The Reporter

June 2002

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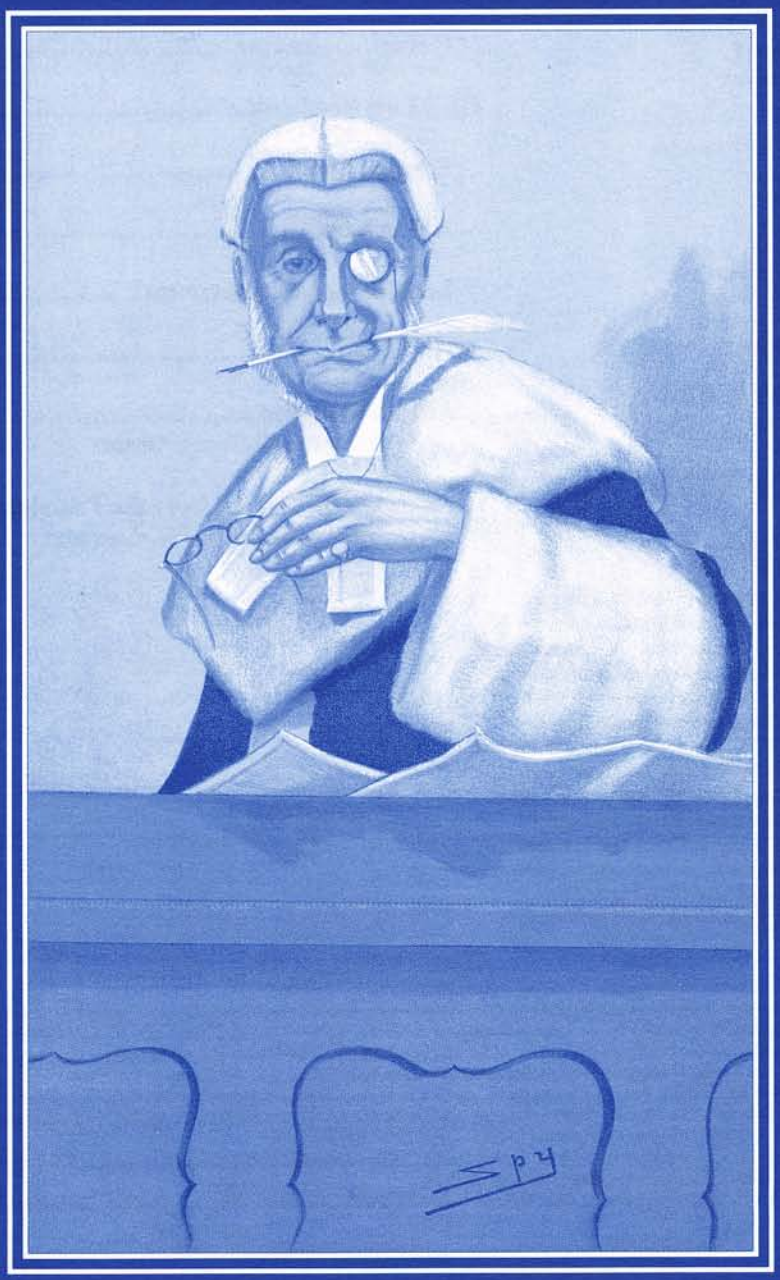

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The Reporter

FROM THE EDITOR

We are honored to include two pieces from two prestigious attorneys involved in federal service. Major General Robert I. Gruber, Air National Guard Assistant to TJAG, has contributed an excellent leadership article on the importance of acknowledging those who work with you and for you. This concept is masterfully demonstrated in the piece by The Honorable Alberto R. Gonzalez, the Counsel to the President, who gives acknowledgment to Air Force JAGs and the work we do.

This issue also features two articles on litigation and the impact of recent Supreme Court cases on how we practice. The first examines the impact of technology on our reasonable expectation of privacy. The second reflects on charging in virtual child pornography cases.

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BIG BROTHER IS WATCHING:
REASONABLE EXPECTATIONS OF PRIVACY IN THE TECHNOLOGICAL AGE
(Part I)

Major Richard D. Desmond

> *"Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment...It was even conceivable that they watched everybody all the time."*[1]

In 1949, George Orwell predicted the demise of individual privacy in a society without a Fourth Amendment to protect its citizens. Today, innovative breakthroughs in the fields of science and technology have moved Orwell's predictions closer to reality. The use of technological advances to enhance government surveillance techniques threaten to erode the expectations of privacy we take for granted.

Over the past two decades, federal and state law enforcement agencies have conducted "sense-enhanced" searches with increasing frequency. Such sense-enhanced searches range from familiar methods, such as wiretaps and canine sniffs, to more recently developed techniques, such as "beeper" monitoring and infrared imagers. Such technology has presented a challenge to courts, as they require the application of a constitutional guarantee written over two centuries ago to modern devices which give police the power to see through the walls of people's homes and detect minute amounts of contraband.

This article is Part I of a two-part series that examines the interplay between the Fourth Amendment and the increasing use of sense-enhancing technology by law enforcement agents. After offering a brief historical overview of Fourth Amendment law and the creation of the reasonable expectation of privacy standard, the article analyzes the reasoning and holding in *Kyllo v. United States*, discusses the ramifications of the decision, and considers the implications of that decision to future sense-enhancing technology cases.

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Historical Overview

The Fourth Amendment to the United States Constitution states:

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

The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasion by the government.[2] Not all searches and seizures are prohibited, only those that are unreasonable. The determination of reasonableness is based upon a balancing test, weighing the need for the government search or seizure against the individual right of privacy guaranteed by the Fourth Amendment.[3] Evidence obtained in violation of the Fourth Amendment is inadmissible against the defendant based upon the exclusionary rule.[4] Fourth Amendment protections against arbitrary government intrusion do not extend to conduct that is not considered a search or seizure. Therefore, "[c]entral to an understanding of the Fourth Amendment...is a perception of what police activities, under what circumstances and infringing upon what areas and interests, constitute either a search or a seizure within the

meaning of that Amendment."[5] Although the word "seizure" has been easily defined by the United States Supreme Court[6], the meaning of the word "searches" has "not as easily [been] captured within any verbal formulation"[7], and indeed, the Court "has never managed to set out a comprehensive definition of the word 'searches' as it is used in the Fourth Amendment."[8]

Originally, Fourth Amendment protections were interpreted according to traditional concepts of property law. For nearly fifty years, beginning in 1928 with *Olmstead v. United States*,[9] the United States Supreme Court premised the existence of a search on whether a physical trespass had occurred under local property law. In *Olmstead*, law enforcement officers apprehended over fifty persons for violating the National Prohibition Act by illegally "possessing, transporting, and importing intoxicating liquors..."[10] Federal prohibition officers placed a wiretap "along the ordinary telephone wires from the residences of four of the [suspects] and those leading to the [main] office."[11] By using the wiretaps, federal officers were able to intercept incriminating information without trespassing upon any of the defendants' property.[12] Since there was no physical intrusion on the suspects' property, the officers did not need a search warrant.[13] In a 5-4 decision, the Court held that the Fourth Amendment could only be violated by an actual physical invasion of defendant's property.[14] Further, the Court added that the Fourth Amendment applied to "places to be searched and the persons or things to be seized."[15]

The Court's "trespass equals search" analysis was restated in *Goldman v. United States*.[16] In *Goldman*, the Court held that a microphone placed against the outer wall of a private office was not a physical trespass which would trigger a Fourth Amendment violation.[17] Conversely, in *Silverman v. United States*,[18] penetrating an office wall with a foot-long "spike-mike" to overhear a conversation was found to be a "search" under *Olmstead*.[19]

Katz v. United States: Reasonable Expectation Of Privacy

Technological advances forced courts to expand the concept of what constituted government invasions beyond purely physical intrusions. *Olmstead*'s trespass analysis of Fourth Amendment search issues was ultimately rejected by the Supreme Court in *Katz v. United States*.[20] Charles Katz was convicted of illegally transmitting wagering information across state lines. Without obtaining a warrant, Federal Bureau of Investigation agents attached "an electronic listening and recording device" to the outside of the public phone booth where Katz was allegedly transmitting wagers.[21] The device allowed agents to hear Katz' side of phone conversations whenever he used the phone booth. At trial, the government introduced evidence of Katz' portion of the telephone conversations.[22] The Supreme Court reversed Katz' conviction because the use of the listening device constituted an illegal search.[23]

Departing from its own precedents, the *Katz* court declared that property concepts would no longer define the scope of the Fourth Amendment.[24] The Fourth Amendment, the Court reasoned, applies to a person who justifiably relies upon the privacy of a particular place.[25] Justice Stewart, writing for the majority, stated:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected...One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.[26]

The rule that *Katz* eventually came to stand for, however, is Justice Harlan's "reasonable expectation of privacy" standard, embodied in the two-prong test of his concurring opinion.[27] The test requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[28]

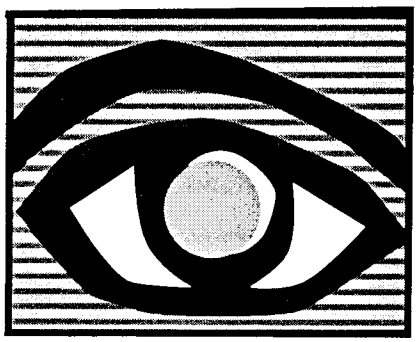
The expectation of privacy test established in the *Katz* concurrence has become the lodestar of Fourth Amendment analysis. "By defining the basis upon which it could be said that a search and seizure had taken place, *Katz*...also potentially altered all future applications of Fourth Amendment rights regarding searches and seizures."[29] From *Katz* forward, an individual's reasonable expectation of privacy would govern whether or not a particular government activity constituted a "search" within the meaning of the Fourth Amendment.

Post-*Katz* And Further Technological Advances

In application, however, the *Katz* decision raised more questions than it answered, causing the Court to

return again and again to the question of what constituted a "search." This has been especially true in cases involving the use of sense-enhancing technology. The Court tended to find that "the effect of modern life, with its technological and other advances, serves to eliminate or reduce a person's justified expectation of privacy."[30]

For example, in *Dow Chemical Co. v. United States*,[31] the Court found no violation of the Fourth Amendment where the Environmental Protection Agency (EPA) engaged in warrantless aerial photographing of Dow Chemical's Michigan manufacturing plant. After being denied access to Dow's industrial complex for an on-site inspection, the EPA hired a commercial aerial photographer who used a standard precision aerial mapping camera to take pictures of the facility.[32] The Court found that because any person with access to a camera and an airplane could have taken the same photographs, it was unreasonable, under the second prong of Justice Harlan's test, for Dow to expect that its plant would remain private.[33] The Court continued by stating:



> It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns.[34]

The Court concluded that aerial photography of outdoor areas merely enhanced the natural senses and considered it beyond the scope of Fourth Amendment protections.[35]

Another form of sensory enhancing technology reviewed by the Supreme Court was the use of a beeper to track the movements of a suspect along public roads. In deciding whether the government's use of a beeper was an intrusion that society was prepared to recognize as reasonable, the Supreme Court looked at the nature of the subject being monitored. In *United States v. Knott*,[36] Drug Enforcement Administration agents used a beeper to track the defendant on the highway. The Court held that monitoring a vehicle traveling on a public highway was not considered a Fourth Amendment search.[37]

The Court reasoned that one does not have a reasonable expectation of privacy while traveling in an automobile, because an automobile's movements are exposed to public view and observation.[38] However, the Court drew an important distinction in its 1984 decision in *United States v. Karo*,[39] which held that the warrantless monitoring of an electronic tracking device in a private residence, which was not open to visual surveillance, violated the Fourth Amendment. *Karo* was distinguished from *Knotts* because the beeper was being traced while in the defendant's residence.[40] This intrusion violated the defendant's reasonable expectation of privacy because the law enforcement agents acquired the information through the use of technology located inside the home.[41] The *Karo* court noted that it has always been the case that searches and seizures inside the home without a warrant are presumptively unreasonable absent exigent circumstances.[42]

It has been almost two decades since the Supreme Court decided *Karo*. A number of new surveillance technologies now in development or in use by law enforcement agents raise interesting questions about the scope of the Fourth Amendment. Sophisticated surveillance cameras and heat radiation measuring equipment have been developed which enable police to draw inferences about what is going on in a person's home without physically entering the premises.

Kyllo v. United States

Federal law enforcement agents suspected that Danny Kyllo was using his home for the indoor cultivation of marijuana.[43] An agent subpoenaed Kyllo's utility records and compared the use of electricity in Kyllo's triplex with a chart developed by the local electric company.[44] The chart served as a guide for estimating average power usage relative to square footage, type of heating and accessories, and the number of people living in the residence.[45] Based upon the comparisons, the agent concluded that Kyllo's use was abnormally high, a common indicator of indoor marijuana cultivation.

The agents knew that indoor marijuana cultivation required the use of high intensity lamps that cause a build up of heat inside the dwelling. In order to determine if heat was emanating from Kyllo's home in levels consistent with the use of high intensity bulbs required for indoor growth, agents used an Agema Thermovision 210 thermal imager to scan Kyllo's home.[46] The scan lasted only a few minutes, and was performed from the passenger seat of the agents' vehicle

located across the street from Kyllo's home.[47] The scan showed that the roof over the garage and a side wall of Kyllo's home radiated more heat than the rest of the home and were substantially warmer than the neighboring homes of the triplex.[48]

Based upon the thermal imaging, the utility bills, and tips from informants, agents were able to obtain a warrant authorizing the search of Kyllo's home.[49] The search led to the discovery of an indoor growing operation involving more than 100 marijuana plants. Kyllo pled guilty, under the condition that he could challenge the legality of the search.[50]

In a 5-4 ruling, the United States Supreme Court held:

> "where...the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment 'search', and is presumptively unreasonable without a warrant.[51]

The majority began its analysis by reaffirming the fundamental principle that "[a]t the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[52] With few exceptions, the warrantless search of a home is unreasonable.[53]

The Court went on to note that this case involved law enforcement officers "engaged in more than naked-eye surveillance of a home."[54] Citing *Dow Chemical*[55], the Court observed that "[w]e have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much."[56] The Court recognized that "it would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[57] Thus, the *Kyllo* majority viewed the question before the Court as: "what limits there are upon this power of technology to shrink the realm of guaranteed privacy."[58]

The *Kyllo* majority began by drawing a "firm line at the entrance to the house,"[59] then set forth a new bright-line rule specifying when a search warrant must be obtained by law enforcement officers: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search -- at least where (as here) the technology in question is not in general public use."[60]

The majority soundly rejected the argument advanced by the government and accepted by the dissenting justices that no "search" occurred because the heat revealed by the thermal imager was simply captured by the device outside the home, without a physical intrusion inside the home.[61] The dissent argued that there should be a differentiation between scans that simply detect emitted heat, referred to as "off-the-wall," and scans that can detect activity within the house, "through-the-wall."[62] A scan determined to be "through-the-wall," the dissent stated, should be found to constitute an unreasonable search in violation of the Fourth Amendment; while a finding of "off-the-wall" imaging should be considered reasonable without the issuing of a warrant."[63] The majority observed that this was exactly the type of physical trespass standard that was rejected by the Court in *Katz*[64], and that "[r]eversing that approach would leave the homeowner at the mercy of advancing technology – including imaging technology that could discern all human activity in the home."[65]

The *Kyllo* majority also rejected the Government's argument that the imaging was constitutional because it did not "detect private activities occurring within private areas," because in the home "all details are intimate details, [and] the entire area is held safe from prying government eyes."[66] An "intimate details" standard, the Court felt, would be absolutely unworkable. Scanning only for those details which are not "intimate" would be impossible for law enforcement officials to apply because an officer would not be able to know in advance whether his scan would pick up intimate details, and would be unable to determine upfront whether his scan was constitutional.[67]

On initial reading, the *Kyllo* decision does not seem to break new ground. But beneath the surface lies evidence of a significant change in Fourth Amendment law. Specifically, the *Kyllo* majority distanced itself from the *Katz* test that the Court used for more than 30 years to determine whether government conduct constituted a search. The *Kyllo* majority did not actually apply the *Katz* test to determine whether the thermal imaging of Kyllo's home constituted a search. Instead, the majority found that the *Katz* test needs to be "redefined" to determine whether the interior of a home has been searched.[68] For that setting, the majority adopted "the ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable."[69] That criterion, the majority explained, "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[70] The majority thus concluded that the common law creates a floor of privacy protection in

the home; government conduct that reduces that level of protection is a search.

The Court had good reason to reconsider *Katz*. The facts of *Kyllo* illustrate the problem with the *Katz* test. The problem is that, under *Katz*, the less privacy we have – because of technology like thermal imaging, for example – the less we can reasonably expect. As our reasonable expectations of privacy decrease, the types of government intrusions that will be found to fall outside of the Fourth Amendment, as not constituting searches, increases. This is why the *Katz* test is criticized as "circular"[71]; it tends to cause a downward spiral in Fourth Amendment protection.

Military justice practitioners must be aware of several significant ramifications of the *Kyllo* decision. First, the decision reaffirms the principle that the Fourth Amendment sets a high threshold against government intrusion at an individual's doorstep. The ruling protects the privacy of a home against high-tech investigatory devices so long as they are not yet in general public use, and are used to glean information from within a home that otherwise would not be uncovered absent a physical intrusion.

Secondly, while *Kyllo* created a bright-line rule, it appears more fuzzy than bright and will certainly generate additional debate. Justice Stevens' dissent, for example, points out the gaping holes in the majority's ruling. What exactly is the definition of "general public use"? How does one go about identifying whether a device meets this definition?

Finally, although the protection of privacy in the home was clearly the driving force in *Kyllo*, the majority nevertheless crafted a broad privacy rule with respect to the government's use of high-tech investigatory tools. It remains to be seen whether the rule will be limited to searches of homes or will find broader reach.

[1] George Orwell, *1984* (New York: Penguin Putnam Inc., 1984), p. 2.
[2] *Carroll v. United States*, 267 U.S. 132 (1925).
[3] *Terry v. Ohio*, 392 U.S. 1, 21 (1968).
[4] *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).
[5] Wayne R. LaFave, Search and Seizure, § 2.1 at 375 (3d ed 1996) (hereinafter *LaFave*).
[6] See, e.g., *United States v. Jacobsen*, 446 U.S. 109 (1984)(a seizure of property occurs when "there is some meaningful interference with an individual's possessory interest in that property").
[7] *LaFave*, § 2.1(a) at 379.
[8] *Id.* at 380.
[9] 277 U.S. 438 (1928).
[10] *Id.* at 455.
[11] *Id.* at 456-57.
[12] *Id.*
[13] *Id.* at 464 (stating that the Fourth Amendment was not violated because "the evidence was secured by the use of the sense of hearing" and the officers did not enter the house of offices of the suspects).
[14] *Id.* at 466.
[15] *Id.* at 457.
[16] 316 U.S. 129 (1942).
[17] *Id.* at 134.
[18] 365 U.S. 505 (1961).
[19] *Id.* at 511-12.
[20] 389 U.S. 347 (1967).
[21] *Id.* at 348.
[22] *Id.*
[23] *Id.* at 359.
[24] *Id.* at 352-53.
[25] *Id.* at 351.
[26] *Id.* at 351-52.
[27] *Id.* at 361.
[28] *Id.*
[29] Note, 23 Cleveland St L Rev 63, 66 (1974).
[30] Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 Wake Forest L Rev 307, 335 (1998).
[31] 476 U.S. 227 (1986).
[32] *Id.* at 229.
[33] *Id.* at 231.
[34] *Id.* at 238.
[35] *Id.* at 239.
[36] 460 U.S. 276 (1983).
[37] *Id.* at 285.
[38] *Id.* at 281.
[39] 468 U.S. 705 (1984).
[40] *Id.* at 714.
[41] *Id.*
[42] *Id.* at 714-15.
[43] *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038 (2001).
[44] *United States v. Kyllo*, 809 F. Supp 787, 790 (D. Or. 1992).
[45] *Id.* at 790.
[46] *United States v. Kyllo*, 140 F.3d 1249, 1251 (9th Cir. 1998).
[47] *Kyllo v. United States*, 121 S. Ct. 2038, 2041 (2001).
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 2046.
[52] *Id.* at 2041, quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961).
[53] *Id.* at 2042.
[54] *Id.* at 2043.
[55] *Dow*, supra at Note 30.
[56] *Kyllo*, 121 S. Ct. at 2043.
[57] *Id.* at 2043.
[58] *Id.*
[59] *Id.* at 2046.
[60] *Id.* at 2043.
[61] *Id.* at 2044.
[62] *Id.* at 2047.
[63] *Id.*
[64] *Katz*, supra at Note 19.
[65] *Id.* at 2040.
[66] *Id.* at 2045.
[67] *Id.* at 2046.
[68] *Id.* at 2043.
[69] *Id.*
[70] *Id.*
[71] *Id.*

THE CONTINUING CRIMINALITY OF VIRTUAL CHILD PORNOGRAPHY IN THE WAKE OF THE *ASHCROFT* DECISION

CAPTAIN CHRISTA S. COTHREL

Until recently, it was common practice to charge military members caught with pornographic images depicting what appeared to be minors engaging in sexually explicit conduct under the Child Pornography Prevention Act of 1996 ("CPPA" or "Act").[1] As written, child pornography under the CPPA included any sexually explicit material that depicted actual minors, depicted persons who appeared to be minors, modified or altered the image of an identifiable minor so that the minor appeared to be engaging in sexually explicit conduct, or was advertised or described so as to convey the impression that it depicted a minor.[2]

Of special concern for the purposes of this article, the CPPA prohibited the shipment, distribution, receipt, reproduction, sale, or possession of any visual depiction that "*appears to be*...of a minor engaging in sexually explicit conduct."[3] [Emphasis added.] The Act also contained a similar prohibition concerning any visual depiction that was "advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[4] [Emphasis added.] Recently, however, after a First Amendment challenge from the Free Speech Coalition[5], the Supreme Court held in *Ashcroft v. Free Speech Coalition* that the definitions of child pornography contained in 18 U.S.C. §2256(8)(B) and (D), were constitutionally overbroad.[6]

As a result of this opinion, images that only "appear to be" or "convey the impression of" children are outside the criminal prohibitions of 18 U.S.C. §2252A. Instead, under the CPPA, child pornography is confined to images of actual minors or "identifiable" minors.[7] Thus, an image wherein an actual or identifiable minor's face is grafted onto an otherwise pornographic image, referred to as a "morphed" image, still qualifies as child pornography under 18 U.S.C. §2252A, but computer generated images created without any reference to a real child, referred to as "virtual" images, are not.

In light of this decision, the question remains whether military members involved in the shipment, distribution, receipt, reproduction, sale, or possession of virtual child pornography are engaging in criminal behavior. Essentially, does the Court's opinion in *Ashcroft*, in particular the portion of the decision relating to 18 U.S.C. §2256(8)(B) (visual depictions that appear to be of minor engaging in sexually explicit conduct), affect the military's ability to prosecute service members for these activities?

The Road Leading to *Ashcroft*

In 1982, the Supreme Court established the constitutional framework for preserving the rights of adults while fighting the real harm of child pornography. In *New York v. Ferber*[8], the Court held that sexually explicit material depicting actual children is unprotected by the First Amendment. Conversely, the Court determined that non-obscene simulations of child pornography that do not involve real children in making the images retain First Amendment protection.[9]

In response to *Ferber*, Congress passed the Child Protection Act of 1984.[10] The Act explicitly criminalized the distribution, possession, or sale of material depicting actual children engaged in sexual activity, but remained silent on the question of virtual pornographic images.[11] In subsequent legislative promulgations, Congress continued to institute prohibitions aimed at sexual depictions of actual children as opposed to simulations or images which merely conveyed the impression of minors. *See* Pub. L. No. 103-322, § 16001, 108 Stat. 2036 (1994) (codified as amended at 18 U.S.C. § 2259) (punishing the production or importation of sexually explicit depictions of minors); Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, §

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301, 104 Stat. 4789 (1990) (codified as amended at 18 U.S.C. § 2252(a)(4) (prohibited the possession of three or more pieces of child pornography); Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. §§ 2251A-2252) (banning the use of computers to transport, receive, or distribute child pornography); Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251) (banning the use and production of advertisements for child pornography). It was not until September 30, 1996, when Congress passed the CPPA that the definition of child pornography included images that did not involve actual children.

Supreme Court's response to the CPPA's definition of child pornography

In response to the Free Speech Coalition's constitutional attack on the expanded definition of child pornography detailed in the CPPA, in *Ashcroft*, the Supreme Court ruled the Act, as written, violated First Amendment protections. The Court distinguished its prior decision in *Ferber* by noting the distribution, sale, and production of child pornography as described in 18 U.S.C. §2256(8)(B) are not "intrinsically related" to the sexual abuse of children. In *Ferber*, the Court reasoned that child pornography was undeserving of First Amendment protection for two reasons. First, the depicted acts served as a permanent record of the child's abuse and the continued circulation of the material continued to harm the child who had participated. Second, because trafficking in child pornography provided an economic motive for its production, the State had an interest in closing the distribution network. Thus, the prohibited "speech" was proximately linked to the ultimate crime.

In comparison, the Court reasoned that the CPPA's prohibitions against images which merely appear to be of minors prohibit speech that records no crime and creates no victims by its production. Therefore, unlike *Ferber*, virtual child pornography, as defined under 18 U.S.C. §2256(8)(B), was not "intrinsically related" to the sexual abuse of children.

Furthermore, the Court was unpersuaded by the argument that virtual child pornography can lead to actual instances of child abuse since it whets pedophiles' appetites and encourages them to engage in illegal conduct. The Supreme Court reiterated that the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it, absent some showing of a direct connection between the speech and imminent illegal conduct.[12] Consequently, the Court ruled 18 U.S.C. §2256(8)(B), prohibiting virtual child pornography, was unconstitutionally overbroad.

The import of *Ashcroft* for military prosecutions of virtual child pornography cases

Based on the Supreme Court's stated rationale for striking portions of the CPPA, the *Ashcroft* case has limited applicability to the military's ability to prosecute service members caught with virtual child pornography. While the protection of actual children is unquestionably of interest to the military, the armed forces are also charged with maintaining good order and discipline among the ranks and a good image in the community - wholly separate concerns and ones which the Supreme Court was not asked to consider in *Ashcroft*.

Case law has recognized this fundamental difference between the objectives of the military and civilian community, most notably in *Parker v. Levy*.[13] In *Parker*, an Army physician challenged his conviction under Articles 133 and 134[14] based on comments he made encouraging African-American enlisted men to refuse orders to go to Vietnam and referring to Special Forces personnel as "liars and thieves," "killers of peasants," and "murderers of women and children."[15]

In rejecting Capt Levy's arguments on appeal, the Supreme Court stated:

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and the civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' *United States ex. rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). In *In re Grimley*, 137 U.S. 147, 153 (1890), the Court observed: 'An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." More recently we noted that "the military constitutes a specialized community governed by a separate discipline from that of the civilian,' *Orloff v. Willoughby*, 345 U.S.

> 83, 94 (1953), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demand of discipline and duty . . . .' *Burns v. Wilson*, 346 U.S. 137, 140 (1953).[16]

Ultimately, the Supreme Court determined " . . . while military personnel are not excluded from First Amendment protection, the fundamental necessity for obedience, and the consequent necessity for discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[17]

As was the case in *Parker,* these uniquely military concerns regarding service-discrediting conduct and maintaining good order and discipline have been traditionally addressed through the charge and prosecution of offenses under clause 1 or clause 2 of Article 134. Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as clauses 1, 2, and 3, of Article 134. Clause 1 offenses involve conduct which is prejudicial to good order and discipline. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law.

Under Article 134, clause 1, the military is permitted to prosecute an act or omission where the effect on discipline and order is real; that is, the effect is direct and palpable. Such conduct must be: (1) easily recognizable as criminal, (2) must have an immediate and direct adverse effect on discipline, and (3) must be judged in the context surrounding the acts.[18] Under Article 134, clause 2, an act must be of a nature to lower the civilian community's esteem or bring the armed services into disrepute. Some acts are inherently service discrediting, while others require an assessment of the circumstances surrounding the commission of the offense.[19]

Given the definitions of Article 134 clause 1 and 2 offenses, it seems clear that a military member's actions in regard to child pornography, whether comprised of images of real children or images virtually indistinguishable from real children, are capable of qualifying as conduct prejudicial to good order and disciple and/or service-discrediting conduct. Further, aside from the abundant case law emphasizing the criminal nature of child pornography, in *United States v. Sapp*[20] and *United States v. Augustine*[21], the Court of Appeals for the Armed Forces made clear that a military member's possession of child pornography can be service discrediting conduct. However, it is important to remember that when prosecuting offenses under these provisions, the good order and discipline element and/or the service-discrediting element, must be proved beyond a reasonable doubt. Indeed, because charging these offenses in this manner has not yet been judicially sanctioned, it is especially important to introduce ample evidence proving that the accused's behavior meets either clause 1 or clause 2 criteria.[22] The key to winning a virtual child pornography case charged under clause 1 or 2 of the general article is proving that the gravamen of the accused's misconduct is its prejudice to good order and discipline and/or service-discrediting nature.[23]

> **"...the fundamental necessity for obedience, and the consequent necessity for discipline, may render permissible within the military that which would be constitutionally impermissible outside it."**

While possessing sexually explicit material containing what appears to be children may qualify as a clause 1 or clause 2 offense, what is more problematic is the question of whether a military member is sufficiently aware that his or conduct is criminal. The primary obstacle to prosecuting a service member under the general article is that he or she must be on "fair notice" that his or her conduct was punishable under the Uniform Code.[24] The adequacy of the notice given to an accused is evaluated on the basis of reasonableness. "Criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."[25]

Traditionally, proof of notice is provided through military customs, regulations, judicial interpretations and common usages.[26] However, on several occasions military courts have recognized that common sense dictates an individual was on notice that his or her conduct was criminal. *See e.g., United States v. Guerro*, 33 M.J. 295 (C.M.A. 1991) (Despite absence of specific provisions, chief petty officer was aware cross-dressing in front of military members was an offense under Article 134.); *United States v. Stone*, 37 M.J. 558, 564 (A.C.M.R. 1994) (A senior noncommissioned officer is on notice that false statements about exploits in Desert Shield/Desert Storm to high school students is service-discrediting.); Cf. *Vaughn*, 56 M.J. at 706 (Regardless of lack of military guidance on criminality of simple child neglect, appellant was on notice that a parent leaving an infant child unsupervised overnight for six hours constitutes service-discrediting conduct.); *United States v. Sullivan*, 42 M. J. 360 (C.M.A. 1995) (Appellant was on fair notice that his conduct was criminal because any reasonable officer would know that asking strangers of the oppo-

site sex intimate questions about their sexual activities, using a false name and a bogus publishing company as a cover, is service-discrediting conduct under Article 134.); *United States v. Hartwig*, 39 M.J. 125 (C.M.A. 1994) (Any reasonable officer would know that sending sexual overtures to a stranger risks bringing disrepute upon his profession.).

Given the low standard to establish notice, it is apparent that military members should reasonably understand that if they are caught with pornographic images depicting what appear to be minors engaging in sexually explicit conduct, they are engaging in a criminal act. While there is no case law specifically pertaining to virtual child pornographic images, logic dictates that when a service member has in his or her possession sexually explicit material that depicts images of real children or images that are virtually indistinguishable from real children, that individual is, or should be, cognizant of the criminality of their conduct. Nor does *Ashcroft* change this result. As previously detailed, *Ashcroft* dealt exclusively with a challenge to a federal statute, not a military codal provision. While the Supreme Court ultimately upheld the challenge to the CPPA, it did so on a basis irrelevant to military considerations of good order and discipline and the necessity of upholding the military's standing in the community. All members of the armed forces are aware that the UCMJ may constitutionally "regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated."[27]

Additionally, not only is child pornography prohibited by military case law, there are several Air Force instructions which should serve to place service members on notice of the criminality of their conduct.[28] Even so, common sense dictates possessing, receiving, transporting, etc., these types of images violates military standards in a criminal manner. Cf. *United States v. Light*, 36 C.M.R. 579, 584 (A.B.R. 1965) ("Some acts by their very nature are prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. They generally are offenses that involve a degree of moral turpitude.").

Also, the mere existence of the CPPA does not preclude the military from charging and prosecuting a service member under the general Article.[29] In *United States v. Long*[30], the Court of Military Review stated: "We are of the opinion that crimes and offenses not capital, as defined by Federal statutes, may be properly tried as offenses under clause (3) of Article 134, but that if the facts do not prove every element of the crime set out in the criminal statutes, yet meet the requirements of clause (1) or (2), they may be alleged, prosecuted and established under one of those."[31] More recently, the Court expressed an even stronger opinion on the military's ability to choose between charging an Article 134, clause 1, 2, or 3 offense. In *United States v. Williams*[32], the Court stated "a facial similarity between a military offense and a Federal crime does not mean that the offense must be brought under the third clause of Article 134. Rather, where appropriate, the charge may be brought under any one of the three clauses." Furthermore, as detailed by the Air Force Court, the elements of an offense under Article 134 are "simply not controlled by the elements of similar offenses denounced by the United States Code."[33]

Finally, while the military is restricted by the prohibitions of *Ashcroft* if the offense has been charged under the CPPA, in lieu of providing proof that the pornographic images depict an actual child or morphed images of a real child, the prosecution may elect to proceed under the lesser included offense of clause 1 or clause 2 of the general Article.[34] If the prosecution elects to proceed under one of these lesser included offenses, all elements of the offense must be proven and instructed upon.[35] Or, in the case of a bench trial, it must be clear that the prosecution proceeded under either clause 1 or 2 as opposed to clause 3. Otherwise, the appellate court will disapprove the findings of guilt.[36]

Summary

While there is no definitive case law on charging virtual child pornography under clause 1 or 2 of the general Article, the Supreme Court's stated rationale for striking portions of the CPPA does not preclude the military from prosecuting service members for the offense provided the circumstances indicate the individual's conduct is prejudicial to good order and discipline and/or service-discrediting. As has been recognized in the past, the military is a specialized society and has different expectations of its members. These different expectations should force all members of the armed forces to recognize that their actions in regard to sexually explicit images of children, whether it is images of actual children or images indistinguishable from actual children, are criminally cognizable.

[1] Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 121, 110 Stat. 3009-26 to 3009-31 (The CPPA amended Title 18, Chapter 110 of the United States Code by revising §§ 2251, 2252, 2256 and adding a new § 2252A.).
[2] *See* 18 U.S.C. § 2256(8).
[3] 18 U.S.C. §§ 2252A, 2256(8)(B) (Emphasis added).
[4] 18 U.S.C. §§ 2252A, 2256(8)(D) (Emphasis added).
[5] Free Speech Coalition was a California trade association for film makers, producers, distributors, wholesalers, retailers, and Internet providers of adult-oriented materials.
[6] *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002). Free Speech Coalition contended these provisions were constitutionally vague as well. Since the Supreme Court determined the provisions were overbroad, the Court felt it need not address the vagueness

issue. *Id.* At 1401.

[7] Identifiable minors are defined under 18 U.S.C. §2245(9) as a person (1) who was a minor at the time the visual depiction was created, adapted or modified, (2) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and (3) who is recognizable as an actual person although you are not required to know the actual identity of the person.

[8] *New York v.* Ferber, 102 S.Ct. 3348 (1982).

[9] *Id.* at 3358.

[10] *See* Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2253).

[11] *See* 18 U.S.C. §§ 2251-2253.

[12] *Id.* at 1404-5.

[13] *Parker v.* Levy, 94 S.Ct. 2547 (1974).

[14] 10 U.S.C. §§ 933 and 934.

[15] *Parker,* supra note 20 at 2252.

[16] *Id.* at 2555-56.

[17] *Id.* at 2563.

[18] *Id.* at 2560 (citing to *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964)).

[19] *United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991) (noting significance of circumstances in which conduct occurred for purposes of determining whether a service disorder occurred), *cert. denied*, 112 S.Ct. 1173 (1992); *United States v. Johnson,* 39 M.J. 1033, 1037-38 (A.C.M.R. 1994) (detailing the two types of service discrediting conduct).

[20] *United States v.* Sapp, 53 M.J. 90 (2000).

[21] *United States* v. *Augustine*, 53 M.J. 95 (2000).

[22] A sample specification would read:

> In that A1C XXX, United States Air Force, did, at or near XXX, on divers occasions between on or about 15 May 20XX and on or about 20 December 20XX, wrongfully and knowingly possess visual depictions of a minor engaging in sexually explicit conduct, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

The "wrongfully" is particularly important in this specification. Otherwise, the specification does not necessarily allege any criminal conduct. *U.S. v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988)

[23] *See United States v. Choate*, 32 M.J. 423, 426 (C.M.A. 1991).

[24] *See generally United States v. Bivins*, 49 M.J. 328, 330 (1998) (discussing whether accused was on fair notice that his actions constituted bigamy under Article 134).

[25] *United States v. Vaughn*, 56 M.J. 706, 708 (A.F. Ct.Crim.App. 2001) (citing to *Parker v Levy*, 94 S.Ct. at 2562, quoting *United States v. Harriss*, 74 S.Ct. 808 (1954)).

[26] *See United States v. Brown*, 55 M.J. 375, 382 (2001); *United States v. Kick*, 7 M.J. 82, 84 (C.M.A. 1979). Moreover, the fact that there is an absence of civilian law prohibiting the military member's action is not determinative of whether the service member was on fair notice of the criminality of his conduct. *Kick, supra*, at 83-84.

[27] *Parker, supra* note 20 at 2558.

[28] *See* AFI 33-129 (prohibiting use of government resource to store, process, display, send, or otherwise transmit child pornography); AFI 33-111 (prohibiting telephone calls which reflect adversely on DoD or the Air Force, including pornography); AFI 36-2002 (listing a conviction for child pornography as a potentially disqualifying "moral offense" from enlisting in the Air Force).

[29] The question of whether the preemption doctrine applies to situations in which the military decides to prosecute a service member under clause 1 or 2 of the general article rather than a particular federal statute has not been addressed by the Court of Appeals for the Armed Forces. As defined historically, a prosecutor cannot violate the preemption doctrine by charging a different crime in order to circumvent an essential element of an offense under the Code. *Manual for Courts-Martial*, Part IV, Paragraph. 60c(5)(a). Paragraph 60c(5) codifies a doctrine articulated early in the Court of Criminal Appeal's history that "Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive Articles." *United States v. Norris*, 2 U.S.C.M.A. 236, 239, 8 C.M.R. 36, 39 (1953). "The doctrine provides that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element." *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979). However, the preemption doctrine has never been applied when the choice is between charging a federal statute versus a clause 1 or clause 2 Article 134 offense. *But see, United States v. Saunders*, 2002 CCA LEXIS 131 (Army Ct.Crim.App. June 10, 2002)(without reference to legal authority, Court examines prosecutor's choice of proceeding under clause 2 as opposed to a federal statute); *United States v. Wagner*, 52 M.J. 634, 637 (N.M. Ct. Crim.App.1999) (addressing the preemption issue but ultimately determining it does not apply in a case involving the prosecution's decision to charge a clause 1, Article 134 violation as opposed to a violation of 18 U.S.C. § 2252(a)(4)(A)).

[30] *United States v. Long*, 2 U.S.C.M.A. 60, 65, 6 C.M.R. 60, 65 (1952).

[31] *See also United States v. Jones*, 20 M.J. 38 (C.M.A. 1985).

[32] *United States v.* Williams, 29 M.J. 41, 42 (C.M.A. 1989).

[33] *United States v. Caudill*, 10 M.J. 787 (A.F.C.M.R. 1981), *rev. denied*, 11 M.J. 342 (C.M.A. 1981).

[34] If the prosecution elects to amend the specification to a general disorder, the accused will be unable to successfully claim he or she was not on notice as to what allegation to defend against. *United States v. Sullivan*, 42 M.J. 360, 365 (1995) (conduct prejudicial to good order and discipline and service discrediting conduct is an implied element of every offense in the military justice system); *see also United States v. Gallo*, 53 M.J. 556, 567 (A.F. Ct.Crim.App. 2000), aff'd, 56 M.J. 191 (2001), *cert. denied*, 122 S. Ct. 924 (2002).

[35] *See United States v. Williams*, 8 U.S.C.M.A. 325, 24 C.M.R. 135 (1957); United States v. Perkins, 47 C.M.R. 259 (A.F.C.M.R. 1973), *pet. denied,* 22 U.S.C.M.A. 635 (1973).

[36] *See United States v. Gallo*, 53 M.J. 556, 567 (A.F. Ct.Crim.App. 2000), aff'd, 56 M.J. 191 (2001), *cert. denied*, 122 S. Ct. 924 (2002) ("It is abundantly clear that the government relied exclusively on the third clause, and that also is the manner by which appellant defended against the charge. During litigation of trial defense counsel's motions to dismiss the charge, his written motion set forth what he believed to be the elements of the offense. His submission did not include conduct prejudicial to good order and discipline or service discrediting as elements, and there was no objection by the government. Further, neither trial counsel nor trial defense counsel mentioned these elements in their respective closing arguments. *Ergo,* we will not approve a lesser included offense under Clause 1 or 2, Article 134.")

PRACTICUM

• ARTICLE 88, CONTEMPT TOWARD OFFICIALS

Article 88, UCMJ, makes it a criminal offense for "any commissioned officer" to use "contemptuous words against the President, Vice President, Congress, Secretary of Defense, Secretary of a military department, Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which the officer is on duty or present...."

Definitions and explanation for Article 88 can be found in DA PAM 27-9, the Military Judge's Benchbook, and the Manual for Courts-Martial, Part IV. "Contemptuous" means insulting, rude, disdainful or otherwise disrespectfully attributing to another qualities of meanness, disreputableness, or worthlessness. The prohibition extends to words used about persons who hold the named office, or about the Congress or legislatures in existence at the time the words are used. That is, former officials and past legislatures are not protected. Neither "Congress" nor "legislature" includes the members individually. It is immaterial whether the words are used against the official in an official or private capacity and whether the statements are true of false. The MCM identifies two possible defenses to an Article 88. Words used "in the course of a political discussion may not be charged as a violation of Article 88," and "expressions of opinion made in a purely private conversation should not ordinarily be charged." Although Article 88 applies only to commissioned officers, AFI 51-902, *Political Activities by Members of the US Air Force*, makes the use of contemptuous words by all Air Force members on active duty against the office holders described in Article 88 a violation of Article 92, UCMJ.

Prohibiting language used against certain officials did not originate with Article 88, which came into effect when the UCMJ was enacted in 1950. Provisions in the Articles of War, first adopted by Congress in 1806 and upon which Article 88 is based, also prohibited contemptuous language, but applied to all "officers and soldiers," not just commissioned officers. During the American Revolution in 1776, the Continental Congress adopted a similar provision, itself based on the 1765 British Articles of War.

Most of the 116 courts-martial based on Article 88 or its predecessors occurred around times of war, chiefly the Civil War, World War I and World War II. Since the UCMJ was enacted, the only court-martial alleging a violation of Article 88 was during the Vietnam conflict. Army Second Lieutenant Howe was spotted at a demonstration carrying a sign which on one side read "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS IN 1968," and on the other side read "END JOHNSON'S FACIST AGRESSION IN VIET NAM," or words to that effect. *U.S. v. Howe*, 37 C.M.R. 429, 432 (1967). The Court of Military Appeals, on reconsideration of its earlier decision affirming the conviction and sentence, held that Article 88 violates neither the First Amendment nor the due process clause of the Fifth Amendment." *Id.* at 442. For further reading, see *Contemptuous Speech Against the President*, 1999 Army Law. 1 (July 1999).

Not only has the law changed little in over 200 years, the purpose behind it remains sound -- to avoid the impairment of good order and discipline and prevent insubordination, thereby respecting the principle of civilian control of the military.

• ARTICLES 57(A) AND 58B AFTER *U.S. V. EMMINIZER*

A recent CAAF decision has prompted a revised approach to the way the Air Force handles adjudged and mandatory (a.k.a. automatic or required) forfeitures. Prior to the decision, Air Force policy was that mandatory forfeitures took precedence in application over adjudged forfeitures. No more. As a consequence of *U.S. v. Emminizer*, 56 M.J. 441 (2002), the application of mandatory forfeitures will be determined by the disposition of adjudged forfeitures.

Some background and explanation are required. Mandatory forfeitures (Article 58b) only take effect if three conditions exist: 1) the adjudged sentence includes confinement for more than six months, or confinement for any period *and* a dishonorable or bad conduct discharge or dismissal; 2) the accused is in confinement or on parole; and 3) the accused is otherwise entitled to pay and allowances *that are subject to mandatory forfeitures*. *Emminizer* focuses on that third condition. Simply stated, an accused must have pay to forfeit before mandatory forfeitures – and waiver of them – are an issue. As a result of the application of adjudged forfeitures or some other cause (e.g., the member has gone past his or her ETS), there may be no pay available to fund all or part of the mandatory forfeitures.

A general court-martial sentenced Specialist Emminizer to a BCD, confinement for 18 months, forfeiture of all pay and allowances and reduction to E-1. In clemency, SPC Emminizer requested a waiver of forfeitures for the benefit of his young son. The staff judge advocate advised the convening authority that in

order to grant the waiver, he would have to disapprove the adjudged forfeitures. The convening authority denied the waiver request. The Court found this recommendation correct but incomplete. "First, he also should have stated that if the convening authority modified or suspended the adjudged forfeitures, he could then waive the resultant mandatory forfeitures."

This is the key to *Emminizer*: If the accused is entitled to pay (and allowances), any adjudged forfeitures will be taken from the pay (and allowances) first, and anything left over is subject to mandatory forfeitures. Put another way, to the extent adjudged forfeitures are not in force (because of deferral, disapproval in whole or in part, mitigation or suspension), mandatory forfeitures apply (to pay [and allowances] to which the accused is entitled up to the jurisdictional limit of the court-martial). The convening authority's options for getting adjudged forfeitures out of the way in order to waive a resulting amount of mandatory forfeitures depend on the stage of post-trial processing. First, before action and only if the accused so requests, the convening authority can defer adjudged forfeitures under Article 57(a)(2). As stated in *Emminizer*: "To the extent that adjudged forfeitures are deferred, there is a corresponding increase in compensation subject to mandatory forfeitures -- and available to be waived on behalf of a servicemember's dependents for up to six months under Article 58b(b)." The remaining options are available at action. The convening authority can disapprove in whole or in part, mitigate or suspend adjudged forfeitures so that they will not be "in force," and to the extent adjudged forfeitures are not in force, mandatory forfeitures can apply. The amount of adjudged forfeitures approved, ordered executed and not suspended in the action is an amount that cannot be waived.

Keep in mind that the most an accused can forfeit in a special court-martial is two-thirds pay per month for one year, and in a general court-martial, total pay and allowances. Also, mandatory forfeitures can only be waived to eligible dependents of an accused, i.e., no dependent, no waiver.

For more ins and outs on Articles 57(a) and 58b, see the JAJM Policy Letter on this topic.

CAVEAT

• INARTFUL SURPLUSAGE

In *United States v. Divita,* ACM 35022 (A.F.Ct.Crim. App. 2 May 2002), the accused was convicted of drug offenses, including wrongful use of "cocaine, a Schedule I controlled substance," in violation of Article 112a, UCMJ, 10 U.S.C.§ 912a. In its decision, the Air Force Court noted that the cocaine offense was erroneously charged because the drug is a Schedule II rather than a Schedule I controlled substance. Apparently none of the trial participants noticed the error. Post-trial, the SJA caught the problem, and in the addendum to her recommendation, requested that the convening authority fix it by substituting Schedule II for Schedule I in his action. The convening authority did as recommended.

Although the Court found the erroneous language specifying the schedule to which cocaine belonged to be merely surplusage and, thus, not fatal to the sufficiency of the specification, it nevertheless took appropriate remedial action because the convening authority lacked the authority to do so in his action. The practical lesson to be drawn from this case is that in drafting drug specifications do not allege the schedule to which drugs such as cocaine, marijuana, LSD, and methamphetamine belong. The use of those drugs is specifically prohibited by Article 112a(b)(1), UCMJ, itself, without reference to the Schedule of Controlled Substances.

• NEW MATH?

In the case of *United States v Horton,* ACM S29991 (A.F.Ct.Crim.App. 28 Jan. 2002), the accused was convicted of uttering bad checks and making a false official statement and sentenced to a BCD, confinement for five months and reduction to E-1. A pretrial agreement provided that the convening authority would not approve confinement in excess of 120 days. However, when all was said and done, the accused was required to serve four months in confinement. On appeal, all parties agreed that four months is not the same as 120 days and, as a result, the term of confinement was erroneously increased by three days.

To remedy the arithmetical error, the Air Force Court of Criminal Appeals approved only 117 days of the approved confinement, which had the effect of restoring to the accused three days of automatic forfeitures earlier assessed, and giving him three days of credit to be applied against an additional three days of automatic forfeitures. Practitioners required to calculate maximum and minimum release dates on terms of confinement should follow the guidance contained in Army Regulation 663-30/Air Force Regulation 125-30, Military Sentences to Confinement, 25 Feb 1989.

• OLD AUTOMATIC...NOT!

Following the accused's conviction of two specifications of wrongful use of cocaine, a military judge sentenced him to a BCD and reduction to E-3. In his addendum to the SJAR, the staff judge advocate, after advising the convening authority that he must consider the matters submitted on behalf of the accused, further advised him,

> Regarding the reduction in grade, you may approve the adjudged reduction in grade to E-3 or to any intermediate grade. You should be aware that under Article 58a, UCMJ an enlisted member who receives a Bade Conduct Discharge is reduced in rank to E-1 by operation of law if you approve the Bad Conduct Discharge.

After considering this advice, the convening authority approved the sentence as adjudged.

In its review of this case (*United States v. Robertson,* ACM 34548 (A.F.Ct.Crim.App. 12 March 2002)), the Air Force Court of Criminal Appeals found the advice regarding automatic reduction erroneous. In that regard, Article 58a, UCMJ, provides,

> *Unless otherwise provided in regulations* to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes--(1) a dishonorable or bad-conduct discharge, ... reduces the member to pay grade E-1, effective on the date of that approval. (Emphasis added).

As the Court noted, the Secretary of the Air Force , in fact, *"otherwise provided"* in Air Force Instruction 51-201, *Administration of Military Justice,* ¶9.10 (2 Nov 1999), by electing not to make that provision apply to enlisted members of the Air Force.

The Court went on to determine that the error materially prejudiced the accused's substantial rights. An important lesson to carry away from this case is that when a statutory provision provides for exceptions by Secretarial regulation, it is incumbent on all concerned to do the research.

GENERAL LAW

• COMMUNITY RELATIONS ACTIVITIES

An ethics counselor's strength of character can be tested by proposals to use Air Force resources in support of community relations events. In many cases, it seems like a clear "win-win" situation -- the community event gets "free" government support and the Air Force gets "free" publicity. What could possibly be wrong with this scenario?

Well, of course, community relations proposals must be analyzed like any other Air Force activity to ensure that they comply with statutory and regulatory guidance. The Air Force legitimately provides support for community relations activities as long as they further the mission by increasing public understanding of DoD and the support is permissible under DoD and USAF policies.

Ethics counselors are familiar with the seven-part test found in the Joint Ethics Regulation (JER), DoD 5500.7-R, section 3-211, Logistical Support of Non-Federal Entity Events, but they may not realize that one of the criteria requires that the support may not be restricted by other statutes *or regulations*. A quick read may translate this to something more simplistic (i.e., support cannot be "illegal"). But here's the catch: there <u>are</u> detailed rules on community relations activities that must be taken into account in these cases. Therefore, remember that JER section 3-211 is not meant to preempt other regulations -- it must be read in conjunction with other regulations.

The key regulatory guidance is found in:

- DoD Directive 5410.18, *Public Affairs Community Relations Policy*, 20 Nov 01;
- DoD Instruction 5410.19, *Public Affairs Community Relations Policy Implementation*, 13 Nov 01;
- AFI 35-101, *Public Affairs Policies and Procedures*, 26 Jul 01, Chapter 8 (Community Relations).

All three regulations set out specific restrictions on activities such as flyovers, air shows, open houses, static displays, memorial ceremonies, orientation flights, public appearances, and military association conferences. They also set out special rules on the use of military bands, honor guards, and demonstration teams. Finally, they point out that, as a rule, community relations activities must not generate additional

costs for the USAF. The sponsor receiving the support must agree to reimburse the USAF, even for incidental costs associated with providing support to non-DoD events.

Not every community relations proposal can be legally supported, but every proposal is entitled to a careful review to determine its compatibility with DoD and USAF policies.

• COMMANDER RESPONSIBILITY REGARDING HOME SCHOOLING

Several questions have arisen regarding the responsibility of overseas commanders with regard to home schooling. On the question of what legal authorities/ attendant responsibilities installation commanders have in overseas locations to ensure that those military dependents not enrolled in DoD schools receive an appropriate education, our view is that the responsibility would be no different than for those installations located in the United States. That is, overseas commanders have a legitimate interest in maintaining morale and welfare within their commands. However, because the actual regulation of home schooling is left to the state or foreign nation in which a military installation is located, the role of the commander is limited. There is in fact no regulation that provides for an installation commander to sign off on the suitability of a particular home school regimen. On the other hand, based upon potential host nation concerns (and SOFA application), it would be appropriate for the local DoD school to maintain a registry of those military dependents who are being home schooled. In this way, a local commander would be better able to address any host nation concerns by identifying those dependents being home schooled.

A second question concerns the installation commander's responsibility when allegations of "educational neglect" are made against a military or civilian sponsor. There is sparse legal authority for a commander to pursue such a charge beyond inquiring as to what is being done. If a host government makes the allegation, confirmation from the above-described list that the individual is being home schooled might be provided. In the end, however, if such confirmation were not acceptable (and there were no SOFA agreement to the contrary), military or civilian sponsors would be subject to host nation law. Also, as the number of dependent minors being home schooled increases, there is a potential for situations to arise that may require command attention.

Dependent misconduct cases should be handled the same or substantially similar for those being home schooled as for those in traditional programs. Other situations not involving misconduct may nevertheless require legitimate regulation by a commander. We are not aware of any specific situation that has arisen as a result of dependents being home schooled even though they may be on different schedules than those in traditional schools. We can, however, foresee possible scenarios involving the use of government facilities or morale, welfare and recreation programs where reasonable command regulation might be required. Of course, any regulation of those being home schooled should be based on a well-reasoned rationale.

Finally, on the issue of extension of other services, DoD policy provides for extension of library services, special education services, and participation in extracurricular and interscholastic activities to home schooled dependents. In our opinion, beyond the limited involvement addressed above, command direction or involvement in the home school program should be exercised with caution.

• USE OF APPROPRIATED FUNDS FOR STATE MEDICAL RESIDENCY FEES

Recently we were asked whether appropriated funds could be used to pay for "institutional permits" required by the State of Texas. According to the information provided, these permits must be obtained by any physician who is practicing as a resident in a Texas hospital (except a military hospital) who is not licensed as a physician in Texas. The Air Force apparently routinely assigns military physicians as residents in civilian hospitals in Texas so they can obtain training in specialties that are not practiced in military hospitals. These members are required to pay $60.00 to obtain the resident's institutional permit. The permit must be renewed annually for the duration of the residency.

We believe this question should be resolved applying the same analysis contained in OpJAGAF 1996/117. As noted in this opinion, appropriated funds are not available to meet the licensing and certification requirements of professional personnel such as teachers, accountants, engineers, lawyers, doctors and nurses. See B-252467, June 3, 1994 and cases cited therein. These individuals are fully aware of the licensing and certification requirements of their profession and that they are required to meet the minimum qualifications before they can begin practice. In that sense, the licensing and certification requirements are considered to be more for their personal benefit than for their employers. Because the benefit accrues to the individual instead of the government, appropriated

funds cannot be used for the expense of complying with these entry-level professional qualifications.

As distinguished from initial qualification however, the government may pay to provide training to maintain or upgrade the professional skills of its military members (10 USC 9301) and civilian employees (5 USC 4101). If a permit or certification is associated with this training, then it is principally for the benefit of the government instead of the individual. Appropriated funds may be used for these certifications as a part of the training expense.

In order to authorize the use of appropriated funds to pay for the annual "institutional permit" required by the State of Texas, the appropriate Air Force medical official must determine whether the residency is part of the curriculum for meeting minimum qualifications before the physician can practice as an Air Force medical officer or whether it is intended to upgrade the skills of an individual who has already met minimum professional qualifications. If it is determined that the residency is for the purpose of upgrading physician skills beyond minimum entry requirements for an Air Force physician, then it is our opinion that appropriated funds can be used to pay for the permits.

LABOR LAW

• PERSONAL LIABILITY OF AF EMPLOYEES AND WIRETAP LAWS

The Civil Litigation Division, Employment Litigation Branch, recently agreed to settle a case brought against eight Air Force personnel for allegedly violating the Federal Wiretap Act. It is well known that the federal government and most, if not all, states have criminal and civil laws prohibiting the recording or interception of telephone conversations without the consent of one or both parties to the conversation. The Federal Wiretap Act, for instance, codified at 18 U.S.C. § 2510, *et. seq.*, makes it a crime for a person to record or intercept the phone conversations of another person unless at least one party to the conversation has consented to the recording. As noted, many states require the consent of all parties to the telephone conversation.

What may not be as well known are provisions in most of these wiretap laws that also prohibit the subsequent knowing use or disclosure of illegally intercepted or recorded phone conversations. In other words, an innocent third party - one who had nothing to do with the recording or interception - who knows a phone conversation was illegally recorded, may be criminally and civilly liable for subsequently using or disclosing the contents of the phone conversation. The Federal Wiretap Act has such a provision, but the federal circuit appellate courts are split on its scope. For instance, the Ninth Circuit has held that law enforcement personnel who know a phone conversation was illegally recorded or intercepted (but had nothing to do with the interception themselves) cannot use or disclose the contents of the phone conversation for *any* purpose, not even a law enforcement purpose, such as evidence to support an investigation. See *Chandler v. Army*, 125 F.2d 1296 (9th Cir. 1997).

In the recently settled case, a staff sergeant secretly recorded his wife's phone conversations with friends. He then provided the tapes to security police law enforcement personnel, who used the tapes as evidence in a criminal investigation In the subsequent civil lawsuit, the district court held that the base law enforcement and legal personnel who used the tapes to support the investigation and subsequent disciplinary action violated the prohibited "use and disclosure" provisions of the Federal Wiretap Act, as interpreted by the Ninth Circuit in *Chandler*.

The lesson to take from this case is a simple one: in providing legal advice to commanders under the Uniform Code of Military Justice, the research of federal statutes outside the UCMJ and state law may be necessary to fully advise a commander as to the proper course of action to take, especially where military case law or the UCMJ is silent on the particular legal issue being addressed.

As for state wiretap laws, the following website has an overview of each state law and is a good starting part when researching wiretap issues: http://www.rcfp.org/taping/index.html.

• SUPREME COURT DECIDES ADA CASE AFFECTING SENIORITY SYSTEMS

On 29 April 2002, the United States Supreme Court decided *U.S. Airways, Inc., v. Barnett*, 535 U.S. ____ (2002), expanding the deference given seniority systems under the Americans With Disabilities Act (ADA) to more closely resemble the Court's prior treatment of seniority systems under Title VII. In a five to four decision, the Supreme Court determined that a request by an employee under a seniority system created and controlled by the employer (not by a collective bargaining agreement) to transfer to a position, in the "run of cases," trumps a disabled employee's request to remain in that position as a reasonable ac-

commodation of his back injuries.

In 1990, the respondent, Mr. Robert Barnett, injured his back while working in a cargo-handling position at U.S. Airways, Inc. At the time of his injury, he invoked his seniority rights and bid for a less physically demanding position in the mailroom. He was given the position and held it for the next two years. In 1992, Mr. Barnett learned that two employees senior to him intended to bid for his mailroom job. He asked U.S. Airways to accommodate him by making an exception to the seniority system that would allow him to remain in the mailroom. After considering Mr. Barnett's request for approximately five months, U.S. Airways denied the requested accommodation and Mr. Barnett lost his job in the mailroom. *Id.* at ____.

At that time, Mr. Barnett brought suit under the Americans With Disabilities Act (ADA) claiming, among other things, "that he was an 'individual with a disability' capable of performing the essential functions of the mailroom job, that the mailroom job amounted to a 'reasonable accommodation' of his disability, and that U.S. Airways, in refusing to assign him the job, unlawfully discriminated against him." *Id.* at ____. U.S. Airways moved for summary judgment and the U.S. District Court awarded judgment in its favor, stating that "the undisputed facts about seniority warranted summary judgment in U.S. Airways' favor." *Id.* at ____. The District Court found that U.S. Airways had demonstrated that "the accommodation would impose an *undue hardship* on the operation of [its] business." *Id.* at ____, (emphasis in orig.). In so ruling, the court relied on evidence that U.S. Airways' seniority system had been "in place for 'decades' and govern[ed] over 14,000 U.S. Air Agents." It also relied on the fact that such seniority systems were "common to the airline industry." Both of these facts were persuasive in its decision. *Id.* at ____. The court concluded that "any significant alteration of [the seniority] policy would result in undue hardship to both the company and its non-disabled employees." Id. at ____, (App. To Pet. For Cert. 96a.).

An en banc panel of the United States Court of Appeals for the Ninth Circuit reversed. It opined "that the presence of a seniority system is merely 'a factor in the undue hardship analysis.'" 228 F.3d 1105, 1120 (2000). It also held that a "case-by-case fact intensive analysis [was] required to determine whether any particular reassignment would constitute an undue hardship to the employer." *Ibid.* U.S. Airways petitioned for certiorari. They asked the Court to decide whether: "the [ADA] requires an employer to reassign a disabled employee to a position as a 'reasonable accommodation' even though another employee is entitled to hold the position under the employer's bona fide and established seniority system." 535 U.S. ____, at ____, (Brief for Petitioner i.).

The Supreme Court agreed to hear the case because the Circuits were split in their conclusions about the "legal significance of a seniority system." *Id.* at ____, (*Compare* 228 F.3d, at 1120, with *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 354 (CA4 2001). The five to four decision contains five separate opinions; the majority opinion written by Justice Breyer, two concurring opinions written by Justices Stevens and O'Connor, and two dissenting opinions, the first written by Justice Scalia and joined by Justice Thomas, and the second written by Justice Souter joined by Justice Ginsburg.

Without recapping all five opinions, it is important to note that the majority determined that, on a motion for summary judgment, a seniority system (even one controlled by the employer as opposed to the bargaining unit) will "in the run of cases" take precedence over a proposed accommodation that would normally be reasonable if the accommodation would violate the seniority system's rules. *Id.* at ____. The majority analogized the above situation with *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1047-1048 (CA7 1996) (*additional citations omitted*), a case in which a district court found that "collectively bargained seniority trump[ed] the need for reasonable accommodation in the context of the linguistically similar Rehabilitation Act." 535 U.S. ____, ____ (2002). The majority was concerned that requiring "the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment -- expectations upon which the seniority system's benefits depend." *Id.* at ____.

Although the Court ruled that a seniority system will take precedence over a proposed accommodation, the Court's opinion does allow for an exception to this general rule based on "special circumstances." The Court suggested several "special circumstances" that the employee might show in order to defeat summary judgment based on the existence of a seniority system. Two examples include showing that

> the employer, having retained the right to change the system unilaterally, exercises the right fairly frequently, reducing employee expectations that the system will be followed--to the point where the requested accommodation will not likely make a difference. The plaintiff might also show that the system already contains exceptions such

> that, in the circumstances, one further exception is unlikely to matter.

Id. at ____. To prevail with an exception, the Court stated that "the plaintiff has the burden of showing special circumstances and must explain why, in the particular case, an exception to the seniority system can constitute a reasonable accommodation even though in the ordinary case it cannot." *Id.* at ____.

LEGAL INFORMATION SERVICES

• DOCUSHARE: Paperless Organization in a Digital Box

In 1999 JAS implemented DocuShare, a paperless electronic document management system from Xerox. DocuShare is designed to let individuals store digital copies of a document and then decide who will be allowed to see it. The result: secure storage of office files with worldwide retrieveability.

DocuShare has many advantages over traditional filing systems. The most immediate is the ability to always find documents. With DocuShare's search capabilities, you can find a document even if you aren't sure where you stored it.

DocuShare also makes it easy to see what others have done on a topic, using the search feature to find and retrieve documents stored on DocuShare. DocuShare provides a tremendously efficient method for sharing knowledge throughout the Department. By posting a legal opinion to DocuShare, all other DocuShare users working on that issue can have the advantage of your research and effort.

DocuShare also allows an individual to post documents, but to limit the access to those documents. For example, documents prepared for litigation are obviously things that should not be shared with individuals on the other side of the issue. Likewise, legal assistance files generally would not be shared beyond those who are a part of the attorney-client relationship. DocuShare can, nevertheless, be used for these documents to allow access for those with a need to view them while restricting those who have no right or need to view them. DocuShare's built-in permission structure allows the document user to limit who has access to anything he or she posts on the site.

Another interesting feature of DocuShare allows the document user to load the document as "private". In this way, individuals who are researching can discover by title and subject that the document exists, but are required to contact the document user in order to view it. This allows the user to have more control over the document and provides the user with knowledge of precisely who is seeking the information contained in the document.

Longer term benefits are even more compelling. By containing the work product of our Department in a searchable document store, we create a knowledge treasure trove. The buzzword is "knowledge management." When faced with an issue of first impression, a base level JAG can search DocuShare to see how other bases have handled it.

DocuShare also has an excellent disaster-preparedness aspect. A fire in a legal office can have devastating consequences if the only paper copies of valuable documents are lost. Relying on the Communications Squadron to restore electronic files from a charred hard drive is a risky proposition and no guarantee that important work product will be saved. In a DocuShare world, immediate access to all files stored electronically is available just by booting up a computer.

What if catastrophe strikes at JAS instead of at the legal office? JAS backs up its servers regularly, including DocuShare, as a precaution against data loss. Backups are stored off-site and can quickly be recalled to minimize service outages.

Some may worry about simple Internet connectivity. After all, even if the documents are safe and secure on DocuShare, they aren't any good if there's no way to connect to them. There are two parts to this equation-- JAS and the Comm world. JAS has backup servers ready to go for automatic switch over in the event of a failure. They also have an excellent relationship with the Comm personnel at Maxwell. That said, there are events beyond anyone's control -- such as power outages -- that will bring the connection down. Those are rare and, frankly, are not unique in their effect on JAS systems. Power outages, thunderstorms, and other uncontrollable events degrade efficiency whether we have access to the Internet or not. (It's hard to read a legal opinion in the dark.)

Finally, there's a great benefit of being able to work on documents from home by pulling the file off DocuShare, working on it and then re-loading it back onto DocuShare. No disks to carry home or to risk losing or corrupting. JAS encourages everyone in the AFJAG Department who is not using DocuShare to try it. The benefits are astronomical. There are complete tutorials and a manual at the DocuShare site so individuals can learn at their own speed. Help is also available at JAS for DocuShare related questions.

The Center for Technology Management at Washington University replaced its paper filing system with DocuShare in 2000. The benefits were quick and "drastic" according to the center's director, Dr. Andrew Neighbour. No more misfiling and no more lost documents. No more need for filing cabinets. There was also the benefit of the ability to have multiple people access the same document simultaneously. No need to fax documents to colleagues - just give them access rights or e-mail the document. Now you can have these benefits, too.

Send Us Your Articles!!!

Contributions from all readers are invited. Items are welcome on any area of the law, legal practice or procedure that would be of interest to members of The Air Force Judge Advocate General's Department. Items or inquiries should be directed to The Air Force Judge Advocate General School, CPD/JAR, 150 Chennault Circle, Maxwell AFB AL 36112-6418, Comm (334) 953-2802 (DSN 493).

ACKNOWLEDGMENT

Major General Robert I. Gruber

This article will focus on a subject that can never be emphasized enough: acknowledgment of our people. While several sources have written about this over the years, recent evidence suggests a more comprehensive approach to the subject may be helpful.

Let's first define the scope of the "acknowledgment" we're talking about. Simply put, it runs from initial enlistment through and even beyond retirement. Acknowledgment is not just about federal decorations, although they are included. Acknowledgment need not only be for a job well done although that is certainly a worthy reason to acknowledge someone. Acknowledgment need not only come from commanders though they are certainly integral to acknowledgment of people. And most importantly, acknowledgment is not something to be pegged to specific timelines or exercised with any rigidity, but rather should be fluid, ongoing, internalized, and a way of life. Notice use of the term "acknowledgment" rather than "recognition," the latter being more commonly used in the military. "Recognition" is a narrow term as it implies a formal process of bestowing tangible evidence of credit on someone for excellent performance. "Recognition" is incorporated into the broader term "acknowledgment" and it is the latter which is the subject of this paper.

These concepts apply to any grouping of people, and even to whole units. The type, source, and reason of this acknowledgment may come in many forms; and that too, should be emphasized.

The types of acknowledgment can be oral, a non-verbal act such as the literal "pat on the back" or a "thumbs up" (way to go!), or written, or a combination of any of these. Sometimes a simple spoken "thank you" is appropriate. Oftentimes acknowledgment may take the form of a congratulatory oral announcement to the commander or other group, or taking the person aside, one-on-one and relating how much you appreciate what they do for you and your office. Other forms may include a "Welcome Package" or a letter an office gives to unit or office newcomers to acquaint them with your unit or office services and procedures, "thank you" letters, letters or certificates of appreciation or commendation for a job well done or extra duty served, "office-only" lunches, letters cards or notes for life cycle events of office personnel and their families, state awards or decorations, Air Force decorations, related organizational awards, congratulatory letters or notes upon promotion, receipt of awards or decorations or special or new assignments, and upon leaving the office/retirement ceremonies and celebrations. These are just a few types of acknowledgment, which can expand as far as your creative thinking allows.

Anyone can acknowledge anyone for anything. While acknowledgment to unit personnel most often comes from commanders, or supervisors to the people they supervise, it is not limited to these sources. Commanders and supervisors generate the more formal types of acknowledgment, but acknowledgement should know no rank or position, as the abiding rule is the "Golden Rule."

"Commanders and supervisors generate the more formal types... but acknowledgment should know no rank or position..."

Acknowledging someone tells him or her that they are important and that they mean something to you or your office. EVERYONE, regardless of rank or position, needs to feel special and wants encouragement. A pat on the back, or a "well done" once in a while is an incentive to sustain excellence. This is acknowledgment. The more creative the type, the more frequently given, depending on the recipient and the circumstance, usually elevates that person's performance to new heights. Just remember how good you felt when someone you admire said a kind word to you.

A sense of professionalism and pride in one's own performance, while essential, will sustain a person only so long. Without acknowledgment, by peers or supervisors, that person may eventually lose interest and their performance will suffer a decline, which adversely affects the mission. This should tell you, that ACKNOWLEDGMENT is a READINESS issue, and

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should be treated as such.

Please constantly look for ways and occasions to acknowledge your colleagues in your offices. Tell their employers, tell their families, and tell THEM how much you appreciate them. When one of your unit members has performed an assignment that has kept the member away from home or civilian employment for a while or has been promoted or placed in a leadership position, a letter to that member's family or civilian employer to share their pride in this accomplishment or the added benefit to the civilian employer is not only a very nice thing to do, but also will boost the member's retention in the unit. It's not only an "if you do this, then look at all the good things that will follow" thing; it's just the way people who associate with each other should act toward one another. In short, the "Golden Rule."

Commanders and Supervisors: Do you know when the last federal decoration was received by each of the people you command or supervise? If you don't, you should.

Authority to award a decoration and "how to do it" are no longer barriers. The only two possible remaining reasons preventing this are: (1) "I just don't have the time" and (2) "the proposed recipient doesn't deserve it."

"No time." No one disputes that "people are our most important resource" and that "we have to take care of our people." We've all heard that often enough. But what does it really mean? It doesn't just mean we have to get them ready for deployment or other crises and prepare their families for their time away. It also means that as part of the everyday military environment we must acknowledge people every chance we can. This is not instituting a new program, but rather adopting a way of life. Federal decorations are just a part of it.

If you say you don't have the time, you're saying you have too many "other things" to do in connection with your military life such as briefings, meetings, conferences, training, etc. If people really are our most valuable resources and everyone needs ongoing acknowledgment to nourish the incentive to sustain and improve the quality of their performance, should those of you who have "no time" to acknowledge them, reassess your priorities? Let some of those "other things" that can wait, wait until you process that decoration package or acknowledge your people in some way. The point is you MUST make time to acknowledge your people as part of your everyday military life. "I have no time" is not an acceptable excuse. Acknowledgment has, for too long, in too many sectors, been thought of as an "extra" that you do if and when you have time. Your office is likely among the busiest in the unit. There's always something to do; and often you try to cram 10 hours of work into an eight-hour duty day that is already shortened by meetings, conferences, and classes. Nevertheless, you MUST make the time to express "thank you" or "good job."

"They're not deserving." If you as a supervisor or commander don't think one of your office or unit members deserves a federal decoration, consider whether that evaluation is more a reflection of your own leadership skills than of any deficiency of the considered recipient. If your people are not performing well enough to merit favorable consideration for a federal decoration every three years, you're either not motivating them enough to improve the quality of their performance to warrant that decoration or you've got the wrong person in that position. In either case, you should do something about it. If you are properly leading the right people in your unit or office, it is almost axiomatic that they should be favorably considered for a decoration every three years. If you recommend someone for promotion for their future potential, you have done them a disservice if during the time between promotions they have not received (a) federal decoration(s). So, awards and decorations, in addition to being a Readiness issue, is also a LEADERSHIP issue.

Remember supervisors, your commanders usually cannot know about the day-to-day performance of your people. You do. You have to take charge and let the commander know by preparing these packages.

It is a tenet of good leadership that the more deserved credit and expressions of gratitude that are given to those you command and supervise, the more favorably it reflects on your abilities as a leader.

Please don't wait three years to say "thank you" or "well done" or otherwise acknowledge your people. If you regularly do it, everybody wins, and you'll just feel better for saying or doing something nice for someone else.

Finally, from time to time when a person leaves a position or retires, that person wants to avoid any kind of fanfare on that occasion. With all good intentions, that person wants to avoid imposing a "burden" on others to say "goodbye" or show their appreciation and affection for all the good the person has done for them, the unit and the mission. As well motivated as that seems to be, it is a wrong, and even a somewhat selfish attitude for two reasons.

First, at the culmination of an assignment or career, those people with whom the person has associated have a basic human need to express their gratitude

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An Acknowledgment to Air Force JAGs from the President's Lawyer

The Honorable Alberto R. Gonzales

The following speech was given by The Honorable Alberto R. Gonzales, Counsel to the President, to Air Force judge advocates at the 13th Annual Air Force Judge Advocate General Dining-In in Washington, D.C. on 24 April 2002.

Thank you ladies and gentlemen. I must confess a secret delight, as a former airman first class, in being asked to address a room full of Air Force officers.

Consistent with the practice of previous administrations, President Bush came into office with a mixture of experienced Washington hands and a group of relatively unknown newcomers – most of us from Texas. Even after a year in office many of the President's advisors remain relatively unknown – though there is a natural curiosity about the people helping the man who is our President.

My name ID as a Texas Supreme Court Justice never rose above one and a half percent in Texas – which is not very good for someone holding statewide elective office.

Because I am today only a staffer, my anonymity continues – but because of who I staff, many groups such as this one have become a lot more interested in both my personal and legal opinions on various issues.

I have been described in a variety of ways by the national media – I have been called the loyalist who helped then Governor Bush avoid jury duty, thus postponing the disclosure of certain information about my client's past... and I am the person single-handedly orchestrating the most comprehensive and coordinated attempt to keep executive branch documents secret from the Congress and American people.

In a story a few weeks ago I was described as follows: "Gonzales is not easy to penetrate. In scripted speeches he has delivered recently, its clear that despite his higher profile, the hard-to-read Al Gonzales lives on: the slight smile, the non-committal nod, the one sentence answers."

So who is the Counsel to the President? Well, my wife Rebecca will quickly confirm that there is no great mystery to who I am or what I do. Let me give you some insight by telling you a story.

When I was 12, I got a job carrying and selling trays of soft drinks at Rice University football games in Houston.

I usually stopped selling beverages by the end of the third quarter because by then most people had had enough to drink and, if you have followed Rice football in recent years, you know that by the middle of the second half the outcome of the game was often no longer in doubt and fans began to go home. So I would find an empty seat, sit and watch the rest of the game, eating a bag of popcorn and drinking a coke.

And at the end of the games, I would often climb to the top of the upper deck of that massive 75,000 seat stadium and watch the Rice students stroll leisurely back to their dorms. Rice has a beautiful tree lined campus. And I would daydream about being a student there. And I would wonder: How did it feel to be in college?

I grew up in a large family in a blue-collar neighborhood in Houston's north side. Like some of you, our family was poor.

With little encouragement to go to college, when I graduated from high school I enlisted in the Air Force hoping to see the world and learn a trade. At the age of 18 I found myself stationed along with 100 other men, at Fort Yukon Air Station, Alaska, a remote radar site located north of the Arctic Circle. Our closest neighbors were a mile away, a village of 600 native Alaskans. You could only reach Fort Yukon during the winter by airplane... you could also get there by boat up the Fort Yukon River in the summers...after the snow had melted.

As you might imagine, the winters were pretty harsh. Some nights the temperature dropped to 60 degrees below zero. It was about this time that college started looking pretty good to this Texan, and it was here that God's strong hand intervened. Two Air Force Academy graduates stationed at Fort Yukon inspired me to apply to the Air Force Academy.

Admission to our service academies is pretty demanding as you know, because in addition to having excellent high school grades, you have to be physically fit and in very good health. But satisfying the entrance requirements is even more daunting for someone stationed within the Arctic Circle.

I was flown 60 miles from Fort Yukon to an old gymnasium on an Army base in Fairbanks to take the physical fitness test required for admission. I still remember being alone in the gym with a grader carefully

noting the number of pull ups and push ups I could do in the allotted time. The Air Force flew in a flight surgeon from Elmendorf Air Force Base in Anchorage to administer my medical examination.

I hadn't taken the ACT or SAT in high school – because I wasn't planning on going to college. So the Air Force had the ACT flown to Fort Yukon. I sat alone in a small room taking the test under the watchful eyes of one of our officers. All of this effort paid off when I was admitted to the 1979 class...the last all male class at the Air Force Academy. And so I left the frozen tundra of Alaska to pursue a new dream of becoming a fighter pilot.

During my first year in Colorado Springs I did well in my studies, but I quickly discovered that I enjoyed my government and political science discussions more than my military history and physics courses; and I soon began to wonder if perhaps I wasn't better suited for the law... a profession that did not require 20/20 vision and that would give me the opportunity to help people...much as I had been helped.

So during my sophomore year I began to debate whether I should leave and pursue a career in law or stay and continue my studies toward a military career. Now given all of the effort to get into the Academy, as you might imagine, I agonized over the decision.

Ultimately, I simply put it in God's hands by applying for a transfer to the school I dreamed about attending as a boy. If accepted at Rice, I would transfer and become a lawyer, if not, I would remain at the Academy and hopefully become a fighter pilot. Well, Rice took me in 1977, thus ending the journey that began as a daydream during those Saturday afternoon football games.

The summer following my fourth class year (which is the freshman year for you civilians out there) I participated in the Academy's summer gliding program. Some of my fondest memories are of those afternoon flights, riding the thermals into a blinding bright sun and blue skies, with the mountains in the distance, flying in joyful silence except for the sound of my pounding heart and the rush of the wind over the wings. I loved that experience.

After I left the Academy I wondered for years if that was the right decision – still today I imagine where I might be if I had stayed and graduated.

But I stepped off that path many years ago and set off on a journey in a different direction. That journey has lead me to the White House, where I begin each day with a commute from my home in Virginia along the George Washington Parkway - which as some of you may know - is a beautiful scenic wooded drive along the Potomac River. My days in the West Wing begin before dawn. So when I cross the Roosevelt Bridge, I always see our nation's capital and the Washington monument standing proudly on the horizon, illuminated by light.

That picture is a daily reminder of the unique opportunity I have been given by our President.

Like most of you, I can chronicle my life by White House events I have watched unfold on television. But seeing the White House on television or even touring it on a Saturday afternoon is so different from walking into the Oval Office to brief the most powerful person in the world. It is an indescribable experience – every time I set foot into that office.

My job as the President's lawyer is very different than being a judge. I no longer have uninterrupted blocks of time to simply think about the law. This President – this Administration – indeed all you serving our country in the Armed Forces — have been commissioned to discharge a special responsibility in a uniquely significant moment in the history of our country.

"This President – this Administration – indeed all you serving our country in the Armed Forces — have been commissioned to discharge a special responsibility in a uniquely significant moment in the history of our country."

One morning last fall I flew from Dulles Airport to Norfolk, Virginia to speak at an ethics conference. Like all of you I had no idea of the extraordinary events that were about to unfold on this day - September 11th.

I was scheduled to speak at 9:00, and I arrived at the hotel in Norfolk around 8:45.

As I made my way up to the ballroom, my assistant called on my cell phone to tell me to get to a television, a plane had crashed into one of the World Trade Center Towers.

I really did not know what to think as I watched those first pictures. Like some of you, I found it hard to believe that this kind of accident could happen.

While I was not sure of the cause of this tragedy, I was sure that I should get back to Washington as quickly as possible. Immediately following my shortened remarks, I was again hustled to a television set. By this time a second plane had hit the other tower, confirming our worst fears, and my office was already working on getting me back to D.C. on the earliest

possible flight.

During the next hour, before most cell phone communication in and out of Washington was shut down, I stayed on the phone with my office trying to collect the most current information from my assistant and from my deputy who had been moved into the Situation Room in the basement of the West Wing. I was told the President was safe in Florida, but beyond that details were sketchy.

When I arrived at the gate at the Norfolk airport I was advised that the airport had been closed by the FAA. By now the television reports were confirming that the Pentagon had been hit.

Fortunately, I found a USO office at the airport and a navy officer graciously offered to drive me to Norfolk Naval Station. There was a lot of activity when we arrived. The base was transitioning to the highest state of military alert.

When we entered the base headquarters we received erroneous reports that the State Department had now been hit and there were still unconfirmed reports of other hijacked aircraft.

Because I am an Assistant to the President and a civilian commissioned officer, the military recognized the need to assist me and offered to fly me back to Washington in a Navy helicopter.

One of the senior military officers asked me where exactly did I want to go - and I said as close as you can get me to the White House. He said they would arrange to land me on the South Lawn. Immediately, I said no, nobody but the President lands on the South Lawn.

For over an hour, the Navy worked to obtain flight clearance. The FAA had shut down all air travel. As we all know now, Air Force jets had been given orders to shoot down aircraft that approached Washington without authorization.

Finally at half past noon we loaded up in the military helicopter - but we sat on the tarmac for an additional 30 minutes - the pilot told me later that there were still concerns about the safety of our trip. Eventually we got permission to leave and headed for Andrews Air Force Base.

We arrived about 2:30 and the Air Force provided me a van to the White House - I remember driving by the Capitol and seeing all the barricaded streets guarded by policemen armed with rifles.

Upon arrival I went immediately to a secure location where the Vice President, most of the Senior staff, and other senior administration officials were working.

I had been to this bunker several times in the past for classified briefings - but that day it was surrounded by heavily armed Secret Service agents with machine guns.

I sat down with the Counsel to the Vice President for a status report. The situation appeared stable, Congressional leaders and Cabinet Secretaries in the line of Presidential succession had been located and moved to secure locations, and, except for essential personnel, the White House staff had either been relocated to various buildings in Washington or told to go home - but the President still was not home. I recall the room was very calm. Some people were on the phone, there was quiet conversation, others were reading briefings or simply watching the television reports. Most of the activity, of course, centered on the Vice President.

Later in the afternoon we had a secure video call with the President and he announced that he would return to Washington - where he felt he should be - even though there were still concerns about his safe return.

The rest of the day is a blur. I remember at some point in the early evening running into Karen Hughes, one of the President's advisors, and walking with her to the Oval Office because the President would be arriving soon.

She and I waited outside for Marine One, as the Oval Office was being prepared for an address to the nation that night. When the President arrived, we immediately went back into his study behind the Oval and worked on his remarks to the nation- Karen and I, Ari Fleischer, Andy Card, Condi Rice and the President. Everybody was serious and we began the work of assessing what had happened and deciding the appropriate response.

So much changed that day. Friends and family members were lost, and our way of life was transformed. Some in the media claim that the President changed. I could not disagree more.

Clearly he was affected by that day's events, as we all were. But people who know the President well and who have worked with him in other times of crisis know that he was not transformed into some new person.

The public revelation in the past seven months of a wise and courageous leader merely confirms what we witness privately in the White House everyday.

Not surprisingly my responsibilities as the President's lawyer have transitioned as a result of the September 11 attacks. I am still involved in the appointment of federal judges and in defending the powers and privileges of the Presidency. But, more of my days are now consumed with the requirements of the Geneva Convention, the treatment of detainees at Guantanamo and the use of military commissions – indeed many of the same issues that some of you have to now address.

During the war on terrorism the President has

made some decisions that, while controversial in some circles, were absolutely necessary in my judgment. Would anyone seriously dispute that the President's first responsibility is to protect American lives? The President, as the head of the executive branch and the Commander in Chief of our armed forces — and the only political leader directly accountable to all Americans — has a unique personal responsibility to ensure our safety and security.

Criticizing some of the actions taken by the President is easy for people who do not bear that personal responsibility, who do not have to imagine having to account to the public for having failed to prevent another horrific attack because of a concern for appearances or international criticism or showcasing our justice system for people whose sworn goal is to destroy it. Respectfully, no individual member of Congress, no member of the media, nor any legal expert is or can be personally responsible for the outcome of this war in the way the President is.

In those first weeks and months after September 11th, the National Security Council met every morning with the President, Monday through Friday, and we met every evening without him to discuss the events of that day and to prepare for the day to follow. After the war in Afghanistan began, we received weekly briefings from General Tommy Franks.

For months, we conducted National Security Council meetings every Saturday morning – often with the President participating from Camp David via video teleconferencing. In my previous legal positions, I never had an occasion to deal with the problems that arise during a time of armed conflict. So while this has been a very difficult time for our country; involving deadly serious matters, it has been interesting for me to work with lawyers at Justice, State, Defense, and the Armed Services on a variety of fascinating legal issues.

Most gratifying, however, has been the opportunity to sit in on discussions in the Situation Room between the President, Vice President Cheney, Secretary Powell, Secretary Rumsfeld, CIA Director Tenet, Chairman of the Joints Chiefs, General Myers, National Security Advisor Condi Rice and the Chief of Staff Andy Card, about the execution of the war. Admittedly, I am not an objective observer, but it is hard for me to imagine a better group to lead this country and I hope Americans are grateful to have these talented people working on our behalf.

I close with a simple declaration that being the lawyer for this President is the best legal job in America. I have by most estimations the most important client in the world, I work with a talented stable of lawyers who are smart, loyal and tough, and the quality of work is unparalleled - what we do more than satisfies the hopes and dreams I had as a young man contemplating a career in the law because I wanted a job where I could make a difference.

"The President is proud of you... more importantly, the nation is grateful for your sacrifices."

But this is clearly the most challenging thing I have ever done - so much rides on the advice I and other senior advisors give to the President of the United States. The issues we have to resolve are often extremely complicated and the way we deal with them has enormous domestic and international consequences.

Political opponents scrutinize every word and action; and the media is always there to publicize every mistake and disagreement - sometimes even when there are no mistakes or disagreements.

And then there is the toll on our families. They suffer the most. Government pay is very modest – as I am sure some of you know better than me - and I am not home nearly enough for Rebecca and our two young sons. As I said earlier, I am at the office at dawn and I usually leave after dark, and since September 11th a weekend off is very rare. Rebecca tells me that the term "White House Widow" is a fitting description of her feelings sometimes. But we do this because of our affection and respect for our President.

It is hard not to like George W. Bush. The public side of him - his strength, his faith, his discipline - too often masks the private side - a person with a wonderful sense of humor and genuine sensitivity.

Of course working in the West Wing is not without its privileges. Rebecca and I were guests of the President at his first State Dinner with Mexican President Vicente Fox in early September. And we get to screen movies from time to time in the White House theater and play horseshoes by the pool on the White House grounds.

And I was part of the President's foursome during his first golf outing last July. For you golfers, next time you take your warm up swings on the first tee, just imagine standing there with the President of the United States and a few hundred of your closest friends in the media ... now that's pressure. Of course, the embar-

rassment of a slice or pull hook captured forever on tape for the world to see is a small inconvenience for the privilege of weekend at Camp David or a ride aboard Air Force One.

The pace at the White House is often intense. The relentless pressure is reflected in the average tenure of an Assistant to the President, which as we are reminded often by Andy Card is 18-24 months. President Clinton had six different Counsels during his two terms.

I do not know how long the President will have me serve ... I do know that every time I receive a visitor-awestruck from walking into the West Wing — or whenever I watch my two young sons play with the President's dogs on the South Lawn, I am reminded of the special privilege of serving in the White House.

Those of us who work in the White House understand that our time is temporary and I know the institution of the Presidency did just fine before the arrival of Al Gonzales, and it will survive long after my tenure as Counsel. But while I'm at the White House, I pledge my best effort to serve you and to serve this President. And as this group knows better than most, that is what public service is all about.

Seven months ago we were reminded that the price of freedom is very high. Those costs have historically been paid primarily by men and women in our military and I am afraid that you will continue to bear the primary responsibility for our freedom in the future. I talked earlier about the importance of what I do ... in many ways my efforts pale in comparison to the work that you do – the pressures of dealing with an irate Senator over a judicial nominee seems so insignificant to the sadness of a father leaving a family for a six month tour of duty in a foreign country. The President is proud of you ... more importantly, the nation is grateful for your sacrifices.

Thank you for your work in securing our freedom and thank you again for asking me to speak.

Judge Alberto R. Gonzales was appointed Counsel to the President in January 2001. Prior to joining the White House, Judge Gonzales was a justice on the Texas Supreme Court. He also served Texas as the 100th Secretary of state and a General Counsel to Government George W. Bush.

Judge Gonzales attended the U.S. Air Force Academy prior to transferring to Rice University where he earned a B.A. degree. He then earned his Juris Doctor degree from Harvard Law School.

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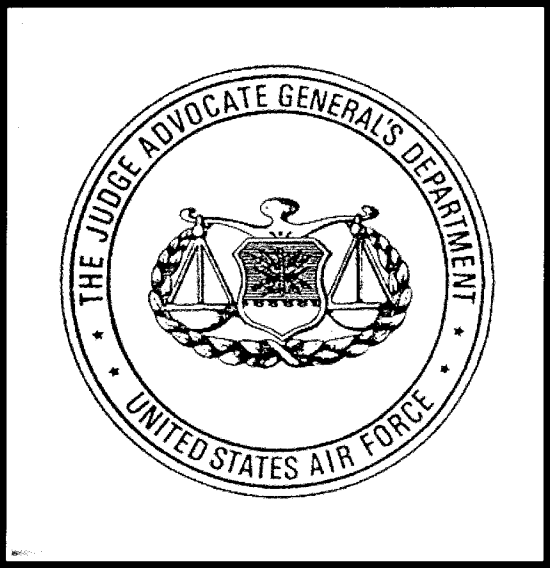
and appreciation. Far from being a "burden," people need the catharsis of saying "good-bye" and "thank you" in a manner, they, and not the person leaving, see fit. It is a "life-cycle" event as much for them as for the person leaving, and they need to celebrate it. Call it "emotional cleansing." Don't deprive them of it.

Second, expressions of appreciation on these occasions send a powerful morale message to the rest of the unit. Everyone inevitably leaves the unit or organization at some time in the future. When people see how the current person leaving is treated, it will hearten them to know that years of dedicated service may someday merit such a celebration for them and their families. So, if you come to the time when you leave your assignment or retire, let those who will honor you and your contributions do so, as they deem appropriate. You'll just have to sit there and "take" all those nice things they will say about you. Take comfort though, there are worse things you could endure.

In conclusion, take the time to do something nice for someone else every chance you can, and when your time comes, let people do something nice for you!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