR) are both forms of DSCA. Although neither DoDD 5525.5, *DoD Cooperation with Civilian Law Enforcement Activities,* or DoD Instruction 3003.01, *DoD Support to Civil Search and Rescue (SAR)* directly address use of RPAs, the DoD DSCA directive 3025.18 does—and it requires SecDef approval.

Military Assistance to Civil Disturbances (MACDIS) is the employment of U.S. military forces to control sudden and unexpected civil disturbances when local authorities are unable or decline to control the situation. This is another potential RPA mission whose governing regulation does not directly address RPA use. However, determining MACDIS approval authority is easy. The military's authority for MACDIS derives from the Insurrection Act, which vests decision-making authority in the President of the United States. Thus, regardless of the asset to be used, authority to use military assets and forces to quell civil disturbances rests with the President, with one very limited exception—emergency response. Emergency response is discussed below.

Likewise, no direct guidance exists on use of RPAs for protection of the people, places, and things under a commander's control. No one disputes that local commanders have wide latitude for force protection (FP) within DoD-controlled airspace. Presumably, they have the authority to use RPA assets in support of force protection in their own domain. FP outside of DoD-controlled airspace is another matter. Extrapolation from DSCA provides a reasonable analogy because DSCA too, by definition, occurs off-base. Because use of RPAs for DSCA requires SecDef approval, local commanders should first seek to use other assets for FP outside of DoD-controlled airspace. If they find RPAs are necessary, they should seek SecDef approval, in addition to other necessary coordination and approvals, such as deconfliction with local law enforcement and a Federal Aviation Administration Certificate of Authorization.

The bottom line is this: except for many training events, all roads lead to SecDef approval–or higher to domestically employ an RPA. Of course, there can't be rules without exceptions. There are two very limited circumstances when a local commander may have the authority to employ an RPA for either DSCA or cases of civil disturbance.

Local commanders may exercise Immediate Response Authority "to save lives, prevent human suffering or mitigate great property damage." Commanders may use this authority upon a civilian authority request when time does not permit contacting higher headquarters to obtain approval for "imminently serious conditions." A good example of this is when commanders respond under Immediate Response Authority during civil search and rescue events or off-base fires to which local fire-fighting resources may be inadequate.

The primary objective of the intelligence oversight program is to ensure that Air Force units and staff organizations conducting intelligence activities do not violate the rights of U.S. persons.

A local commander also can invoke Emergency Response Authority in extraordinary emergency situations during civil disturbances. This can be done without prior authorization from the President because coordination is impossible under the circumstances and local authorities are unable to maintain control. Specifically, commanders can provide military assistance using this Emergency Response Authority, when:

> (1) Necessary to prevent loss of life or wanton destruction of property or to restore governmental functioning and public order if duly constituted local authorities are unable to control the situation and circumstances preclude obtaining prior authorization by the President or
>
> (2) When duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal Governmental functions.

In either event, the commander must use all available means to seek Presidential authorization through the chain of command while taking such action. An historical example occurred during the first few days of the devastating 1906 San Francisco Earthquake. During that catastrophic event, almost 80% of San Francisco was destroyed and over 3,000 people died. Soldiers patrolled the streets to dissuade looting and guarded government buildings like the U.S. Mint, post offices, and the county jail. They aided the fire department in dynamiting to demolish buildings in the path of the fires. The Army also fed, sheltered, and clothed the tens of thousands of displaced residents of the city before civil authorities were able to assume responsibility for relief efforts.

Clearly, these special command authorities are not carte blanche for local commanders to provide support to civil authorities. This is particularly true in today's communications environment where there is rarely insufficient time to seek approval from higher headquarters.

Once an RPA mission is properly authorized, the mission must be conducted in accordance with the law. As a general proposition, the DoD cannot domestically collect information on non-DoD affiliated persons or individually identifiable U.S. persons or organizations using airborne DI unless some very specific conditions are met. RPAs are Intelligence, Surveillance, and Reconnaissance (ISR) assets, a fusion of both operational and intelligence capabilities. As a matter of policy, strict IO procedural guidelines for collecting, retaining and disseminating information on U.S. persons have been applied to RPA operations—including Executive Order (EO) 12333, *United States Intelligence Activities*, and its implementing directives, DoDD 5240.01, *DoD Intelligence Activities*, and DoD 5240.01-R,

Procedures Governing the Activities of DoD Intel Components that Affect U.S. Persons.

The primary objective of the intelligence oversight program is to ensure that Air Force units and staff organizations conducting intelligence activities do not violate the rights of U.S. persons. By policy, the Air Force broadly applies IO to "*non-intelligence organizations* that perform *intelligence-related activities* that could collect, analyze, process, retain or disseminate information on U.S. persons," including commanders of such units. The AFI also adds the requirement for a Proper Use Memorandum, signed at the four-star major command (MAJCOM) level, which defines domestic imagery requirements, parameters of use, and certifies compliance with legal and policy restrictions.

This means that when conducting an authorized mission, RPAs can only collect information on U.S. persons in very limited circumstances, retain it for a certain time period, and disseminate that information only to authorized recipients. Failure to abide by these IO requirements necessitates reporting to the highest levels of government through a rigorous oversight program.

Intelligence oversight rules are stringent and comprehensive. Failure to follow the stringent IO procedures or otherwise engaging in "questionable activity" triggers special notification, investigation, and reporting requirements to outside of the Air Force—to the Office of the Secretary of Defense and, ultimately, to Congress. "Questionable activity" includes any activity which may violate the law, any EO, Presidential directive, or applicable DoD policy.

If a commander uses RPAs for force protection, or for immediate or emergency response, or any purpose outside of DoD-controlled airspace without prior approval, he is still required to comply with DepSecDef Directive-Type Memorandum (DTM) 08-052 – *DoD Guidance for Reporting Questionable Intelligence Activities and Significant or Highly Sensitive Matters* and DoD 5240.1-R. The Questionable Intelligence Activity (QIA) report requires that commanders:

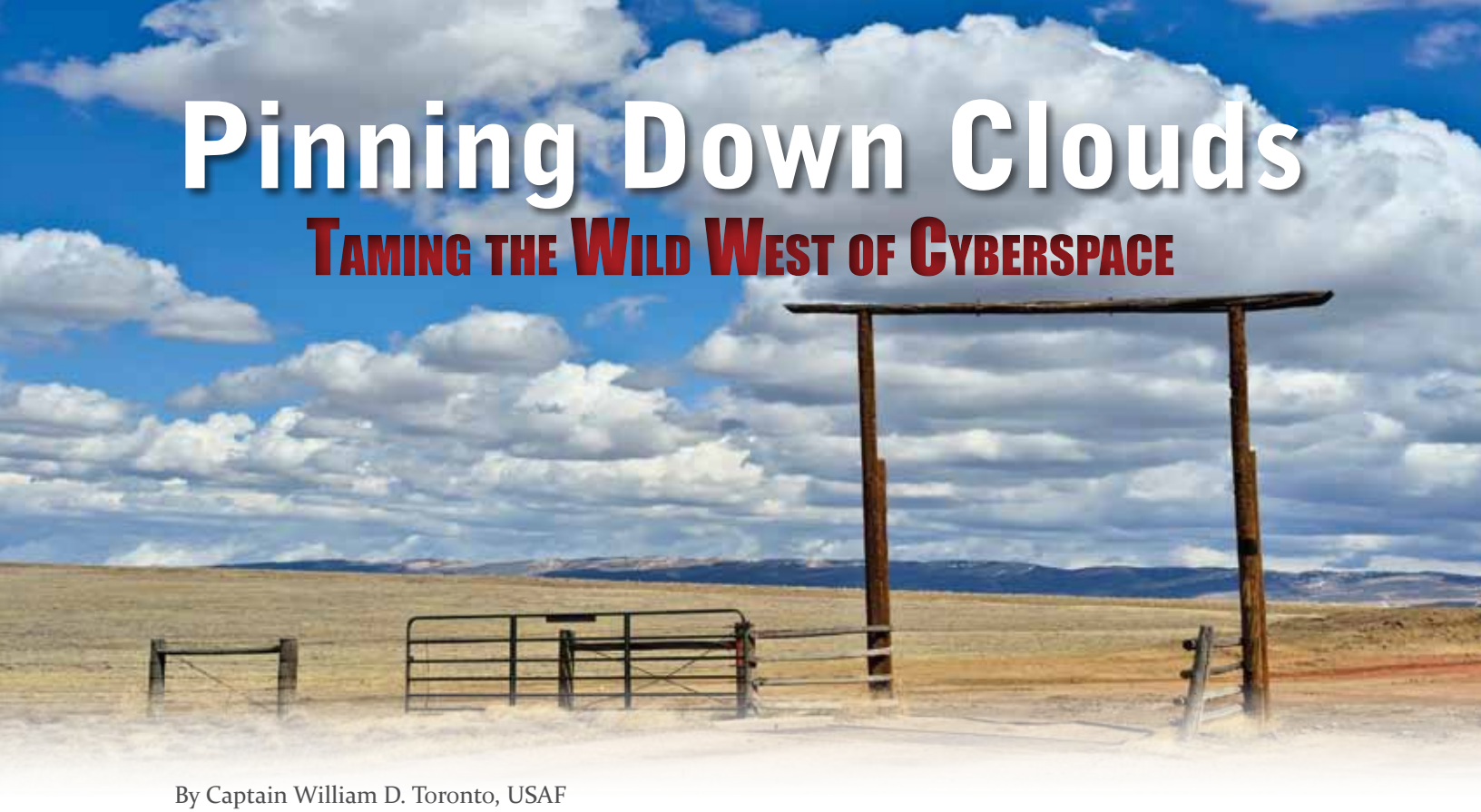
> (1) Explain why he made such a decision (immediate threat to life, limb, mission, government property, etc.);
>
> (2) Articulates how he determined that local civilian authorities could not meet the requirement (timeliness, capability, etc.) and that prior approval was not possible; and
>
> (3) Describe in detail the intelligence or other information that was collected during the mission, particularly anything that could be considered U.S. person information, and how it was being retained and/or disseminated.

As President Obama said in his 2009 Nobel lecture, "[w]e lose ourselves when we compromise the very ideals that we fight to defend. And we honor…those ideals by upholding them...." In our domestic RPA operations, we honor those ideals by complying with law and policy and by watchful oversight that serves to reinforce the importance and need for such compliance.

RQ-4 Global Hawk. (U.S. Air Force photo)

Pinning Down Clouds

Taming the Wild West of Cyberspace



By Captain William D. Toronto, USAF

How do you catch a cloud and pin it down? It's doubtful Rodgers and Hammerstein imagined that the same question sung by the elderly nun in *The Sound of Music* would apply fifty years later to the debate about how to manage and govern the wild-west domain of cyberspace. So, how does mankind pin down the cyber-cloud? And if we can, should we?

Cyberspace is *not* just the Internet—it also includes all other networks, phones, tablets, etc., that connect and share data. As technology advances, more devices and capabilities will evolve to be a part of cyberspace.

The Problem

On 11 February 1998, in response to a reporter's question, Hillary Clinton stated, "We're all going to have to rethink how we deal with the Internet. As exciting as these new developments are, there are a number of serious issues without any kind of editing function or gatekeeping function."[1]

Years ago, information dissemination had well-established editorial and gatekeeping mechanisms. TV, radio, and newspaper reports all had to be filtered and edited prior to broadcast. It was an inherent nature of the technology, with relatively few gates. Now, everyone can "broadcast." They can blog, post on Facebook, and tweet without any such mechanisms—with reckless disregard or with diligent journalistic responsibility. Almost overnight we saw the growth of an expanding buzzing cloud of information exchange.

Exploitation began almost immediately. Various cyber-acts have ranged across the spectrum from merely reconnaissance and scanning of networks to disruption of information and operability to physical destruction. Two of the most serious known acts are *Stuxnet*, which in 2010 destroyed 1,000 centrifuges at the Natanz nuclear facility in Iran, and an attack against Saudi Arabian oil company Aramco, which rendered 30,000 computers inoperable in 2012.[2]

Cyber-operations appear only to be growing more severe and destructive. Some think we've reached a critical tipping point. McAfee Labs predicts that cyber-attacks against companies and government networks will grow "exponentially" in 2013. And security firm IID predicts that cyber-attacks will result in the loss of human life in the next couple of

[1] According to *Reuters*, Hillary Rodham Clinton made this statement in Washington on February 11, 1998 in response to reporters who asked whether she favored curbs on the Internet.

[2] Gary D. Brown & Owen W. Tullos, *On the Spectrum of Cyberspace Operations*, Sm Wars J., Dec. 11, 2012, http://smallwarsjournal.com/jrnl/art/on-the-spectrum-of-cyberspace-operations.

(Photo courtesy of iStock)

Laws requiring the registration of cyber-actors, and other restrictions in cyberspace, may prevent some cybercrime. But such restrictions would fail to prevent hackers or other cyber adversaries from continuing their network warfare against U.S. interests.

years. And while Verizon doubts an all-out cyber-war this year, it acknowledges the possibility and is taking measures to prepare for one.[3] But some terms need revision. Media and politics, and some older military leaders, use the terms "attack" and "strike." In the cyber realm, better terms would be "intrusions" and "capabilities." We may not know the intent of the intruder, and may only be able to measure effects on systems.

Law

Is a cyber-attack a use of force according to international law governing conflict? The answer is unsettled. The electronic domain doesn't fit into the legal framework built around the tangible steel of WWII. Under *jus ad bellum*, when the question is whether a state may resort to use of force, Article 2(4) of the Charter of the United Nations restricts all members from using the "…threat or use of force against the territorial integrity or political independence of any state…." Article 51 allows for use of force as defense of an "armed attack." So only when there is an "armed attack" may a state use force in defense. But is network warfare an "armed attack?" Part of the reason this issue remains unsettled is due to the question of how to define the phrase "armed attack" in the cyber context. With regard to "international humanitarian law" or LOAC (*jus in bello*), one task in applying the rules has to do with distinction—of both targets and actors. Anonymity and non-attribution in cyberspace throws a wrench into that analysis. And while electrons aren't violent per se, their consequences can be. If cyber-operations accompany traditional military operations, such as in the 2008 Russia-Georgia conflict, then it isn't difficult to apply LOAC. But if the conflict was only a standalone cyber-operation, it is less clear.

Unfortunately, trying to apply the legal norms created over 60 years ago in the age of conventional warfare to the new and evolving technology of cyberspace, leaves us with many unanswered questions. Some experts hold the opinion that if a cyber-only operation results in physical damage to property or injury to persons, it would qualify as an "attack." Anything less would not necessarily merit a use-of-force in defense.[4]

The Solutions' Problems

Various solutions have been proposed to address the threats of untamed cyberspace. There are few restrictions on users in the U.S. and only one country, Estonia, is rated as freer in cyberspace.[5] Many other countries, such as China and Iran, restrict cyber-freedom to a larger degree. But these countries don't have as strong a foundation based on individual rights as the United States, such as the First Amendment and the right to privacy. These rights are credited as reasons other proposed legislation to control cyberspace fail. We're bound to see more proposed legislation to tame parts of cyberspace as more cyber-intrusions occur and we see more events akin to Wikileaks.

Others propose establishing sovereignty in cyberspace to tame it. A 2009 article in *The Air Force Law Review* proposed just this.[6] Lt Col Patrick Franzese reasoned "…some entity must control cyberspace for it to exist and function. Cyberspace requires a physical structure …[which] is terrestrially based and thus naturally falls under the purview of the state…." He later adds that "[c]yberspace is based upon a physical architecture and needs regulation, thus allowing states to exert their control." Cyberspace requires tangible tools for one to interact with it. Others think cyberspace is some kind of "intellectual nirvana free from the constraints of the 'real' world."[7]

[3] David Goldman, *Nations Prepare for Cyberwar*, CNN Money (Jan. 7, 2013, 5:40 AM), http://money.cnn.com/2013/01/07/technology/security/cyber-war/index.html.

[4] Brown & Tullos, *supra* note 4.

[5] Freedom House published a report, "Freedom on the Net 2012," which placed Estonia above the U.S. in part because of the U.S.'s telecommunication shutdown capabilities, which it has used, e.g., in San Francisco, CA in August 2011 to impede planned demonstrations.

[6] Lieutenant Colonel Patrick W. Franzese, *Sovereignty in Cyberspace: Can It Exist?*, 64 A.F. L. Rev. 1 (2009).

[7] *Id*.

However, cyberspace is a man-made creation and cannot be reached without physical tools—so some standards will arise and apply. But to what extent? With sovereignty, as proposed by Lt Col Franzese, "the ability for a state to track and identify actors is a fundamental requirement." While user ID and registration would drastically change and possibly restrict our cyber-experience, some think this would be worth it to tame an unruly domain.

Laws requiring the registration of cyber-actors, and other restrictions in cyberspace, would likely prevent some cybercrime. But such restrictions would fail to prevent hackers or other cyber adversaries from continuing their network warfare against U.S. interests. For example, sophisticated operators know how to create 'hop points' and spin a web of botnets, so they can operate with anonymity or get bots to do their bidding. So what is the use in saddling the populace with burdensome restrictions to venture into cyberspace, if such mechanisms won't really prevent state actors and smart criminals from conducting cyber-attacks? Technically, it's feasible to vastly improve the security of U.S. networks, but it would require isolating our networks from the rest of the world—which fundamentally changes the very nature of the Internet. Expert Col (Ret.) Gary Brown (USAF), former U.S. Cyber Command legal advisor, stated that in order to do this with regard to the Internet, we would ultimately be "killing it to protect it."

The inclination to need a "gatekeeper" for cyberspace, and Congress' penchant for regulation, are symptoms of *govthink*,[8]—or the tendency of government workers to see problems through a government lens, with their government toolbox in hand. Not *all* things need to be controlled or regulated by the state—and it could be useful to consider that perhaps the government need not try to start swatting wildly at the general swarm of cyber-actors. Imagine a government agency enforcing ever-expansive new cyber-regulations and punishing new cyber-violations. Government agencies, unfortunately, suffer from bureaucratic accretion and inertia. And *non*-state associated entities have in many instances been more effective at managing things since their income/funding is determined by performance and merit, not Congress.[9]

We don't want another Treaty of Tordesillas. This example from history is instructive. Christopher Columbus' addition to the global map laid the groundwork for Castile (now Spain) and Portugal to sign the Treaty of Tordesillas on 7 June 1494. To govern and regulate the world's oceans, the two nations divided all waters between the two states. Many other nations ignored them, and neither country was able to lay hold on its claims. As other nations grew in power, the treaty became obsolete and irrelevant. National egotism and ambition led to quite an audacious assertion of dominion and control, ultimately proving useless. Such an example in history leads to the following question with regard to cyberspace: If the U.S. (perhaps in concert with other nations) were to create a complex legal framework to address the threats and concerns presented in cyberspace, would such an effort not ultimately prove as useless as the Treaty of Tordesillas?

First, while the world's oceans were too large to govern at the time, water space had a finite end. Cyberspace is *not* finite, and the cyber-cloud appears only to be growing, likely out of the reach of a legal framework of one point in time. Second, there is a very good possibility that the cyber-cloud will change, advance, and "outdistance agreed understandings as to its governing legal regime."[10] Colonel Brown agrees—this effort would be behind the curve from the start, and only get further behind in time. A case in point: The Electronic Communications Privacy Act of 1986 (ECPA). The ECPA allows the government to access data on Internet Service Providers' servers if there for longer than 180 days. This law was implemented when email was new and not stored on servers for long—only briefly before going to the recipient. Email left there longer than 180 days was considered "abandoned." Now people store email and most everything else for years in "cloud" data storage. As a result, Google is now

[8] In the style of *newspeak* from George Orwell's *1984*.

[9] James J. Hill, who created and ran the Great Northern Railroad, was very successful without any government aid, and in 1893, when government-subsidized railroads went bankrupt, his line still turned a profit while also charging less. Also, Cornelius Vanderbilt outperformed two subsidized steamship passenger and mail lines to California, charging fractions of his competitors' fees. Moreover, non-bailed out Ford outperforms bailed-out GM.

[10] Michael N. Schimitt, *Tallinn Manual on The International Law Applicable to Cyber Warfare* (2013) (referring to *jus ad bellum* and *jus en bello*).

demanding warrants based on probable cause, *despite* the ECPA.[11] Already the very nature of the cyber-cloud advances and outdistances the legal regime designed to govern it.

The Rise of Big Brother

In a 2005 Pulitzer Prize winning story, *The New York Times* revealed to the world that the National Security Agency (NSA) had been collecting and analyzing vast amounts of American citizens' phone, email, and financial records without a warrant beginning shortly after 9/11. After the change in administrations, the new Attorney General condemned the program as defying federal law.[12] And with the NSA's new million square-foot Utah Data Center in Bluffdale, Utah, one former NSA official alleges that software will be able to examine every email, phone call, and tweet."[13] Others confirm that today the U.S. has virtually unlimited storage capability, where yottabytes[14] of storage at the Utah Data Center can "preserve every email and phone call communication—henceforth and forever."

While the NSA states that "the agency has no interest or capability in eavesdropping on average citizens,"[15] the definition of terms becomes important. When liberty activists hear such a statement from the NSA, they are suspicious since they would consider *any* recording of an email or phone call akin to "eavesdropping" and "intelligence." Some government officials may define those terms to mean only analyzed, serialized, and reported intelligence records—not merely stored recordings. Some may find the existence of NSA's past capabilities and activities, in light of the *New York Times* story, troubling. Given the worst kind of threat, the U.S. could find itself in possession of and with an inclination to use, an apparatus that would put George Orwell's "Thought Police" to shame. Needless to say, some advocates of free speech and Internet freedom are concerned.

Conclusion

Now that we're in the nebulous and often dangerous buzzing data cloud, what should we do about it? Should we focus on prevention by creating a legal framework to regulate and restrict certain activities? Should we monitor and analyze everything to ferret out the malcontents prior to their malfeasance?

The *govthinking* approach, be it legislation, sovereignty, etc., would most likely create a legal framework in cyberspace that will be quickly outdistanced by the evolving and advancing nature of interdependent network communications. Instead of starting slightly behind the curve, and then trying to play catch up, we should realize that such an effort will in all likelihood ultimately prove ineffective. Rather than asserting dominion by trying to swat at, cast nets around, and herd the whole buzzing cyber-cloud, the United States should focus entirely on its individual capabilities of cyber-defense and cyber-attack.

The only effective way to police this domain will be *self*-policing. Companies such as Verizon realize this, and have developed their own robust cyber force. Others, such as CrowdStrike, provide private cyber-security. The general posture of the U.S. Government and its laws binding private companies such as those just mentioned, is to act only in cyber-defense. It doesn't take long for adversaries to learn that if they go into the ring with an opponent who only blocks and throws no punches, they can let loose without fear of retaliation. In essence, under current law, the government doesn't protect you, but it does a good job of making sure you don't protect yourself. This is why I argue that to prevail, we should adopt a strategy of aggressive countermeasure deterrence in cyberspace.

In the end, the Wild West *was* won, but not by the sheriff. Rather, it all settled down when individuals and banks policed themselves. Anything done to control or pin down the cyber-cloud as a whole would likely prove an ineffective waste of resources.

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[11] David Kravets, *Google Tells Cops to Get Warrants for User E-Mail, Cloud Data*, Wired (Jan. 23, 2013, 5:29 PM), http://www.wired.com/threatlevel/2013/01/google-says-get-a-warrant/.

[12] Michael Isikoff, *The Fed Who Blew the Whistle*, The Daily Beast (Dec. 12, 2008, 7:00 PM), http://www.thedailybeast.com/newsweek/2008/12/12/the-fed-who-blew-the-whistle.html.

[13] James Bamford, *The NSA is Building the Country's Biggest Spy Center (Watch What You Say)*, Wired (Mar. 15, 2012, 7:24 PM), http://www.wired.com/threatlevel/2012/03/ff_nsadatacenter/all.

[14] One septillion (one long scale quadrillion or 1024) bytes (one quadrillion gigabytes)—so large that no one has yet coined a term for the next higher magnitude.

[15] Elizabeth Prann, *NSA Dismisses Claim Utah Data Center Watches Average Citizens*, FoxNews.com (Mar. 28, 2012), http://www.foxnews.com/politics/2012/03/28/nsa-dismisses-claims-utah-data-center-watches-average-americans/.

Legal Restrictions on the Actions of the Japan Air Self Defense Force

By Captain Jun Okamoto, JASDF

Japan may be facing the most serious crisis since the Pacific War or World War II. In 2012, North Korea launched ballistic missiles which caused great tension in Japan and international society. In addition, Russian forces in the vicinity of Japan increased their military activities, and China modernized its military forces through constant increases in its defense budget, becoming a threat to neighboring countries.

Japan is also involved in several territorial disputes. The country has not concluded a peace treaty with Russia over the attribution of Northern Territories which consists of one archipelago and three islands located north-east of Hokkaido, and which were occupied soon after the Pacific War ended and continue to fall under Russian occupation. Japan is also involved in a dispute with China over the Senkaku Islands, the uninhabited islands located approximately 400 kilometers west of Okinawa where Kadena AB stands. Japan believes these islands are territories inherent to and belonging to Japan. In addition, China is intruding on Japanese contiguous and territorial water and airspace, and the Japan Coast Guard is involved with that illegal action.

Another conflict is with South Korea over the annexation of Takeshima, islands located in the Japan Sea which were occupied illegally by South Korea in 1952. Japan plans to refer the issue to the International Court of Justice, however, it does not appear that South Korea, which has not declared compulsory jurisdiction based on Article 36, paragraph 2 of the Statute of the International Court of Justice, will agree to bring the case to court.

Due to these circumstances, Japan has been developing bilateral relations with the United States. With regard to military affairs, Japan, through the Japan–U.S. Security Treaty, maintains a strong military alliance with the U.S. It is a well-known fact that based on Article 6 of the treaty, the United States maintains several bases and depots in Japan including, Yokota AB, Kadena AB, Misawa AB, and Iwakuni AB. Furthermore, Self Defense Forces (SDF), especially the Japan Air Self Defense Force (JASDF), depend on the U.S. for most of their weapons. The security environment in Japan, Asia, and the Pacific may continue to be severe for the next few decades. Although there are differences in policy between Japan and the U.S., regarding each country's national interest on international affairs, it is difficult to deny the importance of their alliance. This article provides a basic understanding of the JASDF's actions and the legal restrictions necessary for U.S. forces to carry out bilateral operations with the SDF.

Japan Air Self Defense Force (JASDF)

There are approximately 70 air bases and sub bases in Japan. Seven of them (Chitose, Misawa, Hyakuri, Komatsu, Tsuiki, Nyutabaru, and Naha) are for fighter aircraft wings. There are three air bases for transport aircraft and others for radar, surface-to-air missiles, schools, and depots. Besides one Japan

(Image courtesy of iStock)

Maritime Self Defense Force sub base in the Republic of Djibouti for anti-piracy operations, JASDF does not have any bases in foreign countries.

JASDF has approximately 200 F-15J/DJs, 95 F-2s (based on the American F-16), and 60 F-4s used as fighter or escort fighter aircrafts. The JASDF also has thirteen RF-4s for reconnaissance missions; 15 C-130Hs and 26 C-1s for cargo missions; and several E-2C, E-767, KC-767, UH-60J and CH-47J aircrafts for various other missions. The JASDF uses PAC-2 and PAC-3 missiles, based on the American Patriot Missile Systems, for surface-to-air missile defense.

The JASDF can carry out several different air operations, including counterair, air interdiction, close air support, maritime air support, air reconnaissance, airlift, and base protection. The JASDF's ability to carry out offensive counterair operations is very limited. Although it is difficult or almost impossible to carry out some of the above-mentioned air missions in peace operations because of legal restrictions, JASDF has had some experience with airlift missions, for example in Kuwait and Iraq from 2003 to 2009.

The biggest feature of JASDF is that it does not have strategic or offensive weapons such as long-distance strategic bombers or intercontinental ballistic missiles. Thus, although it is possible for JASDF to defend Japanese territory (which is the JASDF's main mission), its capabilities to attack adversary territories overseas is very limited at this stage.

Actions of the SDF

Article 76 of the Self Defense Forces Law allows the SDF to execute military operations. However, the SDF can only undertake those defense operations based on the right of individual self-defense as prescribed in Article 51 of the Charter of the United Nations (UNC). Japan has *not* resorted to military operations based on self-defense since the Pacific War.

The SDF can carry out law enforcement actions within its national territory and over international waters, depending on the circumstances. Self Defense Forces Law, which outlines the SDF's operations or actions, prescribes law enforcement actions such as Public Security Operations by Order or Request (Articles 78 and 81), Guarding Operations (Article 81-2), Maritime Security Operations (Article 82), and Actions Against the Violation of Territorial Airspace (Article 84). Article 84 of the SDF Law allows the Minister of Defense to take necessary action when a foreign aircraft enters Japan's territorial airspace in violation of international law and/or the provisions of the aviation law or other relevant laws and regulations. These actions include forcing the invading aircraft to land or withdraw from Japanese territorial airspace. Interestingly, Japan interprets such action as a police action and not a military self-defense action. Because of that interpretation, the criterion for the use of weapons or use of force has to be restrained or restricted as compared with what is available for military operations. In 2011, the JASDF scrambled to intercept foreign aircraft 425 times and of those instances, approximately 250 were for Russian aircraft and 150 were for Chinese aircraft.

The terminology for "international peace cooperation activities" varies by country. The United States uses the term "peace operations" while the United Kingdom uses "peace support operations." Japan uses the above-mentioned term and divides it into three sub-categories: (1) international peace cooperation activities, (2) international disaster relief activities, and (3) activities based on time-limited laws. As to international peace cooperation activities, since December 2012, Japan has been participating in the UN's Disengagement Observer Force (UNDOF), which is a traditional peacekeeping operation, the UN's Stabilization Mission in Haiti (MINUSTAH), and the UN's Mission in South Sudan (UNMISS). Although they are robust peacekeeping operations, the SDF has not participated in all aspects of these missions. For instance, the SDF is not allowed to assist in cleanup operations or public security operations.

With respect to international disaster relief, Japan recently dispatched units to New Zealand, Pakistan, and Indonesia to save lives in areas devastated by natural disasters. In the realm of activities based on time-limited laws, the SDF has carried out logistic support to multinational forces based on a Special Law for Humanitarian and Reconstruction Assistance in Iraq, Anti-Terrorism Special Measures

Law, and Replenishment Support Special Measures Law. Additionally, the SDF has been executing anti-piracy operations in waters off the coast of Somalia in the Gulf of Aden since 2009. As you can see, although limited by domestic law, Japan is able to carry out many aspects of international peace cooperation activities.

In addition to the above-mentioned operations, the SDF is able to carry out Disaster Relief Dispatch (Article 83), Earthquake Disaster Relief Dispatch (Article 83-2), Nuclear Disaster Relief Dispatch (Article 83-3), and Evacuation of Japanese Nationals Residing Abroad (Article 84-3). While other countries carry out non-combatant evacuation operations based on the right to self-defense, the SDF cannot use that justification. To carry out the evacuation of Japanese nationals residing abroad, Japan has to get consent of receiving states for the SDF to enter those countries.

As you have seen, the SDF can carry out military operations, law enforcement actions, and international peace cooperation activities. However, there are two distinct differences from other countries' militaries. First, no servicemen in the SDF have died in military operations, law enforcement actions, and international peace cooperation activities since its establishment in 1954. Second, no units have been dispatched to battle or combat areas. This is because Japan has very strict laws and regulations governing traditional combat actions, and the interpretation of those laws prohibit or limit hostile actions. The only exception to that prohibition is for personal self-defense. As a result of the success in the Japanese-U.S. military alliance, armed conflicts have not occurred. However, the fact that the past half century was peaceful itself does not guarantee that the next half century will be same.

Legal Restrictions

Most of the actions of the SDF are limited by Article 9 of the Constitution of Japan (hereinafter "Article 9"). The Constitution of Japan was promulgated on 3 November 1946 and came into effect on 3 May 1947. Enactment was led by the government section of the Supreme Commander for the Allied Powers' (SCAP) office, although it was formally ratified by the Imperial Diet (the highest representative assembly in the Japanese Empire). Regarding this, some point out that the SCAP may have violated Article 43 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the 1907 Hague Convention IV, which requires respect of the laws in force in an occupied country. This Constitution has *not* been amended since enactment. Article 9 reads:

> (RENUNCIATION OF WAR): Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
>
> In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

At first glance, it seems that the possibility of all military affairs was prohibited, but after more than half a century, Japan has compiled some unique interpretations of Article 9. After the Pacific War, the Japanese Imperial Army and Navy were disbanded. Consequently, the National Police Reserve (NPR) and Coastal Safety Force (CSF) were established in 1950 and 1952, respectively, and changed their

collective name to the Self Defense Force (SDF) in 1954. The fact that the Imperial Army and Navy, once disbanded by the United Nations, were re-established with the occurrence of the Korean War is perhaps not coincidental.

The constitutionality of the SDF was initially debated in court. The judgment of the Sapporo District Court in 1973 found that "the SDF falls under forces provided in Article 9 of the Constitution of Japan and are therefore unconstitutional." However, the Sapporo High Court in 1976 looked at the issue and ruled that "the issue whether or not the existence of the SDF is against Article 9 of the Constitution of Japan belongs to the Sovereign Act, and is beyond the judicial review unless (existence of SDF is) seemingly, extremely and apparently unconstitutional or illegal." Then the Supreme Court in 1982 found "concerning the constitutionality of the SDF, there is no benefit of suit," meaning they avoided judicial review and ended the lawsuit. As such, under interpretation of Article 9, the SDF is not unconstitutional. However, it is notable that the Constitution of Japan, which has a total of 103 articles, does not mention the SDF.

In general, the Japanese people don't like discussing military affairs or national security issues. Although such themes are main topics at political campaigns in some countries, they seldom become a central point in Japan. This may be because many Japanese assume that since Japan has not been a party to any armed conflicts for more than half a century, peace will continue in the future, which may be baseless optimism. It could be a problem that the topic of military affairs isn't discussed and debated in Japan.

It is possible for Japan, as a sovereign state, to exercise the right of individual self-defense and the very existence of the SDF is for that purpose. However, the conditions required for invoking the right of individual self-defense are limited compared with that of the United States. While the U.S. permits anticipatory self-defense,[1] Japan does not.

Based on the Japan–U.S. Security Treaty, the U.S. has the responsibility to defend Japan when an armed attack occurs on Japanese territory, but the opposite is not expected based on Article 5 of that treaty.[2] Japan cannot exercise the right of collective self-defense in a case where the U.S. is attacked. For instance, JMSDF's Aegis destroyers cannot intercept ballistic missiles launched at U.S. territories.

According to the Japanese government view in 1981, "since Japan is a sovereign state, it naturally has the right of collective self-defense under international law. However, the exercise of the right of collective self-defense exceeds the minimum necessary level of self-defense authorized under Article 9 of the Constitution of Japan and is not permissible." Although some Americans might point out the unfairness of this interpretation, Japan pays host nation support[3] which exceeds 2.2 billion dollars a year, as well as provides many bases and depots. Recently some parties demanded that the government amend the Constitution or change its interpretation to enable Japan to execute the right of collective self-defense.[4] Also the Advisory Panel on Reconstruction of the Legal Basis for Security, which is a government-appointed, well-informed person's group, recommends that the government approve the invocation of the right of collective self-defense, which is very persuasive.[5]

Today, many people in Japan are watching to see whether or not the United States will invoke the right of collective self-defense if an armed conflict between Japan and China occurs over the Senkaku Islands. As of December 2012, according to the *Daily Yomiuri Online*,[6] the National Defense Authorization Act

[1] Int'l & Operational Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S., Army, JA 422, Operational Law Handbook, pp. 6-7 (2012).

[2] Article 5 of Japan–U.S. Security Treaty reads, "[e]ach Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."

[3] *See Host Nation Support (HNS)*, Ministry of Foreign Affairs of Japan, http://www.mofa.go.jp/region/n-america/us/security/hns.html.

[4] The Liberal Democratic Party (LDP) and the Japan Restoration Party (JRP) are two such parties advocating for a constitutional amendment. The LDP also insists that the name of the SDF be changed to the "National Defense Force." On 16 December 2012, the LDP won more than a working majority of seats in the House of Representatives election and returned to ruling party status.

[5] *Report of the Advisory Panel on Reconstruction of the Legal Basis for Security*, The Advisory Panel on Reconstruction of the Legal Basis for Security (June 24, 2008), *available at* http://www.kantei.go.jp/jp/singi/anzenhosyou/report.pdf.

[6] *U.S. Reaffirms Senkaku Defense*, Daily Yomiuri Online, http://www.yomiuri.co.jp/dy/national/T121201003302.htm.

(NDAA) of the U.S. was amended to reaffirm the U.S.'s commitment to the defense of Japan and the favorable resolution of the dispute over the Senkaku Islands. But whether or not America's Congress will approve those military operations on the Senkaku Islands is a different issue from the amendment of the NDAA.

Japan has a policy to ensure the ban on the execution of the right of collective self-defense, called the "Exclusively Defense-Oriented Policy." This policy means that Japan will not employ defensive force unless and until an armed attack is mounted on Japan by another country, and even in such a case, only the minimum force necessary to defend itself may be used. Furthermore, only the minimum military defense forces necessary for self-defense should be maintained at any given time. This policy is a passive defense strategy that is consistent with the spirit of the Constitution.

When the United Nations conducts collective security missions, the SDF can participate when those missions do not involve the "use of force" other than for personal self-defense. Therefore, the SDF has been participating in some UN missions such as the UN Disengagement Observer Force (a mission to maintain the ceasefire between Syria and Israel), the UN Stabilization Mission in Haiti (a mission to stabilize Haiti after armed conflict broke out in 2004), and the UN Mission in the Republic of the South Sudan (a mission to stabilize the new nation of South Sudan in 2011). However, under laws now in force, the SDF cannot join missions with high intensity such as "Operation Unified Protector," which was the mission to Mu'ammar Qadhafi-controlled Libya in 2011.

Under the Constitution of Japan, Japan is permitted to possess the minimum necessary level of self-defense capabilities. The specific limit may vary with the prevailing international situation, the technologies available, and various other factors. The specific limit is discussed and decided according to annual budgets and other factors by the Diet on behalf of the people. Whether such capability constitutes a "war potential" that is prohibited by Article 9, paragraph 2 of the Constitution must be considered within the context of Japan's overall military strength. Therefore, whether the SDF should be allowed to possess certain armaments depends on whether such possession would cause its total military strength to exceed the constitutional limit.

The possession of armaments deemed to be offensive weapons designed to be used only for the mass destruction of another country, which would by definition exceed the minimum necessary level, is not permissible under any circumstances. Therefore, the SDF is not allowed to possess intercontinental ballistic missiles (ICBM), long-range strategic bombers, or attack aircraft carriers. Japan can provide supplies and services to U.S. forces based on the "Agreement Between the Government of Japan and the United States of America Concerning Reciprocal Provision of Logistic Support, Supplies, and Services Between the SDF of Japan and the Armed Forces of the United States of America." Its scope of application includes various occasions such as bilateral training and exercises in peacetime, disaster relief activities, UN peacekeeping operations, situations in areas surrounding Japan,[7] and armed attack situations. It would be difficult to provide certain supplies and services to U.S. forces, such as aircraft participation in an armed conflict in which Japan is not a party, because that action may be interpreted as invoking the right of collective self-defense. To conclude, although limited, the SDF can provide supplies and services to U.S. forces.

Conclusion

Japan has strengthened its relations with the United States for more than half a century. Considering the security environment surrounding both countries, the importance of this alliance in the next half century will increase more than ever. It is true that there are some legal restrictions on the SDF's actions and these are stricter than those of U.S. forces. However, to deepen our countries' relations, understanding each other correctly is essential.

[7] "Situations in areas surrounding Japan" means, according to Article 1 of Law concerning Measures to Ensure the Peace and Security of Japan in Situations in Areas Surrounding Japan, "the situation that will have an important influence on Japan's peace and security, including situations that could develop into a direct armed attack against Japan if left unaddressed."

Searching and Seizing Electronic Devices

What Do We Need to Know?

By Major Lisa M. Richard, USAF

With the advent of new and exciting technology comes new legal challenges. Traditionally, the law has been slow to catch up with technological advances; search and seizure of electronic devices is no exception. The dawn of the digital age is upon us. Individuals walk around daily carrying technology containing enormous amounts of their personal information. This information includes their movements, communications, hobbies, friends, likes, dislikes, religion, politics, financial information, etc.

Applying traditional Fourth Amendment[1] jurisprudence to the search and seizure of electronic devices has proven complicated. Some jurisdictions have treated smartphones and tablets as they would a container (e.g., purse, briefcase, datebook, or pocket) of any sort—as long as a warrant is present or an exception to the warrant requirement applies, the item can be seized and fully searched.[2] Therefore, any information obtained from the search can be

[1] U.S. Const. amend. IV.

[2] *See* New York v. Belton, 453 U.S. 454 (1981).

(Image courtesy of iStock)

The initial question when evaluating the legality of a search and seizure is whether there was a search within the meaning of the Fourth Amendment.

used against the accused.[3] Other jurisdictions have determined that smartphones and/or tablets are to be treated differently, highlighting that the ability of smartphones to store large amounts of private data gives the user a reasonable and justifiable expectation of a higher level of privacy.[4] Therefore a warrant or exception to the warrant requirement that allows the seizure of an item is not carte blanche to fully search all of the contents of that item.

...a warrant or exception to the warrant requirement that allows a seizure of an item is not carte blanche to fully search all of the contents of that item.

The initial question when evaluating the legality of a search and seizure is whether the search fell within the meaning of the Fourth Amendment. Specifically, did a search occur? In 1967 the United States Supreme Court decided *Katz v. United States*.[5] *Katz* held that the Fourth Amendment protects people not places.[6] The Supreme Court further stated that a search occurs when a person expects privacy in the thing searched and society believes that expectation is reasonable.[7]

Once this initial issue has been resolved and the court has determined that the individual has a reasonable expectation of privacy or standing to contest a search of their person, place, or thing, we then move on to the second issue—what is the legal basis for the search? Is there a search warrant or does one of the exceptions to the Fourth Amendment warrant requirement apply? For our purposes, I am only going to primarily focus on three exceptions which seem to dominate case law in this area. They are consent, search incident to a lawful arrest, and the automobile exception.

Consent

The simplest means for law enforcement to legally conduct a search is to ask for consent. A consent search requires the individual whose person or property is being searched to freely and voluntarily waive their Fourth Amendment right. The subject has the right to refuse to give consent and may revoke consent at any point during the search.[8] The Government will bear the burden of proving consent was voluntary and not a result of coercion.[9]

Officers conducting a consent search are not required to warn a suspect of their right to withhold consent.[10] Furthermore, law enforcement is not required to "conduct all searches in plain view of the suspect, and in a manner slowly enough that he may withdraw or delimit his consent at any time".[11]

The law of consent regarding electronic devices falls into two categories. The first category treats the data on the cell phone like any other item (e.g., purse, briefcase, pockets, etc.) and therefore subject to a complete search, to include all of the data on the electronic device, once seized. For example, in *United States v. Galante*,[12] the owner of a car that was stopped by law enforcement gave generalized consent for a search of his car. A cellular phone and beeper were found and the court held that the subsequent

[3] *See* United States v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012).

[4] State v. Smith, 124 Ohio St. 3d 163, 169 (2009).

[5] Katz v. United States, 389 U.S. 347 (1967).

[6] *Id*. at 351.

[7] *Id*. at 361.

[8] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[9] *Id*. at 219.

[10] *Id*. at 232.

[11] United States v. Dominguez, 911 F. Supp. 261, 262 (S.D. Tex. 1995) (quoting United States v. Rich, 992 F.2d 502, 507 (5th Cir. 1993)).

[12] United States v. Galante, 1995 WL 507249 (S.D. N.Y. 1995).

The law of consent regarding electronic devices falls into two categories. The first category treats the data...like any other item... and therefore subject to a complete search....The second category of consent case law interprets consent to seize an electronic device as just that, a seizure only.

full search of the content of the phone and beeper did not violate the Fourth Amendment. In *United States v. Coates*,[13] the defendant consented to the officer's search of a message on his cell phone and during the search, the officer discovered pictures depicting child pornography. The court ruled that the search did not exceed the scope of the defendant's consent in that the defendant never instructed the officer on how to retrieve the message and he never informed the officer that other contents of the phone were excluded from his consent. In *United States v. Reyes*,[14] the driver's consent to a search of a car encompassed a search of a pager found in the backseat of the vehicle.

The second category of consent case law interprets consent to seize an electronic device as just that, a seizure only. Therefore, authorization to search the data of the item requires a separate search authorization i.e., specific consent search data, a search warrant for the data, or an exception to the warrant requirement that applies specifically to data. For example, in *U.S. v. Zavala*,[15] the Fifth Circuit held that following an automobile stop based on reasonable suspicion of drug-trafficking activity, a defendant's consent for Drug Enforcement Administration (DEA) agents to search his car did not extend to a search of his cell phones given that the defendant's phones were immediately removed from his person and placed on the roof of the vehicle.

In *Smith v. State*,[16] the court held that although troopers did not exceed the scope of the defendant's consent to a warrantless search of his car for guns, drugs, money, or illegal contraband, when they seized a cellular phone and accessed the data on the phone, the troopers did exceed the scope of the defendant's consent by accessing the computer memory of the phone to retrieve its electronic contents.

The bottom line regarding consent of electronic devices is that initially, at least, the consent must be valid under basic rules, in that the consent must be knowing and voluntary. Depending on the jurisdiction, courts have attached a higher level of protection that requires specific consent as to the data contained within an electronic device, akin to a warning.

[R]egarding consent of electronic devices...the consent must be valid under basic rules, in that the consent must be knowing and voluntary.

Search Incident to a Lawful Arrest

The government may "search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime."[17] The Supreme Court has expanded this concept by holding that when an arrest is made, it is reasonable for the officer to search the "…arrestee's person and the area within his immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[18]

The case law in this area regarding electronic devices falls into two categories. The first category treats the

[13] United States v. Coates, 685 F. Supp. 2d 551 (M.D. Pa. 2010).

[14] United States v. Reyes, 922 F. Supp. 818 (S.D. N.Y. 1996).

[15] United States v. Zavala, 541 F.3d 562 (5th Cir. 2008).

[16] Smith v. State, 713 N.E.2d 338 (Ind. Ct. App. 1999).

[17] Weeks v. United States, 232 U. S. 383, 392 (1914).

[18] Chimel v. California, 395 U.S. 752, 763 (1969).

search of an electronic device as a search incident to a lawful arrest that would include the data stored on an electronic device. For example, in *United States v. Young*,[19] police officers permissibly accessed and copied the text messages on the defendant's cellular telephone during a search incident to his arrest since the officers had no way of knowing whether the text messages would automatically delete themselves or be preserved and the officers needed to preserve the evidence. In *United States v. Mercado-Nava*,[20] a warrantless search of cell phones seized from the defendant's person, by downloading information stored in them, was justified under the Fourth Amendment as a search incident to arrest where the search was contemporaneous with the arrest.

When searching an electronic device in conjunction with a search incident to a lawful arrest, a cursory search generally will be permissible...

In *State v. Harris*,[21] a prosecution for various weapons offenses, the court held that seizure and search of the defendant's cell phone did not violate the Fourth Amendment because it was conducted without a warrant since the defendant's cell phone was seized and searched incident to arrest. The Supreme Court of California in *People v. Diaz*,[22] held that, in a narcotics prosecution, the stored data in the text message folder of the defendant's cell phone was a proper subject of a warrantless search incident to the defendant's arrest, where the cell phone was found upon defendant's person. The court noted that in the context of a warrantless search of an arrestee's person, individuals who carry sophisticated cell phones have no greater right to conceal personal information from official inspection than individuals who carry such information in small containers. The court also held that the 90 minutes between the defendant's arrest and a law enforcement officer's search of the defendant's cell phone did not render the search an invalid search incident to arrest.

The second category of case law requires a separate justification for the search of the data contained within a wireless communication device incident to a valid arrest. For example, *State v. Smith*,[23] held that a warrantless search for information stored in a cell phone, seized from the defendant pursuant to a search incident to arrest, violated the defendant's Fourth Amendment rights where the search was unnecessary for law enforcement safety and there were no exigent circumstances, including identification of the suspect or preservation of evidence, which justified the search.[24] The court stated that the capacity of modern cell phones to store immense amounts of private information is common.[25] The court compared modern cell phones to laptop computers, in which arrestees have significant privacy interests.[26]

The court in *United States v. McGhee*,[27] held that it was unreasonable for the police to believe that the cell phone would contain information relating to the crimes that took place ten months earlier because the phone did not appear to be contraband, destructible evidence, or present a risk of harm to police officers. The court in *United States v. Lasalle*,[28] held that a narcotics defendant was entitled to suppression of information taken from one of his cell phones that was seized incident to his arrest since the search of the defendant's phone did not occur until two to three hours after the arrest.[29] The court in *State v. Williams*,[30] held that an investigatory stop of the defendant was not supported by reasonable suspicion and even if the stop and subsequent arrest were lawful, the officer's search of the defendant's cell phone after his arrest was unlawful and the pictures found therein should have been suppressed. In so holding, the court stated a police officer may not conduct a

[19] United States v. Young, 278 Fed. Appx. 242 (4th Cir. 2008), *cert summarily denied*, 129 S. Ct. 514, 172 L. Ed. 2d 377 (2008).

[20] United States v. Mercado-Nava, 486 F. Supp. 2d 1271 (D. Kan. 2007).

[21] State v. Harris, 2008 WL 4368209 (Ariz. Ct. App. Div. 1 2008).

[22] People v. Diaz, 2011 WL 6158 (Cal. 2010).

[23] State v. Smith, 124 Ohio St.3d 163 (2009).

[24] *Id*.

[25] *Id*. at 167 (2009).

[26] *Id*.

[27] United States v. McGhee, 2009 WL 2424104 (D. Neb. 2009).

[28] United States v. Lasalle, 2007 WL 1390820 (D. Haw. 2007).

[29] *Id*.

[30] State v. Williams, 2010-Ohio-901 (2010).

Belton **added to the automobile exception by allowing law enforcement to search not only the passenger compartment of a vehicle incident to a lawful arrest but also examine the contents of any containers found within the passenger compartment.**

search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant.[31]

When searching an electronic device in conjunction with a search incident to a lawful arrest, a cursory search generally will be permissible, e.g., a search that accesses the phone to obtain the phone number or the serial number for example. With cases providing a significant departure from precedent such as *State v. Smith*,[32] the law seems to be moving toward creating an additional layer of protection for data contained within an electronic device. The United States Supreme Court has made a statement by denying certiorari to *State v. Smith* (see *Ohio v. Smith*[33]) and allowing that deviation from precedent to stand.

Automobile Exception

The motor vehicle exception to the Fourth Amendment warrant requirement was first established by the United States Supreme Court in 1925 in *Carroll v. United States*.[34] The Supreme Court has stated that drivers have a "reduced expectation of privacy" in a vehicle because it is inherently mobile.[35] This reduced expectation of privacy also allows police officers with probable cause to search a car to inspect drivers' and passengers' belongings that are capable of concealing the object of the search.[36]

In 1981 the Supreme Court decided *New York v. Belton*.[37] *Belton* added to the automobile exception by allowing law enforcement to search not only the passenger compartment of a vehicle incident to a lawful arrest but also examine the contents of any containers found within the passenger compartment.[38]

This definition of a container includes smartphones and tablets, and under this application, would allow the government to search a smartphone or tablet in the same manner that a briefcase, purse, or pockets can be searched.

Building on the foundation laid in *Belton*, in 2012 the 7th Circuit decided *United States v. Flores-Lopez*,[39] in which the court defined a container as "any object capable of holding another object…any object that can contain anything else, including data…."[40] This definition of a container includes smartphones and tablets, and under this application, would allow the government to search a smartphone or tablet in the same manner that a briefcase, purse, or pockets can be searched. Although the facts in *Flores-Lopez* were limited in that the search of the phone was only cursory, the court took the opportunity to allude to a broader holding. The court stated that law enforcement would be permitted to seize the electronic device, view the data contained therein, and lawfully use the information found on the device against the accused.[41]

[31] *Id*. (citing State v. Smith, 124 Ohio St. 3d 163, 169 (2009)).

[32] *Smith*, 124 Ohio St.3d at 167.

[33] Ohio v. Smith, 131 S.Ct. 102 (2010).

[34] Carroll v. United States, 267 U.S. 132 (1925).

[35] Wyoming v. Houghton, 526 U.S. 295, 296 (1999).

[36] *Id*.

[37] New York v. Belton, 453 U.S. 454 (1981).

[38] *Id*.

[39] United States v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012).

[40] *Id*. at 804 (7th Cir. 2012).

[41] *Id*. at 809 (7th Cir. 2012).

"[T]he attachment of a GPS tracking device, and subsequent use of that device to monitor vehicles' movements on public streets, is a search within the meaning of the Fourth Amendment."

When you consider the holdings in *Katz*,[42] *Belton*,[43] and *Flores-Lopez*[44] taken together, we come out with a site picture that establishes a privacy right in an electronic device, i.e., standing to challenge a search and/or seizure. An electronic device is defined as a "container of information" (as per *Belton*[45]) under the law which allows it to be searched in the same way a briefcase, purse, datebook, or any other container would be searched and/or seized. This application spans both a search incident to a lawful arrest and the automobile exceptions to the warrant requirement.

The key issue with automobile exception cases regarding electronic devices is whether the courts will continue to treat cell phones or tablets as containers of information or give them a higher expectation of privacy akin to a laptop computer.

What Next?

In January 2012, the Supreme Court decided *United States v. Jones*[46] in which the government, via a valid search warrant, collected 28 days of Global Positioning System (GPS) data that tracked the movements of the defendant. This GPS data was compiled and used to corroborate a drug enterprise in which the defendant was convicted. The court held that "the attachment of a GPS tracking device, and subsequent use of that device to monitor a vehicles' movements on public streets, is a search within the meaning of the Fourth Amendment."[47]

Although *Jones* does not directly speak to search and seizure of an electronic device, it does speak to the government's use of data collected from electronic devices and alludes to an expansive definition of privacy that would consider an electronic device separate and apart from the data contained therein. This result would require a separate search authorization, whether it be a search warrant or an exception to the warrant requirement, be established to access the data contained in a cell phone.

Searching a cell phone or tablet incident to a lawful arrest as part of an automobile stop or through consent may not be enough...

USAF Applicability

You may be thinking this is an interesting legal issue but how does this apply to our Air Force practice? When working with Office of Special Investigations (OSI) and Security Forces Office of Investigations (SFOI) as legal advisors, we need to ensure that they understand the law in this area to prevent Fourth Amendment challenges to key evidence. We need to ensure that investigators do not take it upon themselves to search a cell phone's contents without following the proper procedures for an authorized search. Searching a cell phone or tablet incident to a lawful arrest as part of an automobile stop or through consent may not be enough; there should be some additional level of authorization such as specific consent from the owner or a search authorization as to the contents/data contained on the phone.

In February 2013, the defense in *United States v. Wicks*,[48] were successful with a motion to suppress evidence found on the accused's cell phone after it was stolen by a third party and turned over to law

[42] Katz v. United States, 389 U.S. 347 (1967).

[43] New York v. Belton, 453 U.S. 454 (1981).

[44] United States v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012).

[45] New York v. Belton, 453 U.S. 454 (1981).

[46] United States v. Jones, 132 S.Ct. 945 (2012).

[47] *Id*.

[48] United States v. Wicks is one of the military training instructor (MTI) cases being prosecuted at Lackland AFB, TX. The case is currently on appeal after the case was dismissed on 20 February 2013.

...[T]he law is moving toward providing greater protection for the individual when it comes to the data contained on an electronic device. As a citizen, that is a good thing. As a legal advisor and/or trial counsel, that requires self-education, education of the junior counsel, and education of OSI and SFOI...

enforcement. The court concluded that even though the Government was not the instrument of the theft, it was responsible for ensuring that the accused's privacy rights were protected by obtaining legal authorization to search and use the contents of text messages found on the cell phone against the accused at trial. The Government unsuccessfully argued that the accused abandoned the phone and they also argued inevitable discovery of the text messages; neither argument was successful. The court ruled that the accused had an established privacy right in the data stored on the phone and that use of that information without a warrant or a well-established applicable exception was a violation of the accused's Fourth Amendment rights.[49]

[49] Kristen Davis, *MTI's Case Thrown Out After Evidence Dismissed*, Air Force Times, Feb. 22, 2013 *available at* http://www.airforcetimes.com/news/2013/02/air-force-mti-evidence-thrown-out-court-martial-022213.

Conclusion

Taking all of the above-referenced cases together, I theorize that the law is moving toward providing greater protection for the individual when it comes to the data contained on an electronic device. As a citizen, that is a good thing. As a legal advisor and/or trial counsel, that requires self-education, education of the junior counsel, and education of OSI and SFOI investigations. Regardless of the crime committed, it seems most cases in this digital age have some sort of connection with evidence obtained from or through electronic devices. What is apparent is that there is no clear course of action. With little clear guidance it is wise to err on the side of caution, when in doubt get consent from the accused. If you can not get consent, get a magistrate to approve the search. If you don't have probable cause or consent, dig deeper and seek an independent source of the information or just leave it alone.

(Image courtesy of iStock)

Sexual Assault: Four Commonly Held Beliefs

By Major Christopher J. Goewert and Captain Andrew R. Norton, USAF

The ongoing public attention paid to sexual assault allegations in the military has focused the scrutiny on military justice actors and investigators who are involved in these cases. We approach these cases with a variety of preconceived beliefs that inform how they are viewed and handled. These preconceived beliefs are simply a subset of the range of beliefs that exist in the public sphere. Anyone who has dealt with sexual assault cases has developed personal anecdotal evidence to validate or challenge these beliefs, depending upon one's inclination. Whether analyzing these cases for potential prosecution, discussing them with decision-makers, or briefing units on the topic, it behooves us to take a fresh look and present information that is grounded in fact. This article attempts to distill some of the current literature in addressing common perceptions of this often emotional issue.

BELIEF: There are More Sexual Assaults in the United States Air Force Than in the Broader Civilian Community

EVIDENCE: Studies Suggest That Sexual Assault in the Air Force and Society at Large Occur in Roughly the Same Numbers

Sexual assault has been appropriately analogized to a cancer. The degree of its metastatic rate in our Air Force compared to civilian society merits consideration, if for no other reason than to serve as a point of departure in our discussions about the topic. Whether we are laggards in our response or we are on the cutting edge of prosecution and victim support, is to a degree academic, however, there appears to be a widely held belief that sexual assault within the Air Force is a more common occurrence than in the civilian community. Every sexual assault impugns

(U.S. Air Force graphic/Sylvia Saab)

Marrying the Gallup poll data and the AFPC demographics, we can roughly conclude that 5.8% of college age females in the Air Force were sexually assaulted in some fashion in the survey year.

the honor of our Airmen, as do the unfortunate misconceptions that this societal disease is more prevalent than in the civilian community.

"Measuring the prevalence and incidence of sexual assault is a difficult task for which there is no clear-cut science for ensuring validity and reliability of results," so conclude experts at Gallup. While we might throw up our hands and like Disraeli utter that it's all nothing but "lies, damned lies and statistics," reading the study is instructive. If the data we have is to be reasonably credited, would it surprise you to learn that sexual assault may not be more common in the Air Force than in society at large?

In 2010, the Personal Safety Survey commissioned by the Air Force Office of Sexual Assault Prevention and Response and conducted by Gallup received completed surveys from about 19,000 Airmen.[1] The survey asked questions about sexual assault using the 2008 UCMJ definitions and then calculated the responses to paint a representative picture. From this survey we know that about 2,143 females, or 3.4% of the USAF female population, were victims of sexual assault in the twelve months prior to the survey. This broad category includes sexual acts (vaginal penetration by a penis or object), sodomy (oral or anal sex), and sexual contact (encompassing virtually every other kind of sexual touching other than vaginal penetration and sodomy). All of these categories included attempts to commit these offenses as well. In the Gallup survey, sexual contact was the most common offense with half of the victims falling into this category. Of the 2,143 victims, 66% were between the ages of 16-24 years old. The perpetrators of these offenses were largely military members and these figures do not account for the unknowable number of civilians who were sexually assaulted during the relevant time period.

Let us compare these figures to the civilian community. In a national rape study conducted by the Medical University of South Carolina's National Crime Victims Research and Treatment Center (NCVRTC) and published in 2007, participants were asked questions to determine whether they had been the recipient of unwanted sexual acts, including being raped or sodomized by force, or whether someone had raped or sodomized them while they were high, drunk, or passed out.[2] This study had different criteria as to what would constitute a sexual assault and did not include sexual contacts such as the unwanted groping of breasts and buttocks that were captured in the Air Force Gallup survey. The study was directed toward female college students and women in the broader society. According to the study, 5.2% (301,000) of female college students in America were sexually assaulted during the year surveyed. As to the national average, the survey reported .94% (1.1 million) of women had been sexually assaulted in that year. The study focused a great deal of attention on college students and their experiences with alcohol-facilitated sexual assault.

This serves as a useful comparison to the Air Force which has a large portion of college age personnel who often mimic the behaviors and trends of their peers. According to AFPC demographics, at the time of the Gallup study in 2010, 38.2% of Air Force personnel were under the age of 26 with 44% of enlisted members falling into that category. Marrying the Gallup poll data and the AFPC demographics, we can roughly conclude that 5.8%[3] of college age females in the Air Force were sexually assaulted in some fashion in the survey year. This measures in tandem with the 5.2% of college students who were sexually assaulted as reported by the NCVRTC study,

[1] Steiger, D., Chattopadhyay, M., Rao, M., Green, E., Nemeckay, K., Yen, E., *Findings From the 2010 Prevalence/Incidence Survey of Sexual Assault in the Air Force*, Report for U.S. Air Force Office of Sexual Assault Prevention and Response (2010).

[2] Kilpatrik, D., Resnick, H., Ruggiero, K., Conoscenti, L., McCauley, J., Drug-facilitated, Incapacitated and Forcible Rape: A National Study (2007). Medical University of South Carolina's National Crime Victims Research and Treatment Center.

[3] Size of college-age cohort 24,184 [(63,309 active duty females) * (% under 26 or 38.2%)] / Total number of assaults within college-age cohort 1416.5 [(% females < age 24 or 66.1%) * (# of assaults or 2,143)] = percentage of group assaulted 1 in 17 or 5.8%.

especially considering the NCVRTC study didn't ask about the variety of less serious but significant unwanted sexual contact and attempted offenses that were included in the Gallup study. If the NCVRTC study group had been asked about experiences were with sexual contact offenses, and the answers given at the same ratio[4] as those experienced by their Air Force contemporaries, the incidence of sexual assault in the college population might approach 10%. The incidence of sexual assault in our at-risk group of young airmen is unlikely to be higher than that occurring at any college in America and in some measures could be considered lower.

Based on these two studies, we can at the very least conclude that sexual assault is not more prevalent in the Air Force than in the broader civilian society...

A second figure meriting our consideration is the number of women who have been a victim of some form of sexual assault over elapsed time. 11,986 women (18.9% of the total number of active duty females) were sexually assaulted in some fashion during the course of their Air Force careers. As before, this includes the panoply of possible offenses ranging from sexual acts such as forcible vaginal penetration to unwanted touching of the breast or buttocks through the clothes. According to the NCVRTC study (using the same criteria as those given to the college age group, i.e., does not include sexual contact offenses), 18% (20.2 million women) had suffered a lifetime prevalence of sexual assault. The majority of the woman surveyed were between the ages of 18 and 34.

As most Air Force personnel separate before twenty years of active service, the fact that 18.9% of female members are reporting some form of sexual assault during their career may make us feel that as an institution the Air Force is a more dangerous place than broader society where the survey showed 18% of females were sexually assaulted over an entire lifespan (mean age of 46.6 years). Such a conclusion would be unwarranted as most of the offenses against Air Force members occurred before the member reached the age of 34 and the majority of woman sampled in the general population of the survey were also 18-34, aligning the two groups. Most importantly, the broader survey does not factor in those women who were victims of sexual contact offenses only. An addition that would surely spike the lifetime prevalence of victims in civilian society.

Based on these two studies, we can at the very least conclude that sexual assault is not more prevalent in the Air Force than in the broader civilian society, though this is not to suggest that our present efforts to combat the problem are misdirected. Rather, it is obvious that when 18% of females are in some way sexually assaulted by the age of 34, whether in the military or in society as a whole, the analogy to a pernicious disease is quite apt.

BELIEF: Males are Only Sexually Abused by Other Men, the Occurrence of Which is Rare

EVIDENCE: Males are Sexually Abused by Females in Significant Numbers

Unfortunately, it seems that only the most cursory attention is given to male victims of sexual assault. Undoubtedly, we have all attended a sexual assault briefing where the speaker, in an effort to paint on a gloss of gender equality, makes a perfunctory reference to the possibility of males also being victims of sexual assault before returning to more conventional topics. The passing reference might briefly conjure up images of brutal prison rapes and institutional molestations by gangs bent on humiliating their target. Such intense anecdotal images may mislead about the prevalence of sexual assault against males in the Air Force. More importantly, a misunderstanding of the physiology of the male body and attitudes about gender roles and expectations may create misunderstandings about the nature of an assault and lead to gross underreporting.

[4] 2,143 (total # of past year assaults)–248 (oral or anal sex assaults)–798 (sexual act victims) = 1097 (minimum # of sexual contact victims only). This is a ratio of 1/1. For every victim of an unwanted sexual act or unwanted oral or anal sex there was a victim of an unwanted sexual contact offense only.

The 2010 Gallup *Survey of Sexual Assault in the Air Force* found that 1,355 active duty Air Force males were sexually assaulted in the twelve-month period prior to the survey.[5] Perhaps surprisingly, 61.3% of those assaults were committed by female perpetrators, about half of whom were also military members. Remarkably, of those instances, 28.1% were sexual acts as defined by the 2008 UCMJ, meaning that the male victim penetrated the female assailant's vagina with his penis, finger, or object without his consent. Perhaps unsurprisingly, only 5.8% of male victims reported the assaults to authorities. Only 4% of those assaults were committed by more than one person, underscoring the reality that most of these occurrences did not look like scenes from *Deliverance* or *Pulp Fiction*, though the same fear and sense of unreality may well have been present. These, by and large, are not instances of spousal abuse, coercion, or overreach as 85% of the perpetrators were not spouses, girlfriends, or romantic interests but acquaintances, peers, friends, and strangers. Assuming the study is accurate, a profile of the most common assailant is that of a female acquaintance that ignores the efforts to communicate lack of consent and commits a sexual contact offense.

...a misunderstanding of the physiology of the male body and attitudes about gender roles... may create misunderstandings about the nature of an assault and lead to gross underreporting

At the time of the survey, there were 5,553 active duty males that endured some form of sexual assault over the course of their Air Force career. The figures presented by the Gallup study paint a significantly different picture than other studies which mostly looked at male victims who reported for medical attention. In those cases, victims were anally raped by other males,[6] with multiple assailants in about one-third of the cases. The cases reported to Gallup would seem to encompass many of those instances where the female abuser utilizes psychosocial manipulation and seduction that does not result in the provision of medical attention and are generally unreported.[7]

If you are quietly scoffing at the notion that males could be sexually assaulted by females, including the concept that a male can unwillingly engage in intercourse, please consider what psychiatrists are currently saying. A review of the studies on male rape reveal that men often have involuntary erections and ejaculations during rape.[8] This is because physiologically, the mechanisms of an erection and ejaculation are only partially under voluntary control and respond to extreme anxiety.[9] Anger, fright, and pain can be the mechanism of sexual response.[10] It is apparent from this research that men facing situations that could cause humiliation and anxiety are physically able to become aroused despite a lack of consent; the body does what it's built to do without the free agency of its mental inhabitant. Perhaps even worse, in cases of male-on-male assault, men might be forced to ejaculate by their assailants in a strategy to make the act appear consensual and due to the physiological mechanisms of the body, can occur as a result of nonconsensual receptive anal sex.[11] Such a physical response whether in assaults perpetrated by females or males creates a great deal of confusion on the part of the victim who might think that because of their physical reaction they consented to the offense.[12]

BELIEF: Most Sexual Assaults are One-Time Bad Decisions Unlikely to Occur Again

EVIDENCE: Sexual Offenders are Often Repeat Offenders who Engage in Predatory Behavior

Airmen who volunteer to serve their country represent the best of what American society has to offer. Most people who join the Air Force are drawn to the

[5] Steiger, et al., *supra* note 1.

[6] Bullock, C., Beckson, M., *Male Victims of Sexual Assault: Phenomenology, Psychology, Physiology*, J Am Acad Psychiatry Law 39:199, 2011 (citing multiple studies for this proposition.

[7] Struckman, C., Struckman, D., *Men's Reactions to Female Sexual Coercion*, Psychiatric Times, Vol. 17 No. 3, 2001; Sarrel PM, Masters WH: *Sexual Molestation of Men by Women*, Arch Sex Behav 11:117-31, 1982.

[8] Bullock and Beckson *supra* note 6.

[9] *Id*.

[10] *Id*.

[11] *Id*. at 203.

[12] *Id*.

military by the discipline and sacrifice required of military members and eagerly step forward to accept the challenge. To illustrate this point, think about how military court members rate against a jury in a state criminal trial. Military panels are well-suited to serve as court members; they are intelligent, honest, objective, and rules-oriented. However, the United States Air Force represents a microcosm of society. Alongside the aspiring and inspiring individuals that comprise the best Air Force in the world, you will also find the occasional rapscallion and scoundrel.

Statistics from one study on repeat rape and multiple offending looked at 1,800 college students and found that out of those 1,800, 4% committed 82% of the sexual offenses reported in the study.[13] This means only a small number of individuals account for a great majority of all sexual offenses committed. These few individuals all share several characteristics in common: hostility, anger, dominance, hyper-masculinity, impulsiveness, and anti-social attitudes.[14] It probably doesn't come as a surprise that someone with this "Molotov Cocktail" of personality traits would be more likely to commit sexual offenses. However, there are more subtle signals that are consistently shown by these predatory offenders. They tend to be more sexually active than normal men in their age group. They tend to believe that increased sexual activity makes them more masculine.[15] These predatory offenders also tend to be hyper-masculine and adopt attitudes and beliefs that justify and foster their sexually aggressive behavior.[16] For example, predatory offenders are likely to adopt other "rape myths" such as "women say no to sex even when they want it."[17] They often have feelings of anger and hostility towards women which drive them to feel a need to dominate and control them.[18]

In contrast to the narrative of a decent young man who only crossed the line as a result of too much alcohol and too little communication, these predatory offenders have adapted a set of skills to accomplish their sexually aggressive behavior. They are extremely adept at identifying likely victims, plan and premeditate their attacks using sophisticated strategies to groom their victims for attack and physically isolate them. They use instrumental, not gratuitous violence, using only as much violence as is needed to coerce their victims into submission. They use psychological weapons—power, control, manipulation, and threats—backed up by physical force, almost never resorting to weapons such as knives or guns, and use alcohol deliberately to render victims more vulnerable to attack or completely unconscious.[19] In the college setting, it is well known that predatory offenders focus their efforts on freshmen.[20] Freshmen are new to campus, have less experience with alcohol, and are trying to fit in, so it follows they would engage in more risky behavior to be accepted. In the military arena, we have encountered the same problem with a small number of individuals in the military training environment. In studies where undetected rapists (rapists who have never been caught) were questioned on how they raped women, an overwhelming majority reported raping women who were incapacitated by drugs or alcohol.[21]

While some sexual offenses that occur in the Air Force no doubt fit the profile of a perpetrator who makes a horrible judgement call, which crosses the line between drunken sex and sexual assault, research shows that the majority of rapes are committed by a few individuals engaging in predatory behavior.[22] When AFOSI or the legal office receive a report of sexual assault, the default mindset should be that the act represents a pattern of behavior and may be just the tip of an iceberg. Rather than scrutinizing a victim's individual account, initial energies might be better spent searching for the other undiscovered victims. In one study of college students that identified 120 sex offenders or attempted sex offenders, 76

[13] David Lisak and Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17(1) Violence and Victims 73 (2002).

[14] David Lisak, *Understanding the Predatory Nature of Sexual Violence* (unpublished research paper, 2008), *available at* http://www.middlebury.edu/media/view/240951/original/PredatoryNature.pdf..

[15] DVD: *The Undetected Rapist* (National Judicial Education Program at Legal Momentum) (on file with authors).

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] Lisak, *supra* note 14.

[20] *Morning Edition: Myths That Make It Hard to Stop Campus Rape*, (NPR radio broadcast Mar. 4, 2010) (*available at* http://www.npr.org/templates/story/story.php?storyId=124272157).

[21] Lisak and Miller, *supra* note 13.

[22] Lisak, *supra* note 14.

When AFOSI or the legal office receive a report of sexual assault, the default mindset should be that the act represents a pattern of behavior and may be just the tip of an iceberg.

of them admitted to committing repeat offenses.[23] The fact that relatively few predatory offenders commit the majority of sexual offenses is good news for trial counsel. The likelihood of locating additional victims to strengthen a case against an accused argues strongly in favor of thoroughly investigating an accused's past behavior and interviewing friends, co-workers, and acquaintances. Even if they do not find prior sexual crimes that constitute propensity evidence under MRE 413, viewing the facts of an event through the prism of predatory behavior may go far in explaining how an accused camouflaged his or her behavior under the guise of drunk sex or consent and may be instructed upon for consideration as relevant evidence of motive, intent, plan, preparation, or lack of mistake under MRE 404(b).

BELIEF: Bystander Intervention Training is a Complete Waste of Time

EVIDENCE: Bystander Intervention Training is One of the Most Effective Ways to Prevent Sexual Assault

If we accept the characteristic traits of a predatory offender (hostility, anger, dominance, hypermasculinity, impulsiveness, and anti-social attitude), prevention efforts directed at this type of person, unsurprisingly, are not likely to be effective.[24] Training bystanders to recognize this kind of behavior and intervene is far more effective than attempting to train predatory offenders who are unlikely to change their behavior as a result of watching a video, PowerPoint presentation, or completing computer-based training. Furthermore, targeting all males as perpetrators is only likely to increase defensiveness and reduce the effectiveness of training.[25]

Successful bystander training models involve a series of hypothetical scenarios involving sexism, domestic violence, and sexual assault. The educator then leads the group through a discussion of potential responses, when to intervene and when not to intervene.[26] The program seeks to educate and empower bystanders to intervene early in risky situations and to build a culture that does not accept sexual harassment or assault in any form.[27] For example, watching a friend buy drinks at the bar for an intoxicated woman and then later trying to isolate that woman away from the group would be a good time to intervene early in a risky situation. The first and possibly easiest opportunity to intervene would be at the bar when he is buying drinks for an over-served female. The next opportunity to intervene would be when the friend attempts to isolate the female. By taking action, the bystander can protect both parties from a potentially dangerous situation. Because past studies indicate that in 72-81% of cases in which a male college student rapes a female college student, the female is intoxicated, it makes sense to focus bystander training on alcohol-related situations.[28] The training should also seek to break men of the stereotype that intervening in such a situation would be a violation of the "bro-code."[29]

The recent Air Force-wide workspace sweep of "offensive material" was an attempt to wipe out remnants of this type of "sexist" culture. While some of the things identified in the sweep perhaps were not too threatening (Princess Leia *Star Wars* action figure, *Runner's World* magazine, Magic 8-Ball, and a Breast Cancer Awareness sticker) other items were less benign (pubic hair in logbook, condom-decorated Christmas tree, and pornographic materials).[30]

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[23] Lisak and Miller, *supra* note 13.

[24] Lisak, *supra* note 14.

[25] Jennifer Langhinrichsen-Rohling, John D. Foubert, Hope M. Brasfield, Brent Hill and Shannon Shelley-Tremblay, *The Men's Program: Does It Impact College Men's Self-Reported Bystander Efficacy and Willingness to Intervene?*, Violence Against Women, Vol. 17, No. 6, 743-759 (2011).

[26] *Id*. at 745.

[27] *Id*.

[28] Lisak and Miller, *supra* note 13.

[29] A series of rules defining on how a "bro" should act. Urban Dictionary, http://www.urbandictionary.com, (last visited Jan. 21, 2013).

[30] A full list of items found in the workspace sweep can be found here: http://

Training bystanders to recognize this kind of behavior and intervene is far more effective than attempting to train predatory offenders who are unlikely to change their behavior...

Changing the attitudes and beliefs held in a group is the best way to eliminate cultures where sexual assault and sexual harassment are tolerated or ignored.

The Air Force has taken the lead in engaging bystanders to aid in sexual assault prevention efforts. In the wake of the sexual assault scandal at the Air Force Academy, the Academy and the Air Force as a whole have implemented one of the most comprehensive programs to address sexual assault in a large institution.[31] Yale University implemented bystander intervention training in January 2013, requiring all sophomores to go through a 75-minute training in an effort to prevent sexual misconduct at the university.[32] Similar programs have also been implemented at the University of Kentucky and the University of New Hampshire.[33] Interestingly, nine out of ten Yale students interviewed about the training program did not think it would be effective.[34] This poll mimics how many Airmen view the Air Force's Bystander Intervention Training (BIT), but statistics show otherwise.

Research in the area of bystander training indicates it is an effective mechanism of training. One study of college students who underwent bystander training found that the students who attended a one-hour training session felt more confident about their willingness and effectiveness of intervening in risky situations as opposed to a control group who received other types of training.[35] Another more recent study looked at how the bystander training affected enlisted Army soldiers in Germany.[36] Their study had similar results to that of the college students; the soldiers who participated in the bystander training reported substantial impacts on their attitudes and beliefs about sexual assault and they reported a much higher perceived ability and willingness to intervene in risky situations.[37] These studies are very relevant to the Air Force as both the college student and Army soldier demographics are representative of our Airmen. The next logical question is, do these changes in attitudes and beliefs last or do they go away as soon as they walk out the door and crack open a beer? Two more studies indicate the effects of a men's bystander training have some staying power. In one study conducted on 248 college men, the men were asked questions seven months after their initial training, and two-thirds of the men reported their attitudes and behavior were changed over the previous year directly as a result of the bystander training.[38] Yet another study of 184 college students at a Southeastern university showed that 145 out of the 184 reported long-term change two years after participating in a bystander training program.[39] There were five common themes that emerged from the men's responses: alcohol can be dangerous, rape is very serious, better understanding of the trauma of rape, communication is critical to consent, and attitudes were reinforced.[40]

Bystander training programs have been shown to be effective among college fraternities, student-athletes, first year college students, and Army enlisted sol-

militarytimes.com/projects/air/health-welfare-findings.

[31] Lisak, *supra* note 14 at 9.

[32] Cynthia Hua, Bystander Training Introduced, Yale Daily News, Jan. 24, 2013, *available at* http://yaledailynews.com/blog/2013/01/24/bystander-training-introduced/.

[33] *Id*.

[34] *Id*.

[35] Langhinrichsen-Rohling, et al., *supra* note 25 at 753.

[36] John Foubert & Ryan Masin, *Effects of the Men's Program on U.S. Army Soldiers' Intentions to Commit and Willingness to Intervene to Prevent Rape: A Pretest Posttest Study*, Violence and Victims, Vol. 27, No. 6, 911-921 (2012).

[37] *Id*. at 918.

[38] John D. Foubert, Jerry L. Tatum, & Eric E. Godin, *First-Year Male Students' Perceptions of a Rape Prevention Program 7 Months After Their Participation: Attitude and Behavior Changes*, J. of College Student Dev., Vol. 51, No. 6, 707-715 (2010).

[39] John D. Foubert, Jerry L. Tatum, & Eric E. Godin, *In Their Own Words: Sophomore College Men Describe Attitude and Behavior Changes Resulting From a Rape Prevention Program 2 Years After Their Participation*, J. of Interpersonal Violence, Vol. 25, No. 12, 2237-2257 (2010).

[40] *Id*. at 2244.

diers.[41] The most effective training programs in these environments are those administered by men to all male audiences. Other studies looking at training for men that feature a female rape survivor has actually been shown to *increase* acceptance of rape myths and one program even increased men's reported likelihood of sexual aggression.[42]

It is our impression that one of the most effective aspects to bystander training is setting bystanders up to be a hero. By engaging everyone, bystander training reinforces the belief that anyone in the right place at the right time can make a difference, similar to first aid training. Part of the training we attended included a short series of video clips from the ABC television show *What Would You Do?*[43] One of the clips showed a couple at a bar on a first date. As they sit down at the bar, they chat with the customers around them and when the date excuses herself to go to the bathroom, the man surreptitiously stirs a powder into his date's wine while others at the bar look on. In several of the experiments the witnesses do or say nothing to the man or the woman as she returns to sip her wine, even after she complains of a headache. These customers are mostly younger men and they are clearly the "zeroes" because they are too chicken to stand up and take action. Their behavior was sharply contrasted with that of an older man there with his wife who turns out to be the "hero" when he unapologetically confronted the man who put something in his date's drink and then stopped her from drinking her wine when she returned to her seat. This kind of intervention across barstools and at dorm-parties has the potential to happily save prosecutors and defenders a lot of work.

Gentle reader, thank you for your attention. As your counsel will be sought on these issues, before tendering your advice, consider some of the cited research and ask yourself how your own opinions compare.

An Airman wearing a teal rope—the color symbolizing sexual assault awareness and support.
(U.S. Air Force photo/Kemberly Groue)

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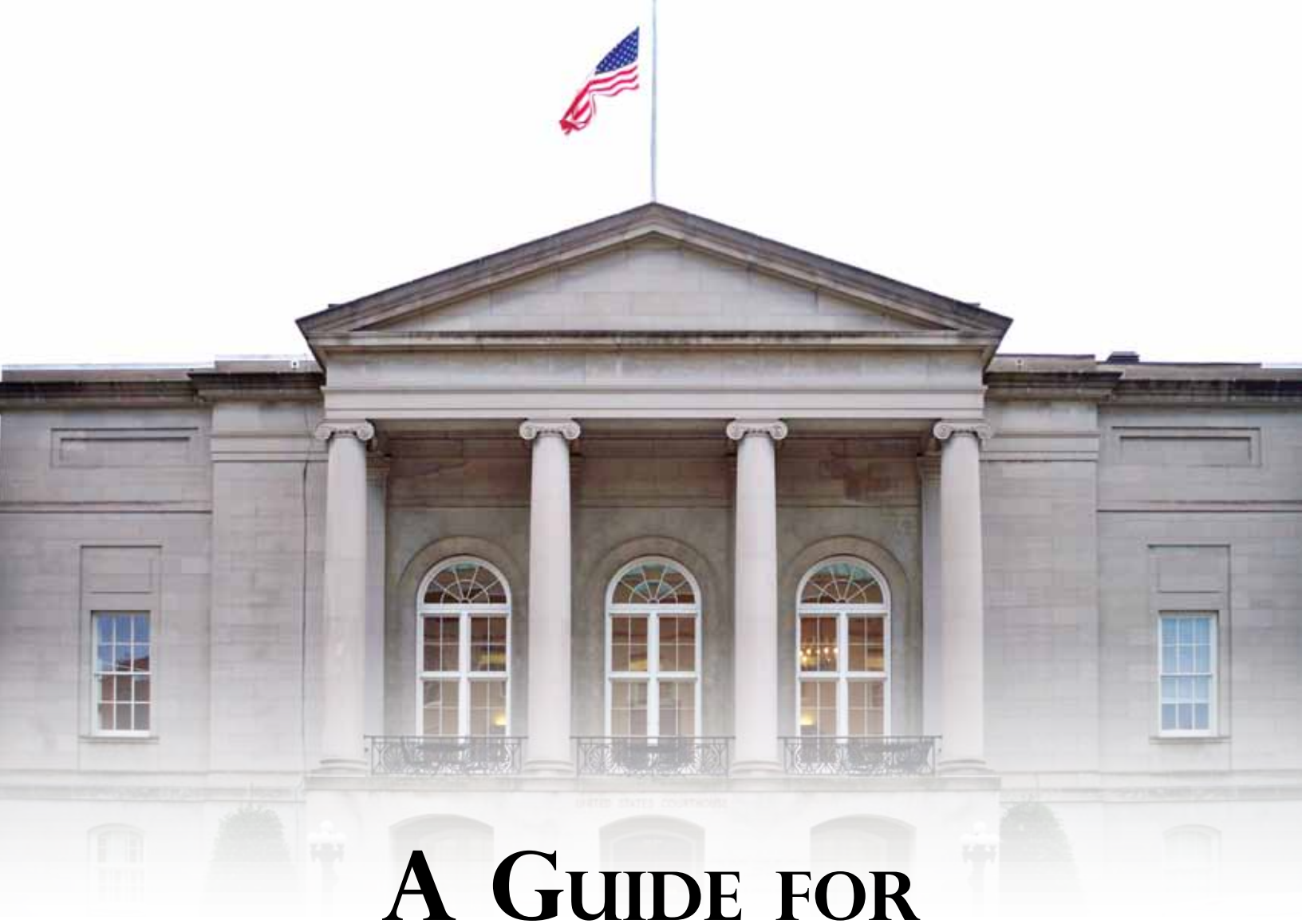
[41] Foubert, et. al., *supra* note 36 at 919.

[42] Foubert, et. al., *supra* note 38 at 708.

[43] *What Would You Do?: See Drink Drugging* (ABC television broadcast Oct. 22, 2010) (*available at* http://abcnews.go.com/WhatWouldYouDo/video/drink-drugging-11952518).



A Guide for Extraordinary Relief at C.A.A.F.

By Mr. Bradley E. Richardson

The authority to grant extraordinary relief within the United States Court of Appeals for the Armed Forces (C.A.A.F.) has been controversial. As recently as 2008, the court lacked a consensus regarding the boundaries of its authority to grant extraordinary relief.[1] The question is not whether the court may grant extraordinary relief; rather it is to what extent it may exercise its jurisdiction. From statutes and case law arise a set of rules and tests which review a petition for extraordinary relief. The following guide will compile those rules and tests intending to assist practitioners with an overview of extraordinary relief at C.A.A.F.

The All Writs Act and C.A.A.F.

The authority for federal courts to grant extraordinary relief was established in the Judiciary Act of 1789, § 14 (1 Stat. 81).[2] The Act later evolved into

[1] Denedo v. United States, 66 M.J. 114, 133 (C.A.A.F. 2008) (Ryan, J., dissenting).

[2] "That all the before-mentioned courts of the United States shall have the power to issue writs of *sacrire facias*, *habeas corpus*, and all other writs not specifically provided for by statute which may be necessary for the exercise of the their respective jurisdiction and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of the inquiry into cause of commitment. Provided, that

Court of Appeals for the Armed Forces. (Photo courtesy of Wikimedia/Matthew Bisanz)

two statutes, the All Writs Act and the federal habeas corpus statute. This law forms the basis of federal judicial authority to grant extraordinary relief.[3] The All Writs Act provides that "[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aide of their respective jurisdictions and agreeable to the usages and principles of law."[4] On the other hand, the federal habeas corpus statute grants habeas power only to Article III courts and sets forth general guidelines and procedures which are applicable in those actions.[5] The distinction is important because, unlike Federal Circuit Courts of Appeal, C.A.A.F. has historically analyzed every writ for extraordinary relief, including habeas corpus, under the All Writs Act.[6] Only recently has the court adopted procedures from the Antiterrorism and Effective Death Penalty Act (AEDPA) for the evaluations of petitions for habeas corpus.[7]

A GUIDE TO C.A.A.F. RULES AND TESTS FOR EXTRAORDINARY RELIEF

C.A.A.F. and Extraordinary Writs, Generally

C.A.A.F. may issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act.[8] This is one of the court's equitable powers.[9] Therefore, writs are not generally available if there is another adequate remedy at law or alternative method of review.[10] "The determination of whether another remedy is adequate requires a contextual analysis."[11] Presidential action is not an adequate remedy because it falls outside the scope of the judicial process.[12]

Two separate determinations are required before granting an extraordinary writ: (1) the writ must be "in aid of" the court's jurisdiction and (2) the writ must be "necessary or appropriate."[13] The writ is "in aid of" the court's jurisdiction if the relief "modif[ies] an action that was taken within the subject matter jurisdiction of the military justice system, such as the findings or sentence of a court and principles of law."[14] On the other hand, C.A.A.F.'s jurisdiction in *Clinton v. Goldsmith* confines extraordinary relief to courts-martial findings and sentences under Article 67, UCMJ.[15] The writ must directly affect a finding or sentence imposed (or potentially imposed) in a court-martial.[16] If "another adequate legal remedy is available," then the writ will not be "necessary or appropriate."[17] The accused bears the burden of "establish[ing] a clear and indisputable right to the requested relief."[18] However, C.A.A.F. may recognize its own error of jurisdiction or the absence thereof, allowing an award of extraordinary relief or reconsideration to the petitioner.[19]

The writ should be brought within the military judicial system before petitioning a federal civilian court.[20] For collateral attacks, the appropriate forum to petition for extraordinary relief is the service branch Court of Criminal Appeals (CCA).[21] If the writ is denied by the CCA, then it may be appealed to C.A.A.F. under a writ-appeal.[22] However, a writ may be petitioned directly to C.A.A.F. by a showing of good cause for the original petition for extraordinary relief.[23]

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writs of *habeas corpus* shall in no case extend to prisoners in gaol ([jail]), unless they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

[3] Major Thomas A. Rankin, T*he All Writs Act and the Military Judicial System*, 53 Mil. L. Rev. 103, 110-11 (1971); 28 U.S.C. § 1651(a) (2006).

[4] 28 U.S.C. § 1651(a) (2006).

[5] 28 U.S.C. § 2241 (2006).

[6] Captain John J. Pavlick, *Extraordinary Writs in the Military Justice System: A Different Prospective*, 84 Mil. L. Rev. 7, 35-36 (1979).

[7] Loving v. United States, 64 M.J. 132, 134 (2006) (*Loving* has an extensive procedural history. Hereinafter, all references to the various opinions within the procedural history of will be referred as "*Loving*.").

[8] 28 U.S.C. § 1651(a) (2006).

[9] *Loving*, 62 M.J. at 246-47 (citing Clinton v. Goldsmith, 526 US 529 at 537).

[10] *Id*.

[11] *Denedo*, 66 M.J. at 121.

[12] *Loving*, 62 M.J. at 247.

[13] *Denedo*, 66 M.J. at 119.

[14] 28 U.S.C. § 1651(a) (2006).

[15] 526 U.S. 529, 531 (1999).

[16] *Goldsmith*, 526 U.S. at 535.

[17] *Denedo*, 66 M.J. at 121.

[18] *Id*. at 126.

[19] Gallagher v. United States, 22 C.M.A. 191, 194, 46 C.M.R. 191, 194 (C.M.A. 1974).

[20] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 586-88 (2006); Lips v. Commandant, United States Disciplinary Barracks, 997 F.2d 808, 811 (10th Cir. 1986); Schlesinger v. Councilman, 420 U.S. 738, 757-58 (1975), Noyd v. Bond, 395 U.S. 683, 696-99 (1969) (holding that exhaustion of military judicial remedies is required before seeking relief in civilian courts); Burns v. Wilson, 346 U.S. 137, 142 (1953) (holding the military judicial system is "separate and apart" from the Federal civilian system); Gusik v. Schilder, 340 U.S. 128, 131-32 (C.M.A. 1950).

[21] *See Denedo*, 66 M.J. at 124 (2008) (citing United States v. Murphy, 50 M.J. 4, 5-6 (C.A.A.F. 1998)).

[22] C.A.A.F. R. 19(e) (2011); *See Denedo*, 66 M.J. at 117.

[23] C.A.A.F. R. 4(b)(1) (2011).

The Army Court of Criminal Appeals uses the five factors set forth in *Bauman v. United States District Court*[24] to determine whether to grant extraordinary relief.[25] Although C.A.A.F. has not adopted these factors, some factors overlap current case law:

> (1) no other adequate means, such as direct appeal, exist to obtain relief;
>
> (2) will the petitioner be damaged or prejudiced in a way not correctable on appeal;
>
> (3) is the lower court's order clearly erroneous as a matter of law;
>
> (4) is the lower court's order an oft repeated error, or manifests a persistent disregard of federal rules; and
>
> (5) does the lower court's order raise a new and important problem, or issues of law of first impression.[26]

Habeas Corpus

The writ of habeas corpus is a specific instrument to obtain a person's release from confinement or other restraint of liberty.[27] Although used primarily for collateral attacks, a non-collateral writ of Habeas Corpus is available in the military judicial system. Petitioning C.A.A.F. under a non-collateral writ of habeas corpus occurs when the accused is being confined either prior to the accused's court martial or during the pendency of review.[28] C.A.A.F. has developed separate rules and tests when reviewing confinement in these situations. However, a writ of mandamus may be a more appropriate writ to bring when confinement is ordered by command. In pre-trial confinement situations, review by a neutral magistrate is required.[29] The pre-trial confinement must be warranted and justified.[30] The conditions may only be as rigorous to ensure the accused presence.[31] Prior to seeking the writ, the accused must seek administrative relief such as petitioning a higher-level commander for relief under Article 138, UCMJ.[32,33] In all confinement situations, the court's standard of review is whether there was an abuse of discretion by a commander or military judge.[34]

Collateral review through a writ of Habeas Corpus occurs after appellate review and the conviction becomes final.[35] Collateral review within C.A.A.F.'s subject matter jurisdiction must (1) be "'in aid of' a court's jurisdiction" and (2) "necessary or appropriate."[36] The petitioner must exhaust other remedies and pursue the normal appellate process before utilizing a writ of habeas corpus to collaterally attack a conviction.[37] C.A.A.F. reviews habeas petitions in the same manner that federal courts review state convictions, under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. §§ 2224-2254 (2000).[38]

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[24] 557 F.2d 650, 654-55 (9th Cir. 1977).

[25] Captain Patrick B. Grant, *Extraordinary Relief: A Primer for Trial Practitioners*, 2008 Nov. Army Law 30, 32-5 (2008) (citing Dew v. United States, 48 M.J. 639, 648-49 (A. Ct. Crim. App. 1998)); Bauman, 557 F.2d at 654-55.

[26] *Id*.

[27] 39 Am. Jur. 2d *Habeas Corpus* § 1 (2003).

[28] *See, e.g.*, Johnson v. Thurman, 3 M.J. 373 (C.M.A. 1977).

[29] Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976).

[30] Berta v. United States, 9 M.J. 390, 391 (C.M.A. 1980) (justification for pretrial confinement based on safety of the accused held not to be sufficient); Fletcher v. Commanding Officer, 2 M.J. 234 (C.M.A. 1977).

[31] Walker v. Commanding Officer, 19 C.M.A. 247, 250, 41 C.M.R. 247, 250 (C.M.A. 1970); Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (C.M.A. 1969).

[32] "Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon." UCMJ art. 138 (2006).

[33] United States v. Coffey, 38 M.J. 290, 291 (C.M.A. 1993) (citing *Walker*, 19 C.M.A. at 251, 41 C.M.R. at 251); Dale v. United States, 19 C.M.A. 254, 41 C.M.R. 254 (C.M.A. 1970).

[34] "The type of restraint, if any, to be imposed on an accused prior to trial presents a question for resolution by the commanding officer, in the exercise of his sound discretion. His discretion will not be reversed in the absence of an abuse of discretion." Harmon v. Resor, 19 C.M.A. 285, 286, 41 C.M.R. 285, 286 (C.M.A. 1969). The decision to restrain during the pendency of appeal by the government is reviewable for abuse of discretion. United States v. Browndd, 6 M.J. 338, 339 (C.M.A. 1979); *Collier*, 19 C.M.A. 511, 42 C.M.R. 113; Reed v. Ohman, 19 C.M.A. 110, 115, 41 C.M.R. 110, 115; Levy v. Resor, 17 C.M.A. 135, 140, 37 C.M.R. 399, 404 (C.M.A. 1967).

[35] Font v. Seaman, 20 C.M.A. 227, 43 C.M.R. 227 (C.M.A. 1971); *Denedo*, 66 M.J. at 121 (citing *Loving*, 62 M.J. at 235).

[36] *Denedo*, 66 M.J. at 119.

[37] *Font*, 20 C.M.A. 387, 43 C.M.R. 227; *Denedo*, 66 M.J. at 121 (citing *Loving*, 62 M.J. at 247)).

[38] *Loving*, 64 M.J. at 145 (declining to adopt review of habeas petitions under 28 U.S.C. § 2255 (2000) because there are no standing courts in the military judicial system).

It is a well-established principle that a petition for writ of error *coram nobis* should be brought before the court that rendered the judgment.

A collateral attack is subject to the highly deferential standard established in *Loving v. United States*.[39] This strict standard requires the court to determine:

> [w]hether this court's prior review: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the prior proceeding.[40]

If the petitioner failed to develop a factual basis for the writ in a lower court proceeding, the court may order an evidentiary hearing at its own discretion.[41] However, it must meet a two-pronged test.[42] The first prong requires the petitioner to "show that the claim relies on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence."[43] Under the second prong, the petitioner must show that "[t]he facts underlying the claim would be sufficient to establish clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offence."[44] If both prongs are met and a factual component requires resolution, then the court will determine if the case should be remanded for an evidentiary hearing under *United States v. Dubay*.[45, 46]

Coram Nobis

The writ of error *coram nobis* is a procedure that arises directly from the All Writs Act,[47] which "permits a court to remedy errors not perceived or not fully assessed when the case was first before it."[48] The All Writs Act supports a writ of *coram nobis* to correct prejudicial errors not apparent in the evidence originally before the court.[49] "*Coram Nobis* is not a substitute for an appeal."[50] It is a well-established principle that a petition for writ of error *coram nobis* should be brought before the court that rendered the judgment.[51] However, collateral review does not occur at the trial level under the UCMJ and the appropriate forum for a writ of error *coram nobis* of a court-martial conviction is the CCA.[52] The petitioner may also directly petition C.A.A.F on a showing of good cause.[53]

Exhaustion of all other remedies, including the writ of habeas corpus, is required.[54] If *coram nobis* is mistakenly petitioned prior to habeas corpus, the writ will be converted to habeas corpus or dismissed without prejudice.[55] Another remedy that must be exhausted is an administrative avenue for reconsideration through a petition for a new trial under

[39] *Id*. (adopting the AEDPA standards codified in 28 U.S.C. §§ 2224-2254 (2000)).

[40] *Id*.

[41] *Id*. (citing AEDPA, 28 U.S.C. § 2254(e)(2) (2000)).

[42] *Id*.

[43] *Id*. at 146 (citing 28 U.S.C. §2254(e)(2) (2000)).

[44] *Id*.

[45] 17 C.M.A. 147, 37 C.M.R. 411 (1967).

[46] *Loving*, 64 M.J. at 147.

[47] 28 U.S.C. § 1651(a) (2006).

[48] United States v. Morgan, 346 U.S. 502, 512 (1957); Del Prado v. United States, 23 C.M.A. 132, 133, 48 C.M.R. 748, 749 (C.M.A. 1974).

[49] *Morgan*, 346 U.S. at 512.

[50] United States v. Frishcholz, 16 C.M.A. 150, 153, 36 C.M.R. 306, 309 (C.M.A. 1966).

[51] *Denedo*, 66 M.J. at 124.

[52] *Id*.

[53] C.A.A.F. R. 4(b) (2011).

[54] *Loving*, 62 M.J. at 257.

[55] *Id*. *See also Morgan*, 346 U.S. at 510 (rejecting the view that habeas corpus under 28 U.S.C. § 2255 should be construed to include *coram nobis*).

A writ of mandamus is a drastic remedy which C.A.A.F. and other federal courts have concluded should be invoked only in truly extraordinary circumstances.

Article 73.[56] This petition must be based on newly discovered evidence or fraud before the court.[57] Either the avenue of relief must be exhausted or the two year statute of limitation must have run before petitioning for a writ of *coram nobis*.[58]

If the exhaustion requirement is met, relief may be afforded "without limitation of time for facts affecting validity and regularity of the judgment."[59] Even if the petitioner is no longer subject to the court-martial process, the power of C.A.A.F. to entertain the writ and grant relief is not terminated.[60] However, if the petitioner is in custody, then habeas corpus is the more adequate remedy.[61]

Note Regarding Retroactivity

A complete discussion of post-trial and collateral attacks through extraordinary relief at C.A.A.F. is not complete without a brief overview of retroactivity of decisions of the United States Supreme Court. C.A.A.F may retroactively apply a decision based on the weight of three factors: (1) the purpose to be served by the new standard, (2) the extent of the reliance by the law enforcement authorities, and (3) the effect on the administration of justice of a retroactive application of the new standard.[62]

INTERLOCUTORY WRITS

In *Gale v. United States*, the then Court of Military Appeals stated that "[Article 67 (b)] does not purport to act as a jurisdictional prohibition against granting extraordinary relief at an earlier stage of a criminal proceeding against an accused. Its purpose is to limit our review in cases properly before us as to questions of law."[63] But the court must still confine its interlocutory extraordinary relief to be "in aid of" its jurisdiction, as it does not have broad supervisory power with respect to the administration of justice.[64]

1. Mandamus

A writ of mandamus is a grant of authority allowing a higher court to command an inferior court, board, tribunal, or official to perform a particular duty as required by law.[65] A petition for a writ of mandamus is "designed to 'confine an inferior court to a lawful exercise of its prescribed jurisdiction' in instances where the lower court may have incorrectly exercised their authority."[66] "Although courts have not 'confined themselves to an arbitrary and technical definition of 'jurisdiction,' the writ is justified in 'only exceptional circumstances amounting to a judicial 'usurpation of power,' a 'clear abuse of discretion.'"[67]

A writ of mandamus is a drastic remedy which C.A.A.F. and other federal courts have concluded should be invoked only in truly extraordinary circumstances.[68] The All Writs Act serves as a residual

[56] The accused may petition the Judge Advocate General for a new trial within two years after approval of the sentence by the convening authority. UCMJ art. 73 (2006).

[57] *Id*.

[58] *Denedo*, 66 M.J. at 121(there appears to be a typo in the opinion at pg. 121 – "Art. 74" should read "Art. 73").

[59] *Del Prado*, 23 C.M.A. at 133, 48 C.M.R. at 749 (citing *Morgan*, 346 U.S. 502).

[60] *Id*. (citing Asher v. United States, 22 C.M.A. 6, 46 C.M.R. 6 (C.M.A. 1972); Lewis v. United States, 21 C.M.A. 667 (C.M.A. 1972); *See also Denedo*, 556 U.S. at 915 (holding that the rules of finality are not a jurisdictional bar from examining an earlier judgment).

[61] *Morgan*, 346 U.S. at 510.

[62] "The purpose to be served has been the foremost of the factors and the other two have been relied on only when the purpose did not clearly dictate either a retroactive or a prospective application." Mercer v. Dillon, 19 C.M.A. 264, 266, 41 C.M.R. 264, 266 (1970).

[63] 17 C.M.A. 40, 37 C.M.R. 304 (C.M.A. 1967).

[64] *Goldsmith*, 526 U.S. at 534.

[65] 52 Am. Jur. 2d *Mandamus* § 1 (2003).

[66] Harrison v. United States, 20 M.J. 55, 57-58 (C.M.A. 1985) (writ denied because the military judge had correctly exercised his authority); *See also* United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983).

[67] *Cheney*, 542 U.S. at 380 (internal citations omitted).

[68] Murray v. Haldeman, 16 M.J. 74, 76 (C.M.A. 1983); *Labella*, 15 M.J. at 229.

authority for mandamus, but as with other writs, exhaustion of other legal remedies is required.[69]

The United States Supreme Court established three conditions that must be satisfied before a writ of mandamus may be issued: (1) the party seeking issuance of the writ must have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process; (2) the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable; and (3) even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.[70] "To justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even gross error; it must amount to a judicial usurpation of power or be characteristic of an erroneous practice which is likely to recur."[71]

2. Prohibition

"[T]he writ of prohibition is one that commands the person or tribunal to whom it is directed not to do something which he or she is about to do."[72] Unlike mandamus, it is remedy that restrains rather than corrects.[73] "The writ is also commonly defined as one to prevent a tribunal possessing judicial or quasi-judicial powers from exercising jurisdiction over matters not within its cognizance or exceeding its jurisdiction in matters of which it has cognizance."[74] The petitioner must show his or her "right to the writ to be clear and undisputable and that the actions of the court were a clear abuse of discretion."[75] A clear abuse of discretion may be demonstrated through several factors: (1) there must be no other adequate means to secure relief, (2) the petitioners will be "damaged or prejudiced in a way not correctable on appeal," (3) the court abused its discretion, (4) the court order "represents an often-repeated error and manifests a persistent disregard" of C.A.A.F. opinions, and (5) the court order "raises new and important problems or issue of law of first impression."[76]

OTHER FORMS OF EXTRAORDINARY RELIEF

1. Writ-Appeal

As an appellate court, C.A.A.F. may be petitioned through a writ-appeal to review a CCA's decision regarding a writ.[77] The court may make one of three decisions: (1) grant relief on its merits, (2) deny relief on its merits or (3) remand for factual development under *DuBay*.[78]

2. Motions to Stay

C.A.A.F. may be petitioned for a motion to stay.[79] A judge's denial of a motion to stay is reviewed for an abuse of discretion.[80] For a grant of a motion to stay, the petitioner must show: (1) whether the petitioner has made a strong showing that he is likely to succeed on the merits; (2) whether the petition will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties to the proceedings; and (4) the motion to stay will serve the public interest.[81]

Conclusion

Navigating through the sometimes complex law of writs can be confusing. This guide compiles the current case law useful to practitioners who are petitioning C.A.A.F. for extraordinary relief. Two themes seem to remain consistent when petitioning the C.A.A.F. for extraordinary relief: (1) establish jurisdiction and (2) exhaust all other remedies. Only then will a petitioner be able to present the claim on its merits.

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[69] *Denedo*, 66 M.J. at 114.

[70] *Cheney*, 542 U.S. at 380-81.

[71] *Labella*, 15 M.J. at 229 (internal citations omitted).

[72] 63C Am. Jur. 2d *Prohibition* .§ (2003).

[73] Rankin, *supra* note 2, at 105 (citing *Leimar v. Reeves*, 184 F.2d 441 (8th Cir. 1950).

[74] 63C Am. Jur. 2d *Prohibition* § 1 (2003.

[75] University of Texas at Austin v. Vratil, 96 F.3d 1337, 1339 (10th Cir. 1996) (Although C.A.A.F. has not adopted a test for writs of prohibition, *University of Texas* is a good test).

[76] *Id*.

[77] C.A.A.F. R. 27(b) (2011); *Denedo*, 66 M.J. at 117.

[78] *Mercer*, 19 C.M.A. at 266, 41 C.M.R. at 266.

[79] C.A.A.F. R. 30 (2011).

[80] United States v. Franchia, 13 C.M.A. 315, 321, 32 C.M.R. 315, 321 (C.M.A. 1962).

[81] Hilton v. Braunskill, 481 U.S. 770, 776 (C.M.A. 1987).

The New Foundational Leadership Pillar
Building Leaders

Remarks by Lieutenant General Richard C. Harding, USAF

During his 26 February 2013 JAG Corps Update webcast, The Judge Advocate General, Lieutenant General Richard C. Harding introduced a new foundational leadership pillar—Building Leaders. The following is a summary of that introduction.

We have talked about building leaders for some time. Building leaders is about building your professional strengths to maximize your leadership potential. We have been working this for some time but it is time to recognize its importance by elevating it to the status of a foundational leadership pillar. As we build leaders by following our foundational leadership model, we must remember our Corps represents a meritocracy; the embodiment of Jefferson's dream that a meritocracy would rise from the ashes of an aristocracy....

Mentoring, especially the mentoring of those junior to us, is essential for our success. Our mentorship surveys, both civilian and military, told us that a substantial percentage believe we are never mentored enough and that the mentorship we receive could be improved. We now have a civilian career field manager at the Air Staff level and a new civilian career filed team chief at the Air Force Personnel Center. For officers, last year we levied a requirement that DE-eligible officers be counseled by an SJA about the advantages of DE. We have requested an increase in Squadron Officer School seats to help officers attend SOS in residence, which I believe is incredibly important for the development of a junior officer. Civilians should be counseled about the importance of DE as well....

We need to develop a culture of daily mentorship. Talk to your subordinates on a regular basis—not just during annual feedback sessions. For enlisted members, we've made significant progress to improve leadership development. The University of Great Falls degree in Legal and Paralegal Studies is a great step forward. You can get your baccalaureate for virtually no cost because the Air Force will pick up most of the tab with tuition assistance.

Our new Enlisted Development Teams are on track as well. This year, we will hold boards in late-October for all E-5s through E-7s. What a wonderful way to have your record reviewed and be provided feedback by more senior paralegals on what you need to do next to develop as a professional. These Enlisted Development Boards will provide career guidance and assignment recommendations based on your record. Chief Wallace is also working with JAS to develop an enlisted PDI system so future boards can be 100% electronic. And our paralegal professional development Air Force Instruction is currently being edited by our paralegal Chiefs and I anticipate a full draft will be ready by early fall.

(Image courtesy of iStock)

GATEWAY VII student Major Leah Sprecher participating in a leadership scenario during the two-day capstone exercise JAGWAR. (Photo courtesy of Lt Col Mark McKiernan)

Building Leaders: The GATEWAY Experience

By Lieutenant Colonel Mark B. McKiernan, USAF

On 18 January 2013, 34 judge advocate majors became the seventh class to graduate from The Judge Advocate General's GATEWAY course. Identified as one of TJAG's "Foundational Courses," GATEWAY is designed to transition judge advocates from staff officers to the next generation of JAG Corps leaders. GATEWAY is a vital part of the education and training to build future JAG Corps leaders.

In order to meet this goal, TJAG has two overarching objectives for the course:

> First, each student will receive either classroom or read-ahead instruction in the elements of professional legal knowledge (black letter law) that majors at every level of the JAG Corps must know.
>
> Second, GATEWAY will teach universal skills to students, which in turn enhance students' leadership capability. Universal skills include motivating, mentoring and developing people; organizing, guiding, and managing organizations; and writing and speaking to inform, advocate, and persuade.

GATEWAY offers a unique education opportunity for judge advocates in the development of their careers as future JAG Corps leaders. Below are some key points about GATEWAY and effective education.

Finding the Time for Effective Training is Difficult

Legal offices are busy. Commanders, clients, and subordinates all demand considerable portions of a judge advocate's time. This is true not only for the SJA, but all members of the staff. Often there

is resistance for offices to engage in training, as it usually is accomplished at the expense of "real work."

GATEWAY is an exceptional example. Pulling any Major from a legal office for two weeks can be painful. The work doesn't simply disappear. It either piles up, waiting for the member to return, or is absorbed by other members of the office. However, training is much more than a means to an end. Training is capital investment. Training improves our most valuable long-term resource—our people. It creates more knowledgeable, efficient, and effective people in an organization.

GATEWAY's curriculum better prepares future leaders for their "9-11 moment"—a point in time which legal advice will have a profound impact in the lives of a client, commander, organization, or nation. As Lt Gen Harding frequently points out, there are times when judge advocates must rely solely upon *their* training and experience before giving advice. You may not have time for reach back support, or as TJAG explains when discussing 9-11, that support may not be available. You must be ready for that moment. A quote from pioneer track and field athlete Jesse Owens puts it best: "*A lifetime of training for just ten seconds*."

Attitude is Everything

Attitude has a direct and measurable effect on learning. During in-processing at each GATEWAY course, students are asked to talk about their best education or training experience. Answers vary widely. Some students speak about the experience in a particular LL.M. program; some cite law school; while others mention pre-deployment contingency skills training. All great education experiences have a common theme: the reason why the education or training experience was their "best" was because they *wanted* to do well.

As with all training, whether or not GATEWAY is successful for a particular student relies heavily on a student's attitude during the course. Studies are conclusive—attitude affects a student's ability to learn effectively. The more positive the attitude toward training, the more receptive the brain is for comprehension and retention of information. More importantly, a bad attitude may not only affect the individual learner. A bad attitude may affect other students' learning. Complaining is disruptive. Complainers tend not to exercise good followership, a skill essential to a successful GATEWAY experience. GATEWAY is about leadership and teambuilding—negative attitudes are roadblocks to that objective.

Training Should Have a Purpose

One shouldn't train for training's sake. There should be a definable need for training and clear objectives. In others words, all effective training must start with answering *why* the training is being accomplished and then develop a roadmap to plot *how* to reach those learning objectives. The GATEWAY curriculum plan details overall objectives for the course and provides a background to the genesis, or *why*, the course was created:

In 2009, TJAG appointed a study group to examine whether a mid-career course for judge advocates would be valuable to majors and to the Corps as a whole. With the help of the AFLOA Legal Information Services Directorate (AFLOA/JAS), the group conducted a survey of over 400 JAG Corps respondents, including 200 majors, and also received inputs from other sources. Based on the survey results, the group recommended developing the course, which TJAG approved.

The agenda for the first class was the result of a joint effort of the AFJAGS staff and members of the study group. They used the JAS survey to help determine the subject matter to be taught. They also conducted a focus group session with majors from the National Capital Region to test an approach for linking lectures to seminar-based exercises. That provided important information about the format and the course in general. The first class was held in January 2010, and subsequent courses have been conducted twice a year since.

The name GATEWAY was selected because majors are in the midst of the transition from company grade officers to senior JAG Corps leaders—they are passing through a developmental "GATEWAY."

Training is a capital investment in our people. It costs time, money, and patience. As with most

leadership decisions, training should be a cost-benefit analysis. If the training is not planned for and well thought—out, it is probably not worth your people's time. They'll have better things to do.

Embracing the Training Designed to Test Your Comfort Zone

We should continually strive to improve ourselves, both as leaders and as lawyers. In order to do this effectively, we must train beyond our comfort zone. We all have our "comfort zone"—an area of practice where we all trained or experienced. It is the fear of the unknown that tends to keep us in this zone. The uncomfortableness of new experiences keeps us on a familiar path. Fear keeps us doing what we've already mastered. Unfortunately, this path doesn't make a good judge advocate or leader.

GATEWAY presents students with opportunities to expand existing comfort zones. Here are several built-in leadership roles for students throughout the course. These roles are not a passive learning experience. They test each student's ability to lead their peers, sometimes under great pressure, to reach an objective. It is not within most students' comfort zone to brief TJAG about a controversial or debated topic, in front of the entire GATEWAY class noless. However, the preparation and delivery of the briefing does give the student excellent leadership experience. How many majors have the experience to say "I briefed TJAG on this issue?"

Evaluate and Redesign Training to be More Effective

The Greek philosopher Heraclitus once said, "The only thing that is constant is change." This is especially true here at the JAG School. From course to course, GATEWAY has consistently changed. The change is based significantly on TJAG objectives, student feedback, student evaluations and exercises, and course director observations. AFJAGS strives to offer the most conducive environment for learning to make students better leaders and lawyers. Students are the target audience. Therefore, students play a vital role in the development and evolution of the GATEWAY experience in building our future leaders.

(Photo courtesy of Lt Col Mark McKiernan)

Professional Responsibility and Supervisory Attorneys

By Major Andrew R. Barker, USAF

Most Air Force attorneys studied the Professional Responsibility (PR) rules in law school and took the Multistate Professional Responsibility Exam. As members of the JAG Corps, attorneys, both active duty and civilian, are required to know and follow the Air Force professional responsibility rules and incorporate them into practice. Air Force attorneys train constantly to ensure our legal advice is correct and our work product is excellent, and we strive to practice law with integrity, knowing that there could be consequences for ethics violations. After all this study and preparation, did you know that you could also be disciplined by your state bar if someone under your supervision fails to comply with the rules? Even if you are a supervisor and not directly involved in the action, the personnel you supervise are likely subject to the PR rules. From a leadership perspective, it is not enough to ensure only that *you* comply with the PR rules, but you must look out for those who you supervise as well. Keeping everyone on the right side of the PR rules makes for good practice and helps build Air Force leaders.

The Air Force Rules of Professional Conduct explain the responsibility of a supervisory attorney in rule 5.1. Rule 5.1(b) says that a "lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the *Rules*." Rule 5.1(c) goes on to say that a "lawyer shall be responsible for another lawyer's violation of the rules if (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved, or (2) the lawyer has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action." Unfortunately, there is not a lot of discussion or explanation in the text of the PR rules, and Air Force attorneys are sometimes left wondering exactly what is required.

Attorneys frequently ask what it means for supervisors to make "reasonable efforts" to ensure a subordinate attorney conforms to the PR rules. It would be impossible for a Staff Judge Advocate to sit in on every attorney-client conversation that happens in a legal office, and it would be equally impossible for an

(Photo courtesy of Nosha/Flickr)

SJA to anticipate every potential PR rules violation from all those client relationships. On a typical day, dozens of attorney-client conversations take place when attorneys meet with commanders, investigators, victims, defense clients, legal assistance clients, and with Air Force officials on a whole host of legal issues. To require the supervising attorney's presence during those conversations or ask subordinates to replay the day's interactions so the supervisor could be sure there was no PR violation seems to be very unreasonable.

The solution to this question can be implementation and execution of what should already be part of our regular office training. An SJA or other supervisory attorney should have a subordinate review the Air Force PR rules periodically, which can be done as part of an attorney's personal training plan or periodically during weekly office training. Of course TJAG requires all Air Force attorneys to complete an annual review of the rules and certify not only that the rules were reviewed, but also that the attorney is in active status in a state bar and that the attorney has not been involved in disciplinary proceedings from any state bar. Most states require its attorneys to accumulate several hours of ethics CLE each year, and many JAG School courses offer at least an hour of PR study, which is another opportunity for subordinates to learn the rules. Supervisors can also add to these PR training opportunities by keeping lines of communication open. Simply knowing the boss has an open door policy where tricky PR issues can be discussed and potential violations can be avoided will prompt many subordinates to spot issues and bring them to a supervisor for discussion. The combination of plenty of recurring study, a willing supervisor and a cautious subordinate will likely keep both individuals on the right side of the PR rules. Making sure subordinate attorneys understand the PR rules and incorporate them into their practice is also a good chance for supervising attorneys to help build future Air Force leaders.

Fortunately there are not too many examples of Air Force attorneys who intentionally or otherwise violate the applicable PR rules. There are also very few examples of an Air Force attorney supervisor who is held accountable for a subordinate's PR violation. Those cases do happen occasionally outside the JAG Corps, and many state bars publish disciplinary proceedings where attorneys subject to the State's PR rules are found to have committed a violation. An example of a supervisory attorney being found responsible for a subordinate's PR violation is found in *Attorney Grievance Commission of Maryland v. Ficker*.[1] In that case, the law firm's senior partner and supervising attorney maintained a high volume practice concentrating on drunken driving cases and other motor vehicle violations, handling an estimated 1500 cases per year. The law firm had no established case assignment system, and apparently associate attorneys would simply grab the cases they thought they could handle, cases that were sometimes opened just before the scheduled trial date. The supervising attorney did not know who had what case and he did not have a system to ensure that case preparation was being handled properly. Associates were on their own.

In one instance, an associate attorney took on a DUI case at the last minute, failed to read the entire file and did not realize the client had two prior convictions for the same misconduct. The unprepared attorney's negotiations with the prosecutor went very poorly. Needless to say, the client was extremely unprepared for the outcome of the case, later filing a complaint, and the supervising attorney knew nothing about the problem until it was too late. The judge presiding over the professional responsibility inquiry found that attorney violated Maryland's PR rule requiring competence as well as a number of others. The judge then found that the supervising attorney's system was broken and he had shown "a complete absence of thoroughness and preparation" in his representation of clients. That finding, in addition to other similar complaints against the firm, caused the supervising attorney's license to be suspended indefinitely. It is very unlikely that we would see that set of facts in our Air Force practice, but the case is a good illustration of how a supervising attorney must have a plan to ensure subordinates comply with the PR rules.

In the rare occasion that a PR violation occurs and a supervisory attorney becomes aware, the situation must be handled immediately. As stated in the rule above, the supervisor may be held responsible for the violation if the supervisor ordered the conduct, ratified the conduct that made up the violation, or knew about the violation and failed to correct

[1] Attorney Grievance Commission of Maryland v. Ficker, 924 A.2d 1105 (Md. 2007).

the conduct or take some kind of remedial action. Waiting around too long deciding how to handle a situation or turning a blind eye, hoping that no harm will come from the subordinate's violation, could make a supervisor just as responsible as the attorney who initially failed to comply with the PR rule.

The responsibility of Air Force supervising attorneys does not end with looking out for subordinate attorneys. Another important requirement of the Air Force PR rules involves "non-attorney assistants." Rule 5.3(a) explains that with respect to a paralegal or other nonlawyers supervised by an attorney, "the senior Air Force lawyer in an office shall make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the conduct of all subordinate lawyers and nonlawyers is compatible with their professional obligations." Rule 5.3(b) goes on to explain that "a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Finally, similar to a supervisor's responsibilities concerning a subordinate attorney, Rule 5.3(c) states that "a lawyer shall be responsible for conduct of such a person that would be a violation of these rules if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action."

Through TJAG's teaming initiative, Air Force paralegals and other legal office personnel take on a large piece of an office's workload, seeking out and distributing discovery, researching and drafting legal reviews, conducting witness interviews, handling trial transcripts and other post-trial documentation, drafting wills, and assuming many other critical tasks. These responsibilities require knowledge of the PR rules, including confidentiality, communication, competence, conflicts, client contact, and candor, among many others. The paralegals and other legal office personnel, who must comply with the PR rules, are usually very successful when handling this workload, but mistakes can be made. Some attorneys have not considered that they may be responsible for the ethical mistakes made by non-lawyers in the legal office or other Air Force offices where attorneys practice. Common errors are mishandled discovery, breaches of confidentiality, and legal advice given by nonlawyers. One legal office position that could easily be in danger of a PR violation is the person working at the front desk, where potential clients have a thousand legal questions and cannot wait or do not want to wait for an appointment with an attorney. Although most legal office personnel will resist the urge to dispense legal advice to the client without authorization and perhaps without knowing all the facts of a particular case, it can sometimes lead to ethical problems. All legal office personnel, including paralegals and other nonlawyers, should be included in training that covers the PR rules. While they may not need to record professional responsibility CLE, the benefit to having an office trained on PR can avoid a lot of trouble. They are also future Air Force leaders who will advantage of this valuable knowledge.

Another cause of PR violations can be an overly demanding workload. When files stack up, back to back hearings are scheduled, and the waiting room is full of potential clients, personnel sometimes begin to cut corners, which can lead to problems with the PR rules. Subordinate attorneys, paralegals, and other legal office personnel can do their part by not letting legal assistance clients, defense clients, or other attorney-client relationships suffer because a particular attorney is busy with other cases. Pitching in and redistributing cases can improve the situation. If a workload becomes too great, supervisors can have a plan in place to help relieve the burden and avoid a potential PR violation.

In the end, there are a lot of PR rules and they are not always easy to understand. There is not a lot of discussion that accompanies the rules and attorneys must research and figure out definitions and how the rules apply to a particular situation. This is a lot for an individual to handle, let alone a supervising attorney responsible for more than a dozen people in the legal office. Proper training and good communication can help supervisors ensure subordinate attorneys and other legal office personnel comply with the rules, which will avoid ethics complaints and builds up our future Air Force leaders.

Teaming *Really* Is Fundamental

By Major Scott A. Van Schoyck, USAF and Master Sergeant Elena M. Lund, USAFR

There has always been confusion concerning Air Reserve Technicians and their role as part of the total force. As I discuss my job as a paralegal, the confusion isn't entirely unjustified. An Air Reserve Technician (ART) is "a dual status civil service employee who must maintain active status as a Reservist in the Air Force Reserve unit where they are employed." ARTs usually work during the week in a civilian status, doing the same jobs that military personnel might otherwise do. ARTs are subject to recall onto active duty and serve on active duty tours throughout the year to maintain military proficiency.

The ART program was first implemented in 1958 after an Air Force study revealed that Reservists and Air National Guardsmen could be trained by fewer ARTs during drill than by full-time Active Duty Regular AF personnel. It was reported that the ART program saved the Air Force approximately $13 million dollars during its first year of operation. Unsurprisingly, the Air Force decided to maintain and expand the program. In 2012, ARTs comprised over 10,500 of all personnel assigned in the Air Force Reserve Command (AFRC), or approximately 15% of total AFRC manning.

The Air Force has quite a few enlisted personnel who serve as ARTs. The JAG Corps does not. Currently there is only one ART paralegal. The challenges of being an ART paralegal are unique, and are only overcome through effective teaming in both my civilian and military capacity. This underscores the importance of teaming in our JAG Corps, no matter how unique the job.

The ART's Point of View: Master Sergeant Elena M. Lund

In order to grasp the best understanding of an ART, I can only offer my experience. First, I must say that it makes for an interesting work environment. Many of the individuals who work at the 94th Airlift Wing are ARTs like me. We come to work daily as civilians, but with an interesting twist–we wear our military uniforms. This is where some confusion begins. A common assumption is that we are in our military status. My understanding of why ARTs wear the uniform is because while in uniform our civilian employment requires us to abide by all military customs and courtesies commensurate with the military rank we are wearing. However, we are not subject to the Uniform Code of Military Justice (UCMJ) in this status. Rather, we can only be disciplined in accordance with traditional civilian disciplinary personnel actions. This is truly a unique professional existence.

As a Paralegal ART, my duties as a civilian employee during the week are different than those I perform in my military capacity. As a matter of fact, this is a

Working with an ART paralegal, I have to be aware that...my paralegal who looks like and acts like a military member, is in fact...a civilian wearing military clothing.

distinctive part of my JAG/Paralegal teaming role. As a civilian paralegal specialist, I am supporting Maj Scott Van Schoyck as he performs functions related to Labor and Employment Law, Environmental Law, Contracting Law, Ethics and JAG Recruiting. Maj Van Schoyck has a charter that explains these are the primary areas of the law in which he is to provide support to the wing. The charter is incredibly important for him since he is the only attorney on base when the Traditional Reservists (TR) JAGs are not serving a tour. One weekend a month, when my TR JAGs come into the office, I switch to my military role and become the Law Office Superintendent. In this role, I plan, organize, and direct legal services personnel in the areas of Military Justice, General Law, and Civil Law. In both roles, I am the only paralegal in the office to support the attorneys.

JAG/Paralegal teaming is a necessity in this unique office. With so many areas of practice and sometimes blurred areas of responsibility, we could not be effective if teaming did not occur. In my civilian capacity, the duties I perform are in subjects as diverse as Ethics and Standards of Conduct, Environmental, Labor and Employment, Contract, and Fiscal law. This requires that I consistently team with Maj Van Schoyck to produce the best office products. On all drill weekends, I team with the Traditional Reservists to interview clients regarding their legal assistance needs and to decide the best methods to process and execute all judicial and nonjudicial matters. In both of my capacities, I support the effort by preparing documents such as powers of attorney, wills, promissory notes, and deeds.

The Active Duty JAG's Point of View: Major Scott A. Van Schoyck

My job as the active duty Staff Judge Advocate assigned to the 94th Airlift Wing presents some unique challenges to be sure. The 94 AW is a stand-alone reserve installation, without an active duty legal office. There are six other SJAs who are similarly assigned to stand-alone reserve installations. Each of us has a charter that directs us to focus our legal advice first on Labor Law issues, second on Environmental Law issues, and third contracts. For those of us that have a Numbered Air Force commander with general court-martial convening authority, we can supplement our reserve JAGs advice when a court is convened. Otherwise, our other priorities are supporting JAG Corps recruiting efforts and accession interviews, as well as assisting in UCI/IG issues. And, of course, we need to provide ethics advice and legal assistance, particularly to deploying members. This office is unique in that it's the only one with an ART paralegal.

JAG/Paralegal teaming is a necessity in this unique office. With so many areas of practice and sometimes blurred areas of responsibility, we could not be effective if teaming did not occur.

Working with an ART paralegal, I have to be aware that MSgt Lund, my paralegal who looks like and acts like a military member, is in fact Ms. Lund, a civilian wearing military clothing. Of course, that is really the relatively easy part. The hard part is making sure she is accomplishing what we've planned each day within her allotted 8 hour work day. I have to be careful to only assign her work that is in her "Doc" statement. Otherwise, I could be committing a grievable offense and subjecting the Air Force to liability for back pay. This is never a good thing, but particularly bad when your number one job is to provide labor law advice to the wing. To succeed with such constraints in place, effective teaming is of paramount importance.

I need to trust MSgt Lund to do those things that she is qualified to do. I need to focus my efforts as much as possible on those things that I am uniquely qualified to do, supplementing MSgt Lund only where it is absolutely necessary. In so doing, MSgt Lund and I try to make the mystical math equation of 1 + 1 = 3 into a reality. To do this, we leverage skill sets differently each week so that we can best respond to the challenges before us at that moment.

MSgt Lund does many thing that help the office accomplish our mission. She has to interview people and gather information and documents. She has to explain legal processes to people. She has to explain our charter to people. This is vitally important because people, especially commanders and supervisors, often struggle to understand why we are unable to provide legal advice on non-exigent matters until the weekend when the reserve JAGs are on duty. MSgt Lund has to conduct training on my behalf. She has to research matters and write legal reviews that I sign. She has to coordinate and schedule appointments, particularly for accession interviews and recruiting visits. And, I have to TRUST her to do all of this even as she fights the good fight answering phone calls, accomplishing recurring training, and otherwise performing all her additional duties.

Frankly, I am not sure we always succeed in getting the math to add up like we would prefer. But we are constantly re-evaluating how the unique skill sets and competencies each of us possess can best be leveraged to get the job done. After all, like it or not, we must do more with less. When we absolutely have to "do less" we have to make smart decisions about the work that matters most to the mission. Failure is not an option.

Through our teaming efforts, I do believe that MSgt Lund and I provide essential legal support to our stand-alone reserve installation. In so doing, we do our part to enable the mission of the 94 AW which is to provide world class theater airlift and combat support across the spectrum of military operations. It is rewarding job. But it's rewarding only because we team effectively.

Teaming is a necessity. It is true. Even in a job as unique as ours here at Dobbins ARB, if we want to survive and thrive, then we need to team. It is fundamental.

An incoming C-130 taxis Airmen to a homecoming ceremony at Dobbins Air Reserve Base for Reservists returning home from deployments in the Middle East. (U.S. Air Force photo/Brad Fallin)

TEAMING in the Deployed Environment

By Senior Master Sergeant Charles S. McQueen, USAF

When I first received notification that I would be deploying to Afghanistan, my Staff Judge Advocate, Lt Col Jeremy Weber, called me into his office and said, "The MAJCOM just called, you're being tasked for a deployment to Afghanistan." I responded with, "You're kidding, right?" He wasn't. I can say that the emotions I experienced within the next 30 seconds ranged from disbelief to a renewed attitude of, "Okay, I have a lot to do, so let's get moving."

The events that took place within a period of three weeks before I stepped on the plane to depart for the six-month deployment were, needless to say, fast paced with little time to take it all in. Here I was at the 20-year mark in my career, and I was faced with missing my only child's graduation from high school and her entering college—something I had dreamed of seeing her accomplish since she was born. Professionally, I would be leaving my office, which was scheduled to have three attorneys depart with three replacements arriving and three paralegals coming in (two being new to the career field). That was in addition to an imminent Article 6 Part 1 inspection looming in the not so distant future. Needless to say, it was not an optimal time for a deployment, but rarely do all things fall into place perfectly. Of course, none of these things, individually or collectively, distinguished our office as special; many legal offices worldwide face similar, if not more difficult challenges.

After accomplishing all of the necessary training, ranging from Combat Airman Skill Training (CAST) to additional required JAG Corps training, my commitment to the mission was solidified. I especially thought the JAG Corps' decision to send attorney and paralegal teams to the training together was a force enabler, because it provided an opportunity to set the cornerstone for a working relationship with the Staff Judge Advocate, Deputy Staff Judge Advocate, and a fellow paralegal. Even though we really did not discuss much about our career experiences as JAGs and paralegals, it was good to assess how we would complement each other when it

(U.S. Air Force photo/SSgt Christopher Griffin)

Upon my arrival to the AOR, it quickly became apparent that I was going to have to change my way of thinking on how things should go and how I would need to work within this framework.

came to possible combat situations. Similarly, it was important to know that your title or rank was not the discriminator when it came to defending yourself or your wingman. We definitely had an advantage over our classmates, because the JA CAST had given us additional training in weapons and tactics, which came into play later during training with other Air Force personnel.

Upon my arrival to the AOR, it quickly became apparent that I was going to have to change my way of thinking on how things should go and how I would need to work within this framework. As a deployed Law Office Superintendent (LOS), I was going to have to approach my duties in a nontraditional way, because they would not be the same as those of a LOS in a non-deployed environment. There was no need to track the budget or create spend plans or purchase office supplies—that aspect of the job was handled elsewhere. There were methods for obtaining items, but they were vastly different than the processes to which I was accustomed at my home base. The budget is just one example of common roles normally accomplished by the LOS, but not needed in the AOR. In short, it was a whole new world.

However, what I did find was that I had the opportunity to get back to the basics. Like many LOSs, I had not drafted Article 15 specifications or accomplished basic AMJAMS inputs on my own for a few years. But because in the expeditionary environment "all hands on deck" was imperative, I did what any paralegal would do: I re-accomplished whatever AMJAMS tutorial and training I could find on CAPSIL and yes, opened up the MCM.

Deployed Military Justice is just one small example of some of the "getting back to basics" I encountered. One of the most important things, however, was even more basic: working together as a team. JAG/Paralegal teaming was paramount to the success of the office and individuals. Our concept was modeled by the SJA. There was not a task or job that was too good or too bad to be handled by any of us, unless it was prohibited by law. We routinely paired together to discuss evidence-gathering for Article 15s, CDIs and other discipline-related issues. We all shared in handling our numerous legal assistant clients, many of whom wanted to ship Afghan firearms back to the U.S. More importantly, we were in the fight. The SJA and DSJA were routinely called upon to provide ROE briefs to medical evacuation members and pilots. Additionally, our office had responsibility for the security of the 455 AEW HQ building. This was a daunting task, because we hosted all Sister Services as well as contractors and DoD agencies. The JAGs, to include the SJA, stepped up. Everyone assisted when needed. Without the entire team, there was no way we could have ever been successful.

In closing, I would like to point out that JAG/paralegal teaming is not solely defined by what we do in our non-deployed JAG offices, but also by what we bring to the many facets of what we do outside of our legal services, especially downrange. What is most important to me is fostering a positive relationship, recognizing each other's skill sets, and leveraging those attributes for the greater cause. Perhaps that is what TJAG means when he speaks to us about concepts like inclusion, building leaders, and teaming.

Capt Matt Van Maasdam, SSgt Amanda Stepp, MSgt Charles McQueen, and Lt Col Julie Hugyen of the 455 AEW/JA. (Photo courtesy of MSgt Charles McQueen)

Partnering with USCIS

Simple Steps to Help Us Help Our Clients

By Captain Virginia M. Bare, USAF

For clients with immigration questions, a relationship with your local United States Citizenship and Immigration Services (USCIS) office can provide help for burdensome issues. USCIS has several initiatives to military communities and offers programs, services, and publications that can be useful to a base legal office.

My experience with USCIS began in 2010 while stationed at Keesler AFB, a USCIS officer provided training on military benefits available during the immigration process. Shortly after the training, I had my first client with an immigration question and the USCIS officer was just a phone call away. Having a link to an immigration professional helped simplify what quickly escalated into a complicated problem.

Later, USCIS approached me about setting up routine appointments to meet with military members, retirees, and families on base. The legal office thereafter began a monthly, and later bimonthly, partnership in which a USCIS officer met with clients in a spare office. We provided the space, publicized the events, and took appointments. USCIS provided a representative to meet with clients, helpful publications that we could distribute, and a steady presence on base. It was a success on every level! Not only were our clients better served, but we received additional immigration training and developed a relationship that we could count on whenever we had questions.

When I moved to Joint Base Langley-Eustis, I replicated this program but was unsure how popular it would be. Keesler houses several technical schools and many of the immigration clients were new to the military. I found that even outside of the training environment, military members have complex immigration questions and a base legal office can serve as a conduit to the answers.

The military community has unique immigration needs and benefits. For instance, those who commit to serving the United States before they are citizens are entitled to a fee waiver and expedited processing. Some naturalized military members have families in

(16th Mobile Public Affairs Detachment photo/Spc Edward Garibay)

their home countries they wish to sponsor for lawful permanent residence. Other military members meet their spouses during an overseas assignment, which also raises numerous immigration issues.

I recently spoke with Ms. Kristie Krebs, Branch Chief at USCIS, who told me about some of the initiatives USCIS has taken to reach out to the military. In 2009, USCIS and the Army began the *Naturalization at Basic Training Initiative* by which military members file the *Application for Naturalization* (Form N-400), submit biometrics, have a naturalization interview, and take the Oath of Allegiance before they graduate from basic training—and without having to leave the installation. USCIS was able to expand the program to the Navy in 2010 at the Naval Station Great Lakes and to the Air Force at Lackland AFB in 2011. In January 2013 it conducted the first naturalization ceremony for non-citizen recruits at Parris Island with the Marine Corps. Since 2002 USCIS has naturalized over 83,500 military members and approximately 1,681 military spouses since 2008.[1]

Once a link is established with USCIS, the dividends pay out quickly. Connecting someone with basic immigration resources is not legal advice; anyone who happens to be at the front desk of your office can point clients in the right direction. At JBLE, we keep our USCIS liaison's phone number at the front desk where we can direct calls outside of legal assistance hours and send clients in the appropriate direction without requiring them to wait. In addition to ensuring our clients receive advice from an immigration expert, our attorneys are freed up to see legal assistance clients with other issues.

In establishing USCIS visits, I tried several settings including group briefings to one-on-one appointments. The individual appointments have been significantly more popular with the liaison spending approximately 20-minutes per client. In another example, Davis-Monthan's legal office hosts monthly USCIS representative visits for approximately eight 30-minute appointments. According to Captain Jenny Liabenow, the Chief of Legal Assistance at Davis-Monthan, these appointments are well attended.

[1] U.S. Citizenship and Immigration Services, *Naturalization Through Military Service: Fact Sheet*, *available at* http://www.uscis.gov.

If your base does not already have a relationship with a USCIS military liaison, the process is straightforward and repeatable. On its website, an interactive map will help you locate your nearest field office. It does not, however, include field office telephone numbers which can found by calling the USCIS military helpline. When calling a field office, ask for either the military liaison or field office director. If one of them is able to visit, I recommend inviting them to conduct training for your legal office so that personnel know what services are available. If you are able to have someone come out to meet with clients, monthly to quarterly visits create an ongoing relationship between your office and the representative.

In order to advertise visits, base-wide e-mails complemented by base newspaper advertisements, signs at the legal office, base Facebook posts work well. Finally, as individuals meet with a USCIS representative, a formal feedback process will help improve the process. I made a simple document asking how the individual heard about the program, what worked well, and what could be improved. I always make certain to provide this feedback to USCIS as well. The response at Keesler and Joint Base Langley-Eustis has been overwhelmingly positive which encourages us to continue the partnership.

Immigration questions do not affect a large percentage of legal assistance clients, however, they are important and often pose difficult challenges for clients involved in the immigration process. Having a friendly face to help begin the process saves time and eases worries for those with immigration concerns. Knowing the basics of the immigration process helps us help our clients. When immigration questions are more complicated, a relationship with your local USCIS field office can get your clients expert knowledge with just a phone call.

USCIS Military Resources

USCIS has established a toll-free *Military Help Line* exclusively for members of the military and their families: 1-877-CIS-4MIL.

More information can also be found at www.uscis.gov/military.

You Shouldn't Marry a Lawyer...

But if You Do, PCS to Arizona (or Idaho)

By Captain Rodney B. Glassman, USAFR
Married to a lawyer whom he met in law school

Lawyers should never marry other lawyers. This is called inbreeding, from which comes idiot children and more lawyers. This memorable line is from the 1949 movie *Adam's Rib*, as stated by the neighbor of Katherine Hepburn and Spencer Tracy who play a married couple serving as opposing counsel in the trial of a woman accused of shooting her husband. Although many JAGs married to civilian attorneys will never be in this awkward position, problems do exist with the transitory nature of duty locations.

The obstacles associated with active duty marriages involving an attorney spouse create a new level of complexity. Attorneys are required to be licensed in each state where they practice. With the expense associated with preparation for bar entry requirements ranging from $4,000-$5,000, practicing law while moving alongside an active duty spouse can be described as nothing less than trying. Then add the time and effort needed to study for (and pass) a state bar examination. By the time a spouse finally completes all of the requirements to practice law in a jurisdiction, JAX might be calling about a new assignment.

Recently, there has been a concerted campaign by volunteers within the military community to begin lobbying state courts to create rules that will accommodate military spouses who are practicing attorneys. They are seeking to remove the hurdles associated with bar entry requirements when assignment of a military member is the sole reason the spouse desires to practice in a particular state and they are already bar certified elsewhere.

(Photo by Alexandre Delbos/Flickr)

The Military Spouse JD Network (MSJDN) is an international network of legal professionals made up of more than 650 members dedicated to improving the lives of military families. The organization was co-founded by Erin Wirth, an administrative law judge with the Federal Maritime Commission in Washington, D.C., and Mary Reding, a corporate law attorney based in Tucson, Arizona. The MSJDN advocates for state licensing accommodations including Bar membership without additional examination. They also provide education about the challenges facing military families, encourage the hiring of military spouses, and provide a support network for attorneys married to active duty military members.

According to the MSJDN, there are currently more than one thousand military spouses from all branches of the military who are bar certified attorneys. The paradigm of the future will continue to include a larger number of Airmen with a spouse who is interested in pursuing a legal career as they join their partner traveling around the world on various assignments.

The concept of protecting active duty military members and their families from unfair discrimination during their service commitments is not new. During World War I, Congress passed the Soldiers' and Sailors' Civil Relief Act of 1918 (SSCRA) to ensure that members were protected from having their rights adversely impacted solely because of their participation in active duty service. In 1942, the SSCRA was amended to include some protections for military dependents and to "avoid situations in which dependents suffered as a result of the service member's period of service." The Servicemembers Civil Relief Act of 2003 (SCRA) replaced the Soldiers' and Sailors' Civil Relief Act of 1940, adding additional protections for servicemembers and their families.

States are beginning to recognize the need to accommodate certain military spouses. On 10 December 2012, the Arizona Supreme Court approved the "Military Spouse Exception" Rule 38(i). This rule change allows military spouses to practice law in Arizona without completing the Arizona Bar examination. Arizona Supreme Court Vice Chief Justice Scott Bales stated:

> In adopting the rule, our Court recognized that when military personnel are temporarily posted in Arizona, the relocation can pose particular hardships for their lawyer spouses, who generally would be required to complete the entire admissions process in order to practice law in Arizona. The new rule helps support military families stationed in Arizona by allowing lawyer spouses to be temporarily admitted to practice here.

The amended rule requires a servicemember's spouse to: (1) have graduated from an ABA-approved law school, (2) have been admitted by Bar exam in another state (in good standing), (3) have passed the MPRE and met other "fitness to practice" criteria, (4) be a dependant of an active duty military member, (5) be residing in Arizona, (6) have not failed the Arizona bar exam, (7) have not previously been denied admission to the Arizona Bar, and (8) will complete a course in Arizona law.

The one year temporary license must be renewed annually to practice law while their spouse is assigned in Arizona and only applies to military spouses of active duty members. The admission will end 30 days after the active duty member separates, retires, or PCSes (unless it is to a location where the Department of Defense will not authorize the travel of dependents).

Arizona is the second state to pass the "Military Spouse Exception" following Idaho's lead. Currently, the MSJDN is working with leadership and volunteers in California, Delaware, New Jersey, New York, North Carolina, Ohio, and Maryland to adopt similar exceptions for military spouses. "We regulate the admission to practice to serve and protect the public using legal services," said Vice Chief Justice Bales. "The new rule, we expect, will not only help military families, but also benefit Arizona through the services provided by qualified lawyers who accompany their military spouses to our state."

Barksdale's Legal Assistance Program SOLVES State Tax Conundrum

By Captain Anna Magazinnik; Staff Sergeant Porshia B. Reynolds; Staff Sergeant Joseph A. Rosenstiel; Senior Airman Danny D. Riddlespriger, II; and Airman First Class Brittney M. Guzman, USAF

When Airmen move to Louisiana on PCS orders, many of them receive an unwelcomed welcome gift from the state—an income tax notice. Fortunately for many of the Airmen, they have a legitimate, lawful avenue to escape tax liability. This past tax season, the 2 BW/JA's Legal Assistance Program at Barksdale Air Force Base not only helped individual military members defeat Louisiana's income tax claims, but also forged an on-going solution to prevent Airmen from receiving wrongful tax bills in the first place.

Under the Servicemembers Civil Relief Act (SCRA), active duty personnel are exempt from paying income taxes to the state of their duty location if they are legal residents of another state and subject to that state's tax jurisdiction. For example, a military member stationed at Maxwell Air Force Base in Alabama is not subject to Alabama's income tax if that military member is the legal resident of Texas. The Military Spouse Residency Relief Act (MSRA) provides similar protections to the spouses of active duty members who share the active duty member's legal residence.

Despite these protections, many military personnel from installations located in Louisiana have been receiving taxation letters from the Louisiana Department of Revenue (LDR) claiming that the member and/or spouse owe state income taxes. These taxation letters are sent out on an annual basis by an automated system utilized by the LDR.

The problem is simple. The LDR system is designed to catch anyone residing in the state who is failing to pay state taxes by automatically checking mailing addresses from federal tax returns. Louisiana addresses without a corresponding Louisiana state tax return are then flagged in the system. Once an individual has been identified, the system automatically generates a letter requesting payment without regard to that person's potential military status. Military members are frequently caught up in this automated system after PCSing to Barksdale and filing tax returns with their legal state of residency. Since Louisiana had not developed a method for identifying military members exempt from paying Louisiana taxes under the SCRA and MSRA, the tax notices kept pouring in. Because this system is

In dealing with the issue, many members either paid the taxes that were claimed due or ignored the notices altogether.

a couple of years behind, notices were sent out for taxes owed as far back as 2009.

In dealing with the issue, many members either paid the taxes that were claimed due or ignored the notices altogether. In most cases, however, when notices were disregarded, the LDR forwarded the amount claimed to a collection agency or garnished the member's wages or federal tax return refund. Because of this recurring problem, the Barksdale legal office developed a plan to help Airmen who had received erroneous LDR notices. The office teamed with local Army and Navy legal assistance offices and negotiated an agreement with the LDR and the Governor's office to find a permanent solution for all military members stationed in Louisiana who are legal residents of other states.

The combined efforts paid off in January 2013 when the LDR generated a new form specifically for military members and their spouses. The two page form is filled out by the military member and/or spouse and delivered to the Barksdale legal office where it will be faxed directly to the LDR.

Once the LDR receives the form, the member's and spouse's information is placed into the LDR tax demand system. When listed individuals subsequently file their federal tax return, the LDR's automated system will find the record identifying them as a military member and will not send a tax liability notice. Submitting this form will help prevent a vast number of military members from receiving improper tax liability notices. Currently, the Barksdale legal office encourages maximum dissemination of the LDR forms to military members on base. Forms are given out a squadron commander calls as well as at Right Start briefings and at the base tax center.

To help Airmen who have already received notices of tax liability, the Barksdale legal office and Louisiana Department of Revenue worked together to create a pre-drafted letter the legal office sends to the LDR along with the member's W-2, PCS orders, LDR tax demand letter.

The combined efforts paid off in January 2013 when the LDR generated a new form specifically for military members and their spouses.

Paralegals play a vital role in assisting clients with LDR issues. They often draft and mail letters to the LDR, educate military members and their spouses about the issue at Right Start briefings and the base tax center, distribute LDR forms to military members, and deliver completed LDR forms to an attorney for review.

The new plan has been a resounding success. Since this issue has been identified, the combined efforts of attorneys, paralegals, and the Louisiana Department of Revenue have saved military members thousands of dollars. The new system protects the rights of servicemembers and their spouses and they are now free from wrongfully-claimed state income taxes. It will also proactively solve the problem for generations of military members stationed in Louisiana who are not a legal resident of that state.

Secrets of Special Ops Leadership

Dare the Impossible—Achieve the Extraordinary

By Major General (USAFR, Ret.) William A. Cohen, reviewed by Captain Jason S. Deson, USAF

Secrets of Special Ops Leadership: Dare the Impossible—Achieve the Extraordinary by Maj Gen (Ret.) William A. Cohen, USAFR was on the 2011 CSAF Reading List and I understand why. Many of the lessons in this book have application to the broader Air Force and especially to the JAG Corps. As we face the reality of budget cuts and force reduction, we are increasingly being called upon to accomplish the mission with fewer resources and even less manpower, something special operators have been doing for hundreds of years. In his book, Gen Cohen explains how through accounts of special ops exploits and through some pointed leadership techniques which I will summarize here.

PRINCIPLES OF SPECIAL OPS LEADERSHIP

Gen Cohen begins with a discussion of special ops leadership principles, which are extrapolated from a list put together by now-Admiral William H. McRaven, the commander of US Special Operations Command (SOCOM). That list consisted of simplicity, security, repetition, surprise, speed, and purpose and were used to obtain what is called "relative superiority" or the decisive advantage that allows a smaller force to defeat an apparently stronger opponent. Gen Cohen modifies these principles into six "business commando operations" principles.

Purpose. You cannot get there until you know where there is. You cannot present a clear understanding of what you are going to do if you do not understand it yourself. Any military operation must have an objective. Think about it; every wing has a mission statement and the mission is not just about what you do, but what you intend to accomplish.

Repetition. Repetition is the repeated practice of actions that must be accomplished before an operation for precision. Gen Cohen analogizes this to the repetition of a successful method of operating. While there may always be a better way to do things, there is often a right way and wrong way to do things.

Speed. Gen Cohen writes, "Speed…allows the commando to achieve his purpose before adversaries can react effectively to counter an attack with their superior resources." If we move too slowly, we may lose an opportunity to capture or destroy a high value target. That said, there is a corollary rule to this principle that I have heard time after time at the 352d Special Operations Group, "slow is smooth, smooth is fast." Speed is important, but we do not want to go so fast that we miss something important.

Surprise. Surprise is "one of the commando's greatest weapons" in overcoming the advantage of a stronger opponent. Gen Cohen modifies this principle for business by arguing that a competitor cannot be strong everywhere, so the commando focuses his efforts on the weakest point so he can "achieve maximum impact." If we surprise our clients by showing them how much we can help them, we may achieve the maximum impact of stronger credibility.

Security. Gen Cohen says that if the competition knows what you are planning or doing, or even what you are capable of doing, he can take action to thwart your actions. There are plenty of legal operations that require security. Whether it is trial strategy or legal advice to a client, nobody outside of the client and a few trusted sources need to know about it.

A special operator peers out from a C-130 ramp to identify the drop zone before a high altitude low opening jump. (U.S. Air Force photo/Senior Airman Julianne Showalter)

Purpose. You cannot get there until you know where there is.

Simplicity. The commando lives by the creed that everything that can go wrong will go wrong. Gen Cohen writes, "Simplicity reduces the number of things that can go wrong by reducing the number of elements that must fit together to make the plan successful." This calls to mind the axiom, work smarter not harder. Whether it is a lengthy legal opinion that can be reduced to one page or less or a proof analysis with too many charges, sometimes it is necessary to just keep it simple.

STRATEGIES OF SPECIAL OPS LEADERSHIP

Create the Best. To create the best, Gen Cohen writes that you must recruit, screen, train, and motivate. You rarely have the opportunity to recruit or screen those assigned to our unit, however, you can certainly train and motivate. In addition to motivation, you can also build commandos by having them remember why they became commandos in the first place.

Dare the Impossible. The motto of the British Special Air Service (SAS) is, "Who dares, wins." Commandos are motivated by tough challenges. A job that is too small will probably de-motivate a commando. Gen Cohen writes that you don't throw away a commando's talents on less important tasks. Instead, give the commando the challenge of demanding and important jobs and the results may "blow you away."

Throw the Rule Book Away. The key is that you are not ignoring the rulebook, but rather when the rulebook doesn't solve your problem you need to innovate. Gen Cohen writes, "All commandos have a common belief system: They believe there is always a way. As a special ops leader it is your job to come up with the solution, whether you do it yourself or tap your commandos for ideas. The idea may be far out or right in front of you." He follows with, "So, when the need arises, don't focus on your problem. Instead focus on the idea that there is always a way and start thinking about the various possibilities." Unless the law makes whatever you are doing plainly illegal, then consider the possibility that there is a way to legally do it and find it for your client.

Be Where the Action Is. Gen Cohen writes that when you are where the action is, you share the problems, hardships, failures, and successes of your team. It also ensures that you can immediately see what is happening and can take immediate action where necessary.

Commit and Require Total Commitment. "If you aren't totally committed to a project, no one else will be," writes Gen Cohen. You should not go after any objective unless you intend to achieve it. "You do not lead commandos half-heartedly." According to Gen Cohen, being totally committed will yield dramatic results because: 1) it proves that the goal is worthwhile and important; and 2) it confirms that the leader is not going to quit before the objective is achieved. Gen Cohen provides four ways that special ops leaders show their commitment: 1) communicate face-to-face; 2) make commitments public; 3) do not stop when the going gets rough; and 4) always find a way.

Demand Tough Discipline. "In any critical project, you must be able to rely on subordinates without question. If you cannot trust them to follow the instructions you give, you cannot succeed because you will not know what they are going to do." Discipline ensures that commandos will carry out your orders when you are gone "no matter the obstacles, difficulty, hard work, or risk." In the end, Gen Cohen writes, "If you want your organization to succeed on a regular basis, you have to insist on self-discipline and enforce tough discipline without blinking—and that goes for unpopular orders that come from on high. You can express your disagreement privately, but once a decision is made, adopt it as your own or get out."

Build a Commando Team. "In commando organizations, the unit, the team, and teamwork are everything," writes Gen Cohen. In the end, the "high-performance" team has the following characteristics: "clear goals, goals known by all, goals achieved in small steps, standards of excellence, feedback of results, skills and knowledge of everyone applied, continuous improvement expected, adequate resources provided, autonomy, performance-based rewards, competition, praise and recognition, team commitment, plans and tactics, rules and penalties, and performance measures."

Inspire Others to Follow Your Vision. According to Gen Cohen, "Your vision defines the 'there'—the place where you want your team to go, the goal that you want to achieve." Your vision must be clear in that it spells out exactly where you want your organization to go and exactly what you want it to be. It must be compelling in that it is difficult, challenging, and important.

Accept Full Blame and Give Full Credit. You must delegate authority to accomplish certain things to others, because you can never do everything yourself. A special ops leader may delegate various tasks and authority to subordinates, but if the project fails, the leader cannot put blame on their subordinates or environmental variables. The leader makes the decisions, and if things go awry, regardless of what subordinate leaders or commandos do (or fail to do), the leader is responsible. Along with taking responsibility, Gen Cohen reminds leaders to also hold others accountable, but to do so in private and to keep the criticism short and then move on. Finally, Gen Cohen writes that the special ops leader gives full credit to his team and takes none for himself or herself. This is done because it is the commandos who do the work on the front lines

Take Charge! To take charge and get things done, Gen Cohen writes that the special ops leader must: 1) dominate the situation; 2) establish your objectives early; 3) communicate with those you lead; 4) act boldly and decisively; 5) lead by example; and 6) follow your instincts. "Your goal should be to be seen everywhere at once and to be on top of the situation."

Reward Effectively. To be effective, rewards must be: 1) timely; 2) fair; 3) tied to specifics; and 4) important. "Remember that the idea is to give deserved recognition for performance to encourage not only the awardee, but other commandos as well."

Make the Most of What You Have. To build commandos out of what you have, you need to develop: 1) cohesion; 2) teamwork; 3) morale; and 4) espirit de corps. Building cohesion starts with building pride in the organization itself. To feel pride, your team must feel that they are part of the best organization of its type, anywhere.

Never Give Up. Determined commandos possess three qualities: 1) a tough mental attitude; 2) flexibility; and 3) determination in the face of adversity. Gen Cohen writes, "The key to successful special operations is not quitting, no matter what. You can get high levels of performance if you imbue your commandos with mental toughness, warn them away from rigidity in their thinking, and lead them by demonstrating your own determination to see things through, regardless of adversity."

Fight to Win. "Commandos play, fight, and do business to win." The key here is to not hold back. Commandos put everything they have into what they are doing. They risk all. They persevere when things get tough. This doesn't mean that you will always succeed, but it does mean that you can keep your "confidence, faith, and fighting spirit." According to Gen Cohen, "It is the fighting spirit of your commandos that will see you through every time."

Gen Cohen concludes his book with some final thoughts on special ops leadership. First, he stresses that you do not need to talk tough to be an effective leader. Second, he reminds us to keep integrity first and foremost. Third, while you may not be able to change your leadership style, you can alter your "tactics." Gen Cohen identifies eight tactics you can use for different situations: 1) direction; 2) persuasion; 3) negotiation; 4) involvement; 5) indirection; 6) enlistment; 7) redirection; and 8) repudiation. Finally, Gen Cohen provides the "ready, aim, fire" model for concentrating effort on a target. In "ready" we select the target. In "aim" we direct our resources to that target. In "fire," you execute, but just like in marksmanship, you must execute appropriately, don't jerk the trigger—squeeze the trigger. Only if all three phases are executed successfully will you have the best chance to hit your target.

The special ops strategies in Gen Cohen's book will not have universal application to our legal practice. Which strategies will apply in a given situation will depend on the facts and circumstances of that particular situation. If done correctly, all of us—JAGs and paralegals—*can dare the impossible and achieve the extraordinary*.

Contributors

Colonel Dawn M.K. Zoldi (B.A., University of Scranton; M.A., University of Scranton; J.D., Villanova University School of Law) is the Chief of Operations Law at Headquarters, Air Combat Command, Joint Base Langley-Eustis, Virginia.

Lieutenant Colonel Mark B. McKiernan (B.S., Central Missouri State University; J.D., University of Missouri at Kansas City; LL.M., The United States Army Judge Advocate General Legal Center and School) is the Chief, Professional Outreach Division at The Judge Advocate General's School, Maxwell Air Force Base, Alabama.

Major Andrew R. Barker (B.S., Brigham Young University; J.D., University of Missouri-Kansas City School of Law) is a Professional Outreach Division instructor at The Judge Advocate General's School, Maxwell Air Force Base, Alabama.

Major Christopher J. Goewert (B.S., St. Louis University; J.D., George Mason University) is a Military Justice instructor at The Judge Advocate General's School, Maxwell Air Force Base, Alabama.

Major Lisa M. Richard (B.S., Northeastern University; M.S., Northeastern University; J.D., New York Law School) is the Chief, Civil Law Division at The Judge Advocate General's School, Maxwell Air Force Base, Alabama.

Major Scott A. Van Schoyck (B.S., Miami University; J.D., University of Cincinnati) is the Staff Judge Advocate for the 951st Reserve Support Squadron, Dobbins Air Reserve Base, Georgia.

Captain Virginia M. Bare (B.A., McGill University; J.D., Georgetown University Law Center) is an Area Defense Counsel at Joint Base Langley-Eustis, Virginia.

Captain Jason S. DeSon (A.A., Fullerton College; B.A., University of California, Los Angeles; J.D., Whittier Law School) is currently a student at The United States Army Judge Advocate General Legal Center and School pursuing an LL.M. in International Law.

Captain Rodney B. Glassman (B.S., University of Arizona; MBA, University of Arizona; MPA, University of Arizona; Ph.D., University of Arizona; J.D., University of Arizona) is a Category B Individual Mobilization Augmentee assigned to the 355th Fighter Wing, Davis-Monthan Air Force Base, Arizona.

Captain Anna Magazinnik (B.A., Boston University; J.D., University of Michigan Law School) is the Chief, Contracts, Legal Assistance, and Environmental Law for the 2d Bomb Wing at Barksdale Air Force Base, Louisiana.

Captain Andrew R. Norton (B.A., University of Missouri; J.D., University of Missouri School of Law) is a Senior Defense Counsel at Joint Base Langley-Eustis, Virginia.

Captain Jun Okamoto (B.L., Ritsumeikan University; LL.M., Sophia University) is the Staff Judge Advocate, Central Defense Force, Iruma Air Base, Saitama Prefecture.

Captain William D. Toronto (B.S., Brigham Young University; J.D., University of New Hampshire School of Law; LL.M., University of New Hampshire School of Law) is an Operations and International Law instructor at The Judge Advocate General's School, Maxwell Air Force Base, Alabama.

Senior Master Sergeant Charles S. McQueen (B.S., Southwestern College) is the Law Office Superintendent of the 30th Space Wing, Vandenberg Air Force Base, California.

Master Sergeant Elena M. Lund is the Law Office Superintendent of the 94th Airlift Wing, Dobbins Air Reserve Base, Georgia.

Staff Sergeant Porshia B. Reynolds is a General Law paralegal for the 2d Bomb Wing at Barksdale Air Force Base, Louisiana.

Staff Sergeant Joseph A. Rosenstiel is a General Law paralegal for the 2d Bomb Wing at Barksdale Air Force Base, Louisiana.

Senior Airman Danny D. Riddlespriger, II is the Defense Paralegal for the 2d Bomb Wing at Barksdale Air Force Base, Louisiana.

Airman First Class Brittney M. Guzman is a General Law paralegal for the 2d Bomb Wing at Barksdale Air Force Base, Louisiana.

Mr. Bradley E. Richardson (B.M., West Virginia University; J.D., University of South Dakota) is a recent intern at the United States Court of Appeals for the Armed Forces in the chambers of Judge Charles E. Erdmann.

Where in the World?

Photo courtesy of Major David Feith

If you have a unique, funny, or poignant photograph of your travels in the JAG Corps for inclusion in "Where In The World?" please email the editors at **AFLOA.AFJAGS@us.af.mil..**

Answer: *At the United States Naval Station Guantanomo Bay gate.*

Professional Outreach Division
The Judge Advocate General's School
150 Chennault Circle
Maxwell AFB, Al 36112-5712

HH-60G Pave Hawk (U.S. Air Force photo/A1C Benjamin Wiseman)