

Fall 2007

Volume 34, Number 3

# The Reporter

The Judge Advocate General's Corps

## Military Justice in the AOR



Protecting Those Protecting America

# The Reporter

Fall 2007

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## On the Cover:



Balad's first Air Force Court-Martial took place 15 December 2006 at the LSA Anaconda Army Legal Office Courtroom.

Col Dawn Eflein is flanked by (clockwise from left) Captain Daniel J. Watson (Trial Counsel, 332 AEW/JA, Balad, Iraq ), TSgt Collis Stanley (Paralegal, 332 AEW/JA), Captain Jason S. Robertson (Area Defense Counsel, Al Udeid, Qatar), SrA Mary Robinson (Bailiff), Captain Joshua Yanov (Staff Judge Advocate, 332 AEW/JA) and TSgt Katrina Martin (Enlisted Court Reporter, Ramstein AB, Germany).

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# The Reporter

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*The Reporter* is published quarterly by The Judge Advocate General's School for the Office of the Judge Advocate General, United States Air Force. Contributions from all readers are invited. Items are welcome on any area of the law, legal practice or procedure that would be of interest to members of The Judge Advocate General's Corps. Items or inquiries should be directed to The Judge Advocate General's School, AFLOA/AFJAGS (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802).

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## Message from the Commandant

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Colonel David C. Wesley

This edition of *The Reporter* focuses on the deployment of JAGs and paralegals in support of the Long War. Capt Jason Robertson, a member of the inaugural class of Instructor-Litigators at the School, has just returned from an exciting tour as the first permanently assigned ADC to serve in the Gulf. His account of that job makes fascinating reading for garrisoned and deployed trial advocates alike.

We also provide a host of tips for those with upcoming deployments and welcome your ideas on other things we can share with those about to take on this important challenge. You can forward your ideas to our Editor, Lt Col Brad Mitchell, here at the School. Colonel Jeff Rockwell, SJA to Air Force Special Operations Command, provides an excellent primer on the sovereignty issues that are so fundamental to our efforts to build nations.

You'll also find an excellent book review of Company K in this edition, authored by Maj Bobby Hall. We ask that all members of the Corps (particularly paralegal and civilian members) consider reviewing a book and forwarding it to us for use in future editions of *The Reporter*!

As I write these words, our faculty and staff are hard at work producing products to share the remarkable KEYSTONE week in Atlanta with members of the Corps who were not able to attend the conference. In the coming weeks, you can expect to see PowerPoint and video presentations from the all-star list of speakers appearing in the plenary and breakout sessions. We look forward to sharing those moments in a variety of appealing formats for your use as an individual member of the Corps, as part of an office training program, and even to share outside of the legal community.

I am also proud to update you on the last edition's distance learning article. Since that time, we have added three new Division Chief courses. The new courses contain over twenty lessons to help the JAG Corps 21 transformation of Field Support Centers and wing legal office personnel seamlessly providing counsel to commanders on contract law, environmental law, and labor law counsel.

No matter how you use these materials, please give us your feedback on ways to make them better...thanks!

*David C. Wesley*

# AN ADC IN THE AOR: Defending Those Defending America

by Captain Jason S. Robertson,\* USAF

## I. Introduction

By mid-2006, the demand for defense services in Southwest Asia surged to unprecedented levels. Nonjudicial punishment proceedings initiated in the Middle East surged 42% from July 2005 to July 2006. Courts-martial doubled in the same period. The Area Defense Counsel's office at Ramstein Air Base, Germany, was tasked with providing defense services to a market that constituted 35% of all nonjudicial punishment actions in the European Region. Demand justified the need for a permanent defense presence in Southwest Asia.

Commanders requested an in-theater defense counsel for their Airmen. When the position was created in August 2006, I volunteered and was selected. I deployed on a 365-day tour to open the Area Defense Counsel office at Al Udeid Air Base, Qatar, and to augment defense

services in the European Region. The Al Udeid ADC office was charged with providing first-line defense services to the roughly 20,000 Air Force members deployed to Southwest Asia in support of Operation Iraqi Freedom and Operation Enduring Freedom.

Three seasoned paralegals deployed on successive 120-day tours to serve as the other half of the defense team at Al Udeid: TSgt Stacy Powell, SSgt Adam Smith, and SSgt Marisa Gibson. Prior service as a defense paralegal was a factor in their selection. TSgt Powell deployed from her assignment as the



*Capt Robertson, Lt Col Brown, and Mr. Gittins at Kabul, Afghanistan*

defense paralegal at Eglin Air Force Base, Florida. SSgt Smith and SSgt Gibson served as defense paralegals earlier in their careers. Each 120-day rotation averaged 400 clients, 150 Article 15 actions, and 3-4 courts-martial.

Central Air Forces ("CENTAF") commander, Lieutenant General Gary T. North, is the general court-martial convening authority for all Air Force forces in Southwest Asia. CENTAF is located at Shaw AFB, South Carolina. Special courts-martial are convened by the installation commanders at the 379th Air Expeditionary

Wing ("AEW"), Al Udeid Air Base, Qatar; the 332d AEW, Balad Air Base, Iraq; the 376th AEW, Ali Al Salem Air Base, Kuwait; the 380th AEW, Al Dhafra Air Base, United Arab Emirates; the 386th AEW, Manas Air Base, Kyrgyzstan; and, the 455th AEW, Bagram Air Field, Afghanistan. Forward operating bases are attached to the SPCMs for military

justice adjudication of nonjudicial punishment or other more significant actions.

## II. Operational for Defense Services

The first challenge to build a presence in the AOR was to create an operational office suitable for defense services. Lieutenant Colonel Michael Welsh, the Staff Judge Advocate for the 379th AEW, and MSgt Teri Herrera, the Law Office Manager for the 379th AEW, initiated a building conversion, furniture purchase, and an acquisition schedule long before I arrived.

I was tasked with receipt and setup. The building was empty and in the final stages of the conversion when I arrived. I coordinated with the Communications Squadron to set up basics like telephone lines, a fax line, and networking

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\* Captain Jason Robertson is an Instructor/Litigator at The Judge Advocate General's School, Maxwell Air Force Base, Alabama.

lines. With a great deal of help from Lt Col Welsh's legal office, the new ADC office was operational one week after I arrived.

The Judge Advocate General, Major General Jack Rives, USAF, and Colonel Lindsey Graham, USAFR, visited Al Udeid shortly afterwards and were able to tour the first ADC office in the AOR.

### III. Getting the Word Out

Once operational we needed to let Airmen know where we were. We hosted an Open House for local commanders and first sergeants, developed a web page to reach people on the net, and published an article in the base paper. I also visited "frequent flyer" commanders with heavy justice loads. The main source of information for all recent arrivals at Al Udeid is the Right Start briefing. New arrivals are scheduled to receive Right Start 7-14 days after arrival. I briefed Right Start every week. The reception was warm wherever we went. Commanders and First Sergeants appreciated that representation would be local for their Airmen. Several Airmen on second or third tours approached me after Right Start and expressed relief that an Area Defense Counsel office was now in the Middle East.

Our efforts paid off. The phones started to ring, e-mail requests started to flow in, and the appointment calendar filled. It was time to implement a more detailed case management scheme to deal with the client workload.

### IV. Managing the Workflow

Several factors influenced how we operated. Only about twenty percent of our clients could physically come to our office at Al Udeid. The rest were spread over a large geographic region and in a variety of different types of units. Most of our

workload was handled telephonically and via e-mail. In the case of courts-martial, I used military airlift to travel to the location of the various Article 32 hearings or courts-martial. The region we covered spread over three time zones. Even though we maintained office hours Monday through Saturday, we were ready "24/7". Clients could reach us at any time by phone or e-mail.

Marshalling data was key to our survival. TSgt Powell called first sergeants and traded our ADC office posters for command rosters. She set the precedent by gathering rosters at the start of every rotation. While commanders deployed on 365-day tours, their first sergeants were usually rotational. Similarly, Lt Col Welsh was the only Staff Judge Advocate deployed on a 365-day tour so our counterparts at the legal offices rotated on 120-day cycles. Maintaining updated rosters was crucial to our ability to keep the community informed with updates on our office.

### V. Long Distance Clients

Since roughly eighty percent of the clients we represented from Al Udeid were handled via telephone, providing proper defense services across time zones and over a wide span of

geography presented unique challenges. Was the client able to call from a private location where confidentiality could be maintained? How would we handle potentially suicidal clients? How would we engage commanders and first sergeants on behalf of Airmen who would effectively only serve in the unit for 120 days?

Our clients were primarily rotational.

Our workload surged at the end of every rotation. What that translated to was that our clients were placed on administrative hold and



*Lt Col Adam Oler (Military Judge) and TSgt Marcel Brown (Enlisted Court Reporter) outside Air Force Thunder Hospital at Balad AB, Iraq*

forced to remain until the action was complete. How would we effectively represent clients and explain to them the need to defend themselves versus waiving all of their rights, get on the rotator, and go back home? We faced these questions daily. Our solution was to make ourselves available at all times and to the extent possible simulate a real office experience.

Our consultations involved using telephone and e-mail in concert. I generated form e-mails for multiple topics and during an appointment I would send the client a topic e-mail with one of our pamphlets attached to simulate handing the client information in a face-to-face interview. What is sacrificed in face-to-face contact can be compensated with more frequent contact—our office communicated with the average client two to three times for every issue that might be resolved in one face-to-face meeting.

## **VI. An Air Force Education**

As an ADC at Keesler, I had to learn the training environment to communicate with Airmen and commanders effectively. Similarly, at Al Udeid, knowing the mission was essential to our mission success. Studying airframes, squadron missions, operational requirements, command chains, and knowing the politics of the Middle East informed me in ways that ultimately benefited my clients because I gained credibility.

## **VII. Deployment**

Living away from loved ones and learning the routine of deployed life is a challenge by itself. I sought advice from those that had done it before. I turned to Lieutenant Colonel Adam Oler, then a military judge in the European Region, who provided invaluable advice in the how-things-work category of deployment. He spoke from experience and explained the CENTAF makeup and the history of military justice in Southwest Asia.

Other experienced members provided many tips on making the most of any deployment. Preparation, things to pack -- including a great attitude -- and similar advice ended up being very helpful in this deployment.

## **VIII. Concluding Thoughts**

The new ADC position at Al Udeid fills a vital role. It also serves as a visible commitment to military justice in the AOR.

The deployed environment presented some challenges. As we evolve through JAG Corps 21, though, we will all face challenges and become stronger advocates by applying our skills and creativity.

Any deployment demands great skill, along with the creativity to work in a new environment. I listened to people with different deployment experiences, even those that were very different from the experience I expected. Much of their advice carried over into my own experience. Even if it didn't directly apply, it gave me a greater context to understand deployed clients and commanders.

I also applied the lessons I learned as an ADC at Keesler. Communication, managing the flow of clients, understanding the mission, and other lessons are critical to serving anywhere as an Area Defense Counsel.

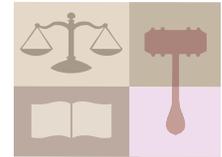
Finally, teamwork is crucial. It is crucial anywhere, but the demands of deployment highlight the importance of teamwork. Everyone has great opportunities to expand their abilities, and to do so in a challenging environment far away from traditional support structures.

The great news is that we can continually build our skills in all of these areas wherever we are, so we are ready to answer the call! If you are ready for an incredible challenge and the rewards of defending those who are defending us, consider an assignment as an Area Defense Counsel at Al Udeid!

### **For More Information . . .**

Capt Robertson has offered to speak with people interested in working in the Al Udeid Area Defense Counsel office, by phone, email, or in person at The Judge Advocate General's School.

# Prospective Professional Responsibility: Spotlight on Spoliation



*(The following scenario is based on a case arising from another military branch)*

In 1997, the Air Force enters into a requirements contract with vendor United Kennel Supply Inc. (UKS) to supply all Security Forces units at Air Force installations across the Southwest. Things don't work out well for UKS, though. In 2003, UKS sues the Air Force for breach of contract. Among other things, UKS claims that the Air Force repeatedly purchased items from other vendors in violation of the provisions of the requirements contract.

In early 2004, Air Force attorney Joe Pigro begins efforts to gather and preserve evidence.

Mr. Pigro pulls out his listing of base contracting officers and sends a mass email to all the bases he can remember in the Southwest. He asks that the bases preserve "all records and correspondence with respect to UKS." He doesn't check his email distribution against a list of installations covered by the contract, nor does he follow up with bases that did not respond. He forwards the documents he ultimately receives to the Department of Justice, saying that these were all the documents available. DOJ relays this information to the plaintiff.

In June 2005, after the plaintiff files a motion to compel production of evidence, Mr. Pigro enlists the help of a paralegal to seek additional documents. However, apart from asking the paralegal what the results of his search are, Mr. Pigro doesn't follow up. The paralegal tells him that "all documents have been produced or destroyed."

After Mr. Pigro forwards this information to DOJ some months later, the DOJ attorney assigned to represent the Air Force relays this information to the court at a discovery status conference in December 2005.

In 2006, UKS files a second motion to compel, noting that no Government Purchase Card records have been included in the discovery response. The court then orders affidavits from contracting officials at all installations covered by the contract and from all attorneys and paralegals involved in the discovery process. The contracting officials' affidavits reveal that many offices did not find out about the litigation until 2006 and did not know that GPC purchases were at issue. Many offices consequently destroyed relevant documents through routine record disposition procedures following the 2005 status conference.

Ultimately, the court orders spoliation sanctions, depriving the Air Force of the ability to rebut plaintiff's assertions about the significance of missing records. UKS eventually prevails in its claim and settles for a substantial sum.

## **A Very Brief Spoliation Primer**

Black's Law Dictionary defines spoliation as "the intentional destruction, mutilation, alteration, or concealment of evidence, usually a document", stating generally "if proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible."

Rule 37 of the Federal Rules of Civil Procedure adds to this adverse inference rule, allowing a court to strike the spoliator's claims and even render a default judgment against the offender -- in addition to holding him in contempt and awarding attorney's fees caused by the spoliation.

## Key Professional Responsibility Rules Involved in this Issue:

### Air Force Rules of Professional Conduct

#### Rule 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client

#### Rule 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

#### Rule 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not: [\* \* \*]

(d) in pretrial procedure, ... fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party ....

### Discussion & Take-Away Learning Points

Although Mr. Pigro did not act in bad faith in the UKS litigation, his lack of diligence cost the Air Force. More troubling for him on a personal level, though, Mr. Pigro's persistent apathy toward discovery obligations may result in professional discipline against him personally. Mr. Pigro did not violate Air Force Rule of Professional Conduct 3.3, "Candor toward the Tribunal," because he did not knowingly make a false statement to the court nor did he violate AFRPC 3.4(a) because he did not unlawfully destroy evidence. Nonetheless, Mr. Pigro appears to have violated AFRPC 1.3, 3.2 and 3.4(d) by being chronically negligent over the course of two years of litigation. As the court noted in its decision imposing spoliation sanctions on the government, "[a]side perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence."

Because the Air Force operates from numerous locations with agents and documents scattered across the globe, complying with discovery obligations often takes adept document management skills and a good working relationship with records custodians. In this scenario, trust without verification compounded the problem. When coordinating evidence preservation and collection from multiple agents and locations, tracking and follow-up are key—not just for the Air Force but for the individual attorney as well. And when making representations to a court about document searches, an attorney must be prepared to describe the efforts taken to identify relevant electronic and paper files and to preserve evidence at all relevant locations.

The case upon which this scenario is based can be found at *United Med. Supply Co. v. United States*, No. 03-289C, 77 Fed. Cl. 257; 2007 U.S. Claims LEXIS 207 (June 27, 2007)

Questions about this scenario or any other issue relating to the Rules of Professional Conduct should be directed to the Professional Responsibility Division, AF/JAU, [afjau.workflow@pentagon.af.mil](mailto:afjau.workflow@pentagon.af.mil) or DSN 426-9029, COMM (703) 696-9029.

### Professional Responsibility CLE Credit

The Judge Advocate General's School offers two different one-hour professional responsibility DVDs. The DVDs were created with AF/JAU to highlight professional responsibility issues in the Air Force. The DVDs can earn viewers self-study CLE credit in many states.

The DVDs are managed by the School's CLE Director, Mr. Steve Stevens at [steve.stevens@maxwell.af.mil](mailto:steve.stevens@maxwell.af.mil) or DSN 493-2802, COMM (334) 953-2802.

# PROOF ANALYSIS: Win Your Case, Not Just Your Case-In-Chief

by Colonel Charles W. Williamson III,\* USAF

## I. Introduction

*“T.C. is charging down the field in great form! What speed – what grace! Looks like he’s on his way to another touchdown! Whoa, did you see that? D.C. just slammed into him from the side! The ball is loose – it’s a fumble! D.C. scooped it up and is running back down the field! Looking back, T.C. really should have seen that coming.”*<sup>1</sup>

If you are trial counsel, not seeing a good defense coming is the one thing you want to avoid; if you are defense counsel, a good defense is exactly what you are looking for. Unfortunately, traditional teaching on proof analysis will not get you there.

Traditional guidance says that for every case counsel should “[s]tart by conducting a proof analysis. The proof analysis will identify the elements that must be proved, the evidence to prove each element, the theory of admissibility, and the foundational requirements.”<sup>2</sup> For trial counsel, this will help you win your case-in-chief, but you will need more if you want to win your case because you need to account for all the defense can throw at you. For defense counsel, this approach will help you identify objections to keep government evidence out, but you will need to do more to account for all the other tools you can use to create reasonable doubt.

This article will show how a good proof analysis helps both trial and defense counsel

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\* Colonel Charles W. “Charlie” Williamson III is the Staff Judge Advocate for Air Force Intelligence, Surveillance, and Reconnaissance Agency. He has been a base-level staff judge advocate two times and has served on a joint task force.

<sup>1</sup> Justice is not a game and the goal of a trial counsel is to seek justice rather than to win cases. Standard 3-1.1, *The Function of the Prosecutor*, Air Force Standards for Criminal Justice (15 Oct 02). [hereinafter AFSCJ].

<sup>2</sup> Faculty, The Judge Advocate General’s School, United States Army, *The Art of Trial Advocacy: First Steps, Planning and Preparation*, Army Lawyer, Sept. 2000, at 41.

prepare a case using a structured, ethics-centered approach. This logical alignment of the evidence supporting and refuting each element of the offense, eases teamwork, and engages paralegals.

## II. Advantages of a Strong Proof Analysis

### A. Sound Charging Decisions

Our ethics rules tell trial counsel that only charges which can be reasonably supported with admissible evidence should be brought.<sup>3</sup> A solid proof analysis helps trial counsel show where evidence exists and highlights the gaps so they can be efficiently closed. It will also help trial counsel advise the convening authority so she can fulfill her duty effectively. A convening authority may have formed an opinion about the proper outcome of a case based on the first impression she had from an investigator’s early briefing. The first version of a story is often more sensational and memorable than the final report. Commanders need to be caught up to the facts that finally emerge. A good proof analysis also reduces the chance the government will need to change the charges after referral.<sup>4</sup>

### B. Better Discovery

Good proof analysis helps with discovery obligations. Among other things, trial counsel are required to provide matters “which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused.”<sup>5</sup> A proof analysis helps highlight which items in the mass of evidence trial counsel will use so he can be doubly sure those items were provided to the defense. Likewise, trial counsel must give notice of witnesses.<sup>6</sup> Listing witnesses,

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<sup>3</sup> AFSCJ *supra* note 1, Standard 3-3.9. *Discretion in the Charging Decision*, Discussion.

<sup>4</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 603, *Changes to Charges and Specifications* (2005) [hereinafter MCM].

<sup>5</sup> See MCM, *supra* note 4, R.C.M. 701, *Discovery*.

<sup>6</sup> *Id.*

including witnesses who will provide document foundation testimony, will provide a double check for notice to defense.

### C. Better Article 32 Hearings

Doing a proof analysis before preferral helps counsel on both sides prepare for the hearing and aids defense counsel make a cogent decision on waiver.

### D. More Appropriate Guilty Pleas

For the government, a superior proof analysis can induce a guilty plea from the defense. Even though trial counsel is unlikely to show their proof analysis to defense counsel, discussions between counsel will inevitably indicate how prepared the government is. When I was his wing staff judge advocate, Capt Mike McCoy was the most prepared trial counsel I had ever seen. He was absolutely uncompromising in preparing his cases, so I always gave him the toughest and most interesting cases. He would become frustrated when he would repeatedly put extensive work into preparation, only to have the defense notify him on the eve of trial that they were pleading guilty. I had to convince him that it was his superior preparation that induced the plea, even for what had originally looked like a difficult case. A guilty plea is often good for the accused as well because it allows him to assert responsibility as part of his sentencing case.<sup>7</sup> However, a guilty plea should only be considered after defense counsel has analyzed the law and evidence for trial.<sup>8</sup> A structured proof analysis could have the added benefits of helping defense counsel educate his client on likely outcomes at trial and show that defense counsel has fulfilled his ethical responsibility.

### E. Focused Defense

For the defense, it may be possible to win by demonstrating the absence of evidence, inferences, and presumptions that would

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<sup>7</sup> U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK], Section VI, *Court Members (Sentencing Only)*, para 2–6–11, p. 102; see also para 8–3–35, p. 942.

<sup>8</sup> AFSCJ *supra* note 1, Standard 4-6.1, *Duty to Explore Disposition without Trial*.

reasonably tend to establish a single element. That absence is all that is required to win on the merits<sup>9</sup> or sustain a motion for a finding of not guilty.<sup>10</sup> This may be powerful information to use in pretrial discussions with the staff judge advocate.<sup>11</sup> If the case goes to trial, defense counsel may be able to hammer an element strongly enough that he could get the tactical advantages of requesting a trial before members and also get a chance to take the case out of the members' hands.

### F. Faster Interlocutory Government Appeals

Trial counsel generally must coordinate his motion with the numbered air force and major command legal offices, and is required to coordinate his motion with AFLOA/JAJG before filing<sup>12</sup> with the military judge, all within 72 hours of the judge's adverse evidentiary ruling.<sup>13</sup> This timeline would be extraordinarily difficult without a well-prepared proof analysis.

### G. Confident Counsel

Prepared counsel are confident and that confidence speaks volumes to the factfinder. Smooth presentation of evidence and argument also speed the trial and reduce the chance for error.

Proof analysis helps you put your case together, tear it apart, then put it back together. It is a living document you will not finish until trial is over. (It helps to be obsessive-compulsive. "*I love trial work. Knowing the other guy's case better than he knows it himself. Staying two steps ahead of him.*" Statement of a Direct Appointment Program Applicant.)

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<sup>9</sup> MCM, *supra* note 4, R.C.M. 918(c), *Findings*, and discussion.

<sup>10</sup> See MCM, *supra* note 4, R.C.M. 917(d), *Motion for a Finding of Not Guilty*.

<sup>11</sup> AFSCJ *supra* note 1, Standard 4-6.1, *Duty to Explore Disposition without Trial*.

<sup>12</sup> See AFI 51-201, Administration of Military Justice, para. 8.7.1.

<sup>13</sup> See MCM, *supra* note 4, UCMJ art. 62, *Appeals*, and R.C.M. 908(b)(1), *Appeal by the United States*.

### III. Preparing a Rock-Solid Proof Analysis

*“Know your enemy and know yourself and in a hundred battles you will not be defeated.”*

-- Sun Tzu

Different legal offices take different approaches, but typically the chief of military justice will be familiar with a case since he has been advising investigators. The chief of military justice will review a preliminary or final report of investigation and have a pretty good idea of the potential charges. Investigators will typically identify the charges they think the case could support. After discussing the case with the Staff Judge Advocate (SJA), the chief of military justice will turn the report of investigation over to trial counsel to prepare a proof analysis and potential charges.

Trial counsel will read the report and either he or a paralegal will draft potential charges. Some SJAs believe it is an absolute requirement to do the first proof analysis now rather than after referral so trial counsel can give the SJA, the preferring commander, and the convening authority a stronger idea of what charges are likely to be provable. If counsel is uncomfortable with a specification, a proof analysis will be much more persuasive than counsel’s gut reaction in convincing the SJA and commanders not to proceed.<sup>14</sup>

A recent article on death penalty case advocacy in *The Reporter* gave more detailed guidance:

All cases should have a *counsel useful* proof analysis. No matter the format, at a minimum a proof analysis must cover: the elements, the expected proof, the likely witnesses, probable defenses, potential evidentiary issues, foundation requirements for the evidence, and weaknesses in the case.<sup>15</sup>

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<sup>14</sup> But see MCM, *supra* note 4, RCM 701(a)(1)(A), which requires trial counsel to provide to defense counsel “[a]ny paper which accompanied the charges when they were referred to the court-martial.” If you provide a copy of your proof analysis to the convening authority, it will probably become discoverable.

<sup>15</sup> Lt Col Vance Spath, Maj Rock Rockenbach, Capt Scott Williams, “Is Death Different? Death Penalty

Given this advice, what format would organize these seven areas to be “counsel useful” and structure the information needed to not just win your case-in-chief, but to win your case?

This article recommends a simple three-column format that captures the elements, the evidence, and the defense points, then shows how to align all the supporting issues in a straightforward manner.

#### A. Prefatory Matters

Cut and paste the charge from the charge sheet. Also, cut and paste the model specification from the Manual for Courts-Martial (MCM) for comparison. It is astonishing how easy it is for words to sneak in which are inconsistent with the model specification.

Once charges are copied, create a three-column table: Elements, Evidence, and Defense Points. A sample is provided at the end of this article.

#### 1. Elements

The elements *are* the case. R.C.M. 918(c), Findings, says: “A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt.” The Discussion to R.C.M. 918(c) notes: “The rule as to reasonable doubt extends to *every element* of the offense.” (emphasis added) In other words, the government must prove every element beyond a reasonable doubt to get a finding of guilty and the defense wins if the factfinder sees reasonable doubt on a single element.

Start with the offense. In addition to the model specification, cut and paste verbatim the text and relevant portions of the explanations from Part IV of the MCM. Cite the MCM paragraph number and page for easy reference during trial. You are already looking at the page in the MCM, so you can take 2 extra seconds during preparation to write down the citation, or

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Litigation in the Air Force,” THE REPORTER, March 2007, at 6. The authors noted that the proof analysis for this three-specification homicide case was over 56 pages long.

you can take 30 seconds during trial (which will feel like an hour) while you sweat in front of the judge and panel as you search and search for your reference in the MCM.

Using the Military Judges' Benchbook,<sup>16</sup> Chap. 3, break down the elements in individual boxes of the left column in your table by dragging and dropping. It contains the language the members are likely to hear in a litigated trial, so counsel might as well prepare for that eventuality.

Always include the jurisdictional element from the model specification, e.g., "In that, Airman John Jones, 39<sup>th</sup> Widget Squadron, Anybase Air Force Base, Anystate, ..."

Break down sub-elements where you expect a lot of evidence on a particular point (i.e. intent to defraud, etc.). Sometimes, the critical issue is identity, that is, whether or not the accused was actually the person who committed the offense. In those cases, simply break down the elements so his name is in its own block, while his connection to the Air Force is in a separate block. This will make it easier to logically separate the witnesses who can prove the accused's identity (i.e., as eyewitnesses or through scientific evidence) and those who have knowledge of the accused's Air Force status.

Do not neglect to include the MCM Part IV "Elements" as well. The MCM is the President's Executive Order executing the statute, whereas the Judges' Benchbook is a Service instruction. If you need to cite the law to the court, you cannot use the Judges' Benchbook as authority.<sup>17</sup> Cut and paste the relevant portions of the MCM Part IV "Explanation" paragraph into its corresponding "Element" block in your table. Experienced trial counsel will tell you that 80-90% of the law needed to win at trial is in the MCM, so you should use it. If needed, cut and paste

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<sup>16</sup> BENCHBOOK, *supra* note 8.

<sup>17</sup> BENCHBOOK, *supra* note 8, Forward: "Statutes, Executive Orders, and appellate decisions are the principal sources for this Benchbook, and such publications, rather than this Benchbook, should be cited as legal authority."

selectively from the Analysis of Punitive Articles, MCM, Appendix 23.

How far you go in adding bits of law involves some legal judgment. For instance, in the instruction discussing intent, the Military Judge's Benchbook says the instruction on circumstantial evidence is normally applicable.<sup>18</sup> Since you will not know during your preparation time whether or not you will be facing court members or a military judge, it would be wise to include that instruction so you can shape your investigation and argument. When in doubt, add the legal guidance. It will help avoid having the other side surprise you and it is easy to skip over or delete later if you do not need it.

Consider having a paralegal construct the elements column, if staffing allows; it spreads the work, gets paralegals substantively involved, and enhances their training, skill, and job satisfaction.<sup>19</sup>

If you do these steps correctly, you will have invested about 45 minutes per specification in your proof analysis, but the payoff is great. You now know where to marshal the evidence from the Report of Investigation, you will be able to easily spot gaps in your proof, you will discover new questions for your investigation, and you know what the factfinder will need to decide.

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<sup>18</sup> See BENCHBOOK, *supra* note 8, para 3-63-1d, Note 6, which refers to Instruction 7-3, Circumstantial Evidence (Intent).

<sup>19</sup> Career Field Education and Training Plan, 5J0X1, Apr 06, Task 3.2.8, already requires Journeyman and Craftsman paralegals to be able to assist with or accomplish proof analysis. The Judge Advocate General expects supervising attorneys to also involve qualified paralegals in advanced paralegal tasks, including drafting "comprehensive proof analyses for complex charges." Legal offices are expected to brief paralegal utilization efforts and issues during Article 6 inspections and staff assistance visits. TJAG Policy Memorandum: Personnel-4, Optimal Paralegal Utilization, 2 Oct 07. [https://aflsa.jag.af.mil/AF/JAG/LYNX/pers-04\\_optimal\\_paralegal\\_utilization\\_2\\_oct\\_07.pdf](https://aflsa.jag.af.mil/AF/JAG/LYNX/pers-04_optimal_paralegal_utilization_2_oct_07.pdf) (last visited 2 Oct 07).

## 2. Evidence

The next step is straightforward. Simply type in matters verbatim from the witness statements in the report of investigation, citing the source and tying each piece to its appropriate element.<sup>20</sup> Include physical evidence in this column with its accompanying authentication.<sup>21</sup> Include other forms of evidence, such as judicial notice.<sup>22</sup> Finally, cut and paste the Military Rules of Evidence (M.R.E.) supporting your theory of admissibility. Add case law as needed.

### a. Witnesses

In your proof analysis, type in the line in which the witness identifies the accused. This makes it easier to use your proof analysis during trial and prompts you to have the witness state the basis of the knowledge.

Typing in matters verbatim from previous statements is the step which trial counsel might be most tempted to shortcut, but it has vital advantages. It ensures you do not substitute your thoughts for those of the witness. For instance, the phrase “sexual relations” can mean different things to different people. Typing matters verbatim also makes it easy to find prior statements for refreshing recollection<sup>23</sup> or showing prior consistent statements on redirect,<sup>24</sup> especially if you assembled your trial notebook well and have prior statements handy.

Writing the evidence as statements allows you to conduct your direct examination straight

from the proof analysis rather than writing questions, at least in most cases. First, it will help you sound more natural since you will not be reading questions. It is a trivial mental exercise to convert statements to questions with the slightest practice. Second, counsel’s questions are not evidence, so in many ways they are not relevant. They do not even appear in summarized records of trial, for instance.<sup>25</sup> Third, writing statements helps counsel focus on the witness’ answer during trial to ensure it lines up with what counsel needs out of that witness and that the answer is consistent with the witness’ prior statements. Fourth, if a stipulation of fact or expected testimony is needed for trial,<sup>26</sup> it is a minor exercise to cut and paste the testimony from the proof analysis.

The most important advantage is that writing evidence as statements help counsel divide a witness’ conclusions from that witness’ observations. M.R.E. 701 requires that lay witnesses only testify as to opinions or inferences which are “rationally based on the perception of the witness ....” This also helps satisfy the requirement of M.R.E. 602 that a witness have personal knowledge of the matter to which he is testifying. This can reveal critical points in your case.

When I was the SJA at “Base X,” two civilian women complained to base officials that a captain had exposed himself on their apartment landing. The chief of military justice diligently investigated the complaint, personally interviewed the women, and got their assurances that the captain had exposed himself. The chief of military justice was quite concerned when the squadron commander took the captain’s side in spite of the witnesses’ statements. After extensive follow-up, it turned out that the captain, after having too much wine, had accidentally allowed the liner on his split-leg running shorts to ride up on his right buttock

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<sup>20</sup> It may be possible to use a scanner with Optical Character Recognition to make an electronic version of a typed statement in order to cut-and-paste statements into the evidence column. This will be particularly true with statements from Article 32 hearings.

<sup>21</sup> See MCM, *supra* note 4, MIL. R. EVID. 901, et. seq.; MIL. R. EVID. 1001, et. seq.

<sup>22</sup> See MIL. R. EVID. 201, et. seq.

<sup>23</sup> See MIL. R. EVID. 612 - 613.

<sup>24</sup> See MIL. R. EVID. 801(d)(1)(B): “*Statements which are not hearsay.* A statement is not hearsay if: ...[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.”

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<sup>25</sup> See MCM, *supra* note 4, R.C.M. 1103(b)(2)(C); Air Force Manual 51-203, *Records Of Trial*, page 59, (1 Oct. 1999).

<sup>26</sup> See MCM, *supra* note 4, R.C.M. 405(g)(5)(A)(iv) (stipulations in Article 32 hearings); 705(b)(1) (confessional stipulations); and 811 (stipulations generally).

while he had been repairing a baby's high chair. The women looked out the fish-eye lens in their apartment door and saw him on the landing when he was turned in such a way that his buttock was visible. The women later corroborated the presence of the high chair and the tools. The main point of this story is that the chief of military justice focused on the women's conclusions that the captain had "exposed himself" instead of getting their observations. Careful preparation of a proof analysis will prevent that mistake.

Another step counsel should take is to anticipate what evidence they would like, but which has not yet been revealed. This will help guide the investigation. For instance, in a rape case I tried as trial counsel, the defense found the ex-boyfriend of the complainant and discovered that when he asked if she had been faithful to him during his deployment, she said, "I plead the Fifth." This was devastating to the government's case when the woman had testified on direct that she had no intercourse voluntarily with anyone other than her boyfriend in the previous year and the defense was making the case that she had consented to intercourse with the accused. The defense knew what they wanted the evidence to be, so they crafted a good plan to get it while keeping the accused off the stand. I had not anticipated it and was not prepared to refute it.

One method of clearly annotating the difference between actual evidence and hoped-for evidence is to format the latter differently (i.e., enclose the hoped-for evidence in brackets, or make it all capital or italic letters). If a witness will confirm it, it is easy to convert it to normal formatting. Consistency and attention to detail are vital here. This is another good reason to provide a citation for actual evidence. You will know at trial that the evidence was merely hoped-for if it is not associated with a source.

Be ready to state the basis for admissibility. All evidence must be relevant to be admissible, so be prepared to argue how it helps make a fact of consequence more or less probable.<sup>27</sup> This

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<sup>27</sup> See MCM, *supra* note 4, MIL. R. EVID. 401-402.

will be easy since you will have aligned the evidence to an element of the offense.<sup>28</sup>

Should you merely know your theory of admissibility in order to defeat an objection, or do you need to know the basis for admissibility for other reasons? The Air Force Standards for Criminal Justice impose identical duties on trial and defense counsel in this area. It "is unprofessional conduct for a [trial or defense] counsel knowingly and for the purpose of bringing inadmissible matters to the attention of the military judge or court members to offer inadmissible evidence . . ."<sup>29</sup> Counsel would be wise to know the basis for admissibility before walking in the courtroom in order to stay as far away as possible from unprofessional conduct.

Since testimonial evidence often must be non-hearsay or fit into a hearsay exception<sup>30</sup>, this is an easy place to record your theory on the hearsay of the testimony. This prepares trial counsel for an "easy kill" if there is a defense objection.

#### **b. Documentary and Real Evidence**

Authentication of documentary and real evidence is a condition precedent to admissibility, usually by a witness with knowledge.<sup>31</sup> Therefore, it almost always makes the most sense to tie the document to the proper witness and the proper element within the single "Evidence" column, rather than creating a

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<sup>28</sup> Counsel are generally not allowed to offer sentencing evidence during the findings phase of the trial because it is not relevant. However, counsel should review their sentencing evidence to see if it can be aligned against an element of the offense. If otherwise admissible, counsel may be able to get it before the court in both findings and sentencing phases.

<sup>29</sup> AFSCJ *supra* note 1, Chap. 1, "The Prosecution Function," Section V, "The Trial," Standard 3-5.6(b), "Presentation of Evidence;" Chap. 2, "The Defense Function," Sec. VII, "Trial, Standard 4-7.5, "Presentation of Evidence".

<sup>30</sup> MCM, *supra* note 4, MIL. R. EVID. 801, et. seq.

<sup>31</sup> See, e.g., MCM, *supra* note 4, MIL. R. EVID. 901(b). (1) Testimony of witness with knowledge; (2) Nonexpert opinion on handwriting; (3) Comparison by trier or expert witness; (5) Voice identification; (6) Telephone conversations.

separate column. This allows you to account for witness issues like bias and ability to recall. These issues might affect the factfinder's view of the document. For instance, proper chain of custody of a weapon may be a key issue. Trial counsel's goal may be to get the weapon admitted as evidence, but the factfinder may be more concerned about the credibility of the law enforcement agent than the weapon itself. Separating the documentary and real evidence from the authenticating witness may make counsel miss the real point.

### c. Judicial Notice

M.R.E 201 gives rules on matters for judicial notice. Simply copy items verbatim into the proof analysis, then take the minor step to later turn them into an appellate exhibit to offer to the military judge.

### d. Inferences

Inferences can make or break your case and are often based on circumstantial evidence.<sup>32</sup> Label them that way so you know to put them into argument, then add the circumstantial evidence rules from the Judge's Benchbook.<sup>33</sup>

## 3. Defense Points

This may be the most important column – if trial counsel has all the evidence lined up on all the elements, but the defense can defeat or deflate the evidence on one element, the government will lose. After the rigorous work of plugging the elements and evidence into the table, the real fun and intellectual challenge comes in creating defenses and refuting them (and for defense counsel, going one step further to counter the refutation).

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<sup>32</sup> See, e.g., MCM, *supra* note 4, Part IV, para. 9c(1)(C)(iii), Article 85, Desertion (“The intent to remain away permanently may be established by circumstantial evidence. Among the circumstances from which an inference may be drawn . . .”) and MCM, Part IV, para. 37c(6), Article 112a, Wrongful use, possession, etc., of controlled substances (“Intent to distribute may be inferred from circumstantial evidence”).

<sup>33</sup> See BENCHBOOK, *supra* note 8, Instructions on Evidence 7-3.

Trial counsel should not put a rationality filter on what he thinks the defense might do. It takes less work to defeat a strong defense point trial counsel anticipated, but trial counsel can be thrown off track by a small point he did not anticipate.

Include all defense points to defeat or deflate the evidence – objections, cross-examination, defense witness direct, stipulations of fact, stipulations of expected testimony, affirmative defenses, and motions in limine. Type in matters verbatim from defense witnesses' previous statements and cite the source in case you need it for cross-examination on a prior inconsistent statement<sup>34</sup> or rehabilitation.

Add government responses to all defense points: redirect, cross-examination of defense witnesses, objections to stipulations or desired content of stipulations, and rebuttal. By the way, if counsel have included the theory of admissibility for each piece of evidence in the "Evidence" column, counsel can simply cross-reference defense objections in the Defense Points column.

The final step is to evaluate the weight of the defense's evidence. At a minimum, counsel should evaluate the following for each witness:

- Bias, character, and conduct;<sup>35</sup>
- Motive to fabricate; and
- Ability to observe.

## IV. Using this Powerful Tool

### A. Format

Use what works - three columns seem to line up with the progression of trial better than four columns, since the case moves from the government case to the defense case to rebuttal.<sup>36</sup> Using a new row for each witness associated with an element keeps the evidence and defense points together.

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<sup>34</sup> See generally, MCM, *supra* note 4, MIL. R. EVID. 613.

<sup>35</sup> See generally, MCM, *supra* note 4, MIL. R. EVID. 608.

<sup>36</sup> See e.g., BENCHBOOK, *supra* note 8, at 48-49.

## B. Before Trial

Counsel should work as far ahead as possible and fill in what is available; do not wait for the complete picture because it will not exist until the defense rests at trial. Counsel should highlight holes in their information and write down a plan to fill them. Documenting holes makes it easier to delegate to co-counsel and paralegals.

Identify government motions and potential defense motions; include case law in the proof analysis to make it easier to draft the motion and to anticipate motions by the other side.

## C. Role of Paralegals

Paralegals can be a dramatically underused resource in trial work. Unless the paralegal's supervisor disapproves, there is no reason for a paralegal to wait to be asked to do a proof analysis. Demonstrating initiative on cool, challenging work generally means more cool, challenging work will be given.<sup>37</sup> Some tasks might be:

Apprentices and Journeymen:

- Create the three-column table; cut-and-paste the Benchbook text, MCM elements, and MCM explanation
- Align witness testimony from the report of investigation with the elements

Journeymen and Craftsmen:

- Add ideas on "hoped-for" testimony
- Add the theory of admissibility (using the particular Military Rule of Evidence where appropriate)
- Especially current and former defense paralegals: add expected defense points

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<sup>37</sup> "Well done, good and faithful servant! You have been faithful with a few things; I will put you in charge of many things." *Matthew 25:23* (New International Version).

## D. Use in Trial

Counsel can cut each witness' testimony out of the proof analysis and paste it onto a separate sheet for each witness or counsel can simply question the witnesses directly off the proof analysis. However, the advantage of questioning off the proof analysis is that the theory of admissibility and the relevance of the testimony are immediately apparent for reference if counsel gets hung up on a point. It is also a lot less work.

If the case is simple, counsel can use a single copy of the proof analysis. If the case has many witnesses, it may be easier to make a copy of the proof analysis for each witness for the trial binder and highlight the witness' name across all the elements on which he will testify. Co-counsel should check off points as they are made.

## V. Summary

A solid proof analysis offers many advantages for both sides by allowing for more orderly preparation, more responsiveness to ethical responsibilities, and a better chance of getting at the truth. This leads to a more efficient system and better justice.

### **Extra: Proof Analysis Office Policy Letter**

The JAG Corps Leadership Development website hosts an office policy letter contributed by Lt Col Dawn Zoldi, 11 WG/JA.

The policy letter extends proof analysis to possible Article 15 action. The proof analysis provides a filter to support a court if the member elects that forum, and pinpoints issues that may keep the matter from going to trial.

The policy letter also includes a useful caution against sharing the proof analysis with commanders, investigators, or others -- so that the document does not lose its attorney work product status and become discoverable!

<https://aflsa.jag.af.mil/Lead/docs/ProofAnalysisPolicy.pdf>

**SAMPLE PROOF ANALYSIS FORMAT**

U.S. v. Case

MCM Model Specification  
Actual Specification

LJOs  
Max. punishment

ELEMENTS	EVIDENCE	DEFENSE POINTS
Specification Jurisdictional Element In that SrA ..., Any AFB ...	TESTIMONY OF GOVT WITNESS 1	[In addition to attacking elements, see R.C.M. 916 and Judge's Benchbook, Chap 5 for defenses.]
Specification Element 1 [Copy relevant parts verbatim:] Judges' Benchbook, Chap 3 MCM Element MCM Part IV, para XX.b., p. XX MCM Explanation MCM Part IV, para XX.c., p. XX MCM Analysis (as needed) MCM App. 23, para XX, p. XX	TESTIMONY OF GOVT WITNESS 2 - [Verbatim from statement, split into bullets.] (Statement to XX, date, p. XX) [Copy relevant parts verbatim:] M.R.E. XXX Judges' Benchbook, Chap 7, Inst. X-X, p. X - Identify PROS EX __ FOR ID [Copy relevant parts verbatim:] M.R.E. XXX Judges' Benchbook, Chap 7, Inst. X-X, p. X - During preparation, identify gaps and questions to ask witnesses. Use different formatting.	TESTIMONY OF DEFENSE WITNESS A - [Verbatim from statement, split into bullets.] (Statement to XX, date, p. XX) [Copy relevant parts verbatim:] M.R.E. XXX Judges' Benchbook, Chap 7, Inst. X-X, p. X  GOVT RESPONSE CROSS-EXAM OF DEF. WITNESS A [Verbatim from notes or statements] (Interview w/ Trial Counsel, witnessed by Paralegal, date) PROS EX __ FOR ID
Specification Element 2 [Copy relevant sources with page cites as above.]	TESTIMONY OF GOVT WITNESS 3 - [Verbatim from statement, split bullets.] (Statement to XX, date, p. XX) [Copy relevant parts verbatim:] M.R.E. XXX Judges' Benchbook, Chap 7, Inst. X-X, p. X	CROSS EXAM OF GOVT WITNESS 3 - [Where applicable, address bias, motive to fabricate, source of knowledge, ability to observe, character for truthfulness]  GOVT RESPONSE REDIRECT OF GOVT WITNESS 3 ...
	INFERENCE - Copy verbatim from MCM Part IV Explanation and Judges' Benchbook, Chap 3 APP. EX. __, EXCERPT OF __, para X.X: [verbatim] MRE 201: Judicial Notice [Copy verbatim]	



# Ask the Experts

**If you have a question, the answer may help other readers! Send your questions to the editors of The Reporter.**

## **Our Open House Committee would like to play popular music during this public event. Any guidance?**

The music is likely to be protected by copyright law. If so, it is crucial to license the music before playing it publicly.

Copyright protection is governed by federal law and is specifically mentioned in Article 1, Section 8, of the United States Constitution. Some "barracks lawyers" confuse the exclusively federal nature of copyright law to conjure up a mistaken federal "exemption" to freely use copyrighted material.

Penalties are massive for publicly playing music without purchasing the rights: \$30,000 for negligently playing music, and \$150,000 for a willful violation. 17 U.S.C § 504. Note that these penalties are typically applied to each playing of each song. A simple example of playing three songs at the open house could cost the government \$90,000 or even \$450,000.

Playing unlicensed music -- from a recording or even off the radio -- is a huge risk for little return. It's much better to purchase the rights to play the music before the event begins. Two organizations license the vast majority of song: American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). Or if you contract with a company to provide the music, ensure they are responsible for securing the rights to play the music.

*This information is drawn from the "JAG in a Box" column in Intercom, a magazine published by the Air Force Communications Agency. The monthly column is authored by Fritz Mihelcic, AFCA Deputy Chief Counsel, and provides a wealth of guidance on a wide range of "cyberlaw" topics. Archived columns are collected at: <http://public.afca.af.mil/library/factsheets/factsheet.asp?id=6928>*

## **UPDATE: A pioneer in civilian practice involving the Survivor Benefit Plan, Brigadier General Michael W. McCarthy, USAFR (ret'd), provides the following update to the SBP item in Vol. 34, No. 2, of The Reporter:**

General McCarthy notes there are practical differences in the "one year application deadline" for members and for former spouses.

The member:

- If not yet retired at entry of the divorce decree, the member has until retirement to effect a former spouse SPB directive.
- If retired at entry of the decree, the one year period starts upon entry of decree.

The former spouse: *(different rules apply for different scenarios, most of which assume state law permits post-decree adjudication of an asset "overlooked" in initial Decree and treats SBP as an "asset")*

- If the decree directs former spouse SBP, the former spouse must submit either the deemed election request or DD 2656-1 to DFAS within one year of entry of the decree. The best practice is to submit both, if possible.

- If the decree is silent as to SBP, a follow-up order can be obtained at any time prior to the member's retirement to effect former spouse SBP. The one year period starts on entry of that order. A series of Comp. Gen. opinions starting with B-174552 (1972) and four key cases in 1992 have defined "one year from date of the order" to mean one year from the date of the first order addressing SBP.
- If member is not retired at entry of the decree, and the decree is silent as to former spouse SBP, and the member retires without effecting SBP, and subsequently obtained order for former spouse SBP will not be honored, as DFAS takes the position there is no SBP in existence for the court to address.
  - *But if the member has remarried* and then retires and effects SBP for the new spouse, the old spouse can obtain an enforceable former spouse SBP order, substituting for the new spouse as the SBP beneficiary.
  - *But note that in this setting*, DFAS will not honor a belated former spouse SBP order if the SBP election at retirement was "children" only, even though such an SBP was then operative.

There are other outcomes with other circumstances, highlighting the importance of two rules Brigadier General McCarthy shared in a legal assistance webcast last year:

Rule 1: Each case is fact-specific.

Rule 2: Go beyond the statute, the regulation, and even published DFAS policy to do the job right. Speak with practitioners and the people at DFAS who handle these cases every day.

### **Evolving responsibilities with the Field Support Centers and other changes have us looking at re-titling some positions in the office. Can we include "judge advocate" in a civilian attorney's duty title?**

In a word: "no".

The title "judge advocate" is narrowly defined by statute. 10 U.S.C. § 801(13)(B) defines "judge advocate" as "an officer of the Air Force or the Marine Corps who is designated as a judge advocate . . . ." "Officer" is further defined in 10 U.S.C. § 101(b)(1) as "a commissioned or warrant officer" -- a uniformed military status which inherently excludes civilians. R.C.M. 103(17), as well as individual service regulations, defines "Staff Judge Advocate" as a judge advocate specially designated by the service Judge Advocates General.

Additionally, only The Judge Advocate General (TJAG) can designate an officer as a judge advocate. Therefore, a local designation applying the term to an Air Force civilian attorney's position description would infringe on this authority.

There are other pure policy reasons to avoid using the term, as well. It may mistakenly lead those outside of TJAGC into believing a civilian attorney is authorized to perform functions which are limited to officers designated as judge advocates or as Staff Judge Advocates. At the extreme, allowing civilians to carry "judge advocate" titles could blur the distinction the law of armed conflict (LOAC) between combatants and civilians - - potentially costing added protections civilians receive by virtue of their civilian status (even when accompanying the force).

It is important that titles accurately describe the duties of each position. Avoiding the improper use of "judge advocate" is proper, and leaves many other titles ready for use.

*This guidance was drawn from an OpJAGAF released by JAA on 27 September 2007. For additional guidance, JAA maintains a very useful website on FLITE: <https://aflsa.jag.af.mil/AF/lynx/jaa/>*

# WHY CUSTOM IN INTERNATIONAL LAW IS SO IMPORTANT

by Colonel Jeffrey A. Rockwell,\* USAF

*“Adaptability is the law which governs survival in war as in life—war being but a concentrated form of the human struggle against the environment.” - B. H. Liddell Hart*

## I. Introduction

Ask a hundred people what international law is and you'll get as many different answers. So no one should be surprised that misunderstandings about the law in general, international law in particular, and international customary law specifically cloud a lot of good discussion of national security issues in halls of academia and government. Editorial pages are also filled with cries of an American hypocrisy for not signing treaties protecting basic human rights, such as those banning landmines or establishing an International Criminal Court, or ignoring the world and international law by invading Iraq. The concept of sovereignty can be simplified by tracing its development, as the quote above suggests, in mankind's struggle to master his environment. It shows that centuries of state activity have left us with a map of the world consisting of three dimensional boxes of sovereign nations. Tracing the development of the principle of state sovereignty in this manner highlights the importance of state action and custom in the continuing development of international law. It also provides some understanding of the roots of confusion in state approaches to international law and relations.

## II. Sovereignty and the Domains of Land, Sea, Air and Space

The basic concept of sovereignty has evolved over the last four centuries based on mankind's ability to operate in four domains: (1) on ground; (2) on and in water; (3) in air; and (4) in space.<sup>1</sup> Human drive to conquer each medium

required the development of principles to regulate activity within each medium. The basic question to be answered over the centuries was whether the domain would be subject to sovereignty claims or be free. The answers leave us with an international system comprised of nation-states, geometric boxes of sovereign territories who define spatial existence by exercising control over its land mass, coastal waters, and the airspace above the two. The remaining areas of our earth, the high seas and outer space, remain free from sovereign claims and open for navigation, exploration and use. We are left with a map of the world – a game board, if you will – with 192 three-dimensional nation-states of varying sizes of land mass, coastal water and the airspace above – our game pieces. So how did we get here?

### A. On Land

In the early 17<sup>th</sup> century, European “states” waged war on each other over territory, pushing their armies across “recognized” borders and laying claims to land in the name of historical, religious and cultural rights. In essence, nothing had really changed from the prior centuries, except perhaps some advancement in technology and weaponry that made conquest more efficient. The infantry, comprised principally of foot soldiers, remained the basic fighting unit of a state's army through this period and into the early 20<sup>th</sup> Century.<sup>2</sup>

A major change occurred in 1648, however, when the continental conflicts raging at the time, the Thirty Years' War and the Eighty Years' War, were diplomatically ended. The major

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<sup>1</sup> How the current nation-state system based on sovereignty will address operations in the fifth domain of cyberspace is beyond the scope of this paper; however, the current construct outlined here

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may help reconcile cyberspace issues under the current Westphalia system.

<sup>2</sup> Martin Van Creveld, *Technology and War I: To 1945*, in CHARLES TOWNSEND, THE OXFORD HISTORY OF MODERN WAR 201 (Charles Townsend ed., University Press 2005).

powers, realizing that future war was inevitable unless a concept of inviolable boundaries was adopted, signed a series of treaties known as the Peace of Westphalia. The principles recognized in these treaties were groundbreaking: the supremacy of the state over all else in international affairs (and the start of the correlative decline of the Church in matters of state); the right of political self-determination; the sanctity of borders; non-intervention of one state in another; the binding nature of law and treaty; and the equality (albeit relative) of nation-states.<sup>3</sup> The basic framework of the international legal process – a system based on the state as the recognizable entity under public international law and relations – was born. As boundary lines on maps became much clearer lines of demarcation and took on new meaning in terms of inviolability,<sup>4</sup> war became somehow subservient to, or merely rooted in, the politics of this newly-born but supreme nation state. War truly did begin to take a back seat to the primacy of the sovereign state, merely a tool for it to use as “a continuation of [its] politics by other means.”<sup>5</sup> On a more fundamental level and for the purposes of this paper, the first dimension of the sovereign box, the land dimension, had been framed.

### **B. On and In the Sea**

Long before the European powers penned their seals to the Treaties of Westphalia, their navies were already conquering the high seas in search of new worlds and trade routes around the globe. With Westphalia firmly establishing the principle of state sovereignty and closing the borders on the continent to further territorial claims, states next had to address a regime to govern the earth’s oceans. Leading scholars of the era like Grotius argued that the high seas must be open for trade and exploration, and free from any territorial claims by sovereign states. While all property is grounded upon occupation,

i.e., subject to enclosure or seizure, Grotius wrote that the high seas are incapable of occupation by their very nature, making the “vagrant waters of the ocean necessarily free.”<sup>6</sup> The high seas must be considered *res communis*, to be shared by all nations, not *res nullius* and subject to appropriation or assertion of title.<sup>7</sup> Grotius’ argument makes even more sense when viewed from the lens of his country of origin, the Netherlands, a major maritime power at the time with a particular state interest in facilitating sail to the four corners of the globe. Any trend of excessive claims by states would block the seafaring powers’ freedom of movement worldwide.

Over the course of the next four centuries specific rules governing the law of the sea were honed, with international legal principles developing in custom and treaty that attempted to balance the competing interests of freedom of navigation and the need of the sovereign to secure its land mass. The result establishes the second dimension of our game board, the open seas, as the antithesis of the land dimension. The sovereign will only be allowed to extend its territory seaward twelve nautical miles beyond its recognized land boundary, the distance deemed necessary for a state to defend its borders from attack.<sup>8</sup> Further rules developed to place additional limits on freedom of the sea such as recognizing exclusive economic zones, continental shelves, and archipelagos, but the effect on the domain related to sovereignty has been slight. Seventy percent of the globe’s game board will remain open to movement.

### **C. In Air**

In 1784, the city of Paris recorded the first attempt to regulate man’s conquest of the air domain by enacting a law that prohibited balloon flights without a permit.<sup>9</sup> Balloons were used

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<sup>3</sup> John Norton Moore, *National Security Law* (Carolina Academic Press 1990).

<sup>4</sup> At least in theory and intent of the Westphalian parties, if the actual practice was not attained.

<sup>5</sup> CARL VON CLAUSWITZ, *ON WAR*, (Princeton University Press, 1976).

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<sup>6</sup> Hamilton DeSaussure, *The Freedoms of Outer Space and Their Maritime Antecedents*, in *SPACE LAW DEVELOPMENT AND SCOPE* 4 (Praeger, 1992).

<sup>7</sup> *Id.*

<sup>8</sup> 33 CFR § 2.22 (defining the United States’ “territorial sea” as twelve nautical miles seaward).

<sup>9</sup> D.H.N. Johnson, *Rights in Air Space*, in *PUBLIC INTERNATIONAL AIR LAW* 10, (Ivan Vlasic ed., 3d ed 1995).

for transport through the 19<sup>th</sup> century, to include extensive use to observe positions behind enemy lines during the Franco-Prussian War,<sup>10</sup> but it wasn't until the early 20<sup>th</sup> century that serious public consideration was given to sovereign ownership of "airspace." It was the military potentialities of aviation, not the civil transport aspects that ripened the issue for resolution.

Great Britain had 12 military aircraft in 1914; by 1918 she had 22,000 in her arsenal.<sup>11</sup> Allied and Axis powers experienced a similar astounding growth. Rapid advancements in technology increased speed, range and cabotage capabilities. Between 1914 and 1918, with the development of a machine gun that could be synchronized to fire through a propeller, and a gravity bomb, aircraft graduated from a mere reconnaissance platform to a real capability for a state to project power into someone else's territory. If there was any question before that airspace should be treated the same as the sovereign territory below, it became quickly evident given the threat the warplane's speed, maneuverability and lethality posed on a potential enemy state. For the state to defend itself from intrusion or attack, it must have complete control over the airspace above its territory and territorial sea. In fact, the potential threat was so great states would later move to expand their controls over international and other state airspace with new legal regimes such as air defense identification zones (ADIZs)<sup>12</sup> to ensure their security. Thus, manned flight into the air domain formed the third dimension of the sovereign box. The boundary lines that states previously drew 12 miles out into their territorial sea were now extended up to the heavens.

#### D. In Space

A few decades after the legal regime of airspace was settled as sovereign territory,

technology was already pushing man into the fourth domain, space. In just a blink of an eye on the timeline of human progress, Russia's Sputnik mission launched a satellite into space on 4 October 1957 that orbited 560 miles above the earth at 18,000 miles an hour and made four crossings over the United States.<sup>13</sup> Vostok and Mercury missions took men into space in 1961, and Apollo landed a man on the moon in 1969, proving quickly man could master the fourth domain too. The vast expanses to be navigated by the spacefarer must have looked a lot like the vast unknown of ocean to the 15<sup>th</sup> century seafarer, and whether this brand new medium would be treated as sovereign like air or sovereignless like the high seas became the question. Ancient principles in property law stated that the owner of the land owns everything from the face of the earth extending downwards to the center of the earth (*usque ad sidera*) and upwards to the heavens (*usque ad coelum*).<sup>14</sup> Almost unanimously and with little debate, states decided not to extend the latter concept to space, establishing that space must be free from claims of state sovereignty and free for all to use.

Only a ceiling, then, would have to be drawn to enclose the top part of the sovereign box. And the real question became where to draw it. Debate raged over the need to establish a specific distance (the Soviets advocated 90 kilometers) versus a limit that reflected an evolving state of technology (the US advocated a distance that reflected the lowest altitude at which satellites could be placed in an orbit and not fall to earth.)<sup>15</sup> The US position would ultimately prevail, allowing activity and further technological advances to drive the legal boundary, rather than creating a static and arbitrary distance etched in stone that could very well work to inhibit the very promise of progress.

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<sup>10</sup> *Id.* A provision in the 1874 Declaration of Brussels actually did address the status of balloonists over enemy territory, stating that a person was not to be considered a spy merely because he passed over the enemy's lines in a balloon.

<sup>11</sup> *Id.* at 19.

<sup>12</sup> Convention on International Civil Aviation (Chicago 1944), Article 11, 61 Stat 1180; TIAS 1591.

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<sup>13</sup> William J. Jordan, *Soviet Fires Earth Satellite Into Space*, THE NEW YORK TIMES, Oct. 5, 1957, at 1.

<sup>14</sup> Bryan A. Garner, BLACK'S LAW DICTIONARY, 8<sup>th</sup> Edition (West Group, 8 ed 2004).

<sup>15</sup> Committee on the Peaceful Uses of Outer Space, Report of the Legal Subcommittee on the Work of its Twenty-ninth Session (2-20 April 1990), May 2, 1990.

With man's drive into the domain of space, the sovereign box had been completed, at least for the present.

### III. The Importance of Customary International Law

The primary significance of the above discussion is this: the legal concept of sovereignty – that fundamental underlying principle of international law which drives all else – developed as we know it because of the activities of states. With regard to each domain discussed above, the sovereignty of land, sea, air and space developed first by significant state practice – the key element of customary international law – followed by a subsequent codification in treaty.<sup>16</sup> Yet, critics of customary international law question its viability as a real source of the law. Their central theme is that custom is simply too imprecise and subjective to be useful, and that treaty law must somehow subsume custom in today's world. The same critics also argue that states like the United States cling to custom as a source because imprecision grants a license to exercise more power than should be legally permissible.<sup>17</sup>

The Statute of the International Court of Justice is the most often cited authority for the sources of international law. Four are listed: (1) Treaty; (2) Custom; (3) General Principles; and (4) Judicial Decisions and Scholarly Publications.<sup>18</sup> The focus here will be on the

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<sup>16</sup> The following are considered the culminating and seminal treaties for each domain: Land (*Charter of United Nations*); Sea (*United Nations Convention on the Law of the Sea*); Air (*Convention on International Civil Aviation*); and Outer Space (*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*).

<sup>17</sup> For a full discussion of the debate, see J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

<sup>18</sup> The specific text is Article 38 of the *Statute of the International Court of Justice*, 59 Stat 1031; TS 993: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

first two sources, treaty and custom, for several reasons. First, no writer has been able to adequately distinguish between custom and general principle for the distinction to have any real meaning or have any real use for practicing states. Second, only treaty and custom can be considered "formal" sources of international law based on legal entity and standing since only the sovereign state can bind itself to a treaty, or develop custom based on its actions vis-à-vis other sovereign states. Judges, professors and other experts may opine to help focus issues for nation-states, but they are merely opining and commenting on the first two sources, treaty and custom. At the end of the day, it is state action that matters.<sup>19</sup>

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b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly

qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

<sup>19</sup> See also some of the classic definitions of international law as instructive of the importance of custom: "...governs the relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims." *Case of the S.S. "Lotus,"* [1927] P.C.I.J., ser. A., No. 10, at 18;

"...is the standard of conduct, at a given time, for states and other entities subject thereto. It comprises the rights, privileges, powers, and immunities of states and entities invoking its provisions, as well as the correlative fundamental duties, absence of rights, liabilities and disabilities. International law is, more or less, in a continual state of change and development." WHITEMAN, DIGEST OF INTERNATIONAL LAW VOL 1 1 (1963); "...is a system of jurisprudence which, for the most part, has evolved out of the experiences and the necessities of situations that have arisen from time to time." HACKWORTH, DIGEST OF INTERNATIONAL LAW VOL 1 1 (1943);

This is not to say international law was nonexistent prior to nation-states agreeing to its terms in treaty. The Statute of the International Court of Justice is a treaty itself, annexed to the Charter of the United Nations, and in essence merely a codification in treaty of what custom itself previously defined as the sources of international law. Similarly, the 1969 Vienna Convention on the Law of Treaties was a codification of the customary international law that had developed over centuries with regard to all aspects treaty law.<sup>20</sup> Countless principles of international law – freedom of the high seas, recognition of the continental shelf and exclusive economic zones, prohibitions against genocide, piracy and the use of poison gases, and the right of self-determination – can find their origins in customary law long before being codified in convention during the 20<sup>th</sup> century era of international treaty-making. This process has allowed for the proper evolution of international law, with custom evolving first via the action of states followed by codification in treaty.

#### **IV. Why Custom is King in America**

The US approach to the process of developing the law by custom is too often misconstrued as motivated by a self-interest and therefore destructive to a community of nations. While a full discussion of international relations theory is well beyond the scope of this paper, two observations may be helpful to understand from where the American mindset comes. The first observation relates to our grounding in a common law system of justice. The second relates to a strong historical sense of anti-federalism.

##### **A. Common Law versus Civil Law Systems**

The two major systems nation-states use to control activity within the sovereign are common law and civil law systems. Common

law systems like those used in the United Kingdom and United States are characterized by the principles of case precedent, case controversy, and a strong judiciary. The law finds its basis in custom, with statutes providing the broad parameters of the law and leaving the fine definitions and nuances to be developed by individuals and organizations in their dealings with each other. Civil law systems, like those found on Continental Europe, represent the majority of systems of the world. Civil systems are characterized by a much more extensive codification of law in statute and regulation, placing less weight on judicial decisions. In essence, civil systems strive to address all permutations of human behavior in statute prior to that behavior being exhibited. Finally, in contrast to civil systems, the judiciary in common law systems like the United States performs more of a balancing of power function to check the other branches of government.<sup>21</sup>

Although generalized, the basic distinctions in the systems outlined above help explain much of the misunderstanding raised when states approach law on an international level. The affinity for treaty law by civil law systems reflects an underlying phenomenon – people look to a comprehensive code to tell them what to do. Conversely, people from common law backgrounds are comfortable with not finding the answer in the code, and more accustomed to the chaos of law created by activity, interaction and custom. Taking this dynamic to an international plane provides some explanation for the American aversion to treaty and relative comfort with sovereign boxes interacting with each other to create law. Stated another way, Americans simply do not need a scripted playbook that addresses every play. Civil law systems simply aren't wired this way and aren't comfortable forging ahead without specific license.

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“...is not promulgated by decree, but, rather, by reasoned consent and cooperation.” Department of the Air Force, Air Force Pamphlet 110-31, *International Law – The Conduct of Armed Conflict and Air Operations* 1-4 (19 Nov 1976).

<sup>20</sup> Vienna Convention on the Law of Treaties, U.N.DOC.A/CONF.39/27, May 23, 1969.

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<sup>21</sup> J.A. Jolowicz, *Developments of Common Law and the Civil Code*, in *COMPARATIVE PRIVATE AIR LAW* 9 (Ludwig Weber ed., 1993).

## B. Anti-Federalism

The currents underlying the debates today – about world government established by treaty; the death of customary international law; the US picking and choosing the laws it will follow based on its “great sheriff” status – have flowed throughout American history. The Federalist/Anti-Federalist debates of eighteenth century America that initially defined our form of government reemerged with a vengeance during the Civil War. The common threads of the debate can be seen continuing with our isolationism and hesitancy to get involved in two foreign world wars in the first half of the twentieth century, let alone entangled in big world governments like a League of, or United, Nations. It is what would be expected of a government rooted with the concept of representative democracy based on popular sovereignty. It is a strong anti-federalism that has brewed for several hundred years, a distinct distrust of any government at any level that may work to limit the individual rights or freedom of action of the individual. Because of this distrust, it is a dynamic that pushes government to the lowest level workable; encouraging governance by exception under the often-cited republican mantra of “a government governs best that governs least.”<sup>22</sup> It is the anti-federalist truism that the best a big government can provide is gross inefficiency; that the worst is outright corruption; and that neither are desirable.

In a democratic, progressive society driven by anti-federalist tendencies, the law belongs to the people. The people define, develop and thereby evolve the law by their actions. With limited exception, they don’t want to first consult a code or bureaucrat before progressing. If the people expect their government, a judge or the law to tell them what to do, inertia will set in. Inevitably, innovation will stagnate. Ultimately, the society – especially one founded on the fundamental pillar of promoting progress – will die (and should for that matter). The law evolves best when it derives from the interaction of individuals or entities in their respective communities at the lowest levels, whether that

be the marketplace or on an Air Force flightline. So it should come as no surprise that Americans want to apply this same principle to nation-states on the international playing field. The irony is that the world perceives unilateral hegemonic ambitions of empire from us when the reality is the polar opposite – an innate fear of power building deep in the American conscience.

## V. Conclusion

As man struggled to conquer the domains of land, sea, air and space, international law followed closely behind and developed basic concepts of sovereignty with respect to the medium in which he was operating. In short, law followed action, as it should. That must not change if human civilization is to remain healthy and be provided an international environment that encourages progress. This is what the concept of custom in the law embraces.

The American aversion to big government, distant bureaucrats, thick civil codes, and stifling international legal frameworks will continue. This is the psyche within the US sovereign box. Unfortunately, the world is much more complicated than what’s depicted by a map of 192 three-dimensional nation-states. But perhaps the first step is to recognize that this is the game board. And regardless of your school of international relations theory – realism, liberalism, institutionalism, functionalism, or ‘you-name-the-ism’ – we can use the board to overlay globalized, transnational, informational, religious and terrorist networks to reconcile boundaries and determine the proper roles and responsibilities of the respective game pieces. Missteps will continue to be checked and balanced by the international system. This process of checking and balancing is the destiny of the international order, the evolution of states, and the evolution of mankind.

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<sup>22</sup> HERBERT STORING, *THE ANTI-FEDERALIST* (University of Chicago Press, 1985).

# Legal Assistance Notes

## DL Wills Licenses

Effective immediately, base legal offices should not purchase individual licenses for the DL Wills® software program with local funds. As of 15 August 2007, AFJAGS now centrally purchases all required licenses at a substantial savings compared to individual local purchases (\$150 savings per unit copy). Earlier this summer, legal offices were directed to update their NETRAMS account to reflect the number of licensed copies needed to effectively run their legal assistance program.

While the licenses are at no cost to each office, the Air Force must pay for every license. Thus, we ask you to be judicious with your requests. Not every computer in your office needs the software. A good rule of thumb is one copy per assigned attorney and an additional copy for each deployment kit. If you need help with NETRAMS, please contact your Law Office Superintendent or contact JAS for help.

If you have questions about estate planning or the DL Wills software, please contact AFJAGS. The AFJAGS DL Wills POC is Major Tom Byron at [thomas.byron@maxwell.af.mil](mailto:thomas.byron@maxwell.af.mil) or DSN 493-3429.

## UNITED STATES AIR FORCE

### SURVIVOR'S BENEFITS SUMMARY



**The Office of the Staff Judge Advocate**  
**67th Network Warfare Wing**  
**Security Hill**  
**Lackland AFB, Texas**

Legal Assistance & Preventive Law

## Survivor's Benefits Handbook

In the profession of arms, the possibility of a service member dying and leaving behind loved ones is all too real. Our airmen need to prepare their family members for this contingency, and we as legal assistance attorneys have a professional responsibility to know what benefits are available for those surviving family members when they seek counsel during legal assistance.

While Casualty Assistance Representatives will be the primary POCs and provide the bulk of information to grieving family members, legal assistance attorneys also need to be aware of the many benefits available.

Capt Charles Hasberry, Jr., Chief of Legal Assistance at 67 NWW/JA, prepared a great Survivor's Benefit Summary that describes the available benefits after the death of an Air Force member. It is designed as a handout for survivors, but is equally beneficial as a guide for legal assistance practitioners unfamiliar financial, funeral, and other benefits provided to survivors.

An electronic version of the Summary can be found on the AFJAGS Legal Assistance Field of Practice page, within the Family Law folder. Feel free to adapt the document for local needs and email any suggested updates or additions to Capt Hasberry at [charles.hasberry@lackland.af.mil](mailto:charles.hasberry@lackland.af.mil)

# Legal Assistance Practice Alert

## Implementation of 10 USC 987 (Predatory Loan Protections)

Many consumer studies, inside and outside of the military, put financial troubles in the top 3 sources of stress for servicemembers-- ahead of deployments, health, and personal relationships.

On 1 October 2007, the rules changed for "payday" loans and vehicle title loans for military members and their families. While these sources of credit are touted by the industry as only short-term solutions, in reality, these products charge excessive fees or interest, and lend without concern for the borrower's ability to repay. They also entice the borrower to repeatedly refinance, thus their designation as "predatory."

Payday loans and vehicle title loans are two common predatory practices prevalent near military installations. Both require a borrower to pay the original amount borrowed (principal), plus hefty interest charges and fees at the end of a short period of time. The charges and fees often exceed a 300% annual interest rate, compared with 20% on most high-rate credit cards. The creditor may also require collateral, such as a vehicle that will be forfeited when the loan is not repaid. Other collateral may be a check post-dated for the next scheduled pay day, with insufficient funds fees charged and even criminal charges brought if the check is not honored.

The new rules are enacted in 10 USC 987, which set a 36% interest rate cap along with certain mandatory disclosures on certain consumer credit transactions to service members and their dependents. The statute also directed DOD to implement rules to reduce the effects of predatory lending on military readiness. The implementing rules were published in the Federal Register at 32 CFR 232 (Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Final Rule). As of 1 October 2007, creditors are not allowed to charge a Military Annual Percentage Rate (MAPR) higher than 36% to service members or their dependents on payday loans, vehicle title loans, and tax refund anticipation loans. The MAPR is similar to the widely quoted APR (Annual Percentage Rate) but includes fees and charges sometimes omitted from the APR calculation. 32 CFR 232.3(h)(1).

It is expected that many businesses will simply stop offering these short-term loan products to military members, though many loopholes exist to alter their credit products outside the scope of protection (e.g., terms longer than 91 days for what otherwise is in all respects a payday loan). In addition, many members may find their previous loans "accelerated" despite agreeing to a later date, as most predatory loan contracts allow the lender to change the due date with minimum notice to the borrower.

In order to break the cycle of debt, DOD recommends military members contact other sources of short-term credit, including the Air Force Aid Society, military banks, and credit unions. These lenders can often provide the same service, but almost always at a lower cost to the service member. Military members should also be reminded via base preventive law programs and legal assistance appointments to turn to other base resources, including personal financial advisors and judge advocates (for review of potential loan contracts before signing).

Legal Assistance practitioners should be aware of the new regulations -- and seek to alert the community they serve. AFJAGS' legal assistance mission recently created a press release, including an article for base newspapers and a talking paper for use at commander's calls, spouses clubs, and when discussing the law with other groups.

The AFJAGS POC for consumer law (including predatory lending) is Capt Suanne Crowley. She may be reached at [suanne.crowley@maxwell.af.mil](mailto:suanne.crowley@maxwell.af.mil) or DSN 493-3437.

# Military Justice Pointers

## Resources from the Legal Advisor to the Air Force Drug Testing Laboratory

The Air Force Drug Testing Program plays a major role in many courts-martial, including many trial counsels' first trials. Major Heather Larson is the judge advocate legal advisor to the Air Force Drug Testing Laboratory (AFDTL) at Brooks City-Base, Texas.

Her office has a long tradition of educating the JAG Corps. She frequently speaks to large audiences and often consults with counsel on managing local aspects of the drug testing program and using testing results.

Major Larson also provides a remarkable range of information through a website on FLITE:

<https://aflsa.jag.af.mil/AF/PJAG/AFDTLLA.htm>

The "Handout for JAGs" should be on every litigator's desk -- or hyperlinked on the desktop! This 100+ page reference provides in-depth explanations of the program's processes and integration with military justice. It also includes definitions of terms, contact information, and a handy glossary of drug references.

A relatively brief resource -- "Urinalysis for Lawyers (And Dummies)" -- explains the science in litigator-friendly terms. It helps bridge the critical knowledge gap between expert witnesses and members.

The website offers a wealth of other creative resources. A visual tour of the facility will help the litigator understand the physical steps in the drug testing procedure at the AFDTL. A separate lab tour is provided to educate the court.

"Q & A" answers common questions, including such things as the effect of poppy seeds on testing and use of hemp products.

Talking papers, checklists, and other resources are provided to assist in procedures like Operation Nighthawk (entry point urinalysis sweeps) and Operation Clean Sweep (dormitory urinalysis sweeps).

"Preparing for & Litigating a Naked UA Case" exemplifies the care taken throughout the site to provide information to trial counsel and defense counsel, rather than giving exclusive assistance to one side or another.

The site is a very useful example of how the AFDTL Legal Advisor meets the mission set out in AFI 44-120 to "maintain the forensic integrity of the drug testing program by ensuring the Laboratory complies with applicable law and regulations and acts as an interface between the Laboratory and the legal community, Surgeon General's community, Commanders, and law enforcement."

The collection of information also greatly assists the JAG Corps with Major Larson's key advice: "You can never do too much research, education, or investigation when preparing for a urinalysis case, especially if it is a naked UA."



*Excerpts from the Virtual Tour*

# Question to the Field...

***"What advice can you give to someone deploying for the first time?"***

This edition's question to the field brought in great practical deployment advice. To keep all of the content and character of the submissions, this feature is expanded beyond its typical single page. The rigors of deployment, the value of preparation, and the effort invested by these currently-deployed members make for a rewarding read! -- The Editors

*Capt Jacqueline Stingl is deployed to Baghdad, serving in Task Force 134, Multi-National Force-Iraq as a Liaison Officer to the Central Criminal Court of Iraq. She discussed the question with fellow JAGs and paralegals deployed with her to create a "Top 10" list of deployment preparation:*

Deployments in the JAG Corps are becoming the norm, rather than the exception. It is amazing what a little preparation can do to ease the process!

The "down and dirty" of it all: yes, your deployment probably will be to the desert and what you have been told is true -- there's lots of sand and it's hot. Although you may not appreciate it immediately, the deployment can quite possibly be the best assignment of your AF career!

**1. Do Some Research Ahead of Time** Talk to whomever you are replacing. This individual is the most invaluable resource you have available to you; he/she can really put your mind at ease and offer lots of advice. Finding out exactly what you are slotted to do before you arrive makes it that much easier to prepare. For instance, if you know you will be working in TF 134, it's helpful to talk to someone there ahead of time who can let you know what's going on. If you are slotted to a ULN where you are replacing a specific individual tasking, get with your PRU and get a name in order to talk to that person directly. If you are just assigned generally to a Task Force like 134, it's still helpful to speak with someone who has just been through the process so they can explain the different functions and possible offices to which you could be assigned.

Also before you leave make sure your biography is up to date before deploying as well as your WebPDI "dream sheet." This is for good reason—first, people will pull your bio here before you arrive (just like they do for any other assignment) and second, you may be considered for an assignment while here.

**2. Pack Light, Ship A Lot** This one is worth spending some time on. After talking to many people, it simply cannot be refuted: pack only what you can carry. There will be many issued items that you will be required to carry. For a lot of us that included Chem Gear, Kevlar and IBA (individual body armor), and the mobility bag items issued by your home station, along with two weapons. (And a side note on this: if given the option, consider both weapons here in theater. You don't want just the M16; the M9 is far more convenient to take to the dining hall and work with in the office.) All of these items will significantly weigh you down before you pack any personal items. So you should narrowly tailor your list to the essentials. Many

people agree on including the following (again remember pack for the short-term -- the first two weeks -- because even many of these items can be purchased or sent):

a. A mini flashlight -- like a Mag Light or Mini Pocket Torch by Inova. (Bring several!) These clips right on to your uniform, and are very helpful when walking around at night and entering your transient tent.

b. The infamous 72-hour bag (large backpack). This turned into a 7-day bag for a paralegal and I as we traveled! (A quick rule of thumb: expect the best, but plan for the worst and you'll never be disappointed.) Put your essential stuff in this bag. Take some snacks, make sure you include your shower shoes, yet pack it so that it will still fit as carry-on luggage. This is the bag that you will live out of and want to make sure is always by your side. Even the military can lose luggage, and being caught without a change of clothes in the desert is not pleasant; for you or your fellow travelers. This backpack is also useful for carrying stuff around in-country (your uniform after PT, laundry, etc.) We also recommend, if possible, using a large military duffel as one of your checked bags. These are great as they can carry a lot of your issued equipment, and the shoulder straps allow you to carry it on your back, making it easier to carry than the A-bag.

c. Ballistic glasses -- like Wiley-X or Oakley -- are worn by the vast majority of folks here. These aren't luxury items; they are a necessity. Not only is the sun extremely bright, but the wind and sand can be equally blinding. Also, look at photos of soldiers who were in a convoy hit by an IED. Their faces are covered in burns, but the area around their eyes where they wore the glasses are undamaged. These work.

d. T-shirts, boot socks, athletic socks and underwear in sufficient quantities. We recommend a minimum of at least 10 pair. For PT gear, we also recommend that you bring at least 6 or 7 pair, but more if you can, because you'll get good use out of them: you'll be wearing your PT gear or your ABUs the whole time here. While PT gear is generally available, it may not be in your size. Two uniform hats are another very good idea. For travel purposes, pack one extra uniform, five or six sets of t-shirts socks, and underwear, three or four sets of PT gear, tennis shoes and shower shoes. Send everything else ahead of you.

e. Holsters. Almost all of us here have one here that we bought before or that we bought when we got here other than the standard green holster that attaches to your web-belt for the 9mm. Many of us find that a shoulder holster is great for in the office. When we travel to court many wear a leg holster.

f. Other musts: tools. A Leatherman and a tactical knife are very useful utility tools. Also, there are endless uses here for 550 Cord: making a lanyard for your weapon and hanging a curtain in your trailer are two common examples. You may also consider packing a sleeping bag with a compression sack. Find ones that is good down to 30 degrees or lower, that is lightweight, and can be compressed down to a small size so it can fit into your 72-hour bag. This is much better than the large bulky ones issued. You will need one for the time you are transient where you will not likely have access to any bedding.

g. Essential medical items. A couple of general suggestions: Band-Aids, Neosporin, and aspirin are always handy for boot blisters, brass burn, and other aches. Also, bring something for an upset stomach and diarrhea.

h. For toiletry and personal hygiene items, know that AAFES “goes where you go.” However, one word of caution about the PX/BX’s here—supplies are very limited. They may not carry your brand of choice, so if you’re picky you may want to make sure to pack these products or ship them ahead of time or as another attorney in our office always says, “That’s what care packages are for.” You can also shop online. Many websites ship to APO addresses and you can get a wide variety of items that you may have never even realized you could buy online until you arrive here. A travel tip: pack your 72-hour bag with a one quart bag containing your necessary toiletries in compliance with TSA regulations for carry-on luggage and place a larger toiletries bag in one of your checked bags in case it takes a while to reach your final destination.

i. Zip-lock bags. It is a good idea for items in these bags for both the 72 hour bag and in the boxes you mail ahead of time. Using them not only keeps items clean and dry in unforeseen accidents, it can be a space saver. By compressing the air out of the baggie, you will find yourself with a little extra room in your 72-hour bag. This may allow you to pack that one little comfort item you are sure you can’t live without.

Distinguishing necessities from niceties may be difficult, but many of us also find these niceties borderline necessary:

1. Laptops. Many of us brought our own computers. We are fortunate to have internet access in our living accommodations and with your laptop you can e-mail and web-cam from the comfort of your temporary home. You’ll need a converter for power over here, but again, this is something you can pickup at the PX/BX. Additionally, the laptop allows you to watch DVDs.

2. DVD player. If you opt not to bring a laptop, you may want to consider a portable DVD player. While the living conditions contain a television and DVD player, you and your roommate may be on different schedules. A portable player allows you to watch movies in your bed without disturbing him or her.

3. MP3 player. You’re likely to be in an office that has a lot going on with a lot of moving parts. Sometimes it’s nice to drown out the noise to concentrate. You’ll want to download songs onto the MP3 player before coming because the internet connection, if available, will likely be too slow to do so once you arrive.

4. Camera. A camera is great for capturing the many memories you are sure to make. A digital camera will let you immediately share photos with friends and loved ones back home.

Again, everyone always says pack light and this cannot be overemphasized enough. Disposable items that you can leave behind are a good way to go. Non-essential items should be sent ahead of time. Ask the individual that you’re replacing for a mailing address. Some

items to send ahead include a twin comforter and sheet set, egg crate/mattress foam, your pillow, and towels. (Another travel tip: I packed all of these items in vacuum space-saver bags.) After a week of traveling to your destination, nothing beats a bed with soft sheets, a nice pillow, and a mattress support for your own bed. A good night's sleep is welcome -- especially after a long journey.



Article contributors from CCCI, TF-134, MNF-I, including Capt Stingl (sixth from the left)

**3. Practice What You Preach** As lawyers and paralegals, an integral part of our job is preparing others to deploy, but there is a quote here that I find apropos—"It's the shoemaker's children who go without shoes..." Just like the Airman who comes in to you to make sure her affairs are in order, make sure that you and your family are ready to go. I know many an attorney and paralegal out there who do not have their own affairs in order; this was true for me too. Make sure to review your SLGI for coverage and beneficiaries, make sure your wills are up to date, think of the issues that may arise back home that someone may need to take care of—especially with finances (i.e. taxes need to be paid, a vehicle registered, canceling your lease, cell phone, etc.) The best thing to do is write down all the events you think will happen and create special powers of attorney for those events. It may seem this one is too easy, but it's often more difficult to help ourselves than others and to find the time to do what we need to do. Do not put yourself or your family in a situation that could have been prevented. For instance, consider whether you should take yourself off as a driver for your vehicle insurance for the six months or longer that you are deployed and whether or not you should cancel that cell phone contract, vehicle lease, etc.

**4. Be Safe, Get Your Training** There may seem to be an endless amount of training that you need before you come, but the military has a reason for it: it's useful. Contingency Skills Training (CST) at your base is important and we all found the Advanced CST follow-on very helpful. You learn some very valuable things. Other courses that obviously will help in your specific JAG duty depend on where you're going and what you're deploying for, but in general—theOps Law Course with JAG Flag, Eagle Flag, the Deployed Fiscal Law and Contingency Contracting Course, and the Law of War Course are all great courses to have under your belt.

**5. Take Leave Before You Leave** Everyone will appreciate spending time with you before you leave and it's good for you, too. The hours are long over here and you'll want to be well

rested before you arrive. You'll also be surprised how quickly your impending departure approaches and everything that creeps up at the last minute that needs to be accomplished. Definitely look at your schedule and remember that deployment times can change, so plan your leave in advance. You'll want to have ample time to do everything that needs to be done and relax with friends and family too.

**6. Be Flexible and Don't Complain** Even before you begin traveling, which is always a test of flexibility, you should remember that service to our country is a great adventure. By virtue of entering into the military you should have already prepared yourself mentally for the possibility of deployment and have few, if any, complaints when your time is called. Whether your deployment is in cycle, out of cycle, or you volunteered; you should be constantly preparing yourself for the eventuality of deployment as a JAG attorney or paralegal. Part of that preparation includes keeping your family informed and preparing them for the possibility. While no one expects you to be overjoyed when you get the news that you are deploying if you did not volunteer, you should at least be ready for the news and step up to the opportunity. Interviewing witnesses virtually every day make us realize we have absolutely nothing to complain about. This is especially true when you see your fellow members from our other uniformed services who have deployed multiple times, in conditions far worse than what most of us in the JAG Corps will ever face, for a much longer period of time, sometimes after having been stop-lossed. It is our duty as members of the world's greatest Air Force to continue to put our core values into practice while embarking upon our deployed assignment.

**7. I Promise, It All Makes Sense When You Get Here** Deploying is like any other major life experience: people like to share their stories about it. Listen to the advice of others. I know sometimes you just don't want to hear for the fiftieth time everyone else's idea for what you should name your first born, or what color your bridesmaids dresses really should be, but many times I got a lot of great advice for my deployment from people who had "been there, done that." See number one above, but also don't just solicit opinions from JAGs and paralegals because there are a lot of other people on your base who have deployed many times before and are also great resources. Besides they may let you in on some secrets some of us didn't find out before we arrived, like why Chuck Norris is our hero.

**8. Home Is Far Away, But It's Easy To Stay in Touch** Of course missing your loved ones is a guarantee while deployed, but it's a common bond shared with your fellow deployed members and something we all share and work through together. MWR provides some outstanding support in the deployed environment. They have phones for calling cards, and computers if you do not bring your own. You can also call home using morale calls. You can find all sorts of good information from the Airman and Family Readiness Center, including age-appropriate books, videos and other resources to prepare kids and spouses. Preparing your family for what to expect before you leave helps foster a good atmosphere before your deployment even begins. We all know that home is where your heart is, but there are definitely a lot of things that can be done in advance and during a deployment that makes the time spent apart a little easier.

Greeting card selection here is very limited. If you plan to send cards to friends and family while you're away, it's best if you can bring them with you to send back home while you're

here. You can also write cards and wrap gifts for spouses and kids prior to leaving. Knowing that I was going to be gone for Halloween, Thanksgiving, my spouse's birthday, our anniversary, and Christmas, I shopped ahead of time and left a closet full of presents with post-it notes. Something else to think of is stocking the shelves—the pantry with non-perishable items, the medicine cabinet with toiletries, and the laundry room, etc. Shopping together for items before you deploy can not only be fun and but it lets your family know that you're thinking about them. Also, it saves family members some stress on some days when they know that's one less thing that they have to do.

A way to keep your family members close to your heart is to take a digital photo frame. It's a great way to remember and to share them with your new co-workers.

Finally, make sure you have a local support network in place for your family before you leave—someone who can check in on them in case they need something. Usually this will be your home office, but don't just expect them to do so. They will be busy with their normal workload, as well as covering your duty section. Specifically ask at least one co-worker, neighbor, and friend to periodically call your spouse or family to check in, invite them to office functions, or just to meet for a cup of coffee.

**9. Get Involved** When you arrive at your destination, embrace your situation and find out what there is to do. I was amazed when I arrived at the wealth of activities to keep you busy outside the office. The choices are numerous: sports (running in 5Ks, enjoying swimming, playing flag football or soccer), religious activities, or some other weekly MWR event like a movie night, karaoke, salsa dancing, or Poker. Find something fun that makes you happy and meet some new friends and rediscover old ones as well. When I arrived here, it was like a mini-reunion, and other people found it to be the same way—in my case four of us were deployed here from the same base with overlapping time. There are people you meet from ACST, people from your JASOC/Paralegal Craftsman class, and even non-JAG Corps people from prior assignments and TDYs like SOS and the NCO Academy. There are always friendly faces, it's just a matter of going out there and finding them.

**10. Enjoy Your Time Here** The experience is amazing: few attorneys and paralegals can say that they've had a chance to practice law in an environment like this and be a part of something a lot bigger than yourself. For JAGs and paralegals, a deployment often provides you another bonus--an opportunity to have a specialized practice, which can be a nice break to having to deal with all the cats and dogs back home at the base office. Regardless of the assignment--whether it's doing legal assistance in a deployed environment, enjoying one of the many rewarding jobs of TF-134, being part of the JCC, LAOTF, etc., you are truly doing your part in the big mission picture. Helping the "boots on the ground" members with deployed legal assistance, making sure the contracts that are needed to keep us functioning are in place here, or preparing witnesses for their role in Iraqi court—all of these are vital roles in the process.

Appreciate your colleagues, the environment, and the job. Like everything else in life, a deployment is what you make of it. This is one time in your life where One Team, One Fight will take on a whole new meaning. All service branches, DoD civilians, and contractors work together here and you will meet some awesome people (you may want to start practicing your

Army, Navy, and Marine rank recognition now). It is also a great opportunity to learn more about the culture and customs of a foreign county. Think of this as the ultimate "study abroad" experience. Finally, please remember you are doing a job you really can be proud of and you may never get another chance to be an important part of such a significant time in our history again!



*Lt Col Charles Huguelet, a Cat B Reservist attached to the Judge Advocate's General School, is currently deployed for a year to the MNSTC-I in Baghdad. Along with his unique guidance, several of his points overlap the advice from Capt Stingl and have been kept in for the additional emphasis and perspective.*

**1. Clothes** Laundry is done by a contractor. It takes about two days. It is hot here, IBAs don't breathe, and everyone sweats. I like to put on a clean uniform each day. I can make it two days, but not happily! Some go three days, and they shouldn't! Unless you want to go to the laundry every other day, you will need at least six uniform sets (I had to order two uniforms from Brigade Quartermaster). I would also recommend bringing six to eight PT uniforms as well. They can be hard to find here--the IZ BX seems to only stock small shorts and XXL shirts. Take eight to ten sets of underwear and socks for the same reason.

**2. Boots** I bought Converse boots and they are comfortable. Whatever boots you plan to bring, start walking in them to break them in before you arrive. Walking around with an IBA and helmet makes you 40-50 pounds heavier, and sore feet can quickly become a major problem.

**3. Holster** The Safariland and Spec-Ops brands of leg holsters seem to be generally available in the BX. They can also be ordered and will arrive in a few days. Quality leather shoulder holsters are hard to find here. I bought a standard (not the "Miami Vice" style) brown Galco, and I like it. Most women tend to wear shoulder holsters because of bathroom issues. Most men, however, stick with leg holsters.

**4. Mail** Mail as much of your clothing and equipment as possible. Getting here is hard work! There is a huge time change, dirty squad bay accommodations in transit locations, extreme heat, and general travel fatigue. IBAs and chemical gear (lots of it) will be issued in Qatar. You will be responsible for loading, unloading, and hauling around your own luggage. Storage between flights is in outside bins, exposed to the weather that includes 120-degree heat. The less weight and the more durable the items in your bags are, the better!

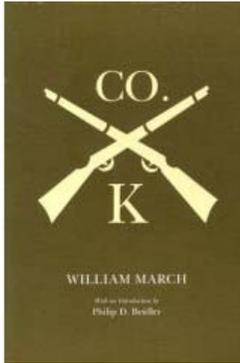
**5. Patience** Be patient with civilian friends and loved ones. You will get strange questions. I had an otherwise intelligent lady ask if my wife, Donna, would be coming with me. And some people who love you will react to your deployment as if you are about to storm the beaches at Normandy. Be nice to them all, but spend as much of your last weeks and days with your wife/husband and children. Even if you don't think you have the time, make the time!



## BOOKS IN BRIEF



Novels play an important role in understanding military history. While many non-fiction works discuss military campaigns in dry, numerical terms based on headquarters plans and reports, military novels move away from campaign maps and figures, delving into the fear, pain, death, and destruction of war from a more personal perspective. Thus, novels can vividly remind us why Americans fight in war, and what is sometimes sacrificed during the fight. Major Robert Hall describes such a novel here: [Company K](#) published in 1933.



**Company K**, William March, \$17.95, The University of Alabama Press.

William March was the pen name of William Edward Campbell, an Alabama native and decorated NCO in a U.S. Marine Corps infantry company during the First World War. In superficial terms, [Company K](#) is an American version of Erich Remarque's [All Quiet on the Western Front](#). Like the similar and slightly earlier work of his German counterpart, March provides a first-person, autobiographical account of the plight of the average infantryman. Both explore the cynical laughter and the utter devastation, the mundane and the incredible, as well as the hope and the waste of war. Beyond these similarities, however, [Company K](#) is a very different book, both in form and in substance.

English professor Philip D. Beidler wrote an introduction that was added to the reprinting of [Company K](#) in 1989. Beidler first provides a brief sketch of March's life as an author. He then presents a lengthy and complex literary analysis of [Company K](#) as well as several other books within what Beidler calls the "American Literature of War." The text of [Company K](#) does not reveal directly whether March intended the book to take on the universal meaning and role that Beidler suggests. March does not preach sermons criticizing how and why wars are fought, nor does he indulge in bemoaning the brutality and suffering of war. Rather, he describes the action in matter of fact terms, leaving it for readers to draw moral and ethical conclusions, and subtly compelling them to do so. To preserve the impact of March's prose, the analysis portion of Beidler's introduction may best be read after, rather than before, readers take in the unvarnished text for themselves.

March's raw style and penchant for irony are exhibited well in one of the most poignant chapters of the book, titled "The Unknown Soldier." In this chapter, a dying infantryman seeks to defy the inevitable hometown celebration of his death in battle by casting away his identification tags to seal his anonymity. The Tomb of the Unknowns was completed at Arlington Cemetery in 1932 to honor the unidentified American dead from the First World War. One cannot help but wonder if this chapter, if not the entire book, is March's bitter reply to the construction of the memorial.

The answer to this question is not important, however, as March focuses his story on the characters and their circumstances, rather than on spelling out his personal philosophy or anger. In the final irony of this chapter, when the mortally wounded man's life finally ends, so too does the war. Then, in a somewhat groundbreaking way for its time, the remaining chapters of [Company K](#) explore the psychological and emotional aftermath of war through the experiences of individual soldiers returning to their families and jobs while coping (or not) with what they lived through and witnessed on the battlefield.

[Company K](#) covers ground that should resonate with military legal professionals. From simple insubordination and AWOL, to the murder of prisoners of war and superior officers, [Company K](#) reminds the reader that, when faced with the horrors of war, some troops will break ranks with varying impact on the mission and humanity. In today's sensationalistic public discourse, military justice is characterized by some as inherently unfair, while the law of armed conflict is seen by others as unduly restrictive in an unconventional fight for national survival. Novels like [Company K](#) demonstrate the importance of the rule of law in military affairs, and the alternative paths taken when some abandon sense and systems of justice.

*Read a good book lately? Share it through the editors of The Reporter!*

## **LEGAL INFORMATION SERVICES: Implementing the System Engineering Process (SEP)**

by Ms. Barbara A. Buchanan,\* USAF

*The Summer 2007 edition of The Reporter looked at dozens of systems JAS created and currently maintains and upgrades. This edition explores the process that structures those efforts. In addition to learning how projects flow through JAS, consider how readily it can be adapted to bring structure to processes across the Corps -- particularly during this time of change with JAG Corps 21. Do you have a system -- requests for legal opinions, reviews of Article 15 actions -- that could use a similar process?*

### **I. Introduction**

In an effort to establish a more orderly and predictable process pursuant to which new weapons systems are purchased, created and fielded, DoD has mandated that all new systems (aircraft, missiles, ships, and IT systems of all sorts) be developed according to a formalized systems engineering process.

The mandate resulted in the implementation of the Integrated Defense Acquisition, Technology, & Logistics Life Cycle Management Framework (DoDI 5000.2 Framework) and IT Lean (Non-DoDI 5000.2 Framework). These documents provide a framework from which agencies have been tasked to develop a formalized life-cycle management process for the development and sustainment of Information Technology (IT) systems.

A variety of systems engineering processes have been proposed by different organizations. AFLOA/JAS has decided to model the processes developed by 554 ELSW/OSSG and have, in part, adopted the IT Lean Non-5000.2 Framework. We have tailored these processes and procedures to ensure our ability to maintain rapid development and deployment of applications that meet the full scope of requirements as defined by TJAGC. Currently, we are applying the SEP to all programs and projects regardless of the project type or the current life-cycle phase.

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\* Ms. Barbara A. Buchanan is a Project Manager and Systems Engineer with the Directorate of Legal Information Services, Air Force Legal Operations Agency, Maxwell Air Force Base, Alabama.

Our SEP incorporates and integrates DoD and Air Force regulations. It also includes the best practices of the Software Engineering Institute's (SEI's) Capability Maturity Model Integration (CMMI) and the IEEE/EIA 12207, Software Life-Cycle Processes standards.

The SEP is a technical and management framework for applying methods, tools and people to information technology programs and projects for systems acquisition, development and sustainment. In addition, SEP establishes measures; provides procedures with step-by-step guidance; provides entry and exit criteria for every phase and procedure within the process; and ensures every work item is properly assigned and its status is tracked.

### **II. The Systems Engineering Process**

Our systems engineering process is a process for applying systems engineering techniques to the development of JAS-developed software applications. The process consists of four phases. Each phase has several steps through which an application software proposal progresses.

#### **A. Phase I: Defining the Need**

The first step in the systems engineering process, once a proposal is received, is to establish an agreement with the customer, an order to build a software product. This order is set only after a feasibility & need study suggests spending resources on a given proposal is justified by the product such proposal will deliver. Restated, in order for the proposal to be formally adopted as a development project, the study must determine that there is a need for a software product, and that there is either no other product that can be used, or that creating

the product internally will be the more cost effective course of action.

### B. Phase II: Design

After the customer agreement is finalized, the planning of the project will begin, and this results in a project plan. The purpose of this phase is to design a solution consistent with the development strategy approved in the Define Need phase. In this phase the following activities are performed: project/phase initiation, requirements interpretation, elaboration and documentation, begin certification and accreditation activities, preliminary design and review, continued test planning, project estimation, business scope base-lining, continued system engineering activities, detailed design and review, and formal reviews. Security issues are considered in this phase because identifying risks and thinking about solutions in an early phase of the SEP will save a lot of work and money in a later phase.

### C. Phase III: Building and Testing

In this phase the solution designed during the Design Phase is developed, configured, and tested to assure consistency with the development strategy approved in the Defining Needs Phase.

The following activities are performed: project/phase initiation, continued certification and accreditation activities, component construction, component configuration and integration, component validation and integration testing, project base-lining, continued system engineering activities, formal testing (Traceability Matrix, Developmental Test and Evaluation and Operational Test and Evaluation), and formal reviews. These are the technical processes that cover the design, development, and implementation phase of a system life cycle.

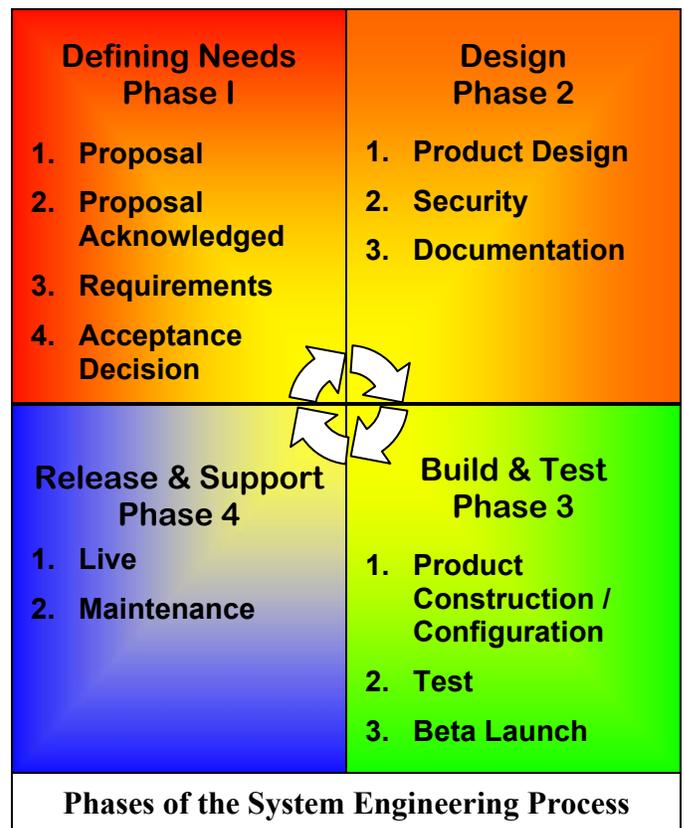
### D. Phase IV: Release and Support

Implementation (release, fielding, and support) takes place in this phase. In addition, continued certification and accreditation activities, implementation activities, operations and support activities, and formal reviews occur.

During and after the creation of a software product the following questions have to be answered: Does the product do what it was intended to do? Does it meet the customer's stated requirements? Do those stated requirements clearly articulate the output or objective the product was intended to deliver? Asking these questions throughout a product's development and life cycle ensures JAS's limited product development resources are expended in the most efficient and mission-advancing endeavors possible.

### III. Concluding with a New Beginning

JAS has taken the view that the systems engineering process is circular. Once a system enters the process and cycles through to maintenance, updates and enhancements continue throughout the 'life' of the system. When the time comes where the system is determined to be ineffective and needs to be retired, as it exits the SEP, a new replacement system enters the SEP and the cycle continues.



## CROSSFLOW: TJAGC MEMBERS IN PRINT

### **Understanding Airmen: A Primer for Soldiers**

Major General Charles J. Dunlap, Jr., USAF, published in the September-October 2007 edition of the *MILITARY REVIEW: THE PROFESSIONAL JOURNAL OF THE U.S. ARMY*.

Each service has a unique culture that helps define the service's character. A healthy understanding of the each culture gives vital joint picture of how the services fit into the mission of defending the nation. At the other extreme, misunderstanding fellow services can lead to frustration, wasted effort, and mistakes in meeting the mission. General Dunlap crafted this primer that explains our culture to a wider audience, attempting to lead turn what he views as a "rising antagonism" between the services:

This rivalry often seems more intense between the Army and the Air Force. Soldiers suffer most of the casualties in Iraq and are rightly concerned about the support they receive. Unfortunately, some soldiers question the Air Force's role or denigrate it. Many soldiers appear to believe that the Air Force is filled with people who, as the former chief of staff of the Army put it, are obsessed with "things that go fast, make noise, and are shiny."

Airmen, however, see themselves as part of a service that has been at war in the Middle East for 16 years, was key in defeating Iraq's conventional forces in Operation Iraqi Freedom, and is very much in today's counterinsurgency fight. Despite this, Airmen feel that the Army under-appreciates and misunderstands them. Many Airmen are concerned, for example, that the Army's new Field Manual (FM) 3-24, *Counterinsurgency*, trivializes airpower's role by confining it to a 5-page annex in a 282-page text.

The primer packs a tremendous breadth of heritage and insight into a brief five pages meant to educate a wide audience. It introduces the main threads of Air Force culture, providing the source and context for themes like technology:

The sheer sophistication of the technology counts a lot, perhaps even as much as the skill of the Airman wielding it. For example, from the first moment jet aircraft appeared in World War II, they had an immediate and radical impact. By comparison, when mechanized units first appeared on the battlefield in World War I, they had little effect on the war. It took decades for mechanization to evolve into the decisive force it became. No aviator—however skilled and courageous—can consistently overcome an opponent who deftly operates technologically superior equipment.

As a result, Airmen, aware of the long lead-time needed to develop complicated aircraft, always press to acquire the most advanced systems far ahead of potential adversaries. This can be a source of irritation to the other services where technological advantage changes the calculus of battles more slowly.

The Air Force's status as the youngest service, and its respect for the individual are just some of the many other themes covered:

This leads to another distinguishing aspect of Air Force culture. The other services proudly trace their heritage to ancient warriors and foreign armies and navies. The Air Force unapologetically revels in its status as the youngest service, uninhibited by thinking derived from the days before man. [\* \* \*]

Yet, it is also true that Airmen's technological focus helps breed a culture of "assertive individualism" that is rather unusual in the armed services. Indeed, in the joint environment—especially with soldiers—some view this trait as being unhelpful or even insolent. Why are Airmen this way? Some of this goes to the earliest history of flight: those who first stepped into flying machines were doing so against conventional scientific—and practical—wisdom. With that heritage, it is not surprising that an Airman's "DNA" inclines him or her to not accept the status quo and to ask "why" or, often, "why not?"

The primer closes with the respect Airman have for those we serve alongside, and with a challenge to continue learning more about other services.

Providing support to U.S. troops on the ground is relentlessly imprinted on Airmen. As General Hal Hornburg, one of the Air Force's most distinguished combat veterans and the former commander of the Air Combat

Command, put it, “If you don’t love soldiers, you have no place in my Air Force.” Today’s Airmen do “get it”—yet, sadly, the myth of Air Force indifference to soldiers seems to persist.

All of this said, it is quite true that Airmen do not do enough to understand the cultures of their sister services. That deficiency is one the Air Force is attempting to address through better training. Thousands of Airmen are also achieving a greater appreciation of the Army by working with soldiers as augmentees or “in lieu of” forces at various forward locations in Iraq and Afghanistan.

This article helps readers in other services understand our perspectives. It is a must-read for Air Force members, as well, to know what may well be the only formal education other servicemembers may receive on how we meet the mission.

**Coca and Cocoa -- Colombia's Bitter and Sweet: This Deployed Military Lawyer's Experience**

Major Cornelia Weiss, USAFR, published in the Spring 2007 edition of the Council of American Ambassadors' THE AMBASSADORS REVIEW.

Maj Weiss' article details some of the challenging work involved in deployments far away from Iraq and Afghanistan. She spent 18 months as the Staff Judge Advocate Liaison Officer to Plan Colombia. The only resident legal representative of the United States Southern Command in Colombia, she was responsible for implementing \$2.5 million in legal and human rights reform line items in Congress' Plan Colombia supplemental aid package.

The article describes the mission of helping a nation battling to lift itself past four decades of battling narco-terrorism. Maj Weiss describes the human toll of that battle, including the highest rate of landmine casualties in the world, and the second largest number of internally displaced persons. She also provides some eye-opening facts regarding military justice in Colombia:

Each death of a narco-terrorist guerrilla by a member of the Colombian Public Forces is investigated as a homicide. [\* \* \*] During the investigation, which may take up to eight months, the military member may be placed in jail. The investigating military justice offices receive from the Ministry of Defense approximately \$1.75 per month for office expenses.

If that figure appears to restrict the investigation, the military member's defense fares no better:

Because the Colombian military does not provide defense counsel for its troops, the military member must pay for defense counsel from his own pocket. The salary of a conscripted military member is around \$30 a month. On that salary, the conscript has difficulty paying for personal hygiene items, not to mention an attorney.

Given these facts and the other realities of life as a conscript, desertion is the most common offense and robs Colombia of the power to effectively protect its society. This is recognized at the highest levels:

As part of institutional investment, the Colombian Ministry of Defense put Military Justice Reform on its List of Top Five Priorities. The Colombian Ministry of Defense came to realize that without a credible and legitimate military justice system, the operational end of the war was not likely to improve.

Maj Weiss devotes most of the article to describing the reforms she helped implement. Reforms include appointing the first civilian leader of the Colombian Military Justice Corps, shifting from an inquisitorial system to an accusatorial one, and training the second largest military justice corps (after the United States).

The article can be read with an eye toward following in Maj Weiss' footsteps, applying lessons-learned in other environments, or simply to understand a fellow legal professional's rewarding work.

Have an idea for publication? Contact the editors of The Reporter to discuss publishing opportunities including The Reporter, the Air Force Law Review, and other publications.

# IN MEMORIAM

## GENERAL RUSSELL E. DOUGHERTY (USAF, RET.)

General (Retired) Russell E. Dougherty, passed away on September 7, 2007, at his home in Potomac Falls, Virginia. He was laid to rest on September 27th at Arlington National Cemetery. He is survived by his wife Barbara, his daughter Diane Ralston, and his son Mark. He was preceded in death by a son, Bryant, and his first wife, Geralee Shaaber.



General Dougherty was a long-time friend of the JAG Corps, flowing from his childhood desire to be a lawyer and his service as a judge advocate early in his Air Force career.

Through the early 1950s, General Dougherty was one of many judge advocates who were rated officers on flying status. Air Force budget concerns over the cost of flight pay forced these officers to choose between flying or practicing law. Then-Captain Dougherty was one of 98 judge advocates who chose flying, explaining to the first TJAG, General Harmon, "I had one little girl, and now I've had twin boys. I'm getting a more expensive family, and I can't afford to lose my flying status. I'd much rather stay in the law business than leave, but I've just got to do it."

General Dougherty made the most of his choice. He continued flying, piloting almost everything in the operational inventory, from the B-17 to the F-15. General Dougherty also progressed rapidly in command, ultimately retiring as the eighth commander-in-chief of Strategic Air Command in 1977.

In Tuesday Knights: Air Force Reserve Judge Advocate Training in Washington, 1950-1995, Colonel Michael Jennison (USAFR, Ret.) notes an interesting fact about General Dougherty and the rarity of attorneys who become four-star generals in the Air Force:

One of the few lawyers to earn four stars in the Air Force, General Dougherty was succeeded as CINCSAC by another, General Richard H. Ellis. General Ellis went to law school after World War II and was in private practice in New England when he was recalled for Korea, but was never a judge advocate.

In 1989, General Dougherty was honored as the second recipient of The Judge Advocate General's Special Service Award.

At the graduation dinner of JASOC 07C, guest speaker Brigadier General Edward F. Rodriguez, Jr., closed his remarks with a special note on General Dougherty's passing just days prior:

Perhaps you noticed on the front of the [JAG] School wreaths of mourning. Those were placed there in honor of my late law partner General Russell Dougherty. You have seen a painting of him and brass plaque dedicated to his memory in the lobby of the [JAG] dorm.

After he served a number of years with the Air Force Association, he joined my law firm. Those were about the best years I had practicing law. I enjoyed speaking with him at every occasion, and received what amounted to a general officer seminar on the Air Force's history and its values. He was my partner for nine years, and my friend for twenty-one.

He absolutely loved JAGs and the JAG Corps and talked about them all the time. I will truly miss General Dougherty and I know the JAG Corps will too.

The plaque Brigadier General Rodriguez mentioned in the lobby of Dougherty Hall recounts General Dougherty's accomplishments and dedication to the JAG Corps:



*Photos (from the top):  
Dedication Plaque,  
Dougherty Hall on Maxwell AFB,  
General Dougherty (at left) at the  
dedication of the dormitory and The  
Judge Advocate General's School*

## DOUGHERTY HALL

IN HONOR OF GENERAL RUSSELL E. DOUGHERTY  
UNITED STATES AIR FORCE (RETIRED)  
COMMANDER - AVIATOR - JUDGE ADVOCATE

This hall is dedicated to General Russell E. Dougherty in honor of his devoted service to the nation, the United States Air Force, and The Judge Advocate General's Department. General Dougherty's distinguished career as an aviator and attorney spanned 35 years of commissioned service and three major conflicts.

Following his law school graduation in 1948, as a member of the newly created Judge Advocate General's Department, he assumed the duties of staff judge advocate and pilot with 19th Bombardment Wing, Far East Air Force. Over the next five years - including the Korean War - the aviator-attorney would serve as a headquarters Assistant Staff Judge Advocate, claims officer, and trial and appellate contracts counsel - while simultaneously maintaining his flying proficiency.

In 1953, General Dougherty's command and flying duties caused him to leave the Judge Advocate General's Department to resume operational duties. As an aviator, his mastery of flight involved the very wings of Air Force history, including the B-17, B-25, B-29, B-52, KC-135, U-2, SR-71, and the F-15 aircraft. At the pinnacle of his Air Force career, General Dougherty served as Chief of Staff, Supreme Headquarters, Allied Powers Europe (SHAPE), and commander-in-chief, Strategic Air Command, the most powerful deterrent force in the world.

Throughout his career, General Dougherty remained a steadfast friend of the Judge Advocate General's Department, always interested in its people and mission. General Dougherty's achievements are interwoven throughout the historic tapestries of Air Force aviation and the Judge Advocate General's Department.

The men and women of the military legal profession who reside here serve as living reminders of General Dougherty's abiding devotion to this nation, the Air Force and the law.

# Heritage to Horizon

This edition of The Reporter remembers General Russell E. Dougherty (USAF, ret.), a former judge advocate and great friend of the JAG Corps. Brigadier General Edward F. Rodriguez, Jr., shared this letter from 1974, in which General Dougherty offered advice on becoming a General Officer. His guidance is as timely today, and applies to all promotions and leadership in general.

You have asked that I provide advice to young aspirants to General Officer rank on "what it would take for him to make it." (As an aside, I think you should revise the request to read: "... for him or her to make it.")

The first (and possibly the only absolutely accurate) thing I have to say is: "I don't know."

While accurate, that negative response isn't very helpful, so I will try to distill some opinions and observations concerning the things I would look for in the overall performance of an officer to see if he or she has the potential for General Officer--and express some things I think the Air Force wants to see in its General Officer selectees. (Note: I do not pretend that all General Officers I know measure up to these standards ... but I wish they did!)

-- Particularly at the General Officer level, we must select people who view their military occupation as a profession--not just a job. So ... how does this aspirant measure up as a completely dedicated, selfless, totally involved professional officer? "Job holders" shouldn't bother to aspire to General Officers' positions--they will surely stall out before selection; or, if selected, will soon be identified and marked as lacking the balanced sense of responsibility and dedication required. The General Officer worth his salt lives his role and likes its demands and its challenges--he doesn't just put it on and take it off, Monday through Friday, 8 to 5. Our profession is classic in its demands; we must know more and more about our complex role and its responsibilities; we must never stop learning; we must seek out opportunities to do better. The best do these things from a professional inner drive to excel ... the professional motive, if you will.

-- The people we select should be those who care about things--and this "caring" must be the basic motivation for them in their work. The aspirant should ask himself or herself, "Do I work just because I am expected to, or because I want to seek out things that need be done and do them better, and better? Particularly in the vital responsibilities of command--there is no substitute for the subjective motivation that comes from general concern for the quality of mission performance, and for the welfare and equal opportunity of the people who must perform the mission. It has been my observation that there is no officer's responsibility that is so small or insignificant that it fails to reflect an individual's sense of "caring"--or the lack of it!

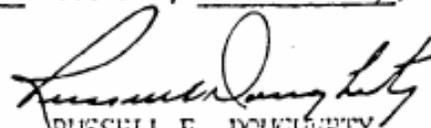
-- Personally, I place a high value on what I have found to be one of the rarest of attributes in any occupation or profession--a complete willingness to work. Fortunately, almost all of the really top-flight people in our profession are completely willing and eager to work at their responsibilities--harder than any outsider can possibly imagine. I will acknowledge

that this willingness to work manifests itself in many ways, and not just in the typical "workaholic" image. However, if we mistakenly select senior people who really think that they can manage major responsibilities associated with running the Air Force without working at it--we'll get just that ... unworkable policies and unmanageable problems. Things just don't happen at the General Officer level of responsibility by pontification, by edict, or by desire; back of every meaningful and wise order, every sound policy, and every productive act of command or management there is represented a vast quantity of intense thought, work and self-involvement. So ... slackers and minimum performers should not aspire!

-- I think an extra measure of integrity must be recognized in an aspirant for General Officer. Not just the classic and important aspects of integrity such as in telling the truth, in not cheating, not stealing, etc. ... but more. I refer to the personal extension of integrity that must go to the "to thine ownself be true" test; i.e., do you really want to accept the broader, more responsible, more demanding, and often less rewarding challenges of direct responsibility for people and things? ... lots of people and all sorts of things--from an adequate supply of toilet paper in the barracks to selection of the targets for a combat mission; and, maybe, to the overall "which way and with what" responsibilities of the Chief and his senior staff. Does the aspirant really, honestly think that he can "stand the heat in the kitchen"?

-- Finally--(and, in my opinion, this is very important) I would advise the serious aspirant for General Officer rank to reject completely, in both action and words, selection to this high rank as the real objective of his professional endeavor. "Making General Officer" should not be an end in itself ... and the officer who adopts this objective as the only measure of success in his profession seriously misunderstands the full, rich scope of a military career and does a serious disservice to the many wonderful officers who are not selected because of circumstance completely beyond their control. I think the Air Force assumes every professional officer worth his salt aspires to its top positions; it doesn't have to be told! And, frankly, the officer who frequently and loudly proclaims his ambition--and openly agonizes, schemes, and worries about achieving a General Officer selection--usually winds up by poisoning his own well.

If our younger men and women who aspire to our few General Officer positions can indulge in a serious bit of introspection and say to themselves that they (and their wives or husbands--a most significant factor in the equation) can willingly accept the responsibilities, keep their personal dignity and sense of values in the face of slurs on their character, sladder of their profession, poor pay, numerous constraints on their actions, frequent moves, and total involvement, ... then they may, someday (as I do at the moment of this writing), look back over 35 years and say "I've loved every minute of it--I have no regrets--and not for a minute have I ever wanted anything more than being an Air Force officer" ... and, incidentally, an Air Force General Officer.

  
RUSSELL E. DOUGHERTY  
General, USAF  
Chief of Staff, SHAPE

28 January 1974